# Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets

**Jon Lauck**

Government intervention in world agricultural markets figured prominently in twentieth-century international economic relations. The nineteenth-century trend toward relatively free global markets, symbolized by the repeal of the British Corn Laws, was reversed as the twentieth century saw unparalleled government intervention.[1] Now, on the cusp of a new century, one ushered in with talk of an integrated, global marketplace, international free trade agreements and international organizations police free trade and limit the ability of policymakers to

1. *See* D.N. McCloskey, Enterprise and Trade in Victorian Britain: Essays in Historical Economics 155, 157, 159 (1981) (table 8.1, Net imports, tariff collected and tariff rates, 1841, 1854 and 1881 (£ thousand)) (indicating that the value of British wheat imports grew 446% from 1841 to 1881 when "the commercial policy of the United Kingdom moved decisively from fettered to free trade"). *See also* Leslie A. Wheeler, *Government Intervention in World Trade in Wheat*, 1 J. of World Trade L. 379 (1967) (discussing the degree of intervention by governments).

> Before World War I international trade in wheat averaged around 25 million tons a year. Of this quantity, on the export side, virtually none was subject to direct intervention by the governments of the exporting countries. On the import side, almost one-half was free of intervention by the governments of the exporting countries. In 1966-67, world trade in wheat amounted to over 60 million tons. *All* of it was subject to varying degrees of intervention by the governments of both exporting and importing countries. (emphasis added)

*Id.* *See also* D. Gale Johnson, World Agriculture in Disarray 251 (1973) (discussing the history of agricultural trade).

> The only major nation that adhered to free trade in farm products for an extended period of time since the 15th century was the United Kingdom and then for rather less than a century. The abolition of the British Corn Laws in 1846 did herald a period of nearly free trade in farm products in Western Europe, but the period was a brief one of two or three decades. War (the Franco-German War of 1870) and the great depression of the last quarter of the nineteenth century induced a return to protection.

*Id.*

advance proposals which interfere in global markets. Policy-makers must now consider the consequences of government actions affecting free trade. Carefully considering different policy approaches is critically important, given the growing number of complaints by American farmers who feel swindled by global markets[2] and a political atmosphere increasingly hostile to free trade.[3]

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2. *See Farmers Want Cork in Imports*, FORUM (Fargo N.D.), Apr. 8, 1994. This article quotes a North Dakota farmer testifying to the International Trade Commission regarding Canadian imports into the United States:

> If this commission refuses to take action and stop the dumping on U.S. markets then U.S. farmers will have no choice but to take matters into their own hands . . . The farmers' next tactic would be to imitate French farmers and block U.S. road and railroad entrances from Canada with manure. U.S. farmers will not sit by and let these outrageous trade agreements bankrupt our farms.

*Id. See also* Don Davis, *Schafer Won't Join S.D. Inspection of Canadian Trucks*, BISMARCK TRIB., September 10, 1998, *available in* LEXIS News Library (noting the "proposal by South Dakota's governor to stop Canadian trucks in retaliation for what officials in the Dakotas consider unfair trade."); *Farmers Unleash Anger at GOP*, DES MOINES REG., Sept. 21, 1998, *available in* 1998 WL 3226907 (describing a farm rally where farm-state Democrats contended "U.S. trade policies fail to protect farmers from unfair policies in Canada and other nations"); *A Spontaneous Protest By Farmers in Montana Jolts the Wheat Trade*, WALL ST. J., Aug. 2, 1994, at A1 (describing another farm protest); A.V. Krebs, *Farmers Beware of GATT*, DES MOINES REG., Nov. 27, 1994, at C1 (demanding more study and public discussion before the congressional vote on GATT); George Anthem, *Nafta Divides Farming Groups; The Split Generally Pits More Liberal - and Smaller - Agricultural and Rural Activist Groups Against Giants of the Industry*, DES MOINES REG., Sept. 17, 1993, at 1 (enumerating the farm groups who doubted the benefits of free trade during the NAFTA debate: "Joining the Farmers Union in questioning NAFTA are the National Farmers Organization, the National Family Farm Coalition, Union Milk Marketing Cooperative, American Agriculture Movement, Rural Coalition, Federation of Southern Cooperatives and Institute for Agriculture and Trade Policy"). *But see Ag Officials Back NAFTA Pact Vital to Future Health of U.S. Farmers*, DES MOINES REG., Nov. 10, 1993, at 4 (noting that "Nine former agriculture secretaries and forty-two heads of state departments of agriculture Tuesday endorsed the NAFTA, saying it is vital to keeping food production in the United States from entering a long period of stagnation and possible decline").

3. *See The Trade Talk Gets Ugly*, BUS. WK., Nov. 23, 1998, at 56; *See also* Nancy Dunne, *Common Ground Elusive as Clinton Seeks Trade Unity*, FIN. TIMES, Jan. 22, 1999, at 7 (explaining grassroots disenchantment with trade pacts).

> This has been made worse by the fact that the old free trade coalition in Congress has eroded as every election since the end of the Cold War has seen the departure of older free traders and the election of trade skeptics. An NBC News/Wall Street Journal poll, conducted last month, found 58 per cent of Americans believe trade has been bad for the US economy, compared with 32 per cent who said it had resulted in economic growth. In a CNN/Gallup poll in October, 47 per cent said the North American Free Trade Agreement had been 'bad' for the country and 52 per cent opposed negotiating similar pacts elsewhere.

Such sentiments have given rise to a North Dakota proposal to involve state government in the coordination of wheat pooling. To relieve economic distress among farmers, the North Dakota Farmers Union (NDFU) has advanced pooling as a method of improving farm marketing by collectively organizing commodities in order to receive higher prices for farm goods.[4] Farmers will enjoy enhanced prices either because of the market power gained through pooling or the economies of scale and enhanced efficiency resulting from the marketing of a larger quantity of farm goods.[5] To strengthen the pool, the NDFU has also advocated a coordinated effort with the Canadian Wheat Board, which collects the wheat grown by Canadian producers.[6] Coordination with Canada, the Farmers Union argues, will enlarge the quantity of wheat controlled by the pool and thereby increase its market power, ultimately giving farmers greater bargaining power.[7]

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*Id. See also* Eyal Press, *The Free Trade Faith: Can We Trust the Economists?* LINGUA FRANCA Dec./Jan. 1998, at 30 (noting that "much of the country opposed the North American Free Trade Agreement (NAFTA), [making] . . . free trade among the most talked-about, polarizing issues in U.S. politics" and reviewing the academic debate over free trade); Alison Mitchell, *By a Wide Margin, House Votes Steel Import Curbs*, N.Y. TIMES, Mar. 18, 1999, at A1 (explaining House passage of a bill limiting steel imports which "displayed the division in the Democratic Party over Clinton's free trade policies as well as the appeal of protectionism to Republicans from Rust Belt states"); Richard W. Stevenson, *The Trade Squabble; Contentious Issue that Casts Spotlight on Frictions of a Shrinking World*, N.Y.TIMES, April 11, 1999, at A12 (detailing Congressional doubts about free trade and the Clinton administration's failure to finalize a trade agreement with China); WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM (1997) (outlining concerns about the social impact of economic globalization).

4. *See Wheat Marketing Pool Plan Unveiled*, BISMARK TRIB., Aug. 5, 1998, *available in* LEXIS, News Library.

5. *See* Won W. Koo, D. Demcey Johnson, Joon Park, Richard D. Taylor, *Economic Analysis of the Proposed North Dakota Wheat Pool: A Preliminary Report* 21, 21-25 (no date) (unpublished manuscript, on file with the North Dakota Industrial Commission). This article explains that

> [a] market pool is an arrangement by which producers market their crops collectively. A marketing organization, typically a cooperative, is charged with selling its members' production. Marketing functions are performed by a specialist or professional staff. Sale proceeds and marketing costs are combined in a single account, and net revenues are divided among producers (members) at the end of an agreed period.

*Id.*

6. *See* Dakota Pride Pool, Proposal presented by Robert Carlson, North Dakota Farmers Union President, Press Conference, Tuesday, Aug. 4, 1998, at 1.

7. *See id.* NDFU noting that "[t]he Canadian prairie provinces are our major competitor for spring wheat and durum markets. If we can reach an

The North Dakota proposal presents itself at an inauspicious time. The Agreement on Agriculture (the Agreement) that resulted from the Uruguay Round of GATT negotiations counteracted the century-long inclination to intervene in agricultural markets.[8] The Agreement established various obligations to reduce government intervention in agriculture.[9] In hope of advancing the Uruguay Round's progress toward free trade in agricultural markets, the WTO has planned agricultural talks for late 1999 as part of the preparation for the "millenium round" of trade negotiations.[10] Given the changing nature of the free trade debate in the United States and the growing opposition to GATT and NAFTA, a review of the dilemmas inherent in liberalizing the global agricultural trade seems appropriate.[11] Such a review reveals the painfully slow progress toward agricultural trade liberalization in recent years and sheds light on the potential success of the newly-proposed wheat pool.

Part I of this Note reviews past government efforts to coordinate and manage agricultural markets and the problems associated with each of these efforts and examines the role of GATT and its efforts to reduce high levels of government interference in agricultural markets. Part II outlines the North Dakota proposal to build an effective wheat pool and analyzes potential problems in light of the history of government intervention. This Note concludes by reviewing the challenges faced by the wheat pooling proposal, noting its incompatibility with the free trade agenda embraced by many farm groups and recommending a continued search for other solutions to farmers' economic distress.

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agreement with them, we will eliminate a competitor and be able to obtain a higher price for wheat and durum on both sides of the border." *Id.*

8. *See* Louis Lorvellec, *Back to the Fields After the Storm: Agriculture in the European Union After the Uruguay Round Agreements*, 2 DRAKE J. AGRIC. L. 411, 413 (1997) (explaining that "the legal framework of international agricultural commodity markets and of internal agricultural policies has been deeply altered by the conclusion of the UR").

9. *See* Agreement on Agriculture, *opened for signature* Apr. 15, 1994, *in* WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 39, (1995) [hereinafter Agreement].

10. *See* Deborah McGregor, *Call for New Round of World Trade Talks Likely to Head Agenda*, FIN. TIMES, Jan. 20, 1999, at 4. *See also* Guy de Jonquieres, *Back on the Fast Track*, FIN. TIMES, Jan. 21, 1999, at 11 (noting the WTO's commitment to negotiating on agriculture and the momentum provided by the Clinton administration).

11. *See* Amy Borrus, et al., *Change of Heart; The U.S. Is Having Doubts About the World Trade Pact It Championed*, BUS. WK., May 20, 1996, at 48-49.

## I. PAST GOVERNMENT EFFORTS TO CONTROL THE AGRICULTURAL TRADE

Import restrictions on agricultural products increased dramatically in the 1920s.[12] In response to the Great Depression in the 1930s, the federal government adopted sweeping programs to support farm income through direct payments and to increase prices through restrictions on production.[13] Post-World War II free trade agreements exempted American agriculture in order to protect the domestic pricing regime from foreign competition.[14] Efforts to liberalize agricultural trade throughout the postwar negotiating rounds generally failed until the finalization of the Uruguay Round in the early 1990s.[15] The debates and dilemmas over such efforts to manage the agricultural trade present several warning signals for the development and application of the North Dakota wheat pooling plan.

### A. THE COMING OF THE POST-WORLD WAR II AGRICULTURAL ORDER

In the 1920s, in response to agricultural groups' demands for tariff protection equivalent to the protection afforded other industries and in response to the post-World War I farm crisis, three different Presidential administrations extended trade protections.[16] Farmers felt angry about the double standard applied to tariff policy. While industrial America enjoyed high tariffs offering protection from foreign competition, agricultural commodities were subject to the whims of the international market.[17]

To complement his efforts to coordinate and stabilize the domestic agricultural system and protect it from disruption through high tariffs, Secretary of Commerce Herbert Hoover advanced similar plans for global commodity markets. Hoover and

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12. *See* DAVID B. DANDOM, BORN IN THE COUNTRY: A HISTORY OF RURAL AMERICA 189 (1995).

13. *See id.* at 209-11.

14. *See* David R. Purnell, *1993 International Trade Update: The GATT and NAFTA*, 73 NEB. L. REV. 211, 218 (1994).

15. *See id.* at 212-15.

16. *See* EDWARD S. KAPLAN, AMERICAN TRADE POLICY, 1923-1995 1-20 (1995).

17. *See generally* Joan Hoff-Wilson, *Herbert Hoover's Agricultural Policies, 1921-1928*, *in* HERBERT HOOVER AS SECRETARY OF COMMERCE 1921-1928: STUDIES IN NEW ERA THOUGHT AND PRACTICE 115,116-44 (Ellis W. Hawley ed., 1981) (evaluating Hoover's efforts to find a solution for the farm problem of the 1920s).

others viewed the sugar market, for example, as disastrously unstable and therefore in need of progressive government coordination.[18] The American market included more than just continental producers of cane and beet sugar: it also included Cuba (which had a tariff exemption after 1902), Hawaii, Puerto Rico, and the Philippines, which were American territories.[19] Like other markets after World War I, the sugar market was extremely unstable.[20] In 1923, for example, Cuban sugar sold for over five cents a pound on the New York market, but by 1929, the price had dropped to less than two cents.[21] As a result, Hoover encouraged the sugar producers to invoke his associational plans for a self-governing, cooperative arrangement to reduce production and boost prices.[22] Like Hoover's domestic stabilization programs, the effort to coordinate sugar production ultimately failed due to a lack of cooperation, and for most of the early 1930s sugar sold for about one cent a pound.[23]

Although Hoover sought to balance and order markets through state-encouraged, voluntary cooperative action, he generally wanted market forces to shape economic activity. He believed a largely free economy was necessary for continued American economic growth and prosperity.[24] In the case of the global rubber market, Hoover believed that the American economy suffered from a lack of competition and free trade.[25] He thus promoted State Department efforts to coordinate the investment of American corporations in overseas rubber planta-

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18. ELLIS W. HAWLEY, THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER: A HISTORY OF THE AMERICAN PEOPLE AND THEIR INSTITUTIONS, 1917-1933, at 183-86 (2d ed. 1992).

19. *See* GEORGE W. STOCKING and MYRON W. WATKINS, CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY 22 (1946).

20. *See* Edward G. Cale and Oscar Zaglits, *Intergovernmental Agreements Approach to the Problem of Agricultural Surpluses*, 34 IOWA L. REV. 230, 236-38 (1949).

21. *See* Stocking and Watkins, *supra* note 19, at 28.

22. Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of the "Associative State," 1921-1928*, 61 J. AM. HIST. 116, 116-40 (1974).

23. *See* Stocking and Watkins, *supra* note 19, at 39. The failure of the plan led to state intervention during the New Deal. *See id.* The Sugar Act of 1937 established national quotas for the different sugar producing regions in the United States. *See id.* Also, similar to the case of wheat, an International Sugar Agreement was established in 1937 and an International Sugar Council was created to manage the overproduction problem. *See id.*

24. Hawley, *supra* note 18, at 83-89.

25. Joseph Brandes, *Product Diplomacy: Herbert Hoover's Anti-Monopoly Campaign at Home and Abroad, in* HERBERT HOOVER AS SECRETARY OF COMMERCE 1921-1928: STUDIES IN NEW ERA THOUGHT AND PRACTICE 186, 197 (Ellis W. Hawley ed., 1981).

tions to undermine the British-sponsored Stevenson rubber cartel.[26] The State Department organized that cartel in response to a price plunge from sixty cents per pound in 1918 to twelve and one-half cents per pound in 1922, a reduction similar to that in the sugar market.[27] Hoover, however, saw the rubber cartel not as a stabilizing effort similar to his sugar plan, but as an effort to gouge or "super-charge" the American consumer.[28] When rubber prices surged to $1.20 in 1925, Hoover whipped up anti-foreign monopoly sentiment, created support for private sector buying pools, and promoted business efforts to create alternative sources of rubber.[29] Hoover launched similar campaigns against foreign cartels in coffee, oil, and potash.[30] Hoover's failure to boost sugar prices highlights the problems inherent in government attempts to build market power in international agricultural markets, and his success at undermining the rubber cartel demonstrates the potential for retaliatory action by foreign governments.

Hoover gave his greatest attention to the domestic organization of core agricultural commodities such as wheat. As Hoover saw it, agriculture depended too heavily on unstable and unreliable foreign markets and should isolate itself, taking advantage of America's "remarkably self-contained" economy and concentrating on coordinating domestic production with domestic demand.[31] However, the voluntary, federated agricultural cooperatives that he envisioned would manage this process failed to coordinate production properly, setting the stage for state-mandated acreage reductions under the New Deal's Agricultural Adjustment Act (AAA).[32]

Hoover's unwillingness to use state power stymied one of the decade's largest efforts by farmers to boost prices artificially. The McNary-Haugen bill, twice vetoed by President Coolidge and vehemently opposed by Hoover, would have forced the fed-

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26. *Id.* at 198. *See* David Kilroy, *Extending the American Sphere to West Africa: Dollar Diplomacy in Liberia, 1908-1926* (1995) (unpublished Ph.D. dissertation, University of Iowa) (on file with University of Iowa Libraries); JOSEPH BRANDES, HERBERT HOOVER AND ECONOMIC DIPLOMACY: DEPARTMENT OF COMMERCE POLICY 1921-28, at 68 (1962) (noting that "The struggle against foreign combinations aroused wide national interest").

27. *See* Brandes, *supra* note 25, at 197.

28. *Id.*

29. *Id.* at 198-208.

30. *Id.* at 187-96 (describing Hoover's anti-monopoly campaign).

31. DAVID E. HAMILTON, FROM NEW DAY TO NEW DEAL: AMERICAN FARM POLICY FROM HOOVER TO ROOSEVELT, 1928-1933, at 110 (1991).

32. *See id.* at 216-36.

eral government to establish two prices for agricultural commodities—a high domestic price to aid farmers and a price low enough to allow dumping on the world market.[33] Foreign governments resented such efforts to protect domestic agriculture, a fact quickly recognized in the post-World War II period. Hoover's unwillingness to engage in state-sponsored dumping, his inability to stabilize global commodity prices (such as rubber, wheat, sugar, and coffee), and his failure to raise domestic agricultural prices contributed heavily to his electoral defeat in 1932 and, unwittingly, to the construction of the postwar agricultural order.[34]

In response to the agricultural crisis of the 1930s and in contrast to Hoover's failed voluntary cooperative efforts, President Franklin D. Roosevelt's AAA designated a national allotment of key commodities, paid farmers to produce within the limits of the allotment, and thereby increased prices through artificial scarcity.[35] To prevent the price support system from being overwhelmed, the legislation included protections from foreign competition, angering Cuban sugar and Canadian wheat producers, among others.[36] Specifically, Section 22 of the AAA authorized import quotas or fees, and Section 32 authorized export subsidies on wheat, which were used continuously from the end of the Korean War until the large-scale Russian grain sales of the 1970s.[37] The agricultural program angered trading partners and conflicted with the diplomatic efforts of the State Department, sparking bitter clashes between Secretary of State Cordell Hull and AAA director George Peek over the Reciprocal Trade Agreements Act.[38]

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33. *See generally* GILBERT C. FITE, GEORGE N. PEEK AND THE FIGHT FOR FARM PARITY 169-184 (1954)(explaining support for and passage of the McNary-Haugen bill). *See also* Hawley, *supra* note 22, at 137.

34. HAMILTON, *supra* note 31, at 195-236.

35. *See* MURRAY R. BENEDICT, FARM POLICIES OF THE UNITED STATES, 1790-1950: A STUDY OF THEIR ORIGINS AND DEVELOPMENT 302-15 (1953).

36. The Secretary of Agriculture was responsible for determining if imports would undermine the farm program. *See id.*

37. *See* Wheeler, *supra* note 1, at 386.

38. *See* PETER B. KENEN, GIANT AMONG NATIONS: PROBLEMS IN UNITED STATES FOREIGN ECONOMIC DIPLOMACY 79 (1960); LLOYD C. GARDNER, ECONOMIC ASPECTS OF NEW DEAL DIPLOMACY 24 (1964). *See also* Elaine Fuller, *American Wheat: From Surplus Production to Export Promotion, 1945-1975*, at 17 (unpublished conference paper, presented at the Social Science History Association Conference, November 1995). This paper argues that the

> [p]ostwar debates over agricultural price supports recognized the importance of expanding agricultural exports but basically the issue was ignored. . . . What seemed to be emerging was a struggle between proponents of economic nationalism, represented by the system of farm

During the early years of the New Deal, representatives of the Roosevelt administration also participated in an economic conference in London which addressed government-sponsored international commodity agreements establishing minimum and maximum world prices for products.[39] One of those agreements, the International Wheat Agreement (IWA) of 1933, involved nine exporting nations and thirteen importing nations.[40] The exporting nations were to reduce acreages fifteen percent, and, in exchange, importing countries agreed to limit their acreages and lower tariffs in order to stabilize prices.[41] The agreement quickly fell apart when Argentina exceeded its quota after a bumper crop, but the remnants of the program helped shape the postwar international agricultural trade.[42] The fragments of earlier farm policies—the domestic production control/price support policies of the AAA, the attempt at international cooperation to coordinate and stabilize the global wheat trade, and agriculture's exemption from increasingly stringent rules governing world trade—combined after World War II to shape the structure of the international agricultural order.

## B. POST-WORLD WAR II AGRICULTURE AND GATT

In the 1940s, many world leaders considered the economic nationalism of the interwar years as partly responsible for World War II.[43] As Secretary Hull argued, "if goods can't cross borders, soldiers will."[44] The ensuing trade negotiations in Havana in 1947 led to an agreement to reduce world tariff levels and to establish both the International Trade Organization (ITO) to police trade disputes and the General Agreement on Tariffs and Trade (GATT), all of which led to tariff concessions

> price supports (whether rigid or flexible), income payments, tariffs and subsidies, in opposition to an internationalist position, the latter now represented by supporters of the State Department's strong position on creating a global multilateral free trade system.

*Id.*

39. *See* Colleen M. O'Connor, *Going Against the Grain: The Regulation of the International Wheat Trade from 1933 to the 1980 Soviet Grain Embargo*, 5 B.C. INT'L & COMP. L. REV. 225, 238 (1982).

40. *See id.* at 239.

41. *See id.*

42. *See* CARMINE NAPPI, COMMODITY MARKET CONTROLS: A HISTORICAL REVIEW 37-47, 63 (1979).

43. *See* THOMAS W. ZEILER, AMERICAN TRADE AND POWER IN THE 1960S, at 21-24 (1992).

44. *Id.* at 23.

on two-thirds of the world's trade.[45] Due to the influence of agricultural interests, however, agriculture was afforded exemptions from the GATT rules banning import quotas.[46] GATT rules governing subsidies were also weakened to accommodate agriculture.[47] The ITO, continuously jeopardized due to American fears of an institution that could undermine agricultural support programs, ultimately failed to gain approval from the U.S. Senate.[48] Additionally, given cold war priorities such as the reconstruction of Western Europe as a bulwark against the Soviet Union, the United States also agreed to permit regional trading blocs, undermining the trade reciprocity principles of GATT and ultimately allowing the creation of arrangements such as the European Union's Common Agricultural Policy.[49] In 1955, the

45. *See generally*, SUSAN ARIEL AARONSON, TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY 79-132 (1996) (explaining the demise of the ITO).

46. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex II, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994), Art. XI:2(c) (allowing "[i]mport restrictions on any agricultural or fisheries product").

47. *See* Jon G. Filapek, *Agriculture in a World of Comparative Advantage: The Prospects for Farm Trade Liberalization in the Uruguay Round of GATT Negotiations*, 30 HARV. INT'L L.J. 123, 138 (1989)

> Originally, the General Agreement only required subsidizing nations to notify the GATT of the 'extent . . . nature . . . estimated effect of the subsidization . . . and of the . . . circumstances making the subsidization necessary.' The current version of Article XVI, the subsidies regulation, retains this notification requirement and bans subsidies on nonprimary products that result in the sale of the product at lower than the domestic price. Primary products may be subsidized, but not as a means for the state to acquire more than an 'equitable share of world export trade' in that product. 'Equitable share' is not defined in Article XVI, although export market share in the product during 'a previous representative period' and any 'special factors' affecting trade in a product will be taken into account.

*Id.* (quoting General Agreement, art. XVI).

48. *See* Henricus A. Strating, *The GATT Agriculture Dispute: A European Perspective* 18 N.C.J.INT'L L. & COM. REG. 305, at 307, 311 (1993) "During the negotiation of the Havana Charter, the U.S. delegation recognized that the United States Senate would not ratify an international agreement that would force the U.S to dismantle or suspend its agricultural programs." *Id. See also* Aaronson, *supra* note 45, at 81. "[T]he United States had not reconciled its new trade policy with its long-standing agricultural programs. This inconsistency was nothing new: 'Agricultural protection was the rock on which some of the best . . . interwar efforts to reduce trade barriers were wrecked.'" *Id.* (quoting Brookings Institution study).

49. *See* Strating, *supra* note 48, at 327. The United States demand for agricultural exemptions from the GATT "gave the EC the opportunity to establish the CAP without seriously violating GATT customs and practices." *Id.*

United States received a GATT waiver offering relief from the already weak rules governing agricultural import quotas.[50]

Agriculture's exemptions from GATT earned it a reputation as "the problem child of world trade."[51] The powerful interests that demanded exemptions from GATT rules and contributed to many international political disputes have also, unsurprisingly, generated a great deal of international legal activity. In the 1950s, twenty-three percent of GATT cases involved agriculture; however, from the early 1960s to the late 1980s, over fifty percent of GATT cases resulted from agricultural trade disputes.[52] Due to the controversial nature of the agricultural trade, liberalization efforts accomplished little during most of the post-World War II period. Indeed, seven of the first eight rounds of GATT focused on manufacturing, not agriculture.[53] The great costs of government intervention in the farm trade, however, made agriculture an urgent agenda item during the Uruguay Round.[54] This renewed interest ultimately produced the Agreement on Agriculture, reversing the long-term tendency of governments to interfere in agricultural markets and limiting the ability of policy-makers to pursue proposals such as the North Dakota Farmers Union wheat pooling plan.[55]

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50. *See* Filapek, *supra* note 47, at 137. The author states:

> The United States requested this waiver when Congress passed farm legislation in conflict with GATT obligations, including an amendment to Section 22 of the Agricultural Adjustment Act. The provision, as amended, required the executive branch to restrict agricultural imports that interfered with the operation of domestic farm programs notwithstanding any 'trade agreement or other international agreement heretofore or hereafter entered into by the United States.' Given the United States' determination to carry out the Congressional mandate, the Contracting Parties granted the waiver, believing that a refusal would damage the GATT system by forcing the United States either to defy GATT principles openly or to withdraw from the GATT altogether.

*Id.*

51. Jeffrey J. Steinle, *The Problem Child of World Trade: Reform School for Agriculture*, 4 MINN. J. GLOBAL TRADE 333, 335 (1995).

52. *See* Robert Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 67 (1993).

53. *See* Steinle, *supra* note 51, at 342.

54. *See* Filapek, *supra* note 47, at 162 (explaining that the pressures leading to the Uruguay Round reforms increased since the "costs of supporting agriculture [had] escalated and the benefits of trade liberalization [had] become more apparent").

55. *See* Agreement, *supra* note 9.

### C. POST-WORLD WAR II COMMODITY AGREEMENTS

Despite earlier failures, or perhaps because of them, in 1947 and 1948 negotiators attempted to stabilize world agricultural prices and limit international competition through another International Wheat Agreement (IWA).[56] This IWA took effect in 1949 and lasted four years.[57] The exporters in the agreement (Australia, France, Canada, and the United States) guaranteed a supply of grain to importers (roughly forty countries) in exchange for the assurance that the importers would buy a fixed supply.[58] The agreement established a price range, applicable to a fixed amount of wheat, above which the exporters could not sell and below which the importers could not buy.[59] However, since the amount of wheat provided for in the agreement accounted for less than half of the world's annual wheat trade (thirty-seven percent of American exports in total), prices continued to fluctuate.[60]

Other factors also undermined the agreement: the refusal of Argentina and the Soviet Union to join; the abandonment of the agreement by the world's largest importer, Great Britain, after the negotiation of a new agreement in 1953 (British negotiators thought the new price maximum of $2.05 was too high); and, unlike the 1933 agreement, the absence of domestic production controls which could stem the entry of new products into the market.[61] The negotiators weakened the 1959 IWA when they deleted the requirement that importers buy a fixed quantity of wheat and instead required them to buy a quantity based on a percentage of their total imports, resulting in the importers' use of substitutes and in greater self-sufficiency.[62] In 1962, the IWA ended the requirement that domestic agricultural policy support the integrity of the IWA, giving exporters and importers "complete liberty of action" to develop domestic agriculture programs, a far cry from the production control requirements of the 1933 IWA.[63]

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56. *See* O'Connor, *supra* note 39, at 240.
57. *See id.* at 241.
58. *See* Wheeler, *supra* note 1, at 392 (noting that the amount to be exchanged was fixed according to an annual quota schedule).
59. *See* O'Connor, *supra* note 39, at 240.
60. *See id.*
61. *See* Cale and Zaglits, *supra* note 20, at 234-35.
62. *See* O'Connor, *supra* note 39, at 242.
63. *Id.* at 240, 242. *See also* Stanley Metzger, *Cartels, Combines, Commodity Agreements and International Law*, 11 TEX. INT'L L. J. 527, 535-36 (1976) (explaining increased restrictions on commodity cartels in the postwar years).

In the late 1960s, in spite of the problems associated with previous efforts, policy-makers attempted another international agreement to stabilize and coordinate the wheat market.[64] This resulted in the International Grains Agreement of 1967 (IGA).[65] By the time the IGA took effect in 1968, however, the pricing agreements had been overwhelmed by that season's large harvests.[66] Unable to unload massive surpluses at the minimum price established under the IGA, major exporters such as Canada and France willfully violated the agreement, and the United States argued that the minimum price arrangement was only a "guideline."[67] In 1971, the Wheat Trade Convention re-convened, but no agreement could be reached on purchase or supply obligations or pricing structure.[68] An attempt to negotiate another agreement in 1978 also failed.[69] The extreme difficulties involved in coordinating international commodity markets, even with the aid of governments, underscore the problems of managing global agricultural markets. The inability of nations to cooperate and the ability of additional producers to enter the market make any such efforts tenuous.

### D. Public Law 480 and the State Trading Problem

In the early 1950s, political leaders were still searching for the best way to manage the agricultural surplus. The limited amount of sales organized under the IWA, the shrinking Marshall Plan sales to Europe, the ending of the Korean war and its extraordinary demand for farm goods, and the chronic stockpiling of USDA commodities complicated their efforts.[70] With the

64. *See* O'Connor, *supra* note 39, at 246.

65. *See id.* at 247 (noting that the Agreement was called grains instead of wheat because prices were pegged to several different varieties of wheat instead of just one prominent variety, Manitoba No. 1).

66. *See* Liaquat Ali, *The World Wheat Market and International Agreements*, 16 J. World Trade L. 59, 66 n.1 (1982).

67. *See* O'Connor, *supra* note 39, at 249.

> The language of the International Grains Agreement led some major exporting countries, notably the United States, to believe that cutting prices below the specified minimum did not violate the agreement. By the summer of 1969, barely a year after the International Grains Agreement became effective, the minimum prices remained only technically in effect because the major exporting countries ignored their existence.

*Id.*

68. *See* Ali, *supra* note 66, at 67.

69. *See* O'Connor, *supra* note 39, at 263.

70. *See* Fuller, *supra* note 38, at 19 (noting that during the first quarter of 1949, when the Marshall Plan was fully operational, it financed 83 percent of American corn exports and 67 percent of wheat flour).

election of Dwight D. Eisenhower to the Presidency in 1952, the farm policy emphasis of previous decades shifted.[71] The new Secretary of Agriculture, Ezra Taft Benson, promoted "freedom to farm" and emphasized the importance of exporting.[72] To increase exports, Secretary Benson advocated scaling down American surpluses through government-aided sales and donations to other countries.[73] The legislation that was enacted, known as the Agricultural Trade Development Act of 1954, or simply Public Law 480, significantly altered the nation's ability to manage its commodity surplus problem.[74] The law allowed the Eisenhower administration to negotiate the sale of $700 million in surplus government stocks for foreign currency over three years and funnel the money back to the purchasing country for economic development.[75] In addition, $300 million could be disposed of via contributions to humanitarian or famine relief efforts.[76] The program became a "free gift" to needy countries that would otherwise have had to spend their foreign exchange on food or "do without."[77] By the late 1950s, one-third of American economic aid would take the form of these local currency sales, and seventy percent of wheat exports would be handled by the program.[78] By 1962, half of soybean oil exports were made under P.L. 480.[79]

The absence of international rules governing agricultural trade and surplus problems in other countries fostered the existence of P.L. 480-type programs and state-trading in other countries. All Canadian grain exports, for example, were sold by the

71. *See generally* Robert Griffith, *Dwight D. Eisenhower and the Corporate Commonwealth*, 87 AM. HIST. REV. 87, 107 (1982) (explaining reduced government support for agiculture).

72. Robert L. McGeorge, *Accomodating Food Security Concerns in a World of Comparative Advantage: A Challenge for GATT's International Trade System*, 71 NEB. L. REV. 368, 388 (1992) ("Starting with the enactment of PL-480, Congress gradually began to rely more upon market-oriented policies and the expansion of markets for U.S. agricultural products to assure adequate farm incomes"); EZRA TAFT BENSON, FREEDOM TO FARM 229-30 (1960).

73. *See generally* TRUDY H. PETERSON, AGRICULTURAL EXPORTS, FARM INCOME, AND THE EISENHOWER ADMINISTRATION 24-32 (1979) (explaining the emphasis on export promotion).

74. *See* Agricultural Trade Development Act of 1954, Pub. L. No. 83-480, 7 U.S.C. § 1701(a); Wheeler, *supra* note 1, at 387.

75. *See* Peterson, *supra* note 73, at 42.

76. *See id.*

77. *See* JACOB J. KAPLAN, THE CHALLENGE OF FOREIGN AID: POLICIES, PROBLEMS, AND POSSIBILITIES 50-51 (1967).

78. Don Paarlberg, *Essentials of Modern Trade Policy*, in READINGS IN AGRICULTURAL POLICY 233, 235-36 (R. J. Hildreth ed., 1968).

79. *See id.*

Canadian Wheat Board, whose mandate was "[t]o market as much grain as possible at the best price that can be obtained". Similarly, Australian grain producers marketed their commodities through the Australian Wheat Board.[80] Such nationally-based state-trading programs, however, created the potential for clashes between nations, as evidenced by the battle over the Iranian market in the postwar years. In the latter part of the 1960s, ninety-five percent of soybean oil exports were subsidized by P.L. 480. During that time, Iran was an important export market and was threatened when the Soviet Union began dumping sunflower oil.[81] A generous counteroffer of P.L. 480 credit preserved the Iranian market for the United States.[82] The same strategy prevented Australian and Canadian wheat from displacing American commodities in subsequent years.[83]

The history of such rivalries makes cooperation between North Dakota producers and the Canadian Wheat Board, a core component of the wheat pooling plan, unlikely, especially given the legacy of bitter agricultural disputes between the United States and Canada.[84] Canada has taken a strong stand in recent trade disputes, alleging violations of both NAFTA and WTO agreements by the United States.[85] U.S. Senator Byron Dorgan of North Dakota has been extremely critical of a recent agricultural accord between the United States and Canada, claiming that Canada continues to violate international agreements and drive down American farm prices, thereby fueling border clashes

80. *See* Alex F. McCalla and Andrew Schmitz, *Grain Marketing Systems: The Case of the United States versus Canada*, AM. J. OF AG. ECON. 204 (May 1979); MICHAEL J. MCGARRY and ANDREW SCHMITZ, THE WORLD GRAIN TRADE: GRAIN MARKETING, INSTITUTIONS, AND POLICIES 333-34 (1992).

81. *See* DAN MORGAN, MERCHANTS OF GRAIN 176 (1979).

82. *See id.* at 176-77.

> The Iranian market was not one that the U.S. Soybean-oil industry was prepared to surrender. . . . [American officials] drew up an action plan for retaking the Iranian market with offers of P.L. 480 loans. . . . By 1975, total Iranian purchases of the American soybean oil reached a record $117 million. The Soviet Union's sunflower oil disappeared from army kitchens, homes, and restaurants, and the American soybean was once again king.

*Id.*

83. *See id.* at 177; McCalla and Schmitz, *supra* note 80, at 204-09.

84. *See Attention Washington: The Wheat Belt Is Not Impressed*, CONGRESS DAILY, Jan. 8, 1999.

85. *See* Heather Scoffield, *Ottawa Tackles U.S. on Farm Blockade; Turns to NAFTA, WTO about Grain, Cattle and Hog Exports to South Dakota, other States*, THE GLOBE AND MAIL, Sept. 25, 1998, at B5.

and dimming the prospects of greater U.S.-Canadian trade cooperation.[86]

### E. THE PROBLEM OF THE COMMON AGRICULTURAL POLICY (CAP)

After making no progress on the agricultural front during the Dillon Round, negotiators placed great emphasis on agriculture during the Kennedy Round of GATT negotiations in the early 1960s.[87] If European tariffs could be cut by fifty percent by 1970, American negotiators believed, American livestock exports could increase by thirty-four percent and crop exports by twenty-one percent over 1961 levels.[88] Without a successful tariff reduction, the Kennedy administration feared that a proposed unified European agricultural policy would exclude American farm products. This policy ultimately came to be known as the Common Agricultural Policy (CAP), a regime which employed variable levies to exclude less expensive foreign agricultural goods, resulting in privileged status for such products as French wheat, Italian rice, and Danish dairy products—all to the exclusion of American commodities.[89]

From 1959 to 1968, when the CAP was in place, European protection levels rose dramatically: for meat, from 19 to 52 percent; for dairy, from 19 to 137 percent (from 30 to 350 percent for butter); for cereals, from 14 to 72 percent.[90] From 1966 to 1969, American agricultural exports to the EEC that were subject to the levies of the CAP tumbled nearly fifty percent.[91] According to the *Farm Journal*, by the end of the Kennedy Round, which

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86. *U.S., Canada Ease Farm Trade Tensions Along Border*, WASH. POST, Dec. 5, 1998, at G1; *U.S. Canada Reach Pact on Grain and Livestock, But Protestors Vow to Block Border Anyway*, SALT LAKE TRIB., Dec. 5, 1998, at D10, "[S]ome militant farmers and their champion, Sen. Byron Dorgan, D-N.D., denounced the deal for failing to restrict Canadian imports, which they blame for driving down grain and meat prices. A farm-protest organizer said a border blockade . . . in four states [would] go ahead as scheduled." *Id. See also Canada Trade Pact Fails to Mollify*, WASH. TIMES, Dec. 5, 1998, at C1 (noting the "long-standing problem with Canada").

87. *See* Zeiler, *supra* note 43, at 170-73.

88. *See* Memorandum from Willard W. Cochrane, senior agricultural advisor, to Orville Freeman, Secretary of Agriculture, Subject: Economic Consequences of the Kennedy Round (Jan. 7, 1964) (located in file folder 1964 W.W. Cochrane memoranda (1), document box 11, 144.K.8.5(B), Orville Freeman Papers, Minnesota Historical Society).

89. *See* Zeiler, *supra* note 43, at 170.

90. *See* H. B. Malmgren and D. L. Schlechty, *Rationalizing World Agricultural Trade*, 4 J. OF WORLD TRADE L. 515, 517 (1970).

91. *See id.*

lasted from 1964 to 1967, "[t]he much-advertised fight that the administration was going to put up for U.S. farmers ended in almost complete capitulation."[92]

The infamous "chicken war" perhaps best exemplifies the U.S.-EEC commercial rivalry of the period.[93] From 1929 to 1961 the output of American chickens grew fifty-fold, and from 1948 to 1964 prices dropped from $.35 to $.14 lb.; as a result, poultry exports surged.[94] American poultry exports to Europe, totaling only $3.6 million in 1958, grew to $53.5 million by 1962.[95] The booming American exports, however, fell victim to the CAP in 1962, specifically regulation 22, which outlined plans for a common market in poultry meat.[96] By 1963, American poultry exports were nearly cut in half.[97] The crisis became so acute that President Kennedy wondered whether the "Grand Alliance [was] going to founder on chickens."[98]

The Kennedy administration presented its case under GATT and promised, if case negotiations failed, to seek retaliatory trade measures.[99] The *New York Times* wondered whether the EEC was on the brink of becoming an "inward-looking, high-tariff club," and argued that the answer would determine the "future shape and even the fate of the Atlantic Community."[100] The journalist C.L. Sulzberger mused that if the United States was denied access to the EEC market, "the Whole Grand Design for NATO defense, interdependence and a tightening Western comity of nations could scatter like feathers in a hen-house."[101] Members of the U.S. Senate introduced a resolution asking the American delegation in Geneva to preserve access to American export markets.[102] The negotiations began with an American offer to participate in a non-obligatory arbitration conducted by a GATT Panel.[103] The Panel ultimately concluded that the EC had violated GATT rules with its restrictive policies, but it also

92. *Farmers and the Kennedy Round*, FARM J., June 1967, at 74.

93. *See generally* ROSS B. TALBOTT, THE CHICKEN WAR: AN INTERNATIONAL TRADE CONFLICT BETWEEN THE UNITED STATES AND THE EUROPEAN ECONOMIC COMMUNITY, 1961-64, at 3-4 (1978) (describing the rivalry as "chicken war").

94. *See id.*

95. *See id.*

96. *See id.* at 30-37.

97. *See id.* at ix.

98. *Id.* at 56.

99. *See id.* at 100.

100. *See* TALBOTT, *supra* note 93, at 84.

101. *Id.* at 96.

102. *See id.* at 94.

103. *See id.* at 111.

ruled that the resulting economic damages were substantially less than the United States claimed.[104] The United States and the EC accepted the conclusions of the Panel and implemented its recommendations, averting a full-fledged trade war.[105] The episode highlights the complexity of the international agricultural trade, the level of state interference in the trade, and the geopolitical concerns surrounding it. It also underscores the dangers of brinksmanship and the ease with which a trade war can be triggered in the volatile international agricultural sector.

In the early 1980s, another GATT Panel approved EC flour export subsidies, and the U.S. Deputy Special Trade Representative commented that the decision "introduces the law of the jungle" into the agricultural trade.[106] The United States then subsidized a large sale of flour to Egypt, which triggered angry EC condemnations of the "brutal [American] takeover" of the Egyptian market.[107] German Foreign Minister Hans Dietrich Genscher informed Secretary of State George Schultz that the sale could damage U.S.-EC relations; British Foreign Minister Douglas Hurd worked to "keep the arguments on agricultural trade under control so they don't produce damaging political results"; a French trade official concluded that "[w]e are on the verge of war."[108] The consequences of the CAP were well-summarized by D. Gale Johnson, the long-time University of Chi-

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104. *See id.* at 115.

105. *See id.* at 116.

106. MILLING AND BAKING NEWS, Mar. 1, 1983, at 9. *See also* Thomas J. Schoenbaum, *Agricultural Trade Wars: A Threat to the GATT and Global Free Trade*, ST. MARY'S L.J. 1165, 1170 (1993). The author notes:

> The GATT panel concluded that EC wheat subsidies had indeed caused 'undue disturbance to normal United States commercial interest.' The trade experts acknowledged that export subsidization had greatly increased the EC's share of the world markets. Nevertheless, the Panel refused to find that the EC undercut prices or used its subsidies to gain more than an equitable share of the world market. The Panel reached these contradictory conclusions because it could not agree on an appropriate base period for defining the EC's equitable share. Because the United States failed to secure relief at the GATT, the United States took retaliatory measures and instituted a wheat-flour export-subsidy program of its own.

*Id.*

107. William H. Boger III, *The United States-European Community Agricultural Export Subsidies Dispute*, 16 LAW & POL'Y INT'L BUS. 173, 222 (1984). "The sale was a signal of U.S. displeasure with the EEC's export policy in general, and showed a willingness on the part of the United States to match the Community subsidy for subsidy in defense of overseas markets." *Id.*

108. MILLING AND BAKING NEWS, Mar. 22, 1983, at 67. *See also* McGeorge, *supra* note 72, at 394 (describing the EC and the United States as "engaged in a full-fledged agricultural trade war").

cago farm market analyst: "the Common Market, instead of being an importer, is pushing all the grain it can out of [the] backdoor. None of it is good for the American farmer."[109] American policymakers responded to the "EC's offensive" in 1985 with an "offensive weapon" known as the Export Enhancement Program (EEP), a subsidy system designed to regain American market share in grain exports.[110] According to the president of the North American Export Grain Association, the "U.S.-EC subsidy war" was waged in part to improve the American bargaining position in the GATT talks on agriculture.[111] The EEP, according to United States Trade Representative Carla Hills, maintained "the credible threat of retaliation."[112]

In sum, the EC created enormous problems for American grain exporters. In the 1960s, the EC imported 15 million tons of grain, but by the early 1980s, with the help of the CAP and export subsidies, EC member-states were exporting 12 million tons.[113] Trade negotiations in recent years sought to control this expensive and trade-distorting commercial rivalry by reducing export subsidies and eliminating import barriers. Addi-

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109. Winston Williams, *Farm Groups Skeptical on Grain Offer to Soviets*, N.Y. TIMES, Oct. 19, 1982, at D27.

110. Christopher Rusek, *Trade Liberalization in Developed Countries: Movement Toward Market Control of Agricultural Trade in the United States, Japan, and the European Union*, 48 ADMIN. L. REV. 493, 499 (Fall 1996). The author notes:

> In 1985, the Export Enhancement Program (EEP) was introduced and is the most important example of U.S. agricultural export policy. The EEP lowers the price of U.S. agricultural products to specific overseas markets in order to increase the U.S. share of world markets, especially in the case of wheat. The intention of this policy is to pressure countries that subsidize agricultural exports to eliminate such trade-distorting policies.

*Id.*

111. RONALD T. LIBBY, PROTECTING MARKETS: U.S. POLICY AND THE WORLD GRAIN TRADE 26 (1992); McGeorge, *supra* note 72, at 393 (explaining that "[t]his massive export subsidy program [EEP] was designed to meet the short-term policy objective of enabling U.S. agricultural exporters to compete with subsidized EEC exporters in world markets, and the longer term objective of forcing the EEC to enter into serious negotiations to liberalize its agricultural trade policies."). Despite increased leverage, squabbles over agriculture still stretched the Uruguay Round of the GATT to eight years.

112. LIBBY, *supra* note 111, at 66.

113. *See* MILLING AND BAKING NEWS, Mar. 22, 1983, at 67. *See also* J. Kodwo Bentil, *Attempts to Liberalize International Trade in Agriculture and the Problem of the External Aspects of the Common Agricultural Policy of the European Economic Community*, CASE W. RES. J. INT'L L. 335, 336 (1985) (explaining how the "EEC's CAP has undermined the international agricultural trade of various non-EEC countries by a significant poaching of their traditional overseas markets").

tional state interference, whether through a wheat pooling plan that subsidizes farmer participation or through other measures, could undermine recent successes and revive simmering trade disputes. The EU would likely rival the wheat pool, given the EU's status as the world's largest producer of durum wheat and as a frequent exporter.[114]

## F. THE RISKS OF GOVERNMENT INTERVENTION

The 1972 American grain sales to the Soviet Union further exposed the pitfalls and complexity of the international agricultural trade.[115] President Richard M. Nixon and his advisors believed that increased grain sales would strengthen the dollar, reduce the mounting balance-of-payments deficit, address the trade deficit (in 1971 the United States ran the first trade deficit since 1888), pare down American commodity surpluses, and improve superpower relations.[116] He therefore agreed, in 1971, to end the licensing requirement for grain exports to Russia and China and the requirement that fifty percent of all shipments be carried on American merchant marine vessels, a Kennedy administration concession to induce the maritime unions to load grain ships in the early 1960s.[117] In the summer of 1972, grain companies funneled almost twelve million tons of grain to the Soviet Union.[118] The sale ushered in a period of food shortages that would end American export subsidies for wheat and even prompt the government to prohibit the exportation of soybeans,

114. *See* Koo et al., *supra* note 5, at 13 (noting that EU durum wheat exports have ranged between 11 and 123 million bushels per year).

115. *See* Ali, *supra* note 66, at 60 (explaining the instability created in international agricultural markets when the Soviet Union became an importer in the early 1970s).

116. JAMES WESSEL, TRADING THE FUTURE 161 (1983). This article explains that President Nixon was responding to international economic developments that precipitated the conversion of American dollars into gold in the late sixties. *See id.* In May 1971, four European countries revalued their money upward, effectively ending the postwar Bretton Woods international monetary system based on the American dollar. *See id.* In turn, "[t]he president unilaterally suspended dollar convertibility into gold, effectively devaluing it, and instituted a wage freeze, a tax surcharge on imports, and a series of measures to improve U.S. export performance—with increased *agricultural* exports the center of this strategy." *Id.* (italics added). *See* ROBERT PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 1929-1976, at 138 (1990).

117. MORGAN, *supra* note 81, at 195 (noting that "The major difficulty in expanding grain trade with the Russians was still the plum that Kennedy had thrown out to the unions in 1963 in the form of a guarantee that American ships would carry half the grain").

118. *See id.* at 207 (calling the sale "what quite likely was the largest grain transaction in the history of the world").

the only government action to impede American agricultural exports since World War II.[119]

When the world suffered food shortages in the 1970s, state involvement in agricultural markets increased the possibility of manipulating food stocks for geopolitical purposes. After decades of disposing of American agricultural stockpiles on international markets despite the protests of allies, the United States considered wielding "agripower" as a diplomatic weapon.[120] With seventy-five percent of the world's grain exports as a diplomatic tool, President Nixon secured the SALT treaty in 1972 which, according to one author, directly "hinge[d]" on American grain sales.[121]

In 1972 and 1973, the pro-American regimes in South Vietnam and Cambodia received seventy percent of P.L. 480 food aid.[122] A Chilean food crisis exacerbated by a discontinuance of American P.L. 480 aid, a suspension of grain sales and credit, and American manipulation of international lending, among other U.S. efforts to "destabilize" the Chilean government, helped topple the Allende regime in 1973.[123] Secretary of State Henry Kissinger also employed American grain as a tool for brokering Middle Eastern peace and, as a result, by 1978 Egypt became the largest recipient of P.L. 480 aid.[124] In 1975, the

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119. *See id.* at 217; Herbert Stein, *Food Prices: Oh, How It All Adds Up*, N.Y. TIMES, Sept. 29, 1972.

120. *See* William T. Weber, *The Complexities of Agripower: A Review Essay*, 52 AGRIC. HIST. 526-28 (1978).

121. SEYMOUR HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE 346 (1983). *See also* Howard Fineman, *It's Dole Inc. vs. Clinton Inc.*, NEWSWEEK, Apr. 8, 1996, at 30 (explaining the continuing importance of agriculture in U.S-Russian relations). When Russia was threatening to ban imports of American poultry President Clinton stepped in: "'This is a big issue,' Clinton told Yeltsin, 'especially since 40% of U.S. poultry is produced in Arkansas.'" *Id.* *See also* William Safire, *The Russian Election*, N.Y. TIMES, Apr. 8, 1996, at A15 (noting that "Mr. Clinton's incredible request made at the last summit to refrain from putting tariffs on Arkansas chickens—a favor to the Tyson lawyer whose commodity 'advice' enriched the Clintons by $100,000—has been heatedly denied and graciously granted").

122. *See* MORGAN, *supra* note 81, at 338.

123. *See id.* at 338-39. The author states:

> Chile provides the best example of a country where the American food tap was turned off and on again in response to political developments. Subsidized food shipments to Chile were stopped after the Marxist Salvador Allende was elected president in 1970, and it was one of the first forms of aid to resume after he was overthrown on September 11, 1973. This was part of the covert tactics of 'destabilization' adopted by the Nixon administration against Allende.

*Id.*

124. *Id.* at 341-42.

United States also sought to use its "grain power" to convince the Soviet Union to exchange ten million tons of oil at below-OPEC prices for access to American grain stores.[125] Underscoring the potential for government abuse of food stocks, former Secretary of Agriculture Earl Butz once recalled that "[m]y fiercest battles were with Henry Kissinger. He was always trying to get his hands on food for a foreign policy tool."[126]

The OPEC oil shocks, coupled with the economic instability stemming from the collapse of the Breton Woods exchange system, stagflation in the United States, and a greater awareness of environmental damage and limits to economic growth, compounded fears of a global resource war in the 1970s.[127] In 1974, the National Strategy Information Center released a study entitled *Can We Avert Economic Warfare in Raw Materials? US Agriculture as a Blue Chip*, exploring the use of farm exports as an economic lever.[128] An expanded version of the study argued that the United States was in a prime position to extract concessions from foreign powers because of its massive capacity to produce agricultural commodities and the limited production in other countries.[129] The study highlighted the Soviet Union's acute vulnerability to American food power.[130] After the foreign policy setbacks of the 1970s—the fall of South Vietnam, Soviet adventurism in Africa, the communist revolution in Nicaragua, and the growth of powerful communist insurgencies throughout Central America—the CIA believed that the "United States might regain the primacy in world affairs it held in the immediate postwar period" by using food power.[131]

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125. *See id.* at 334. *See also* ROBERT L. PAARLBERG, FOOD TRADE AND FOREIGN POLICY: INDIA, THE SOVIET UNION, AND THE UNITED STATES 23 (1985) (noting the potential power of U.S.-Canadian cooperation). "'[T]he food producers' monopoly exceeds the oil producers' oil monopoly,' argued Assistant Secretary of State Thomas O. Enders in 1974. '[W]e could make OPEC look sick,' said another State Department official at the time, 'if we were just to use what our agriculture gives us.'" *Id.*

126. *The Free Market's Biggest Fan; Earl Butz Still Loves Farmers and Hates Controls*, TOP PRODUCER, Mid-March 1996, at 12; ROGER PORTER, THE U.S.-U.S.S.R. GRAIN AGREEMENT 44, 67, 104 (1984). *See also* JOAN HOFF, NIXON RECONSIDERED 204 (1994) (noting the "competition from Butz and Kissinger over who was in charge of making food aid a more integrated part of American diplomacy").

127. *See* WILLIAM SCHNEIDER, FOOD, FOREIGN POLICY, AND RAW MATERIALS CARTELS vii (1976).

128. *Id.* at ix.

129. *See id.* at 20-38.

130. *See id.* at 57.

131. Emma Rothschild, *Food Politics*, 54 FOREIGN AFFAIRS 285, 294 (1976) (quoting the CIA).

The use of grain embargoes in the 1970s accented the dangers and futility of government interference in agricultural markets and angered many American farmers.[132] During the American grain embargo against the Soviet Union, for example, the Soviets simply found other sources of supply.[133] Similar state-sponsored agricultural market manipulation resulted from recent nuclear tests in India and Pakistan.[134] Farmers subsequently protested and voiced their legitimate fears of state interference in the grain trade, an attitude that weakens the chances of a successful wheat pool. Farm groups are currently attempting to end all state interference in the grain trade and to discontinue the embargoes on rogue states such as Iran, Iraq, North Korea, Sudan, and Cuba.[135] In addition to its unpopularity among export-dependant farmers, state manipulation of international food markets is particularly alarming to nations struggling to feed their people.[136] The world's poor pay the greatest price when governments restrain the ability of farmers to market their food.[137]

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132. *See* Lowell D. Hill, *Effects of Regulation on Efficiency of Grain Marketing*, 17 CASE W. RES. J. INT'L L. 389, 393 (1985).

133. *See id.*

134. *See Sanctions Bedevil America's Farmers*, ABERDEEN AM. NEWS (S.D.), June 7, 1998, at 2C. The author notes:

> The nuclear devices India and Pakistan detonated reverberated through American agriculture as farmers once again faced potential lost markets because the United States was imposing economic sanctions for political reasons. Many remembered all too well the harmful impact of 1980's grain embargo on the Soviet Union, intended as punishment for the invasion of Afghanistan, which cost U.S. farmers as estimated $2.3 billion in lost exports and has had a lasting legacy abroad.

*Id. See generally*, *U.S. Firms Bristle at Cost of Trade Sanctions*, DES MOINES REG., July 2, 1997, at 10 (noting farmer anger at government interference in agricultural exports).

135. *See Craig Urges U.S. Crop Sale to Iran*, IDAHO STATESMAN, Dec. 17, 1998, at 11A (describing the push by former state lawmakers to end state restrictions on the wheat trade, which limits the access of American producers to 11% of the world's market).

136. *See* McGeorge, *supra* note 72, at 400-08 (noting the impact of agricultural trade disruptions on countries with non-subsistence levels of agricultural output).

137. *See generally*, Jonathan Carlson, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem*, 70 IOWA L. REV. 1187, 1218-20 (explaining how agricultural trade liberalization could help less developed countries enhance food security); Charles House, *Author Says Millions in China Still Go Hungry*, FEEDSTUFFS, Jan. 4, 1999, at 22 (noting Chinese reluctance to rely on the world agricultural trade, despite food shortages). "'They can't afford to trust hostile foreign powers for their food,' he said. 'Food is always a strategic weapon in their minds.'" *Id.*

### G. THE URUGUAY HOPES

Agriculture was the greatest obstacle to reaching a final agreement during the Uruguay Round, prolonging the negotiations for seven years.[138] When an agreement was finally reached, it was hailed as the Round's greatest accomplishment.[139] The Agreement on Agriculture included provisions for scaling back export subsidies and domestic support programs and guaranteed greater market access for imported products.[140] Although the achievement seemed momentous, some commentators reserved judgment in light of the historic difficulties of liberalizing the agricultural trade, but still acknowledged that a framework with the potential to foster wide-ranging reforms had been established.[141]

The Agreement requires the tariffication of non-tariff border measures.[142] This process enables the level of agricultural protection to be quantified in a way that is conducive to reducing such protection during future trade negotiations. The effectiveness of such an arrangement is evident in the agreement itself: once tariffication occurs, tariff levels are to be reduced, on average, by thirty-six percent over six years for developed countries.[143] Also, after the end of six years, imports are guaranteed at least five percent of domestic markets.[144] Should tariffication create greater protection than previous non-tariff barriers, market access will be protected by the requirement that neither the percentage *nor the quantity* of imports fall below 1986-1988 levels.[145]

The Agreement also requires that domestic support be reduced twenty percent over six years.[146] Support levels are to be calculated using the Aggregate Measure of Support (AMS).[147] Of particular relevance to the North Dakota wheat pooling plan,

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138. *See* Strating, *supra* note 48, at 305 (noting that "Among the fifteen different negotiating groups, the agricultural trade group was considered not only the most important, but also the most contentious").

139. *See* McGeorge *supra* note 72, at 382 (noting the Uruguay Round deadlock over agriculture, as late as the summer of 1992, between the United States, the Cairns Group [a group of nations promoting free trade], the EEC, and Japan).

140. *See* Agreement, *supra* note 9.

141. *See* Steinle, *supra* note 51, at 333.

142. *See* Agreement, *supra* note 9, art. 4:2.

143. *See* Steinle, *supra* note 51, at 346.

144. *See id.*

145. *See id.*

146. *See id.* at 352.

147. *See* Agreement, *supra* note 9, art. 6:1.

the Agreement stipulates that state and local government support be included in the calculation of the AMS.[148]

The Agreement also addresses the problem of export subsidies for farm products, an issue that has bedeviled GATT since its inception.[149] Countries are required to reduce their spending on export subsidies by thirty-six percent and the volume of subsidized exports by twenty-one percent over six years.[150] Further, countries are prohibited from creating new export subsidies on currently subsidized products and cannot implement new subsidies for products which were unsubsidized between 1986-1988.[151] The agreement defines "export subsidy"[152] to include a wide range of activities, potentially bringing the wheat pooling proposal into conflict with the subsidy reduction requirement.

## II. THE CHALLENGES FACING THE POOLING PLAN

### A. THE NORTH DAKOTA FARMERS UNION WHEAT POOLING PLAN

In late summer of 1998, in the midst of extremely low prices for agricultural products, the President of the North Dakota Farmers Union (NDFU) announced a plan to raise farm income through the pooling of wheat, particularly durum and hard red spring (HRS) wheat. By pooling their products to build market power, farmers hoped to "bargain with buyers for a better price."[153] The proposal includes potential collaboration with the Canadian Wheat Board in the selling of wheat.[154] The NDFU feels that "[i]f we can reach an agreement with them, we will eliminate a competitor and be able to obtain a higher price for wheat and durum on both sides of the border."[155] The state-owned North Dakota Mill and Elevator would administer the

148. *See id.* at Annex 3:3. "Support at both the national and sub-national level shall be included." *Id.*

149. The Tokyo Round of the GATT, 1974-1979, did attempt to toughen restrictions on subsidies, but the resulting Code on Subsidies and Countervailing Duties did not apply to agricultural subsidies. *See* Filapek, *supra* note 47, at 138-39. "[T]he Subsidies Code has been plagued with interpretive difficulties. Moreover, it has failed to stem the massive use of production and export subsidies for agricultural products." *Id.*

150. *See* Agreement, *supra* note 9, art. 9:2(b)(iv).

151. *See id.* at art. 8 and art. 3:3.

152. *See id.* at art. 9:1.

153. Dakota Pride Pool, proposal presented by Robert Carlson, North Dakota Farmers Union President, Press Conference, Aug. 4, 1998.

154. *See id.*

155. *Id.*

program by "acquir[ing] marketing rights" over North Dakota wheat.[156] To encourage farmers to join the pool, farmers would be given an "incentive payment" of $1 per bushel for their first year of participation and $.50 per bushel for the second year.[157] After the first two years, the NDFU assumes the program "will be on its feet."[158] Given the history of similar efforts in the past, however, the wheat pooling proposal faces a number of potential challenges.

### B. THE MARKET COORDINATION PROBLEM

In order for the wheat pool to generate income for farmers, commodity prices must be higher than total production costs. The volatility of global agricultural markets makes this very difficult.[159] If it were not, farmers would not need state intervention. When prices fall, the wheat pool will need to rely on additional funding from the North Dakota Treasury. The state's modest budget and sparse population make this unlikely.[160]

If the pooling effort increases wheat prices, other nations could retaliate, embracing methods reminiscent of Herbert Hoover's anti-cartel campaigns of the 1920s.[161] Foreign nations, for example, could build buying pools to counter the power of the wheat pool, eliminating any advantage a large wheat pool would have over smaller and more disorganized buyers.[162] Foreign nations could also attempt to grow wheat themselves, much like

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156. *Id.*

157. *See id.*

158. *Carlson unveils initiative to form ND wheat marketing pool*, NDFU Press Release, July 28, 1998.

159. *See IMF Called Vital to U.S. Agricultural Interests*, OMAHA WORLD-HERALD, Mar. 19, 1998, at 20 (noting that this is particularly true, given the costs of the current Asian crisis, since over 40 percent of American exports go to Asia).

160. *See* Koo et al, *supra* note 5, at 62 (noting costs to the state of North Dakota). *See also Don't Count on Rush to Set Up Wheat Pool*, ABERDEEN AM. NEWS, Aug. 10, 1998, at 5A (estimating that "[s]tate payments to farmers who participate in the pool could run into the hundreds of millions of dollars").

161. *See* O'Connor, *supra* note 39, at 261 (explaining that the similar plan of a wheat exporting cartel would be "weakened since individually, cartel members could be faced with significant repercussions in the form of retaliatory trade restrictions imposed by resentful importers")

162. *See* Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. INT'L L. & COM. REG. 393, 419 (explaining how Japanese wood chip importers conspired to lower prices to counter a coordinated exporting effort on the part of American exporters).

Hoover's efforts to foster the development of rubber tree plantations to counter the Stevenson rubber cartel.[163]

While the climatic conditions necessary for growing wheat would limit such an enterprise, the potential exists for expanding the world wheat acreage by changing current crop production patterns or through the tilling of new ground amenable to wheat production.[164] In the case of Durum wheat, North Dakota only produces twenty-five percent of the North American supply and 6.3 percent of the world's supply, indicating the existence of other suppliers who would be willing to enter a profitable market.[165] Durum wheat production also has shown the capacity to shift to new areas of the United States, a prospect that undermines the ability of the proposed pool to boost prices by maintaining a large market share.[166] Additionally, certain areas have proven to have the capacity to increase or decrease

163. *See* Brandes, *supra* note 25, at 198-99. Brandes notes:

> By March 1923, Congress had responded to Hoover's calls for a 'National Defense against this price control' with a half-million-dollar appropriation to finance both a world-wide search for alternative sources and rubber-producing experiments within the Western Hemisphere ... The ensuing survey explored investment opportunities and generated debates over the virtues of growing rubber in the Philippines—under the American flag—as compared to new Latin American plantations. [Harvey] Firestone's ambitions in Liberia were also encouraged. . . Before the Rubber Survey ended, Department of Commerce agents had been sent to the tropical wilderness of Central America, the Philippines, Ecuador, and the bargaining tables of London and The Hague.

*Id.*

164. *See* Koo et al, *supra* note 5, at 63 (explaining how price increases could induce production in the United States alone).

> [A] 10 percent increase in the price of durum wheat would induce about the same percentage increase in supply. If the pool were to raise the domestic price of durum by 30 percent (e.g., from $4.00/bushel to $5.20/bushel), the domestic supply of durum wheat would increase by 30 percent. To the extent that additional production is supplied by free riders, this will weaken the market power of the pool.

*Id.*

165. *See* Won W. Koo et al., *Economic Analysis of the Proposed North Dakota Wheat Pool: Prepared for North Dakota Industrial Commission* 21-22 (unpublished manuscript, on file with the Department of Agricultural Economics, Northern Plains Trade and Policy Research Center, North Dakota State University).

166. *See id.* at 19-24 (explaining the movement of durum wheat production from Eastern North Dakota, South Dakota, and Minnesota to Western North Dakota and Eastern Montana). *See also Farmers Begin Planting New Crop in Kansas; State Plans Shift to White Wheat*, DES MOINES REG., Jan. 24, 1999, at 5 (explaining how "Kansas has been preparing for years to make the shift to hard white wheat – which is increasingly preferred in the global marketplace, particularly in Asia").

durum wheat production in response to market conditions.[167] The prospects of an HRS wheat pool are even slimmer because of North Dakota's much smaller market share[168] and the availability of other varieties of wheat which can be substituted for HRS when prices increase.[169] The prospect of additional wheat acreage is directly proportional to the success of the wheat pooling plan: the more prices rise, the greater the likelihood that other nations will expand wheat production to take advantage of the price increase and avoid paying higher wheat prices.[170]

Other possible consequences of the wheat pool include consumer boycotts or product substitution.[171] The American beef industry, which has suffered as consumers embraced substitutes such as chicken and fish, provides an apt precedent for such an

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167. *See* Koo et al., *supra* note 165, at 26.

> Arizona and California raise durum wheat under irrigation. During the past 12 years the planted acres in Arizona varied between 38 and 165 thousand acres, while planted acres in California varied between 55 and 140 thousand acres. Planted acres in the southwest region are very responsive to durum price changes. . . . The western states of Montana, Wyoming, Colorado, Utah, and Nevada irrigate 323 thousand acres of spring wheat. Some of this irrigated land could be used to grow durum wheat.

*Id.*

168. *See id.* at 8, 19. North Dakota only produces 50 percent of HRS wheat in the United States compared to 88 percent of durum wheat. *See id.*

169. *See id.* at 85.

> Unlike durum wheat, HRS wheat is substitutable with hard red winter wheat. HRS wheat represents about 30 percent of the U.S. hard wheat production. Domestic demand for HRS wheat is very sensitive to the price of HRS wheat (price-elastic), while demand for durum wheat is much less sensitive to the price of durum (price-inelastic).

*Id.*

170. *See* Koo et al., *supra* note 5, at 61 (noting that"Since Canada can increase its exports to the United States in response to a price increase, the pool's market share may shrink in absence of some form of cooperation with Canada."). *See also* Ali, *supra* note 66, at 59 (noting that "wheat is produced in most countries of the world.").

171. *See* O'Connor, *supra* note 39, at 259-60 (describing the difficulties of a cartel among the major wheat exporting countries.)

> Political and farm leaders in both the United States and Canada have seriously considered this possibility. Under such a plan, the producer countries would form a commodity cartel to control the supply and demand of wheat. In the short run, a wheat cartel would probably increase export revenues of the exporting nations. However, this result would depend on their political will to form and maintain a cartel arrangement. In order for a commodity cartel to be successful, both supply and demand must be relatively price inelastic. Without such inelasticity, an *increase in price could result in either a consumer boycott, consumer substitution of another product, or an increase in production by new or current producers.*

*Id.* (italics added).

outcome.[172] This outcome is possible in Asia, for example, where consumers could revert to their historical preference for rice, undermining previous efforts of wheat exporters to build international demand for wheat in regions where demand has typically been low.[173] This possible consequence is more likely given the current Asian economic crisis, which could be exacerbated by policy initiatives undermining trade liberalization, further depressing an export market critical to American producers.[174]

The experiences of the International Wheat Agreements of the middle decades of this century also illustrate the problem of coordinating global agricultural markets with other nations. Canada could repudiate the agreement, sell wheat for whatever price it wishes and undermine the pool, much like the nations who left the International Wheat Agreements after making a commitment to cooperate.[175] Ample precedent also exists for

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172. *See* Jon K. Lauck, *Competition in the Grain Belt Meatpacking Sector after World War II*, 57 ANNALS OF IOWA 135, 142-43 (Spring 1998).

> The inflation of the early 1970s, which produced food price increases of as much as 15 percent in 1973 alone, also triggered protests, boycotts, and the organization of a broad consumer movement that was quick to criticize what its supporters viewed as high food prices and to urge consumers to substitute other products for meat.

*Id.*

173. *See* Ali, *supra* note 66, at 62 (noting that Chinese consumption of wheat doubled in the 1970s).

174. *See Agricultural Trade Can Help Recovery*, NEW STRAITS TIMES, Nov. 15, 1998, at 5. *See also* Bill Barret, *Devastating Year in the Heartland* (letter to editor), WALL ST. J., Nov. 6, 1998, at A15 (noting that in 1997 and 1998 "producers of wheat, corn, feedgrains and upland cotton lost more than 20% in commodity export sales from Asia alone."); Koo et al., *supra* note 5, at 2 (noting that China has been the largest importer of common wheat during the past seven years and that Japan has also been a significant importer); Bob Davis, *U.S. Brings Mixed Message to Asia Forum*, WALL ST. J., Nov. 16, 1998, at A2 (noting the already muddled message sent to Asian leaders by the Clinton administration: "Boost your ailing economies through trade liberalization, but don't export so much that it hurts U.S. companies and their workers").

175. *See* Koo et al., *supra* note 5, at 60 (explaining the importance of cooperation with Canada).

> The success of the pool depends upon its market share in the United States and the extent of potential cooperation with the CWB [Canadian Wheat Board]. Without full cooperation from the CWB, the proposed ND wheat pools may not be able to raise domestic prices. Millers in the United States will buy wheat from Canada if the pool attempts to raise its domestic price without such cooperation. In general, the pool is unlikely to exert much market power if its market is less than 50 percent.

*Id.*; Brandes, *supra* note 25, at 199 (explaining that a key weakness of the Stevenson rubber cartel was the absence of a key producer). "In spite of official British pleas for cooperation with their restriction scheme, the Dutch producers nationalistic rivalry similar to the competition between the American P.L. 480 and Export Enhancement Programs and the export subsidy programs of the European Union.[176] Since the Canadian Wheat Board commands more resources than the North Dakota State Mill and Elevator, it is better equipped to withstand a price war between the two bodies. With a larger financial endowment and the numerous experiential advantages a more established state-trading institution possesses, the Canadian Wheat Board could attempt to exhaust the financial capacity of the North Dakota wheat pool.[177] An initiative premised on international cooperation could degenerate into a prolonged trade war subsidized by sub-national and national governments, reversing the trend toward liberalization.[178]

### C. AGAINST THE GRAIN

As discussed previously, the Agreement on Agriculture reached during the Uruguay Round of GATT negotiations interrupted the long history of state interference in global agricultural markets.[179] The North Dakota wheat pooling proposal runs counter to the Agreement's effort to roll back export subsidies and state intervention in agricultural markets.[180] Most

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remained outside the system, and their decision to compete made the Stevenson plan less effective." *Id.*

176. *See supra* notes 80-83 and accompanying text.

177. *See* Wheeler, *supra* note 1, at 384 (noting that the organization of the Canadian Wheat Board came after cooperatives, a central feature of the North Dakota plan, proved too weak to accomplish their task).

> For many years attempts were made in Canada, under both provincial and federal legislation, to organize co-operatives for the marketing of grain with a view to securing control over a sufficient part of the supply to enable them to obtain adequate returns to the producers. These attempts were not successful in the face of the price deflation of the late twenties and early thirties and, in 1935, the Government of Canada established the Canadian Wheat Board.

*Id. See also* McCalla and Schmitz, *supra* note 80, at 204 (also explaining that the CWB grew out of cooperatives, which were aided by subnational governments, such as the Alberta Wheat Pool, Saskatchewan Wheat Pool, and Manitoba Pool Elevators).

178. *See generally*, Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past*, 19 U. PA. J. INT'L ECON. L. 513 (advancing the general principle that linking trade and domestic policy concerns, in the present case to bolster the economic security of farmers, undermines the global trading regime).

179. *See supra* note 10 and accompanying text.

180. *See* Eva Rook Basile, *The General Agreement on Tariffs and Trade (GATT), the European Economic Community (EC), and Agriculture*, 28 TULSA L.J. 741, 742 (1993) (noting that "the idea of prohibiting or reducing both export subsidies and domestic subsidies has found popular support"). *See also* Terence

farm groups, in contrast to the North Dakota Farmers Union, have fully endorsed the trend toward liberalization in export markets and have organized their support through a lobbying effort known as "Ag for Fast Track," a coalition of sixty-eight agricultural groups.[181] In addition, the pooling plan conflicts with the agenda set for the 1999 WTO negotiations, which are scheduled to examine methods for reducing state-trading in agriculture.[182] The Farmers Union pooling proposal may represent another lonely dissent from the foreign economic policy views of other major agricultural groups.[183]

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J. Centner, *The Internationalization of Agriculture: Preparing for the Twenty-First Century*, 73 NEB. L. REV. 5, 6-7 (1994)(lamenting the continued doubts about fur trade among some farm groups).

181. *See Trade Policy: U.S. Agricultural Coalition Wants Comprehensive Fast-Track Authority*, INT'L TRADE REP., Nov. 26, 1997. *See also* Bill Houd, *Yeutter Pushes Fast Track Bill for Ag*, OMAHA WORLD-HERALD, Sept. 4, 1998 (quoting former Secretary of Agriculture Clayton Yeutter criticizing the failure to pass a fast-track law in preparation for the 1999 agriculture negotiations); Anthau George, *Falling Prices Put More Pressure on Fast-Track Talks*, DES MOINES REG., Aug. 30, 1998 (explaining that "[m]ost agricultural and agribusiness interests increasingly see trade liberalization as an economic life-and-death issue, as crop output has increased by 3 percent to 4 percent a year, while domestic demand increases 1 percent to 2 percent annually."); *U.S. Fears Backsliding on Farm Trade*, THE FIN. POST, Mar. 3, 1998 (noting Secretary of Agriculture Dan Glickman's fear of "backsliding" on agricultural trade liberalization and his announcement to "continue the push toward elimination of subsidies, and tariff barriers and non-tariff barriers" at the 1999 negotiations on agriculture); Thomas Friedman, *Heartland Geopolitics*, N.Y.TIMES, May 1, 1996, at A13 (quoting former Minnesota Governor Arne Carlson referring to the failure of Pat Buchanan's anti-free trade message in farm states).

> The problem with Buchanan is that he did get his message out, and there was a very quiet 'no' vote. Dole swept North Dakota, South Dakota and Minnesota. What you had here was a quiet understanding on the part of farmers that they benefited from free trade. They want open, competitive relationships on the world market and while there might be some dissatisfaction with the question of equity, they were not willing to buy into the closed-door theory of Buchanan.

*Id.*

182. *See* G. Chandler Keys, III, submission to House Committee on Agriculture, July 22, 1998 (noting that at the 1999 meetings leaders will "[n]egotiate elimination of State Trading Entities (STEs) and increase access to wholesale and retail trade in importing countries (especially relevant in China, but this issue also applies to the Australian and Canadian Wheat Boards"). *See also Prairie Rebels; Ottawa Cracks Down on Wheat Smugglers*, MACLEAN'S, Oct. 10, 1994 (indicating growing discontent among Canadian farmers with the Canadian Wheat Board). "Under law, prairie farmers must export their wheat through the Canadian Wheat Board. But hundreds of them have been hauling grain illegally to the United States, where they can earn more than twice as much. And the revolt is spreading." *Id.*

183. *See generally*, BRUCE FIELD, HARVEST OF DISSENT: THE NATIONAL FARMERS UNION AND THE EARLY COLD WAR 9-28 (1998)(outlining the historic difference between the Farmers Union and other farm groups).

Contrary to the wheat pooling plan, many members of the agricultural policy community, as well as important agricultural interests, have urged greater liberalization of global agricultural markets.[184] The productivity of American farmers creates enormous opportunities for expanding agricultural sales in a free trading world.[185] This rationale explains American efforts to halt the Common Agricultural Policy in the 1960s. It also explains the very ambitious liberalization agenda advanced by the United States prior to the beginning of the Uruguay Round negotiations in the mid-1980s.[186] Since many farm groups hope to continue this trend during the upcoming WTO talks on agriculture, the wheat pooling proposal is working against the grain.[187] Other farm groups may be hostile to proposals that undermine the limited progress made toward greater trade liberalization, especially given the heightened tension over the current banana dispute, which threatens the WTO dispute settlement sys-

184. *See supra* note 181 and accompanying text.

185. *See* Rusek, *supra* note 110, at 511.

> Many American producers of wheat, corn and soybeans for example, are low-cost producers in the world market whose products are fully competitive with other unsubsidized producers in the world. If multilateral agricultural reform led to the elimination of export subsidies worldwide, the markets for U.S. products should expand as the competition from highly subsidized producers in other countries disappeared. Thus, at least some U.S. farmers would have a strong incentive to support global agricultural reform.

*Id. See also* Charles Johnson, *The Free Trader Fires Away: American Agriculture Can Deregulate Itself into World Dominance, Ed Schuh Thinks*, FARM J., Nov. 1995, at 20D (quoting agricultural economist Ed Schuh). "If we let it, foreign demand will sustain us. As per capita incomes rise, people tend to upgrade their diets to livestock and livestock products. The demand for feed grains grows apace, and demonstrably this is one sector in which producers in this country have a comparative advantage." *Id.*

186. *See* Filapek, *supra* note 47, at 148 (commenting before the end of the Uruguay Round).

> The United States proposal for agricultural negotiations represents the most unambiguously liberal approach to trade of any proposal before the Agriculture Group. It marks the culmination of the United States' shift to market-based, export-oriented agricultural policies over the past two-decades. The proposal thus reflects both the economic ideology of the Reagan administration and the export interests of the United States.

*Id.*

187. *See* Testimony of Janet A. Nuzum on behalf of the International Dairy Foods Association before the House Committee on Agriculture Regarding the Upcoming WTO Negotiations on Agriculture and Trade in the Western Hemisphere, July 22, 1998. "In the upcoming round of agricultural negotiations, the *highest priority* should be achieving the complete elimination of all agricultural export subsidies, and substantial improvements in market access through both expansion of tariff-rate quotas and reduction of tariffs" (italics added). *Id.*

tem.[188] During recent trade battles with Canada, Secretary of Agriculture Dan Glickman was quick to emphasize the risks of protectionism, noting that "[e]ven with the current downturn in exports, the fact is that in the past year, we still exported about $17 billion more in agriculture products than we imported."[189] As a general principle, state-level intervention in foreign economic policy can potentially undermine national efforts to negotiate free trading arrangements perceived as beneficial by many farmers.[190]

Changes in domestic agricultural support programs are also an important part of the liberalization trend. In 1996, Congress passed the "Freedom to Farm Act,"[191] which was hailed as reversing government interference in agriculture dating back to the Great Depression.[192] While the long-term consequences of the legislation are unclear, and despite emergency legislation in 1998 to aid farmers hit hard by falling prices, the Freedom to

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188. *See Fight Over Banana Trade Escalates*, NAT'L L. J., Nov. 30, 1998, at A14 (explaining that the banana controversy is "the first WTO case in which compliance with a panel decision is disputed. Diplomats say it demonstrates the shortcomings of the world trade regulator's new dispute settlement system."). *See also* Kevin Whiteland, *Banana-Trade Split; A Clash Between the U.S. and Europe May Ultimately Define the Power of the WTO*, U.S. NEWS & WORLD REP., Jan. 11, 1999, at 49 (calling the dispute the "most serious challenge yet to the World Trade Organization's three-year process for resolving trade disputes."); Ed Maixner, *Efforts Launched to Help Pork Producers*, FEEDSTUFFS, Dec. 21, 1998, 1 at 3.

> Last week 40 senators joined Sen. Bob Kerrey (D., Neb.) and Sen. John Ashcroft (R., Mo.) in a letter to U.S. Trade Representative Charlene Barshefsky asking that the U.S. use pork import tariffs as a retaliation against the European Union in its refusal to abide by World Trade Organization rulings on Europe's banana importing regime.

*Id. But see* Guy de Jonquieres and Frances Williams, *US Nears Truce with Europe Over Bananas*, FIN. TIMES, Jan. 23/Jan. 24 1999, at 1 (outlining efforts by the head of the WTO designed to "stop the conflict [from] escalating into a damaging trade war.").

189. Robert S. Greenberger, *U.S.-Canada Farm-Trade Pact Leaves Problems Requiring Much Longer to Solve*, WALL ST. J., December 7, 1998, at A2.

190. *See* Brenda S. Beerman, *State Involvement in the Promotion of Export Trade: Is It Time to Rethink the Concept of Federalism as It Pertains to Foreign Relations?* 21 N.C. J. INT'L & COM. REG., 187, 199 (1995) (explaining how state export promotion programs "might impede otherwise coherent and unified federal policy and undermine the credibility of the federal government's negotiating posture regarding specific foreign policies" but also noting potential positive effects).

191. Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

192. *See* Neil D. Hamilton, *Plowing New Ground: Emerging Policy Issues in a Changing Agriculture*, 2 DRAKE J. AGRIC. L. 181, 190 (1997).

Farm Act represents a Congressional bias against further government involvement in agricultural markets.[193] The legislation is specifically linked to greater efforts on the part of the federal government to promote free trade and agricultural exports.[194]

## D. POTENTIAL GATT CONFLICTS

The degree of government intervention in past decades would have made the North Dakota wheat pool largely uncontroversial, at least as far as GATT was concerned. As it stands, in light of the continuing trend toward liberalization in international agricultural markets and the Uruguay Round's Agreement on Agriculture, the wheat pool proposal generates concerns about potential conflicts with international trading rules. Although interference in international trade is often discussed in terms of national governments, state governments can also disrupt trade flows.[195] In the event that state activities are incompatible with trading rules, national governments can act: "It is well settled that the federal government can legally preempt state laws that are inconsistent with international trade agreements."[196]

The wheat pool's greatest potential conflict stems from the subsidy articles of the recent Agreement on Agriculture. Article 9:1(a) includes in its definition of subsidization "the provision by

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193. *See* James Bovard, *Farmers Harvest Bumper Crop in Beltway*, WALL ST. J., Oct. 21, 1998. *See also GOP Says Trade is Key to Restoring Farm Health*, ABERDEEN AM. NEWS (S.D.), June 19, 1998 (listing Republican priorities as fast-track authority and bailing out the IMF to help Asian economies which buy American farm products); *Farm Income Slides as Exports Slacken*, MILWAUKEE J. SENTINEL, July 5, 1998 (quoting farm analyst's argument that "[o]ne mediocre year won't spur Congress to reverse the laisse-faire direction of farm policy."); *Spending Bill Boosts Farm Aid*, OMAHA WORLD-HERALD, Oct. 15, 1998 (noting that the emergency bill to aid farmers did not include a widely promoted provision to raise program support levels, thus leaving in place one of the main provisions of the Freedom to Farm legislation). *See also* Norman Jane, *Farm Aid to be Transition Payments*, DES MOINES REG., Oct. 20, 1998 (noting that "Republicans wanted [the emergency bill] delivered in transition payments, which would require no alteration of the Freedom to Farm Act").

194. *See* Barrett, *supra* note 174, at A15. "One of the underlying premises of the 1996 Freedom to Farm Act was concurrence from the Clinton Administration that a strong export trade policy was imperative to the success of the new farm bill." *Id.*

195. *See generally* Beerman, *supra* note 190, at 199 (discussing how state governments may hinder federal policy).

196. Kenneth Cooper, Note, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143, 143 (1993).

governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of a product, *to a cooperative or other association of such producers*, or to a marketing board, contingent on export performance."[197] The wheat pool plan may fit within this definition, as the plan would be authorized by the state-run North Dakota Industrial Commission and implemented by the North Dakota State Mill and Elevator. Moreover, opponents of the wheat pool could argue that the "incentive payments" made to farmers to encourage membership in the pool constitute subsidies under the Agreement, potentially creating an international trade dispute.

The Agreement specifically designates cooperatives as a vehicle for subsidization,[198] creating another potential trade conflict since pool members are required to "become members of a Cooperative Marketing Association."[199] The formation of the cooperative, which would act "as a *conduit* for the state to market the producer's wheat by using the ND State Mill and Elevator as the broker," also increases the likelihood of conflict.[200] Article 9:1(d) extends the coverage of the Agreement to include "the provision of subsidies to reduce the costs of marketing exports of agricultural products," including "handling," an activity closely linked to serving as a "conduit."[201] In addition, since advocates of the North Dakota wheat pool have openly embraced the model of the Canadian Wheat Board, which involves a large degree of government coordination, the risks of GATT-conflict seem greater.[202] Since the problem of state-trading entities such as the Canadian Wheat Board is high on the agenda of the upcoming WTO agricultural talks, future GATT complication is likely. At the minimum, such an agenda indicates a growing hostility toward such entities within the WTO.

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197. Agreement, *supra* note 9, at art. 9:1(a) (emphasis added).

198. *See* North Dakota Farmers Union News Release, Aug. 4, 1998.

199. Agreement, *supra* note 9, at art. 9:1(a).

200. Dakota Pride Pool, Aug. 4, 1998 (emphasis added).

201. Brian Rustebakke, ND Wheat Pool Plan Has Drawbacks for Growers, GRAND FORKS HERALD, Aug. 6, 1998. "Under NDFU's proposal, the North Dakota Mill and Elevator would shoulder the majority of the pool's grain marketing burden. The state mill currently does not operate its own marketing arm – an asset it would need to acquire to be part of the plan." *Id.*

202. *See* Koo et al, *supra* note 5, at 36. This article explains that the past success of the Canadian Wheat Board included "the three pillars of single-desk selling, *government association*, and risk management through pooling, self-insurance and *government underwriting*. These are net benefits after accounting for costs related to CWB [Canadian Wheat Board] operations and taxpayer costs of *government association*.") (emphasis added). *Id.*

While the Agreement on Agriculture does not require the abolition of these forms of subsidy, they are to be counted as part of the overall level of subsidies subject to reduction over the six-year period established in the Agreement. Even if the wheat pool were not deemed a form of subsidy, it could be viewed as a domestic support program scheduled to be scaled back in coming years. The calculation of support levels using the AMS includes "[s]upport at both the national and sub-national level," which would seem to include the activities of the State of North Dakota.[203] The wheat pooling plan could thus directly conflict with current GATT agricultural arrangements, triggering an international trade dispute when many farm groups are attempting to liberalize the agricultural trade and avoid controversies which could roll back the modest progress made in recent years.

## III. CONCLUSION

The wheat pooling proposal advanced by the North Dakota Farmers Union to relieve economic distress among farmers faces several challenges. The degree of market coordination required for such a plan to work has historically proven to be difficult. The international rivalries fostered by past government intervention have also tended to exacerbate and prolong agricultural trade disputes. Since these trade disputes are disproportionately costly to export-dependant American farmers, many American farm groups have promoted less government interference in agricultural markets, making the policy environment for a state-sponsored wheat pool less than optimal. Moreover, the trend within the international trading system is to reduce barriers to agricultural trade, a trend expected to continue when international trade negotiations resume next year. Potential conflicts between the wheat pooling proposal and current international trade agreements also make the plan's ultimate success less likely. The search for solutions to the economic distress faced by many farmers should thus move beyond the wheat pooling plan.

203. Agreement, *supra* note 9, at Annex 3:3.