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Trade Remedy Laws in the United States: Bilateral Grain Trade Disputes with Canada

by

Won W. Koo & Ihn H. Uhm

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TRADE REMEDY LAWS IN THE UNITED STATES: BILATERAL GRAIN TRADE DISPUTES WITH CANADA

WON W. KOO & IHN H. UHM*

ABSTRACT

Agricultural trade between the United States and Canada has been contentious since the inception of the Canada-U.S. Free Trade Agreement (CUSTA) in 1989, mainly because Canadian exports of wheat and barley to the United States increased significantly, while U.S. exports remain unchanged. Research conducted by many leading agricultural economists indicates that the asymmetric trade flows of wheat and barley between the two countries, caused by differences in trade policies, farm subsidies, and marketing institutions have resulted in several trade disputes between the two countries under the U.S. trade remedy laws.

Wheat producers in the United States are increasingly relying on the U.S. trade remedy laws, such as anti-dumping and countervailing duty, which requires injury test prior to an imposition of counter measures to correct a surge in wheat imports from Canada. Although some agricultural economists in the two countries call for a gradual harmonization of trade policies, farm subsidies, and marketing institutions for agricultural products in a globalized world to reduce trade disputes between the two countries, the current trend for seeking relief by trade remedy laws would continue as long as the surge in Canadian wheat exports remain unabated.

The United States and Canada are two of the world's largest exporters of grains, wheat and barley in particular, and compete with each other in major foreign markets.[1] They share a common interest in reducing government interference in world agricultural markets and encouraging free world

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* Won W. Koo is Director of the Center for Agricultural Policy and Trade Studies and a Chamber of Commerce Distinguished Professor in the Department of Agricultural Economics at North Dakota State University. Ihn H. Uhm is a Senior Economist at the Canadian International Trade Tribunal in Ottawa, Ontario. The views and opinions expressed in this paper are those of the authors and do not represent the opinions of the Canadian International Trade Tribunal. Any errors or omissions are the authors.

1. *See generally* International Grains Council, International Grain Statistics, *available at* http://www.imf.org (last viewed Jan. 9, 2003) (providing exporter statistics).

trade. This does not preclude them from disagreements over agricultural trade that arises from the differences in agricultural policies and marketing systems between the two countries.

The Canada and U.S. Free Trade Agreement (CUSTA)[2] and the North American Free Trade Agreement (NAFTA)[3], which includes Mexico, became effective in 1989 and 1994, respectively. The CUSTA has been fully implemented for bilateral trade between the United States and Canada. NAFTA will create the largest single market in the world, a market of about 420 million consumers and trade valued at over $25 billion annually, when the agreement is fully implemented.

The CUSTA has resulted in an increase in trade volume between the United States and Canada. For agricultural commodities and products, the increase has been greater for Canadian exports to the United States than for U.S. exports to Canada.[4] Average volumes of Canadian exports of wheat and barley to the United States were greater than average U.S. exports to Canada for the 1990-2002 period.[5] In addition, Canadian exports to the U.S have increased faster than U.S. exports to Canada.[6] U.S. imports of Canadian western red spring wheat (CWRS), for example, increased from 13.2 million bushels in 1990 to over 77.5 million bushels in 1994 and then decreased to 44.1 million bushels in 2002.[7] However, U.S. exports of hard red spring wheat (HRS) to Canada averaged only about 0.9 million bushels per year during the 1990-2002 period.[8] Trade in durum wheat between the

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2. Can.-U.S. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 [hereinafter CUSTA]. The CUSTA created a free trade area comprised of Canada and the United States. *Id.* at 281. Objectives of the Agreement are the following:

> [E]liminate barriers to trade in goods and services between [the two countries]; facilitate conditions of fair competition within the free-trade area; liberalize significantly conditions for investment within the free-trade area; establish effective procedures for the joint administration of this Agreement and the resolution of disputes; and lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement.

Id. at 293. The CUSTA established rules of origin for determining whether goods were "originating" and entitled to CUSTA benefits. *Id.* at 295. Tariffs were to have been eliminated on all goods by January 1, 1998. *Id.*

3. *See* NAFTA: What's It All About?, External Affairs and International Trade, 1993; R.G. LIPSEY ET AL., THE NAFTA: WHAT'S IN, WHAT'S OUT, WHAT'S NEXT, POLICY STUDY 21, Toronto, Ontario: C.D. Howe Institute, xii (1994). NAFTA creates a free trade area that encompasses Canada, Mexico, and the U.S. *Id.* The basic format of NAFTA closely follows that of the CUSTA, and a number of provisions of NAFTA have been designed to rectify difficulties experienced under CUSTA. *Id.*

4. *See infra* Table 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

two countries was similar to that for HRS wheat.[9] The import surge in the early 1990s led to the negotiation of a temporary agreement to limit Canadian wheat exports to the United States.[10]

U.S. barley imports from Canada also grew rapidly, from 9.9 million bushels in 1990 to nearly 89.7 million bushels in 1994, and then decreased to 22 million bushels in 2002.[11] The imports accounted for over 10 percent of U.S. domestic consumption for the 1990-2001 period.[12] During the same period, U.S. barley exports to Canada averaged 1.4 million bushels per year.[13]

Because of rapid increases in Canadian export supply of grains into the United States in the post-CUSTA era, grain producers in Minnesota, Montana, and North Dakota have sought protection not only by means of the U.S. trade remedy laws, but also at times by means of border blockades of Canadian grain and livestock shipments to the United States. For example, South Dakota Governor Bill Janklow announced new inspection requirements for all trucks carrying Canadian grain and livestock beginning September 16, 1998.[14] Governors of North Dakota, Montana, and Idaho followed the South Dakota measures and announced a stepped-up effort to inspect Canadian trucks as they cross the border into these states.[15] On December 2, 1998, in the aftermath of a series of trade disputes, the United

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9. *Id.*

10. *See* U.S. Trade Representative Release 94-43, US Statement Regarding Trade Between the United States and Canada on Wheat, *available at* http://www.ustr.gov. The agreement was effective for only one year from September 12, 1994 to September 11, 1995. *Id.*

11. *See infra* Table 1.

12. *Id.*

13. *Id.*

14. Press Release, Office of the Governor, State of South Dakota (September 15, 1998) (on file with author). Trucks carrying Canadian grain must supply proof that the grain is free from Karnal Bunt and wild oats. *Id.* In addition, the grain should be free of the following six chemicals: dimetridazole, ipronidazol, nitroimidazoles, fluoroquinolones, glycopeptides, and sulfamethazine. *Id.*

15. Press Release, Office of the Governor, State of North Dakota (September 15, 1998) (on file with author); Press Release, Office of the Governor, State of Montana (September 15, 1998) (on file with author); Press Release, Office of the Governor, State of Idaho (September 15, 1998) (on file with author). In addition, North Dakota proposed a law that would restrict the entry of Canadian products under the guise of technical requirements. *See* Press Release, Office of the Governor, State of North Dakota (September 15, 1998) (on file with author). The proposed new law would prohibit a wide range of Canadian agricultural products from entering North Dakota without the necessary scientific justification required by NAFTA and by domestic U.S. regulations. *Id.* The Canadian government vigorously protested to defend the rights of Canadian exporters of agricultural goods. News Release, Foreign Affairs and International Trade No. 72 (April 1, 1999) (on file with author). In this regard, Canada requested NAFTA consultations on the North Dakota trade barrier. *See id.*

States and Canada announced the Record of Understanding in agricultural trade to ease tension between the two countries.[16]

The primary purpose of this paper is to examine the nature, causes, and future perspectives of the bilateral grain trade disputes in the post-CUSTA era. First, this paper examines the market conditions conducive to trade flows between the United States and Canada to provide a better understanding of trade disputes on grain between the two countries. Second, this paper briefly reviews legal aspects of the current U.S. trade remedy laws applicable to grain trade. Afterward, this paper reviews the nature of bilateral grain trade disputes and the extent to which various U.S. trade remedy laws have been applied against grain imports from Canada in the post-CUSTA era. As Canadian durum and hard red spring wheat is under anti-dumping and countervailing duty investigation by the U.S. International Trade Commission (USITC), this paper also examines the statutory requirements of the injury determination process by the USITC.

I. MAIN REASONS FOR ASYMMETRIC BILATERAL TRADE FLOWS FOR WHEAT AND BARLEY

Bilateral trade flows of wheat and barley between the United States and Canada under CUSTA are influenced by differences in resource endowments, marketing systems, availability of marketable surpluses, differences in crop quality, and farm policies between the two countries. Economic analyses conducted by numerous economists over many years indicate that these differences have contributed to prolonged asymmetric bilateral trade flows between the two countries, which in turn, have resulted in several trade disputes during the last fifteen years.

The sizes of the domestic markets for hard red spring (HRS) wheat, durum wheat, and barley in Canada are much smaller than those in the United States.[17] However, the quantities of wheat and barley produced in Canada are larger than those produced in the United States.[18] As a result, Canada has substantial marketable surpluses of grain and, therefore, is more dependent upon export markets than the United States. On average, Canada exports about seventy-five percent of its wheat and fifteen percent of its

16. Record of Understanding between the Governments of Canada and the United States of America Regarding Areas of Agricultural Trade, *available at* http://www.agr.ca/cb/trade/canus/html/record_e.phtml (last modified June 24, 2003).

17. International Grains Council, World Grain Statistics, 1999-2001, *available at* http://geospace4.imbm.bas.bg/gmrsumm.htm (last updated 1999).

18. *Id.*

barley.[19] Under CUSTA, the U.S. market became attractive to Canadian producers mainly because it is the closest and largest market.

In Canada, the Canadian Wheat Board (CWB) markets wheat and barley for exports. The CWB pays producers an initial price when the grain is delivered and returns any revenue surplus to producers as final payments.[20] In the United States, grain is marketed by individual grain trading firms. U.S. wheat and barley in the world market often compete with CWB grain. The CWB controls grain exports to both offshore and U.S. markets through export licenses. Some Canadian producers of wheat and barley are in proximity to the U.S. view, therefore the lack of direct access to the U.S. market arising from the actions of the CWB works to their detriment. Nevertheless, it is perceived in the United States that the CWB may distort trade flows.[21] The argument is that the CWB has monopsony power in purchasing agricultural commodities from producers and at the same time, is a single desk sales agency that has the exclusive right to make marketing decisions regarding prices and quantities.[22] Thus, it is argued that the CWB is able to exercise price discrimination to maximize profits in world markets and has an unfair advantage over private firms in the United States.[23] However, the World Trade Organization (WTO), under Article XVII:1, allows a state trading enterprise to charge different prices between markets, provided it is done for commercial reasons based on market conditions in export markets.[24] It is also argued that the CWB does not provide sufficient information regarding its general operation. This is especially true regarding purchase and sales price information for agricultural commodities.[25] Schmitz and Koo argue that these practices by the CWB represent an unfair advantage over their U.S. competitors.[26]

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19. International Grains Council, World Grain Statistics, *available at* http://www.igc.org.uk/brochure/brochuree.htm.

20. David J. Simonot, The Economics of State Trading in Wheat (1997) (unpublished M.S. thesis, University of Saskatchewan) (on file with author).

21. Merlinda Ingco & Francis Ng, *Distortionary Effects of State Trading in Agriculture: Issues for the Next Round of Multilateral Trade Negotiation* (1988), *available at* http://www.econ.worldbank.org/docs/758.pdf.

22. *Id.* The CWB is a trading agency that is the sole legal exporter for wheat and barley grown in Western Canada. *Id.* The Canadians argue the CWB is a "cooperative;" others argue that it is a state agency. *Id.* Its obligatory relationship with wheat grain farmers sets it apart from the usual conception of a cooperative. *Id.* The CWB operates both as a monopoly and as a monopsony within the boundaries of Canada. *Id.* Internationally, the CWB and the large U.S. grain-marketing firms may be considered as oligopolies within the North American wheat market. *Id.*

23. *Id.*

24. 19 U.S.C. § 2905 (1994).

25. *See* Troy C. Schmitz & Won W. Koo, *An Economic Analysis of International Feed and Malting Barley Markets: An Econometric Spatial Oligopolistic Approach*, Agricultural Economics Report No. 357, Department of Agricultural Economics, North Dakota State

The Canadian rail subsidy was an indirect subsidy provided by the Canadian government under the Western Grain Transportation Act (WGTA) to farmers for shipments of the designated grains from producing regions to export ports.[27] U.S. grain producers argued that, under the WGTA, Canadian grains were more competitive in offshore markets. Canada, however, eliminated the controversial rail subsidy under the WGTA in 1995. Contrary to the expectations of U.S. grain producers, the elimination of the rail subsidy induced larger inflows of grains into the United States. The elimination of the WGTA has ultimately made the U.S. market more attractive for Canadian producers because transportation costs from the Canadian prairies to the United States are lower than those from the Canadian prairies to most offshore markets.[28]

The exchange rate between the two currencies also plays an important role in bilateral trade of agricultural commodities and products. Since the U.S. economy has been stronger than the Canadian economy since 1985, the U.S. dollar has appreciated against the Canadian dollar. The U.S. dollar appreciation makes U.S. agricultural commodities more expensive in the Canadian market and conversely makes Canadian agricultural commodities less expensive in the U.S. market.[29] A study by Kim *et al.* found that the

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University, Fargo (1996). Agricultural economists in Canada argue that American grain exporting firms (*e.g.*, Cargill) do not reveal export prices either. *Id.* Therefore, it is not transparent the extent to which these firms engage in price discrimination. *Id.* Economists further argue that whether or not Canadian producers have benefited from price discrimination by the CWB is a moot point. *Id.*

26. *Id.*

27. Western Grain Transportation Act, I.E.L. V-B-2, January 2, 1988. The WGTA was enacted in 1983 in an attempt to modernize the century-old statutory rail freight, which is known as the Crow's Nest Pass Agreement or the Crow Rate. *Id.* Under the WGTA, the Canadian government provided rail companies with annual payments of up to C$658 million with an adjustment for inflation to cover the transportation costs of eligible grain shipments to selected shipping terminals at western and eastern ports. *Id.* Under this Act, shipping costs from Canadian prairies to offshore markets were lower than the shipping costs from U.S. producing regions to the same offshore markets. *Id.* It is argued by U.S. grain producers that Canada enjoyed a competitive advantage over the Unite States in shipping grains to these markets. *Id.* Under the CUSTA, however, Canada's WGTA is eliminated for grain shipped through West Coast ports for U.S. consumption. *Id. See* Won. W. Koo & Ihn H. Uhm, *United States and Canadian Rail Freight-Rate Structures: A Comparative Analysis*, 32 CANADIAN J. OF AGRIC. ECON. 301-26 (1984) (comparing rail freight structures between the United States and Canada prior to the enactment of the WGTA).

28. JD. Johnson & William Wilson, *Canadian Rail Subsidies and Continental Barley Flows: A Spatial Analysis*, 31 LOGISTIC AND TRANSP. REV. 31-46; Mao, Weining, Won W. Koo & Mark Krause, *World Feed Barley Trade Under Alternative Trade Policy Scenarios*, Agricultural Economics Report NO. 350, Department of Agricultural Economics, North Dakota State University, Fargo.

29. For example, assume that Canadian wheat priced at C$5.00/bushel is sold at $3.75/bushel in the U.S. market at an exchange rate of C$1.40/$1.00. If the U.S. dollar appreciates from C$1.40 to C$1.50, the price of Canadian wheat decreases from $3.57 to $3.33 in the U.S. market. On the other hand, U.S. wheat priced at $3.57 will be C$4.90 in Canada at an exchange rate of

exchange rate has significant short- and long-run influence on bilateral trade between the two countries and also affects U.S. agricultural income.[30]

Another important contributing factor affecting trade flows of grain between the two countries is differences in the quality of grain delivered to downstream industries such as millers and pasta manufacturers.[31] This is especially true for HRS, durum wheat, and barley trade between the two countries. U.S. millers demand high quality durum wheat. Whenever the United States cannot produce enough high quality durum wheat to meet domestic demand—due to weather conditions and diseases during the growing season—U.S. millers have imported high quality durum wheat from Canada. Similarly, Canadian malting barley is desired by U.S. maltsters because of its attributes. Canadian feed barley, on the other hand, competes with other carbohydrate materials such as corn and sorghum as a livestock feed.

II. DIFFERENCES IN TRADE BARRIERS OF WHEAT AND BARLEY: PRE- AND POST-CUSTA ERA

Did differences in the level of traditional trade barriers (*e.g.*, tariffs, quotas, etc.) between the two countries contribute to the asymmetric bilateral trade flows? Tariffs imposed (*e.g.*, tariffs and non-tariff barriers) by the United States prior to 1989 were $7.70/ton for wheat, $2.30/ton for malting barley, and $3.40/ton for other barley; those imposed by Canada

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C$1.40/$1.00 and will be C$5.25 at an exchange rate of C$1.50/$1.00. Since most transactions occur in terms of U.S. dollars in the world market, an appreciation of the U.S. dollar against Canadian dollar does make grains worth more at the Canadian farm gate and encourages exports. *See* J.R. Coleman & Karl D. Meilke, *The Influence of Exchange Rates on Red Meat Trade Between Canada and the United States*, 36 CANADIAN J. OF AGRIC. ECON. 401-24 (1988) (indicating that numerous empirical studies have confirmed this hypothesis).

30. Mina Kim et al., *Does Exchange Rate Matter to Agricultural Bilateral Trade Between the United States and Canada?*, Agribusiness and Applied Economics Report NO. 466, Center for Agricultural Policy and Trade Studies, Dept. of Agribusiness and Applied Economics, North Dakota State University, Fargo (2002).

31. *See* United States International Trade Commission (U.S.I.T.C.), *Durum Wheat: Conditions of Competition Between the U.S. and Canadian Industries*, Report on Investigation No. 332-285 under Section 332(g) of the Tariff Act of 1930 as amended, USITC Pub. 2274, 3-1 to 3-5 (1990). The quality variables of concern to the millers in the United States have grown from basic visual grade specifications to include the following: vitreousness and protein (the quality of gluten); crop years used in blending moisture content; mold and mildew; dockage/cleanliness; falling number, which is a measure of sprouting damage; sedimentation; mixograph tests; and color. *Id.* It should be noted that while the color of bread wheat does not carry to the end product, the color of a durum wheat does, thereby determining the color of the pasta end product. *Id.* According to U.S. milling industry sources, mills are not willing to purchase on the basis of U.S. grade alone. *Id.* The U.S. system of post harvest handling and distribution permits blending between different grades; the Canadian one does not. *Id.* Millers purchasing grain from Canada will receive the average of a grade, with cleanliness and uniformity assures. *Id.* The difference between the two sources has led to a perception that U.S. grain is of lower quality than Canadian grain when comparing similar grades. *Id.*

were C$4.40/ton for wheat and C$2.30/ton for all barley.[32] Under the CUSTA, tariffs on wheat and barley were placed on a schedule of elimination in ten equal segments and, therefore, were eliminated completely by January 1, 1998.[33]

In Canada, imports of wheat from the United States had been subject to import licenses, administered by the Canadian Wheat Board, but these were removed immediately after the implementation of CUSTA.[34] In 1991, however, Canada instituted a legal regime that an end-use certificate (EUC), permitted under CUSTA Article 705(1), must accompany American wheat destined for processing in Canada.[35] Canadian processors importing U.S. wheat must request the EUC from the Canadian Grain Commission.[36] Subsequently, the United States government also instituted an end-use certificate (EUC) requirement for all Canadian wheat entering the United States, effective February 27, 1995.[37]

In the post CUSTA/NAFTA and post-Uruguay Round era, however, the traditional trade policy instruments such as tariffs and quotas are all effectively removed from policy makers' toolbox.[38] The remaining effective instruments to deal with unfair import competition and/or massive imports that are fairly traded but market disrupting are trade remedy laws (*e.g.*, antidumping and, to a lesser extent, countervailing duty laws and safeguard measures), which require an "injury test" prior to the imposition of any remedial measures.[39] The WTO signatories are prohibited from imposing remedial measures in the absence of the "injury determination" that is a crucial element of international trade administrative law.[40]

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32. Karl M. Rich et al., *The Dynamics in the Wheat and Wheat Products Sector: U.S.-Canada Comparison, in* AGRICULTURAL TRADE UNDER CUSTA, 95 (Koo & Wilson eds., 2002).

33. CUSTA, *supra* note 2, at Art. 705.

34. This requirement allowed the CWB to operate the two-price wheat policy. The CWB has an explicit policy to sell to domestic millers at a price equal to or less than the landed price of equivalent U.S. grain. Interest groups in the U.S. argue that as a result of CWB policy on wheat, imports into Canada from the U.S. have been limited to very small volumes and restricted at times when there is a shortage of specific qualities of Canadian wheat. Jeremy Mattson & Won W. Koo, *Canadian Exports of Wheat and Barley to the United States and Impacts on U.S. Domestic Prices, in* AGRICULTURAL TRADE UNDER CUSTA, *supra* note 32, at 73-92.

35. Canadian Grain Act as Form 1 of Schedule XV, *available at* http://laws.justice.gc.ca/en-G-10/index.html (last updated April 30, 2003).

36. D.E. Buckingham & R. Gray, *North American Wheat Wars and the End-Use Certificate, Compromising Free Trade?* 30 J. OF WORLD TRADE, 196 (June 1996).

37. The use of EUCs on commodities applies only when Canada applies them to American products under Section 321(f) of the NAFTA Implementation Act. *Id.* at 198.

38. The existing Most Favored Nation (MFN) tariff rates are bound by the WTO in most cases. *Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994*, 29-30.

39. *See generally infra* Table 2.

40. *Id.*

III. U.S. TRADE REMEDY LAWS DIRECTLY APPLICABLE TO WHEAT/BARLEY TRADE

As shown in Table 2, there are six statutes that constitute the domain of the U.S. trade remedy laws applicable to protect domestic producers of agricultural products from fairly or unfairly trading foreign competitors. They are an anti-dumping law (Subtitle B of Title VII of the Tariff Act of 1930, as amended), a countervailing duty law (Subtitle A of Title VII of the Tariff Act of 1930, as amended), the Agricultural Adjustment Act (Section 22), Section 332 of the Tariff Act of 1930 (Conditions of Competition), Section 301 of the Trade Act of 1974 (Enforcement Action), and safeguards under Section 201 of the Trade Act of 1974 (escape action or import relief).[41] Out of six statutes, the following three statutes require a legally binding "injury test" prior to an imposition of the counter measures: (i) anti-dumping law, (ii) countervailing duty law, and (iii) safeguards action under Section 201 of the Trade Act of 1974.[42] The anti-dumping (AD) and countervailing duty (CVD) are the two most frequently used trade remedy laws to protect domestic producers from unfair trading practices by foreign exporters. The U.S. Congress delegated the administration of the AD and CVD to two agencies: the International Trade Administration (ITA), which is part of the U.S. Department of Commerce (DOC), and the U.S. International Trade Commission (USITC).[43] Although these two laws are aimed at various forms of unfair trade, they have many procedural and substantive similarities. Dumping generally refers to a form of international price discrimination; goods are sold in one export market at prices lower than the prices at which comparable goods are sold in the home market of the exporter or in its other export markets. Section 251 of the Uruguay Round Agreements Act provides that a subsidy exists if there is a financial contribution by a government or a public body or any form of income or price support that confers a benefit.[44]

The current U.S. anti-dumping law is Subtitle B of Title VII (§§ 731-739) of the Tariff Act of 1930, as amended, which provides that anti-dumping duty shall be imposed, in addition to any other duty, if two

41. *Id.*

42. *Id.*

43. U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 59-60, 67 (COMM. PRINT 1997) [hereinafter COMMITTEE ON WAYS AND MEANS].

44. *Id.* "Examples of financial contribution include a direct transfer of funds (*e.g.*, grants, loans, equity infusions), a potential direct transfer (*e.g.*, loan guarantees), the foregoing of revenue otherwise due (*e.g.*, tax credits), the provision of goods or services, other than general infrastructure, or the purchase of goods." *Id.* at 62.

conditions are met.[45] The two conditions include: (i) the U.S. Department of Commerce must determine that "a class or kind of foreign merchandise" is being or is likely to be sold in the U.S. at "less than its fair value," and (ii) the U.S. International Trade Commission must determine that "an industry in the U.S. is materially injured or is threatened with material injury, or the establishment of an industry in the U.S. is materially retarded by reason of imports of that merchandise."[46]

On the other hand, the purpose of the CVD is to offset any unfair competitive advantage that foreign countervailable subsidies. The CVD law under Subtitle A of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 and amended by the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988, and the Uruguay Round Agreements Act of 1994, provides that a countervailing duty shall be imposed, in addition to any other duty, equal to the amount of net countervailable subsidy if two conditions are met.[47] First, the DOC must determine that a countervailable subsidy is being provided, directly or indirectly, "with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold into the U.S." and must determine the amount of the net countervailable subsidy.[48] Second, the USITC must determine that "an industry in the United States is materially injured,[49] or is threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of imports of that merchandise or by reason of sales of that merchandise for importation."[50]

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45. 19 U.S.C. § 1673 (1999).

46. *Id.*

47. 19 U.S.C. Ch. 4; 19 U.S.C. Ch. 13; U.S.: Trade and Tariff Act of 1984, May 1985, 24 I.L.M. 823 (1985); U.S.: Omnibus Trade and Competitiveness Act of 1988, August 23, 1988, 28 I.L.M. (1989); 19 U.S.C. Ch. 22 (1994).

48. COMMITTEE ON WAYS AND MEANS, *supra* note 43, at 59.

49. It should be noted that nothing in the WTO Agreements specifies the degree of harm that domestic investigative agencies are required to find for injury to be "material." Therefore, economists on this subject argue that the concept of material injury is more a matter of subjective judgment in the eye of the beholder.

50. 19 U.S.C. Ch. 4; 19 U.S.C. Ch. 13; U.S.: Trade and Tariff Act of 1984, May 1985, 24 I.L.M. 823 (1985); U.S.: Omnibus Trade and Competitiveness Act of 1988, August 23, 1988, 28 I.L.M. (1989); 19 U.S.C. Ch. 22 (1994). The 1979 GATT Codes and the WTO Agreements require proof of a linkage between the dumping (or subsidization) on the one hand and the material injury on the other. This relationship is best described as the "causal link." 19 U.S.C. § 2501. This is the *sine qua non* for the application of anti-dumping or countervailing duties. Both Agreements require the investigative agencies and the complainants to demonstrate that the subject imports, through the "effects" of the dumping or subsidization, are causing material injury and to not attribute injury caused by other factors to the imports under examination. The causality provisions of the 1979 Code are repeated in Article 3 of the 1994 anti-dumping agreement with some important additions. The additions represent a modest tightening up of the requirements for causality and an attempt by the UR negotiators to ensure that all extraneous factors affecting the domestic industry are excluded from the assessment of the evidence.

If an interested party is dissatisfied with a final AD or CVD determination or review, they may file an action in the United States Court of International Trade.[51] Decisions of the United States Court of International Trade are subject to appeal to the United States Court of Appeals for the Federal Circuit.[52] In addition, as a result of provisions in the CUSTA/NAFTA and its implementing legislation, final determinations in AD or CVD proceedings involving products of Canada and Mexico are reviewed by a NAFTA panel instead of by the United States Court of International Trade if the United States, Canadian, or Mexican government so requests.[53] In the event of a dispute with the United States, Canada and Mexico would have recourse through either the NAFTA or WTO forum, depending on the nature of the dispute; disputes involving NAFTA obligations would be resolved under NAFTA, and disputes involving WTO rules would seek resolution under the WTO.[54]

In addition to the AD and CBD laws, import relief (safeguards) under Section 201 of the Trade Act of 1974, as amended by Section 1401 of the Omnibus Trade and Competitiveness Act of 1988, and Sections 301-304 of the Uruguay Round Agreements Act set forth the authority and procedures for the President to take action, to facilitate efforts by a domestic industry which has been seriously injured by imports to make a positive adjustment to imports competition.[55] If serious injury results from increased competition by import that are not necessarily traded unfairly, then domestic industries should be provided a period of relief to allow them to adjust to new conditions of trade. This mechanism, while amended over the years, has provided authority for the President to withdraw or modify concessions and impose duties or other restrictions—quotas, tariff rate quotas, negotiate orderly marketing arrangements, surtaxes, etc.—for a limited period of time on imports of any article that causes or threatens serious injury to the domestic industry producing a like or directly competitive article, following an investigation and determination by the USITC.[56]

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51. COMMITTEE ON WAYS AND MEANS, *supra* note 43, at 79-80.

52. *Id.* at 62.

53. *See* CUSTA, *supra* note 2, at ch. 19, art. 1901 (1989) (describing that Canada and the United States have agreed to create a bi-national dispute settlement mechanism, whereby, in case of dispute, the application of AD and CVD laws by national trade agencies may be reviewed by a specially created system of ad hoc panels instead of by the courts); 19 U.S.C. § 1902 (1999) (stating that the NAFTA panel will apply U.S. law and U.S. standards of judicial review to decide whether U.S. law was applied correctly by the DOC and the USITC).

54. WTO Agreement, Annex 2, art. 1, *available at* http://www.org/English/tratop_e/dsu_e.htm.

55. U.S.: Omnibus Trade and Competitiveness Act of 1988, August 23, 1988, 28 I.L.M. (1989); 19 U.S.C. Ch. 22 (1994).

56. COMMITTEE ON WAYS AND MEANS, *supra* note 43, at 98-99.

Safeguards have their origin in Article XIX of GATT of 1947 (often referred to as an "escape clause").[57] Its primary objective was to give GATT signatories the possibility of assisting domestic producers that could not compete with increased imports as a result of trade liberalizing measures. The 1994 UR Agreements made substantive changes to Article XIX. The WTO Safeguards Agreement contains new sunset provisions as opposed to the old GATT Article XIX rule that allows safeguards to stay in place "to the extent and for such time as may be necessary to prevent or remedy the injury."[58] New safeguard measures are, as a general rule, to last no longer than four years.[59] Compensation was no longer required for measures applied on a Most Favored Nation (MFN) basis for up to three years.[60]

There is a fundamental difference between safeguard measures and AD and CVD measures. AD/CVD remedies have no international prior notification and consultation requirements as do safeguard import measures. The need for safeguard measures presupposes that, because of their lack of competitiveness, producers cannot adjust quickly enough to major upward swings in import penetration. The need for AD/CVD measures presupposes that by removing injurious dumping or subsidizing, domestic producers can compete with fairly traded imports.

Safeguards cannot be used where imports have caused injury only through price suppression or erosion.[61] In addition, a key difference is that the finding in a safeguard inquiry considers the effects of imports from all sources rather than the effects of imports from a country or certain countries found to be dumped or subsidized. In safeguard inquiries, it is clear from the Agreement that an actual increase in imports, either in absolute or relative terms, is required for a finding of serious injury.[62] In AD/CVD cases, there can be a finding of injury in the absence of an increase in

57. GATT art. XIX (1947).

58. *Id.*

59. Uruguay Round, Agreement on Safeguards, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK, 524 (2001). However, the text allows considerable room for departure from this rule, giving the contracting party concerned the right to extend the measures for another four years, but only if it has determined by a proper hearing and consideration of all evidence that: (a) continuation of the measures is necessary to prevent a recurrence of serious injury and (b) the domestic industry is adjusting. *Id.*

60. *Id.* at 525. In other words, import restrictions cannot be directed to a particular country or group of countries but must be applied to all imports across-the-board. Non-MFN measures were permitted in certain limited circumstances (*e.g.*, safeguard provisions under China's WTO accession protocol). *Id.*

61. The material injury test required in the AD/CVD context has a relatively lower threshold than that of the serious injury test required in the safeguards investigation.

62. 19 U.S.C. §§ 2571-3572 (West 1999); Uruguay Round, Agreement on Safeguards, at 521.

imports providing that it can be demonstrated that injury was incurred in some other way, especially price erosion or suppression.[63] However, many similarities exist between safeguards and AD/CVD injury inquiries. Both deal with injury and must be based on "positive evidence" or "objective evidence."[64]

Section 22 of the Agricultural Adjustment Act of 1938, as amended, authorizes the President to impose fees or quotas on imported products that undermine any United States Department of Agriculture (USDA) domestic commodity program.[65] This authority is designed to prevent imports from interfering with the USDA efforts to stabilize domestic agricultural commodity prices. Under Section 22, the Secretary of Agriculture advises the President when the Secretary has reason to believe that (i) imports of an article are rendering or tending to render, ineffective, or materially interfering with, any domestic, agricultural-commodity price-support program, or other agricultural program; or (ii) imports of an article are reducing substantially the amount of any product processed in the United States from any agricultural commodity or product covered by such programs.[66] If the President agrees that there is reason for the Secretary's belief, the President must order an USITC investigation and report.[67] On the basis of this report, the President must determine whether the statutory conditions warranting imposition of a Section 22 quota or fee exist.[68]

If the President makes an affirmative determination, he is required to impose, by proclamation, either import fees (which may not exceed fifty percent *ad valorem*) or import quotas (which may not exceed fifty percent of the quantity imported during a representative period) sufficient to prevent imports of the product concerned from harming or interfering with the relevant agricultural program.[69] In the Uruguay Round Agreement on Agriculture, however, the United States agreed to convert all quotas and fees on imports from any country to which the United States applies the WTO Agreement to tariff rate quotas.[70] The Uruguay Round Agreement on

63. *Id.*

64. *Id.*

65. 7 U.S.C. § 624(a) (1933).

66. *Id.* Unlike AD, CVD, and safeguards investigations, Section 22 requires a relatively modest legally binding test, which is known as the material interference test. *Id.* The material interference test only asks do imports "materially interfere with a farm commodity program . . . in the United States?" *Id.* § 624(a). This test is less stringent with a lower threshold than that of the material injury test. COMMITTEE ON WAYS AND MEANS, *supra* note 43, at 124.

67. 7 U.S.C. § 624(a).

68. *Id.*

69. *Id.* § 624(b).

70. Uruguay Round Agreement on Agriculture, *reprinted in* BHALA, *supra* note 59, at 308-11.

Agriculture, Section 22 authority is applicable only to imports from countries to which the United States does not apply the WTO Agreement.[71]

Section 332 of the Tariff Act of 1930, as amended, also provides that the USITC investigates and reports to the President and Congress on the administrative, fiscal, and industrial effects of the United States customs laws; the relations between the duty rates on raw materials and finished or partly finished products; the effects of *ad valorem* and specific duties and of compound specific and *ad valorem* duties to investigate the operation of customs laws, including their relationship to the Federal revenues; their effect upon the industries and labor of the country; and to submit reports of its investigations as hereafter provided.[72] The Commission has the power to investigate the tariff relations between the United States and foreign countries; commercial treaties; preferential provisions; economic alliances; the effect of export bounties and preferential transportation rates; the volume of imports compared with domestic production and consumption; and conditions, causes, and effects relating to competition of foreign industries with those of the United States, including dumping and the cost of production.[73] Investigation under Section 332 often provides information for the President and Congress suggesting relief measures provided under another statute.[74]

Finally, Section 301 of the Trade Act of 1974, as amended, provides the authority and procedures to enforce U.S. rights under international trade agreements and to respond to certain unfair foreign practices.[75] If the U.S. Trade Representative (USTR) determines that a foreign act, policy, or practice violates or is inconsistent with a trade agreement or is unjustifiable and burdens or restricts U.S. commerce, then action by the USTR to enforce the trade agreement's rights or to obtain the elimination of the act, policy, or practice is mandatory, subject to the specific direction, if any, of the President.[76]

The USTR has discretionary authority to take all appropriate and feasible action, subject to the specific direction, if any, of the President, to obtain the elimination of the act, policy, or practice.[77] With respect to the form of action, the USTR is authorized to (i) suspend, withdraw, or prevent the application of benefits of trade agreement concession to carry out a

71. COMMITTEE ON WAYS AND MEANS, *supra* note 43, at 123.
72. 19 U.S.C. § 1332(a) (2000).
73. *Id.* § 1332(b).
74. *Id.* § 2112.
75. 19 U.S.C. § 2411 (2000).
76. *Id.* § 2411(a).
77. *Id.* § 2411(b).

trade agreement with the foreign country involved; (ii) impose duties or other import restrictions on the goods of and, notwithstanding any other provision of law, fees, or restrictions on the services of, the foreign country for such time as the USTR deems appropriate; (iii) withdraw or suspend preferential duty treatment (*e.g.*, under the Generalized System of Preferences, the Caribbean Basin Initiative, etc.); or (iv) enter into binding agreements that commit the foreign country to (a) eliminate or phase out the act, policy, or practice, (b) eliminate any burden or restriction on U.S. commerce resulting from the act, policy, or practice, or (c) provide the United States with compensatory trade benefits that are satisfactory to the USTR.[78]

IV. HISTORICAL OBSERVATIONS OF BILATERAL WHEAT/BARLEY TRADE DISPUTES IN THE POST CANADA-U.S. FREE TRADE AGREEMENT (CUSTA)[79]

Given the scope of the U.S. trade remedy laws, these statutes have been applied against the asymmetric grain trade flows between the two countries. The recent history of grain trade disputes between the two countries reveals that U.S. grain producers have attempted, using almost all of those statutes and even other means (*e.g.*, border blockades), to stop or at least reduce the flow of Canadian wheat and/or barley into the U.S. market.

The first legal challenge with respect to the bilateral asymmetric wheat trade flows in the post-CUSTA era began in 1989 when North Dakota durum wheat producers complained that the Canadian freight subsidies provided under the Western Grain Transportation Act (WGTA) constituted

78. *Id.* § 2411(c).

79. Prior to the implementation of CUSTA, the Commission conducted a number of investigations on wheat and wheat products exported from Canada. United States International Trade Commission (U.S.I.T.C.), *Durum and Hard Red Spring Wheat from Canada*, USITC Pub. 3563 at I-2 (Dec. 2002) [hereinafter *Durum and Hard Red Spring Wheat from Canada*]. In 1941, in an investigation under Section 22 of the Agricultural Adjustment Act of 1933, the U.S. Tariff Commission determined in effect that wheat and wheat flour fit for human consumption were practically certain to be imported under such conditions and in such quantities as to interfere materially with USDA price support programs for wheat. *Id.* After reviewing the Commission's findings, on May 29, 1941, President Roosevelt issued Presidential Proclamation No. 2489 establishing absolute annual global import quotas of 800,000 bushels of wheat fit for human consumption and 4 million pounds of milled wheat products fit for human consumption. *Id.* These quotas essentially remained in effect through 1974. *Id.* In 1974, at the request of President Nixon, the Tariff Commission conducted an investigation under Section 22 of the Agricultural Adjustment Act of 1933 on wheat and milled wheat products. *Id.* The Commission recommended that the President issue a proclamation suspending the import quotas on wheat and milled wheat products for a one-year period. *Id.* The President adopted the Commission's recommendation and decided to suspend the quotas. *Id.* No action was taken to reinstate the quotas until 1994. *Id.*

an export subsidy in violation of CUSTA Article 701.[80] The USTR investigated the allegation.[81] The USTR found that "subsidies under the WGTA would not appear to be classified as export subsidies," which implied that Canada had not violated Article 701.[82] That is because the freight subsidy under the WGTA applied to all shipments to Thunder Bay, whether destined for export or domestic use.[83] Subsequently, the Canadian government in 1995 repealed the controversial WGTA.

The second legal challenge was initiated on October 26, 1989 by the U.S. Congress, which instructed the USITC, under the provisions of Section 332 of the Tariff Act of 1930, as amended, to examine the "condition of competition" of durum wheat between the United States and Canadian industries.[84] In accordance with Section 332(g) of the Act, the USITC instituted an investigation.[85] The U.S. Senate Committee on Finance requested the Commission to report the results of its investigation by June 22, 1990.[86] The Commission reported on that date the results of its investigation to the House Committee on Ways and Means and the Senate Committee on Finance.[87] The USITC rejected the U.S. wheat industry's

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80. CUSTA, *supra* note 2, at 316-17. Article 701 provides the following:

(1) The parties agree that their primary goal with respect to agricultural subsidies is to achieve, on a global basis, the elimination of all subsidies which distort agricultural trade, and the Parties agree to work together on multilateral trade negotiations; (2) [n]either party shall introduce or maintain any export subsidy on any agricultural goods originating in, or shipped from, its territory that are exported directly or indirectly to the territory of the other Party; (3) [n]either Party, including any public entity that it establishes or maintains, shall sell agricultural goods for export to the territory of the other Party at a price below the acquisition price of the goods plus any storage, handling or other costs incurred by it with respect to those goods; (4) each Party shall take into account the export interests of the other Party in the use of any export subsidy on any agricultural good exported to third countries, recognizing that such subsidies may have prejudicial effects on the export interests of the other Party; and (5) Canada shall exclude from the transport rates established under the Western Grain Transportation Act agricultural goods originating in Canada and shipped via west coast ports for consumption in the United States of America.

Id.

81. *Durum and Hard Red Spring Wheat from Canada*, at I-2.

82. *Id.*

83. *Id.*

84. United States International Trade Commission (U.S.I.T.C.), *Durum Wheat: Conditions of Competition Between the U.S. and Canadian Industries*, Investigation No. 332-285, 6 (1990) [hereinafter *Durum Wheat: Conditions of Competition*]. On November 15, 1989, the USITC received a letter from the Committee on Finance, U.S. Senate, containing an identical request. *Id.*

85. *Id.*; *see also* 19 U.S.C. § 1332(g) (2003) (stating that investigations may be instituted by the President on legislative committees).

86. *Durum Wheat: Conditions of Competition.*

87. *Id.*

allegation that the Canadian Wheat Board (CWB) had been dumping durum wheat into the U.S. market.[88]

Subsequently, based on complaints filed by grain producers in North Dakota and Montana, the U.S. Congress requested the Government Accounting Office (GAO) to conduct a study analyzing the responsiveness of durum prices to market forces.[89] The results of the GAO study, presented during a congressional field hearing in Bismarck, North Dakota, in December 1989, indicated that prices of durum wheat for sixteen years (1973-1988) had generally followed the movement of market forces such as stocks-to-use ratios (*e.g.*, price level bears a strong inverse relationship to stocks on hand at the end of the year).[90]

Furthermore, the Chairman of the Senate Agriculture, Nutrition, and Forestry Committee's Subcommittee on Domestic and Foreign Marketing and Product Promotion asked the GAO to obtain information on (i) Canada's and Australia's grain export marketing systems, including their respective wheat board operations; (ii) Canada's and Australia's government assistance to wheat producers during the last five years; and (iii) any new export practices established in reaction to the U.S.'s 1985 Export Enhancement Program and the practice's impact.[91] The results of GAO's study indicated that both Canada and Australia operate wheat boards as part of their grain-marketing systems.[92] These boards generally function as a single buyer of wheat in their designated region and one of few sellers to the global wheat market.[93] All wheat delivered to marketing boards is pooled.[94] If the boards incur a deficit on their wheat sales, both governments reimburse the wheat boards for the deficit on the pooled wheat.[95] The Canadian government guarantees a minimum price to its wheat farmers.[96] In Canada, the board has incurred only two wheat pool deficits

88. *Id.*

89. *See generally* GAO Analysis of Durum Wheat Prices, 2-9, (Dec. 1989), *available at* http://161.203.16.4/d38t12/140155.pdf. The U.S. General Accounting Office undertook an audit of CWB pricing practices. However, it is generally viewed in the United States that the GAO was not able to complete the study mainly because the CWB refused to provide the information required for the investigation.

90. *Id.* at 9. Canadian exporters viewed these investigations as indirect probes of alleged dumping. *Id.*

91. REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON DOMESTIC AND FOREIGN MARKETING AND PRODUCT PROMOTION, U.S. SENATE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, CANADA AND AUSTRALIA RELY HEAVILY ON WHEAT BOARDS TO MARKET GRAIN 2, (1992) *available at* http://archive.gao.gov/d33t10/146992.pdf.

92. *Id.* at 3.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

between 1943 and 1990.[97] While neither Canada nor Australia directly subsidizes its wheat exports, each has agricultural programs that indirectly support wheat exports—in the form of freight subsidies, crop insurance, and guaranteed minimum prices.[98] A bi-national Panel hearing held in 1992 pursuant to Article 701(3) of the CUSTA, unanimously ruled that there was no compelling evidence that the CWB was selling wheat below acquisition cost into the U.S. market.[99]

Having failed to reduce Canadian exports of wheat, including durum, into the U.S. market by the use of U.S. trade statutes and CUSTA Articles, the United States wheat industry pressured the Clinton Administration in 1993 to take further legal action through the Executive Branch under the provisions of Section 22 of the Agricultural Adjustment Act[100] (AAA), as amended.[101] As directed by the President, the USITC instituted investigation No. 22-54 on November 17, 1993, in accordance with the AAA's procedures, to determine whether wheat was being imported into the United States under such conditions or in such quantities as to render or tend to render ineffective or materially interfere with the price support, payment, and production adjustment program conducted by the USDA for wheat.[102]

The USITC determined, by the majority rule, that wheat, wheat flour, and semolina were being imported into the United States under such conditions and in such quantities to "materially interfere" with the price support programs conducted by the USDA for wheat.[103] The Commission's

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97. *Id.*

98. *Id.*

99. Canada-U.S. Free Trade Agreement, In the Matter of: the Interpretation of and Canada's Compliance with Article 701(3) with respect to Durum Wheat sales, Final Report, ch. 18 (Feb. 8, 1993).

100. 7 U.S.C. § 624(a) (2000).

101. United States International Trade Commission (U.S.I.T.C.), *Wheat, Wheat Flour, and Semolina,* Investigation No. 22-54, Publ. 2794 (July 1994). The USITC received a letter from President Clinton stating that he had been advised by the Secretary of Agriculture "that there is reason to believe that wheat, wheat flour, and semolina are being . . . imported into the [U.S.] under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, the price support payment and production adjustment program for wheat conducted by the [U.S.] Department of Agriculture." *Id.* at 5.

102. *Id.*

103. *Id.* at 3. Material interference is defined by the USITC in past cases as "more than slight interference but less than major interference." When determining whether material interference is occurring or would occur the Commission has examined factors such as: (i) the available supply of imports, including import levels, changes in import volumes, world production, and world stocks of the imported products; (ii) pricing data, including the relationship between import prices, U.S. prices, and the support price; (iii) information relating to domestic supply and demand; (iv) data relating to the government programs, including CCC outlays, CCC surpluses, and changes in the cost to the government of running a program. Three Commissioners—Rohr, Newquist, and Bragg—determined that the subject goods are imported into the United States under such conditions and in such quantities as to materially interfere with

report to the President indicated that the Commission had seriously considered five economic analyses, *inter alia*, containing empirical evidence submitted by the participants of the investigation, as well as the USITC staff in its deliberations.[104] The USITC report to the President, in fact, led to a negotiated settlement for the 1994-95 crop year, which is known as the Wheat Peace Agreement.[105] In market response to the agreement, the U.S. domestic price of durum wheat rose from $4.67/bushel in 1994 to $5.75/bushel in 1995. However, the price fell to $3.95/bushel in 1997.

There have been a few negotiations on wheat trade between the United States and Canada despite the many trade disputes between the two countries. On December 2, 1998, in the aftermath of a series of legal actions, hostile words, and border blockades, the United States and Canada announced a Record of Understanding on bilateral agricultural trade that included the U.S.-Canada Action Plan to improve and expand agricultural trade relations between the two countries.[106] The primary purpose of the

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the price support programs conducted by the USDA for wheat. However, three other Commissioners—Chairman Watson, Vice Chairman Nuzum, and Commissioner Crawford—determined that (i) wheat, wheat flour, and semolina are not being imported under such conditions and in such quantities as to render or tend to render ineffective the USDA wheat program; and that (ii) the evidence of the recent impact of increased wheat imports could support the President finding either material interference or not material interference. When the vote by the six Commissioners is a tie, it is considered an affirmative determination. *Id.*

104. *Id.* During the investigation, the USITC received four economic submissions from parties to the proceeding. They are SAG (on behalf of the CWB by Sumner, Alston, and Gray); the Law and Economic Consulting Group; U.S. Department of Agriculture; and ADE (Abel, Draft and Earley on behalf of the Millers National Federation, the National Pasta Association, and the National Grain Trade Council, all users of grain). The most detailed one was submitted on behalf of the CWB by SAG. The SAG submission presents a partial equilibrium simulation model of the world market consisting of the United States, Canada, and the "rest of the world." The SAG submission suggested that Canadian wheat export supply has had very small effects on U.S. wheat prices and on U.S. wheat program costs. The Commission's report indicated that the SAG analysis contains an extensive comparison of the results of economic models of the effects of imports on a market. The common ground comparison of the results of economic models presented by SAG, USDA, and the Commission's empirical model indicates that a one percent rise in domestic supply (including imports) generates 0.424 percent decline in domestic price. The USDA price response is much larger (-1.47 percent), and the SAG response is far less (-0.15 percent). The Commissioner's report states further that "on the basis of this discussion, SAG parameters are chosen such that the effects of Canadian wheat on the U.S. market are small." *Id.* at II-80 to II-94.

105. Alston, J.M., et al., *The Wheat War of 1994*, 42 CANADIAN J. OF AGRIC. ECON. 231-51 (1994). The Agreement was effective for only one crop year beginning September 12, 1994 and ending September 11, 1995. *Id.*

106. Record of Understanding between the Governments of Canada and the United States of America Regarding Areas of Agricultural Trade, *available at* http://www.agr.ca/cb/trade/canus/html/record_e.phtml (last modified June 24, 2003). The Record of Understanding is the result of negotiations between the United States and Canada on a number of trade issues in the fall of 1998. *Id.* Many of these issues fall into the category of technical barriers to trade for grains, livestock and meats, and horticultural products. *Id.*

Record of Understanding was to ease the tension between the United States and Canada resulting from the trade in grain and livestock. Although this U.S.-Canada Action Plan has provided opportunities for United States growers to ship their grains to Canada and to use the Canadian rail system to ship grain to destinations in the United States, the plan did not fully satisfy grain producers in the U.S. because the major issue perceived by the grain producers is not access to the Canadian market. U.S. grain producers' major concerns are the rapidly increasing volumes of Canadian exports of wheat and barley into the United States and their impacts on local grain prices and farm incomes, particularly in the Northern Plains region. The root of the problem remains unresolved as far as grain producers in the United States are concerned.

The most recent dispute has come as a result of a petition from the North Dakota Wheat Commission alleging that the CWB, a state trading enterprise with a near monopoly on Canadian wheat sales, engaged in unfair trade practices in its export sales of wheat to the U.S. market and to certain third-country markets of interest to U.S. exporters. In September 2000, the North Dakota Wheat Commission filed a petition under Section 301 of the Trade Act of 1974 requested an investigation of the wheat marketing practices used by the CWB.[107] The USTR undertook a sixteen-month investigation and requested that the USITC examine the competitive practices of the CWB in the U.S. market and overseas.[108] At the request of the USTR on April 2, 2001, the Commission, on April 12, 2001, instituted an investigation concerning the conditions of competition between U.S. and Canadian wheat in the United States and in certain third country markets.[109] Two types of wheat—Hard Red Spring and Durum—were included in the

107. Press Release, North Dakota Wheat Commission, Petition Filed Today: USTR Receives Complaint Against Canadian Trade Practices (Sept. 8, 2000) *available at* http://www.ndwheat.com/in/news. The petition alleges that the CWB engages in unfair trading practices affecting U.S. durum wheat and U.S. hard red spring wheat, predominantly grown in North Dakota and adjacent states. *Id.* A dozen U.S. farm organizations, thirty-eight congressmen and senators, and three elected state officials (North Dakota Governor, Attorney General, and Commissioner of Agriculture) supported the petition. Press Release, North Dakota Wheat Commission, Bipartisan Support Extended for 301 Petition Against Canadian Wheat Board (Sept. 27, 2000) *available at* http://www.ndwheat.com/in/news; Press Release, North Dakota Wheat Commission, Support Builds for Investigation into CWB Trade Policies and Practices (Oct. 18, 2000) *available at* http://www.ndwheat.com/in/news.

108. Press Release, USITC, ITC to Investigate Conditions of Competition Between U.S. and Canadian Wheat Industries (April 13, 2001) *available at* http://www.edis.usitc.gov. The USTR investigation followed the receipt in September 2000 of a Section 301 petition from the North Dakota Wheat Commission, which represented wheat farmers. Press Release, North Dakota Wheat Commission, Petition Filed Today: USTR Receives Complaint Against Canadian Trade Practices (Sept. 8, 2000) *available at* http://www.ndwheat.com/in/news/news_detail.

109. Press Release, USITC, ITC to Investigate Conditions of Competition Between U.S. and Canadian Wheat Industries (April 13, 2001) *available at* http://www.edis.usitc.gov.

investigation.[110] The USTR requested that the USITC submit its confidential report to the USTR by September 24, 2001, which was later extended to November 1, 2001.[111]

In February 2002, the USTR released the findings of its investigation.[112] The report indicated that the CWB has used special monopoly rights and privileges that disadvantage U.S. farmers and were unfair to trade; it determined that the CWB has, in effect, been taking sales from U.S. farmers.[113] As a result of these findings, the USTR made a decision to attempt to level the playing field for U.S. farmers. The USTR announced that it would examine the possibility of filing U.S. countervailing duty and anti-dumping petitions with the U.S. Department of Commerce and the USITC.[114]

An anti-dumping or countervailing duty investigation is normally initiated by the filing of a petition with both the DOC and the USITC by an interested party on behalf of a domestic industry. On September 13, 2002, a petition was filed with the USITC and DOC by the North Dakota Wheat Commission (hard red spring wheat), the Durum Growers Trade Action Committee (durum wheat), and the U.S. Durum Growers Association (durum wheat), alleging that industries in the United States were materially injured and were threatened with material injury by reason of subsidized and less than fair value imports of durum and hard red spring wheat from Canada.[115] On October 23, 2002, the International Trade Administration

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110. *Id.*

111. Letter from Robert B. Zoellick, to Honorable Stephen Koplan, Chairman, USITC (March 30, 2001) *available at* http://www.edis.usitc.gov. The Commission ultimately extended the deadline of the report to November 1, 2001.

112. Press Release, North Dakota Wheat Commission, USTR Rules in Favor of North Dakota in Section 301 Investigation (Feb. 15, 2002) *available at* http://www.ndwheat.com/in/news/news_detail.

113. *Id.* Press Release, USITC, ITC Votes to Continue Cases on Durum and Hard Red Spring Wheat from Canada, (Nov. 19, 2002) *available at* http://www.usitc.gov/er/nl2002/ER1119z1.htm.; Press Release, North Dakota Wheat Commission, NDWC Lauds ITC Ruling Confirming Injury to U.S. Producers (Nov. 19, 2002) *available at* http://www.ndwheat.com/in/news/news_detail.

114. Press Release, Office of the United States Trade Representative, United States to Pursue Action Against Monopolistic Canadian Wheat Board (Feb. 15, 2002) *available at* http://www.ustr.gov/releases/2002/02/02-22.pdf. (Last visited Feb. 6, 2004). The USTR stated that the "USTR has decided not to impose a tariff rate quota (TRQ) at this time since such an action would violate our NAFTA and WTO commitments, could result in Canadian retaliation against U.S. agriculture, and would not achieve a durable solution or a permanent change to the market distortions caused by the monopoly of the Canadian Wheat Board." *Id.*

115. United States International Trade Commission (U.S.I.T.C.), *Durum and Hard Spring Wheat from Canada*, USITC Pub. 3563, 1-2 (2002) [hereinafter *Durum and Hard Spring Wheat*] *available at* http://www.usitc.gov/wais/reports/arc/w3563.htm (last visited April 7, 2004). This petition must contain evidence required by Article 5.1 of the Anti-dumping Code. Antidumping and Countervailing Duty Handbook, art. 5.1, Pub. 3566 (2002) [hereinafter Duty Handbook]. The term "interested party" means a manufacturer, producer, or wholesaler in the United States of a

and the DOC announced their decision to initiate anti-dumping and countervailing duty investigations on imports of durum and hard red spring wheat from Canada.[116]

On November 25, 2002, the USITC made a preliminary determination that there was a reasonable indication that the subject industries in the United States were being materially injured by reasons of imports from Canada of durum and hard red spring wheat.[117] The legal standard for preliminary anti-dumping and countervailing duty determinations requires the Commission to determine, based upon the information available at the time of the preliminary determinations, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or whether the establishment of an industry is materially retarded by reason of the allegedly unfairly traded imports. In applying this standard, the Commission weighs the evidence and determines whether "(i) the record as a whole contains clear and convincing evidence that there is no material injury or threat of material injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[118] The legal standard for preliminary determination has to be a lower threshold than that of the final determination due to the fact that, at the preliminary stage of the investigation, the available information before the Commission is rather limited.

After an affirmative preliminary determination by the USITC, the DOC imposed a preliminary countervailing tariff of 3.94 percent, as of March 4, on all varieties of spring wheat from Canada.[119] The matter is now before the USITC for a final determination of material injury, which is scheduled to deliver in September 2002.[120] The DOC also imposed preliminary AD

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like good, a union or group of workers representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product, or a trade or business association, a majority of whose members manufacture, produce, or wholesale a like product in the United States. *Id.*

116. *Durum and Hard Spring Wheat from Canada*, *supra* note 115.

117. *Id.* at 13. It was a split decision with Commissioner Koplan dissenting. *Id.* at n.3. The Commissioner stated that "I find that the record as a whole contains clear and convincing evidence that there is no reasonable indication of material injury or threat of material injury to the domestic industries in these subject investigations by reason of the imports of durum wheat and hard red spring wheat from Canada that are alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value, and that there is no likelihood that contrary evidence will be available in any final investigations." *Id.* at 40.

118. *Id.* at 31.

119. Duty Handbook, *supra* note 115, at Art. 5.1. An affirmative preliminary determination is the basis for the imposition of provisional duties. *Id.* These normally may not be in place for more than 120 days. *Id.*

120. *Id.* If the final determination of the Commission is affirmative, an anti-dumping duty order requiring imposition of anti-dumping duties is issued within seven days of notification of the Commission's determination. *Id.* The WTO ADA contains an important new provision. *Id.*

duties of 8.15 percent on durum and 6.12 percent on hard red spring wheat importation from Canada on May 2, 2003.

V. PENDING FINAL DETERMINATION OF "MATERIAL INJURY" BY THE USITC

The USITC is a quasi-judicial, independent, and bipartisan agency established by Congress with broad investigative powers on matters of trade. In its adjudicating role, the Commission makes determinations whether or not the dumping or subsidization has caused or threatened material injury to production in the United States by imports.[121]

The overall investigation process for AD and CVD cases can be divided into five stages, each ending with a determination either by the DOC or the USITC:[122] (i) initiation of the investigation by DOC, (ii) the preliminary phase of the Commission's investigation, (iii) the preliminary phase of DOC's investigation, (iv) the final phase of DOC's investigation, and (v) the final phase of Commission's investigation.[123] The Canadian durum and HRS wheat case is in the final phase of the Commission's

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The relevant provisions of the ADA are, for example: subsection 11.2, which states that the authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. *See id.* (referring to the sunset clause for anti-dumping findings added in 19 U.S.C. § 1675(c)(6a)) requiring review of a finding within five years of its making). If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately. 19 U.S.C. § 1675 (c)(6a) (2003).

121. United States International Trade Commission (U.S.I.T.C.), *General information about the USITC and its commissioners (Oct. 2, 2003), available at* http://www.usitc.gov/geninfo.htm#itc-does. Commission activities include:
(i) making recommendations to the President regarding relief for industries seriously injured by increasing imports; (ii) "determining whether U.S. industries are materially injured by imports that benefit from pricing [below] fair value or from subsidization; (iii) directing actions, subject to Presidential disapproval, against unfair trade practices such as patent infringement; (iv) advising the President whether agricultural imports interfere with price-support programs of the [USDA]; (v) conducting studies on trade and tariff issues and monitoring import levels; and (vi) participating in the development of uniform statistical data on imports, exports and domestic production, and in the establishment of an international harmonization commodity code.
Id.

122. United States International Trade Commission (U.S.I.T.C.) Robert Carpenter, *Antidumping and Countervailing Duty Handbook*, Ninth Ed, USITC, Pub. 3482, II-3 (Dec. 2001). Until 1954, the U.S. Department of Treasury was responsible for both calculation of dumping margins and of injury determination. *Id.* In 1954, the responsibility for inquiring into injury was moved to the Tariff Commission, now the U.S. International Trade Commission. *Id.* The Trade Agreement Act of 1979 delegated authority to investigate dumping and calculation of dumping margins to the International Trade Administration in the U.S. Department of Commerce. 19 U.S.C. Ch. 13 (1979).

123. Carpenter, *supra* note 122, at II-3.

investigation at the time this paper was prepared.[124] This final phase can be broken down into eight stages including the following: scheduling of the final phase, questionnaires, pre-hearing staff report, hearing and briefs, final staff report and memoranda, closing of the record and final comments by parties, briefing and vote, and determination and views of the Commission.[125]

In the final determination stage of AD/CVD investigation, what criteria will be applied by the Commission to determine whether or not the wheat producers in the United States were materially injured? Material injury is defined in the U.S. law as "harm which is not inconsequential, immaterial, or unimportant."[126] The U.S. AD/CVD laws set out the various types of analysis and the factors that are to be used by the commission to determine whether unfairly traded imports are materially injuring or threatening material injury to a domestic industry and establish if a causal relationship exists.[127] "In evaluating the volume of imports, the Commission is directed to consider whether the volume of subject imports, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."[128] In "evaluating the effect of imports of subject merchandise on prices, the Commission is instructed to consider (i) whether there has been significant price underselling by the imported merchandise as compared with the price of similar domestic products in the United States and (ii) whether the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree."[129]

> "In examining the impact of subject imports on producers of domestic like products, the Commission is to evaluate all relevant economic factors[130] which have a bearing on the state of the industry in the United States, including, but not limited to (i)

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124. *Id.* at II-14. "Under normal circumstances, within 280 days after the date on which the petition is filed in [AD] cases or 205 days in [CVD] cases, the Commission makes a final determination of whether an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the [U.S.] is materially retarded, by reason of imports of the [durum and HRS wheat]." *Id.*

125. *Id.*

126. 19 U.S.C. § 1677(7), § 771(7) (1979).

127. Carpenter, *supra* note 122, at II-29.

128. *Id.* at II-29.

129. *Id.* (stating that criteria to be used by the USITC to determine whether dumping and/or subsidization is causing injury are, in fact, reflecting wording in the WTO Antidumping Duty Agreement); *see also* WTO Antidumping Duty Agreement. 19 U.S.C. §§ 1672-1677 a-n (noting that the WTO ADA does not prescribe how national authorities should organize their domestic laws and procedures to meet the obligation of the Agreement).

130. Carpenter, *supra* note 122, at II-29 to II-30.

> actual and potential declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (ii) factors affecting domestic prices; (iii) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; (iv) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic product; and (v) in anti-dumping investigations, the magnitude of the margin of dumping."[131]

These factors sometimes are referred to as "the statutory factors" to be examined in the process of the final determination.

The injury determination process is an extremely complex task given that a wide variety of economic indicators or factors, as stipulated in WTO AD/CVD Agreements, have to be observed and analyzed in the process of final determination.[132] Although the observed economic indicators of the subject industries during the investigation time-period represent the health of the subject industries in the presence of dumped or subsidized imports (facts), they are not in and of itself indication injury per se.[133] To arrive at an evidence of injury, the Commissioners have to estimate the state of the subject industries in the absence of dumping or subsidization (*e.g.*, counterfactual analysis).[134] In the case where counterfactual information is not readily available from historical data, it may have to be estimated by using such information as price elasticity of substitution between imported and domestically grown durum and HRS wheat and price elasticity of aggregate supply and demand.[135] For example, the higher the magnitude of price elasticity of substitution between imported and domestically grown wheat, the higher the magnitude of injury caused by the alleged dumped or subsidized wheat from Canada. Comparison of the two states (economic indicators in the presence of dumping/subsidy and in the absence of dumping/subsidy) of the subject industries would provide some magnitude

131. *Id.* In a preliminary determination, the Commission is to use the dumping margin(s) published by Commerce in its notice of initiation of the investigation; in a final determination the Commission is to use the dumping margin(s) most recently published by Commerce prior to the closing of the Commission's factual record. 19 U.S.C. § 1677 (35)(c), § 771 (35)(c) (1979).

132. D. Featherstone & Ihn Ho Uhm, *Trade Disputes: The Anti-dumping and Countervailing Duty Laws and the Role of Quantitative Economic Analysis, Agricultural Trade under CUSTA*, 301-22 (Won W. Koo & William W. Wilson eds. 2002).

133. *Id.*

134. *Id.*

135. *Id.*

of injury indicators.[136] The next question before the Commissioners is how much injury constitutes material injury?[137]

In general, the outcome of the USITC's final injury determination is not predictable. The reasons include: (i) the Act defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant," which is an ambiguous term without any quantitative standard for materiality;[138] (ii) neither the Act nor the WTO ADA made any attempt to define the concept of material injury explicitly, resulting in subjective interpretation by the national authorities; (iii) nowhere in the U.S. statutes is the USITC expressly told to determine whether the unfair trade practice is the cause of material injury;[139] (iv) there are a large number of material injury indicators stipulated by the U.S. law and WTO Agreements that make no attempt to describe how these various factors are to be weighed; and (v) neither U.S. law nor WTO Agreements specified methodology to be used to arrive at material injury estimation.

Historical observation of the USITC's injury determination by a number of economists found some clues as to which of the statutory factors play important roles in the outcome of a petition. Between 1980 and 1992, the USITC found injury in the preliminary investigation in seventy-three percent of the cases filed and found material injury in sixty-six percent of the cases filed.[140] This historical record indicates that the probability of having an affirmative determination by the USITC is relatively higher than that of a negative determination.

The next question is which of the statutory factors listed above played more or less significant role in finding material injury by the Commission? In addition, it raises questions about the factors affecting the filing behavior of industries and whether industries are using the law to restrict imports and

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136. *Id.*

137. *Id.*

138. *Id.* at 304-09. The new WTO Anti-dumping and Subsidies Agreements indicate that "examination of the impact of the dumped imports on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry." *Id.* It then provides a non-exhaustive list of such factors, including sales, profits, output, market share, productivity, prices, and the like. *Id.* Neither agreements indicates how these various statutory factors are to be weighed or what quantum of injury is required for "materiality." *Id.*

139. Alan O. Sykes, *The Economics of Injury in Antidumping and Countervailing Duty Cases*, *in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES, 83-125, (Jagdeep S. Bhandari & Alan O. Sykes eds., 1996).

140. Faten Sabry, *An Analysis of the Decision to File the Dumping Estimates of Anti-dumping Petitions*, XIV THE INT'L TRADE J. 115-16 (2000). A higher percentage of preliminary determination than that of the final determination is because the standard applied in the preliminary determination is a lower threshold. *Id.*; CONGRESSIONAL BUDGET OFFICE, *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy*, (1994).

make more profits when facing unfavorable economic conditions. An empirical analysis of the demand for AD or CVD protection helps answer these questions. A number of the empirical analyses indicate that the import-penetration ratio, capacity utilization rate, and the margin of dumping estimated by the DOC are significant factors in explaining the outcome of the petitions.[141]

Sabry's null hypothesis, for example, was that a high import-penetration ratio, low profits, and low capacity utilization tend to increase the probability of success of a petition.[142] The economic variables used in this study are the import-penetration ratio (predicted sign is a positive determination) and the percentage change in demand (predicted sign is a negative determination). As shown in Table 3, out of a large number of statutory factors, the following economic factors have played an important role in the outcome of the petition: decline in capacity utilization, decline in profits, decline in production, increase in level of imports (or import penetration ratio), dumping margin, and the decline in demand.[143]

The forthcoming final injury determination by the USITC for Canada's durum and wheat investigation can be affirmative or negative depending on the Commissioner's implicit or explicit analysis of counterfactual state of the domestic industry. Some Commissioners may rely on the reasoning embodied in the explicit mathematical models—USITC's in-house model known as COMPAS—to derive the counterfactual state of the domestic industry, expressed by a number of statutory factors such as market shares, profits, output, price, etc. While some other Commissioners may rely on an intuitive logical approach to arrive at counterfactual state of the subject industry. Nevertheless, regardless of the outcome of the petition of this investigation, the issue does not appear to rest. Interested parties in this investigation are likely to pursue further challenge through judicial review either through domestic courts—U.S. Court of International Trade—or international courts— either NAFTA panel or WTO forum.[144]

VI. CONCLUDING REMARKS

The Canada-U.S. Free Trade Agreement (CUSTA) created one of the largest single markets in the world. Ten years after the CUSTA, overall effects of the agreement in macroeconomics terms have generally been very

141. *Infra* Table 3.

142. Sabry, *supra* note 140, at 115-16.

143. *Infra* Table 3.

144. WTO Agreement, *supra* note 54. Canada and the United States, through CUSTA and NAFTA, introduced new bi-national dispute settlement mechanisms, which is an alternative avenue of judicial review in lieu of domestic courts. *Id.*

positive on both sides of the border as the two-way trade reached nearly two and one-half times the level before the agreement.[145] However, there have been several trade disputes concerning grains trade during the post-CUSTA era. Literature review indicates that asymmetric trade flows have caused these disputes. There are interwoven multiple factors influencing bilateral trade, including the persistent differences in grain marketing and delivery systems, farm subsidy programs, trade policies between these two countries, and the relative value of the Canadian dollar.

The trade dispute between the two trading partners is extremely complex to resolve and undoubtedly requires Solomon's wisdom. There are two opposite views on the resolution among agricultural economists. One group of economists argue that gradual harmonization of trade policies, farm subsidy programs, and marketing institutions would reduce trade disputes between the two countries in the future. However, some are skeptical of such a view based on the fact that an elimination of Canada's WGTA, to some extent, harmonized grain freight rate structures between the two countries but did not lead to a significant reduction in Canadian exports to the United States. On the contrary, an elimination of the century long freight rate subsidy in Canada encouraged Canadian grain producers to divert grain shipments from the world market to the United States. Simultaneous and comprehensive harmonization of trade policies, farm subsidies, and marketing institutions could be more effective in reducing trade disputes between the two countries rather than partial harmonization. However, U.S. trade disputes with other major trading partners could increase to protect the U.S. industries from unfair foreign competition under a freer trade environment.

As long as U.S. imports of wheat from Canada are many times larger than its exports to Canada and the U.S. grain producers perceive that the increased imports from Canada cause injury, trade disputes (by means of the U.S. trade remedy laws) could continue despite the harmonization of grain sectors in the two countries.

145. CANADA WEST FOUNDATION, *Ten Years After: Cross-Border Export/Import Trends Since the Canada-U.S. Free Trade Agreement*, 1 (1999).

Table 1. Bilateral Trade of the Selected Grains between the United States and Canada, 1990-2002.

	1990	1992	1994	1996	1998	2000	2001	2002	Average
	----------million bushels----------								
U.S. Imports from Canada									
HRS	13.2	34.8	77.5	39.0	57.7	57.4	60.1	44.1	46.7
Durum	10.0	19.0	13.8	9.2	15.7	10.7	16.0	21.8	15.2
Barley	9.9	20.0	89.7	36.6	32.1	26.7	29.5	21.9	32.9
U.S. Exports to Canada									
HRS	0.0	0.8	0.9	2.8	0.4	0.8	1.4	0.3	0.9
Durum	0.0	0.0	0.0	0.0	0.0	0.1	0.5	0.2	0.2
Barley	0.1	0.0	0.1	0.5	1.6	1.6	3.7	6.3	1.35

Source: U.S. Foreign Agricultural Service (FAS)/U.S. Dept. of Agriculture

Table 2. U.S. Trade Statutes and Statutory Requirements for Relief (e.g., Injury Test)

Trade Statutes in the U.S.	Primary Purpose of the Statute	Investigating Agencies	Statutory Requirements for Relief (e.g., material injury test)
Agricultural Adjustment Act (Section 22 of the AAA of 1933, as amended) [1]	To ensure that imports of agricultural products do not undermine domestic farm programs.	USITC for determination of "material interference;" USDA is a designated interested party.	Required "material interference test" vis-à-vis a farm commodity program administered by USDA.
Anti-dumping - Dumped imports (Title VII of the Tariff Act of 1930, as amended)	To protect domestic industries from injurious effects of dumping.	USITA (DOC) for determination of dumping; USITC for determination of material injury.	Required "material injury test" caused by subject imports.
Conditions of Competition (Tariff Act of 1930, as amended, Section 332)	To investigate the conditions affecting competition and the U.S. industries competitiveness.	USITC; USITA (DOC).	Not applicable.
Countervailing Duty - Subsidized imports (Subtitle A of Title VII of the Tariff Act of 1930, as amended)	To protect domestic industries from subsidization by foreign governments.	USITA (DOC) for determination of subsidization; USITC for determination of material injury.	Required "material injury test" caused by the subject imports.
Enforcement Action - Unfair trade (Section 301 of the Trade Act of 1974, as amended)	To enforce U.S. rights gained under international trade agreement.	USTR	Not applicable.
Import Relief (Safeguard) (Section 201 of the Trade Act of 1974, as amended)	To deal with the temporary adverse effects of fair import competition.	USITC for determination of "serious injury."	Required "serious injury test" caused by the subject imports. [2]

Notes:

(1)7 U.S.C. 624. Section 22 authority is now available only for imports from countries to which the U.S. does not apply the WTO Agreement.

(2)Serious injury test requires somewhat higher legal standard than that of the material injury threshold.

Source: Committee on Ways and Means U.S. House of Representatives, Overview and Compilation of U.S. Trade Statutes, U.S. Government Printing Office, Washington D.C., June 1997.

Table 3: Selected Empirical Studies on the Statutory Factors Affecting the Outcome of the AD Petitions (i.e., Affirmative Findings of Material Injury)

Author(s)	**Statutory Factors Affecting the Outcome of the Petitions (i.e., affirmative findings)**	**Method Used**	**Study Period**
Goldstein and Lenway (1989)	Decline in capacity utilization and profits. USITC decisions not directly influenced by political forces.	Logit analysis	1960-84
Moore (1992)	Decline in production and increase in the level of imports. (1)		
Finger, Hall, and Nelson (1982)	None of the political variables is significant, while the technical factors (e.g., injury indicators specified by the law) are significant and have the expected sign.		
Anderson (1993)	Statutory requirements (i.e., injury indicators specified by the law) appear to be the primary force underlying the USITC decisions (2)		
Hansen (1990)	Trade protection (e.g., tariff, AD, escape clause petitions) is subject to domestic forces similar to those affecting other regulatory policy areas.	Nested Logit model	1974-84

Sabry (2000)	The import-penetration ratio, dumping margin (estimated by DOC), and percentage change in demand.[3]	Probit model	1986-92
	The level of industrial concentration of the petitioning industry is statistically significant in explaining the probability of filing, but not the probability of success of the petition.	Univariate Probit model	
	The import-penetration ratio is a statistically significant factor in explaining both the decision to file and the outcome of the petitions. In addition, the probability of success of a petition is significantly affected by the magnitude of dumping margin, capacity utilization rate, and percentage change in demand. Employment has the predicted sign, but is not statistically significant. The level of industrial concentration affects the decision to file, but not the outcome of the petitions.	Bivariate Probit model	

Notes:

(1)The study indicated that industries with plants in the states of the Senate Trade Subcommittee members are more likely to receive an affirmative finding in the final determination.

(2)The study indicated that none of the political factors is significant in explaining the probability of an affirmative finding.

(3)Employment and industrial concentration index (i.e., domestic market structure) have correct sign, but neither estimate is statistically significant.