EMERGING ISSUES IN CANADA-U.S. AGRICULTURAL TRADE

UNDER THE GATT AND FTA

THEODORE H. COHN

The year 1986 was of special importance to the United States and Canada, with negotiations for their Free Trade Agreement (FTA)* beginning in May, and the decision to launch the Uruguay Round of multilateral trade negotiations in September. American and Canadian frustrations with the General Agreement on Tariffs and Trade (GATT) provided a major stimulus for the Free Trade Agreement, and this raises questions about the relationship between the FTA and the GATT. Can the FTA serve as an alternative or substitute for an effective GATT agreement, or are the bilateral and multilateral approaches complementary? Does the FTA weaken the multilateral trading system and contribute to the development of regional blocs, or does it provide a stimulus and lessons for multilateral reform? Is the GATT "obsolete," or does it provide a framework essential for the effective operation of the Free Trade Agreement?

The response to these queries has particular relevance for U.S.-Canadian agricultural trade relations. Agriculture has been one of the most conflictual

** A list of acronyms used in this article is provided on page 44.*

issues in the two countries' trading relationship, and neither the GATT nor the FTA has been particularly successful in dealing with these disputes. The eventual decision to include certain aspects of agriculture in the FTA stemmed largely from the view that this would contribute to progress in the GATT Uruguay Round, but agriculture has in fact emerged as the single most important issue blocking a successful conclusion of the Round. The main purpose of this study is to examine the roles of the GATT and the FTA in Canadian-American agricultural trade relations. Several hypotheses concerning the relationship between multilateral, bilateral, and unilateral approaches to trade reform are examined, including the following:

1. Some of the most important differences in U.S.-Canadian agricultural trade relations can only be resolved in a multilateral context.
2. The FTA actually heightens bilateral conflict over agriculture in some instances, largely because the GATT provides inadequate guidelines for changes that are occurring bilaterally.
3. The FTA on occasion can impede GATT efforts to deal effectively with agricultural trade issues.
4. The FTA serves as an important stimulus to GATT reform in certain areas, but further progress in these areas depends on both bilateral and multilateral initiatives.
5. While aggressive unilateralism often hinders agricultural reform, some unilateral policy changes can complement bilateral and multilateral efforts to promote trade liberalization.
6. Agricultural trade reform is more likely to occur if countries recognize the need for domestic change but also accept the fact that agriculture will continue to be a "special case" in certain respects.

To examine these hypotheses, I focus on three areas where agricultural protectionism has presented special problems for Canadian-American relations: the GATT exceptions and waivers (relating to export subsidies and quantitative restrictions), trade relief (or trade remedy) measures, and technical standards and regulations. In each of these

---

A Professor of Political Science at Simon Fraser University, Theodore H. Cohn is the author of Canadian Food Aid (1979), The Politics of Food Aid: A Comparison of American and Canadian Policies (1985), *and* The International Politics of Agricultural Trade: Canadian-American Relations in a Global Agricultural Context (1990).

areas, I draw comparisons between American and Canadian policies and assess the capacities of the GATT and the FTA to resolve bilateral differences. Before examining these three areas, it is necessary to provide some background on the general relationship between the GATT and the FTA, and on the nature of U.S.-Canadian agricultural trade relations.

A reading of the GATT and FTA documents would seem to indicate that the global and regional approaches are compatible. Article XXIV of the GATT recognizes "the desirability of increasing freedom of trade" through free trade agreements (and customs unions), as long as the FTAs are more trade-creating than trade-diverting. To ensure that FTAs do in fact facilitate trade, Article XXIV poses requirements with regard to notification, trade coverage, and the level of barriers to third-country trade. As for the U.S.-Canada Free Trade Agreement, its Preamble states that the two countries agree "TO BUILD on their mutual rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation."[1] Some trade specialists, however, are highly skeptical of claims that the GATT and FTAs are compatible. They often point out, for example, that FTAs fundamentally undermine the nondiscrimination and most-favored nation principles of the GATT. Furthermore, Patterson argues that it is "standard operating procedure for those favoring the FTA approach to pay homage to the GATT principles and objectives," but that Article XXIV is one of the "most abused" of GATT articles, since it poses no serious restraint to the behavior of free trade agreements.[2]

While most analysts would agree that FTAs can provide only second-best solutions to trade problems that are global in scope, some are more favorably disposed to FTAs as realistic accords that can be complementary with the GATT. There is also a tendency to single out the U.S.-Canada Free Trade Agreement as being especially compatible with GATT Article XXIV, and as being important in establishing precedents for a future GATT accord. For example, Aho states that "bilateral free trade agreements are justified only in special cases," and that the U.S.-Canada FTA may be such a special case "in light of the proximity and interdependence of the member-states"; Stone argues that "the Canada-U.S. Agreement is probably more in line with the GATT rules than most other free trade areas"; and Schott maintains that "the rules on trade in services and trade-related investment" in the Canada-U.S. FTA "were regarded as useful precedents for current GATT negotiations in these areas."[3]

Despite their positive assessments, many of these commentators realistically note that some U.S.-Canadian issues which involve third

countries can only be resolved at the multilateral level. There is no area where third-country issues have a greater impact on the bilateral relationship than in agriculture. It is difficult to discuss Canadian-American agricultural trade relations without focusing on broader multilateral concerns, because both states send their principal food exports—grains and oilseeds—primarily to third countries. The importance of these third-country exports is reflected in the trading statistics. In 1987, for example, over 20 percent of total U.S. exports—but only 6.3 percent of U.S. agricultural exports—went to Canada. Approximately 75 percent of total Canadian exports—but only 32 percent of Canadian agricultural exports—were sent to the United States. Thus, third-country issues involving surplus disposal, export subsidies, export credits, and international pricing have constituted an important part of Canadian-American agricultural trade relations.[4] Hence it is not surprising that the agricultural provisions in the FTA (which are rather limited and controversial) were included largely because of considerations related to GATT. First, American and Canadian negotiators were reluctant to exclude an entire sector such as agriculture from the Free Trade Agreement, since GATT Article XXIV stipulates that FTAs should include "substantially all trade."[5] Second, the FTA negotiators hoped that the inclusion of agriculture would have a positive influence on the GATT negotiations. A U.S. Department of Agriculture official stated that "if our two nations—both of which...have a big stake in freer and fairer agricultural trade—cannot resolve the issues that trouble our trade, what chance for success will there be in the Uruguay Round?"[6]

Despite the centrality of third-country issues, the importance of agricultural trade across the U.S.-Canadian border should not be underestimated. Cross-border trade has been composed primarily of commodities with a lower profile than grains and oilseeds. In 1988, for example, live animals and red meats accounted for over 40 percent of Canadian agricultural exports to the United States, and fruits and vegetables accounted for 42 percent of U.S. agricultural exports to Canada. Nevertheless, when trade in all agricultural commodities is considered, the two countries have a large and varied relationship. The United States is Canada's largest agricultural trading partner, and while Canada has been less important to the U.S., the two countries export some commodities almost exclusively to each other. Thus a report prepared for a U.S. Senate subcommittee has noted that "among the developed nations of the world, Canada occupies a unique position in the U.S. agricultural trade picture."[7] Cross-border agricultural trade is often rather routine and problem-free, but bilateral disputes do arise and they are sometimes quite serious. Furthermore, the decision to include

agriculture in the Canada-U.S. FTA will increase the importance of strictly bilateral agricultural trade issues.

While I devote some attention to third-country issues (such as the export subsidy "war") in this study, most of the cases examined (including disputes over dairy products, pork, corn, and beef) relate to trade across the Canadian-American border. This study will demonstrate that developments in the GATT have major significance, even for these "strictly bilateral" issues. It is therefore befitting to begin with a discussion of the GATT exceptions and waivers.

GATT EXCEPTIONS AND WAIVERS

Those who have written about the United States as a postwar hegemon committed to liberal trading principles have often ignored the case of agriculture.[8] Yet U.S. support for agricultural exemptions from postwar trade liberalization measures was evident from the time of the Havana Charter. An amendment (section 32) to the U.S. Agricultural Adjustment Act (AAA) in 1935 sanctioned the Department of Agriculture's use of export subsidies, and American agricultural interests resisted the pressures of Britain, Canada, and Brazil to prohibit them in the Havana Charter. This was one factor contributing to escape clauses and exceptions which served to weaken the Charter provisions.[9]

The GATT, designed to be temporary but replacing the Charter's ill-fated International Trade Organization, contains two major exemptions for agriculture which were included largely as a result of U.S. influence. GATT Article XVI:4 prohibits export subsidies for manufactured goods, but an exception is provided for agricultural and other primary products. The only limitation on agricultural export subsidies is an unclear provision (in Article XVI:3) that they should not permit a contracting party to gain "more than an equitable share of world export trade." While Article XI calls for the elimination of quantitative restrictions on imports, such restrictions are permitted for agriculture when they are needed to enforce governmental measures that "restrict the quantities" or "remove a temporary surplus of the like domestic product."

GATT Article XI was patterned partly after Section 22 of the AAA, which sanctioned the use of import quotas for commodities under price support programs. However, Section 22, unlike Article XI, permitted import restrictions even when there were no restraints on domestic production. In 1951 the U.S. Congress responded to agricultural surpluses by adopting two resolutions which were contrary to the GATT, and it ensured their passage (over President Truman's objections) by

attaching them to other important bills. First Congress amended Section 22 of the AAA to permit the imposition of farm import quotas regardless of any international agreement. Then it attached a rider to the Defense Production Act that virtually required the Secretary of Agriculture to impose severe quantitative restrictions on a wide range of agricultural imports. The U.S. government then imposed import restrictions which violated the GATT requirement that concomitant domestic measures such as supply management must be adopted. When GATT members challenged the U.S. import controls on dairy products, the United States sought and received a broad waiver in 1955 from its Article XI obligations (the waiver has no time limit).[10] Canada strongly opposed the waiver and the GATT exceptions, since U.S. import barriers posed a threat to its agricultural exports, and it could not compete with U.S. export subsidies.

Despite its early contribution to agricultural protectionism, the United States became increasingly concerned about the costs of its agricultural programs as its balance of payments problems worsened. The protectionist policies of others, particularly the European Community (EC), were also having a growing impact on global agricultural trade patterns. As a result the U.S. and Canada joined in pressuring for the inclusion of agriculture in subsequent GATT negotiations. The European Community, however, maintained that its Common Agricultural Policy (CAP) was not negotiable, and the results of the Kennedy and Tokyo Rounds in agriculture were disappointing. With the launching of the Uruguay Round, the major trading nations expressed strong intentions to reform their agricultural policies. The Round was originally to be completed in December, 1990, but negotiations were suspended at that time primarily because of continuing differences over agricultural subsidies. Talks were resumed in 1991, but the Uruguay Round discussions were still underway at the time of this writing. As the following discussion indicates, the GATT agricultural exceptions continue to have a major effect on Canadian-American relations.

Export Subsidies

In the 1950s to 1960s U.S. government price supports were usually far above international price levels, and the Commodity Credit Corporation (CCC) depended partly on export subsidies to make U.S. agricultural products competitive. However, the American public strongly disapproved of subsidized sales to the Soviet Union in the 1970s when world grain prices were increasing. As a result the CCC's export subsidy programs were discontinued in 1973 and did not re-emerge as a policy

instrument until the mid-1980s. During this interregnum U.S. administrations tended to view subsidies as unfair trading practices, and a clash with the European Community over its policies was inevitable.

The EC's Common Agricultural Policy, developed in the 1960s, established a fully-controlled European market with high target prices set for major crops. To insulate the market from world prices the EC adopted a variable levy system which ensured that Community products always enjoyed a competitive advantage over imports. As a result farmers were encouraged to increase production, and the EC provided export subsidies (referred to as export refunds or restitutions) to help dispose of the growing surpluses. The Community became a formidable competitor by the 1980s when its agricultural exports began to pose a major threat to North American markets. The U.S. share of global wheat exports declined sharply from 45.0 percent in crop year 1980-81 to 29.6 percent in 1985-86, and while a variety of factors accounted for this decline (including the high value of the U.S. dollar), a major issue was the EC's steadily growing market share.

The United States at first attempted to work mainly through the GATT to produce a change in EC agricultural policies. In March, 1975, a U.S. representative at the GATT subgroup on subsidies and countervailing duties proposed that direct export subsidies on all products be prohibited. However, the Community refused to recognize the jurisdiction of this subgroup and to acknowledge that its restitutions or refunds were in fact export subsidies. The United States also tried to use the 1979 Tokyo round subsidies code to register a complaint about EC wheat flour export subsidies. The subsidies code clarifies and expands upon GATT Article XVI, but it retains Article XVI's exception for primary products. Thus the code's only requirement for agricultural export subsidies is that they should not give the signatory "more than an equitable share of world export trade in such product." With such vague guidelines, the GATT panel failed to provide a definitive judgment against EC export subsidies in the wheat flour case.[11]

Frustrated with its GATT efforts the United States resorted to unilateral actions, beginning with a large, subsidized sale of wheat flour to Egypt in 1983 which undercut EC prices. In May, 1985, the U.S. then established an Export Enhancement Program (EEP) to regain what it viewed as its fair market share and to force the European Community to the bargaining table.[12] The EEP authorizes the Commodity Credit Corporation to offer government-owned commodities as bonuses to U.S. exporters to expand sales of agricultural products. The bonuses are a form of export subsidy, since exporters can sell commodities at prices that are well below domestic levels. By the end of May, 1990, total EEP

sales to 69 countries exceeded 10 billion dollars with wheat accounting for about 80 percent of the sales value.[13]

The U.S. administration indicated that the EEP would target only European Community markets, and initially U.S. policy was consistent with these assurances. For example, American durum wheat was excluded from EEP sales to Algeria in 1985 to protect Canada's market in North Africa. However, smaller exporters felt that American statements were belied by its actions when it extended the EEP to the Soviet Union in August, 1986. "Non-subsidizing" competitors accounted for about 48 percent of the Soviet market at the time, even though the EC's share had been increasing. A diverse coalition of 14 smaller-country exporters, including Canada, therefore formed the "Cairns group" in 1986 to protest the price-depressing effects of EC and U.S. export subsidies.[14] Canada was more inclined than some Cairns group members (such as Australia) to view the European Community as the main source of the problem, since it was negotiating a free trade agreement with the United States at the time and was also looking to U.S. support for their common interests in the GATT.[15]

The United States defended itself against the Cairns group by claiming that it was also a victim of EC subsidy practices, and to demonstrate its resolve for reform the U.S. submitted an ambitious proposal to the GATT Uruguay Round in July, 1987. In essence the U.S. called for a complete phasing out over ten years of all trade-distorting subsidies and import barriers in agriculture. Despite widespread skepticism regarding the feasibility of this proposal, Canadian officials (and other Cairns group members) were generally supportive. Prime Minister Brian Mulroney described the U.S. initiative as a "bold move," and Canada's agriculture minister stated that "it is important that we do not undercut the U.S. position ... because they are the driving force at the GATT."[16]

Nevertheless, as the export subsidy war continued, Canada demonstrated growing impatience with the United States. The U.S. was becoming less concerned with limiting its subsidies to European Community markets, and its Export Enhancement Program targeted Colombia, Iraq, Mexico, and the Philippines even though Canada (rather than the EC) had established major wheat markets in these countries. A September, 1989, report of the U.S. Department of Agriculture's Office of Inspector General (OIG) also acknowledged that Canadian, Australian, and Argentinian wheat market shares had declined since the EEP's creation. Although the OIG felt that several factors could account for this development, it warned that a continuation of the EEP could adversely affect the latter countries' exports. It should be noted that the EEP has not

had a negative impact on *all* Canadian agricultural sectors. For example, Canadian pork products and canola (or rapeseed) oil have become more competitive in the U.S. market, partly because the EEP has driven up U.S. prices for feed grains and domestic vegetable oil. Nevertheless, the negatives of the EEP for Canada have clearly outweighed the positives.[17]

Ironically, the Export Enhancement Program has had less certain effects on its intended target, the European Community. The Program has had little impact on the EC's market share, and the OIG study found that wheat market shares of the Community as well as of the United States (unlike those of the smaller exporters) had *increased* since the EEP's inception. The EEP has had a role (along with internal EC pressures and the Cairns group) in bringing the Community to the negotiating table. However, the EC's willingness to agree to significant agricultural concessions at the Uruguay Round remains uncertain, and Paarlberg has argued that "as bargaining chips go, the EEP isn't weighty enough to threaten the Community, or to be traded away against EC export subsidies, which dwarf the EEP in size by a margin of roughly 10 to 1."[18] If the Community does eventually agree to compromise on agricultural export subsidies, motivating factors other than the EEP will be primary: First, "mounting *internal* disenchantment" with the Common Agricultural Policy is likely to provide the main motivation for changes in EC farm programs.[19] Second, the EC might offer agricultural concessions because it does not wish to be held responsible for jeopardizing GATT agreements in areas such as services and intellectual property.

There is also uncertainty about the degree to which the EEP should be credited for the recent growth in U.S. agricultural exports. It is difficult to isolate the Program's effects from other changes contributing to increased exports, such as the decline in value of the American dollar. Estimates of additional EEP-induced exports range from a low figure of two percent to a high of thirty percent and are greatly influenced by the assumptions made and the time period covered. The Program has been important for concluding sales in certain markets such as China and the Soviet Union, and the EEP coupled with export credit guarantees has aided U.S. sales to less-developed countries. Nevertheless, some of the most prominent cases of U.S. export expansion have occurred without EEP assistance. These include increases in agricultural exports to Japan and in corn exports to the (former) Soviet Union, even though EEP subsidies are not provided for sales to Japan or for sales of corn. Furthermore, there are serious doubts about the benefits of the Program to American farmers, since agribusiness groups and importers of U.S. agricultural products often seem to be the main beneficiaries. Cargill and Continental grain companies have received about $800 million and

$702 million, respectively, in bonuses under the EEP. While both Cargill and Continental are American firms, a Paris-based firm—Louis Dreyfus Corporation—has received almost $591 million in bonuses and ten non-U.S. firms (including Dreyfus) have received a total of $1.57 billion in EEP bonuses since 1985.[20]

Despite the controversy surrounding the EEP's effects, many U.S. policy-makers strongly believe that it should be continued. They maintain that eliminating the Program would signal a lack of political will to combat the EC's export subsidy practices, and they have ambivalent feelings about the EEP's impact on smaller competitors. "To the extent that the program has had an adverse effect on other competitors, including Australia and Canada," the U.S. General Accounting Office has argued, "its continued existence has increased their resolve to negotiate an agreement on agricultural trade reform."[21]

The Free Trade Agreement (in Article 701.2) goes beyond the GATT and prohibits export subsidies on agricultural products traded between the U.S. and Canada, but it has had virtually no role in limiting the use of the EEP in third-country markets. Article 701.4 of the FTA states that "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." Canadian critics maintain that the United States is not taking this provision seriously since it is continuing to subsidize grain exports to Canada's markets, but the U.S. is unlikely to scale down its export subsidies without similar concessions from the European Community. A special problem may emerge with regard to one third country, Mexico, in view of the trilateral free trade negotiations. The United States uses EEP subsidies for a significant percentage of its agricultural exports to Mexico, and Canada understandably would like to have the FTA prohibition of export subsidies on U.S.-Canadian agricultural trade extended to Mexico. But it is unlikely that the United States will agree to such a prohibition as long as the European Community is subsidizing its exports to Mexico.[22] In summary, the resolution of U.S.-Canadian differences over agricultural export subsidies to third countries cannot occur in the context of the FTA; it depends on an agreement in the GATT.

It is important to note that the United States sometimes counters criticisms of the EEP with complaints that Canada provides export subsidies *covertly* through its Canadian Wheat Board and transportation policies. The Wheat Board (CWB) is a crown corporation that controls the foreign marketing of Western Canadian wheat and barley. American officials have criticized the CWB for lacking price transparency and for covertly subsidizing the price of its sales. A former undersecretary of

agriculture has argued that the United States blames "its current export problems on EC export subsidies without recognizing the immense effects of state buying and selling practices on the current situation."[23] Some Canadians reject these criticisms and maintain that the American government itself is heavily involved in the wheat trade through support programs and export decisions made on a political basis. The issue is not government involvement *per se*, it is argued, but the form that this government involvement takes. Canadian critics have also argued that the United States demonstrates a strong ideological bias when it criticizes state trading agencies while ignoring the trade-distorting practices of private companies. For example, a Canadian agricultural economist has stated that the Wheat Board

> does not disclose selling price information. But...Cargill and other similar firms do not tell...how much money they make from wheat and their selling prices in the international marketplace either. It's a trade secret for the Wheat Board just as it is in any private company, so why do we have the perception that the Board distorts trade and the private sector does not?[24]

It is true that the grain companies are as secretive (or more so) as the CWB, but they must "live by the market" while the Wheat Board can also "live by the state." Unlike the Wheat Board, the companies do not have a legal monopsony in the market. Furthermore, the companies must make a profit in a highly competitive market, while the Wheat Board is assured of support from the state if it is in a deficit situation.

Canadian producers receive initial payments from the Wheat Board which have normally been set at 70 to 80 percent of expected market prices. The initial payments are supplemented later by final payments based on additional revenues from CWB sales. But when the net revenues from wheat sales are less than the initial payments to producers, the Canadian government covers the deficit. Deficits have emerged as a problem recently, and this has led to U.S. charges that the CWB is selling wheat at prices below acquisition costs. Canada has argued that its initial wheat prices were not meant to be subsidized and only became so when the U.S.-EC export subsidy war led to drastic declines in world wheat prices. Nevertheless, there were wheat and durum deficits of $743 million in 1990-91, and this added to suspicions that Canada was subsidizing its wheat exports to the United States.[25] Tensions over this issue have increased recently, especially in regard to Canada's durum wheat exports to the U.S. which rose from a negligible amount in the early 1980s to over 280,000 tons in 1990-91.

American officials have charged that the Wheat Board's practices violate several provisions in the FTA. These include Article 701.2, which prohibits export subsidies on U.S.-Canadian agricultural trade, and article 701.3, which states that public entities (such as the Wheat Board) in either country may not export agricultural goods to the other country for less than the acquisition price. In implementing the FTA the U.S. administration indicated its intention "to pursue consultations with Canada regarding the price setting policy of the CWB as it affects goods exported to the United States."[26] However, Article 701.3 of the FTA deals only with cross-border sales, and any decisions regarding the Wheat Board's practices in third countries depend on the outcome of multilateral trade negotiations. Industry officials from the EC and Australia have joined with the United States in arguing that the CWB is subsidizing farm income, and a GATT agreement could limit the Canadian government's ability to cover Wheat Board losses.[27]

The United States has also protested against Canadian transportation subsidies, which it views as a form of export subsidy. In 1897 the federal government had provided the Canadian Pacific Railway (CPR) with various benefits in exchange for the CPR's agreement to charge lower freight rates for shipping grain and flour from the Prairie provinces. These "Crowsnest Pass" rates were fixed by statute in 1926 and became a source of considerable domestic controversy, partly because the railways had little incentive to provide good service at such low rates.[28] In 1983 the federal government enacted a new law which provided the railways with a subsidy in return for their promise to continue charging lower grain shipment fees. The Free Trade Agreement (Article 701.5) calls for the elimination of Canada's rail transportation subsidies for grains and oilseeds shipped to the United States through west coast ports, but freight subsidies for grain sent to the U.S. through eastern ports are unaffected.[29]

While the FTA deals with West coast transport subsidies for grain shipments to *the United States*, it does not address the issue of Canadian transport subsidies for grain sent to third countries. In the GATT negotiations, however, Canada's subsidies for third-country shipments are being viewed as export subsidies, and they would be reduced as a result of an Uruguay Round agreement. Some Canadian farm groups have questioned why American waterway subsidies would not also be affected by a GATT agreement, but the U.S. position is that they are generally available for domestic as well as for foreign trade purposes (and for non-agricultural as well as agricultural shipments).

In short, Canada has become increasingly concerned about U.S. export subsidies provided by the Export Enhancement Program, and

American officials have responded with their own criticisms of the Canada's transportation and Wheat Board practices. The FTA has been fairly successful in dealing with export practices that affect cross-border agricultural trade. However, it has been unable to limit the impact of these policies on the far more substantial grain trade with third countries. Progress in limiting export subsidies in general depends on a successful outcome in the Uruguay Round negotiations. In December, 1991, the Director General of the GATT, Arthur Dunkel, released a draft agreement for the Uruguay Round.[30] As of this writing the agreement has still not been approved, and a major stumbling block is EC differences with the United States (and the Cairns group) over agricultural subsidies. The Dunkel text calls for a reduction of agricultural export subsidies by 36 percent in value and by 24 percent in volume over a seven-year period from 1993 to 1999. The draft act also calls for a reduction of trade-distorting domestic subsidies by 20 percent as measured by an Aggregate Measure of Support (AMS). While agricultural exporters such as the U.S. and Canada had wanted much larger reductions in agricultural export subsidies, the Dunkel levels continue to be unacceptable to the European Community.

Quantitative Restrictions

Canada opposed the early GATT exceptions for agriculture, and the country's GATT delegation in 1955 reacted to the U.S. waiver request with the statement that "it could not agree to permit the United States to exclude imports to any extent considered necessary to protect any program of the United States Department of Agriculture."[31] Canada's criticisms of the U.S. waiver have never ceased, and its October, 1987, proposal to the Uruguay Round agricultural negotiations called for "the provision of equitable rights and obligations among contracting parties, such that all exceptions and waivers would be phased-out."[32]

Despite the criticisms of Canada and other GATT members, the United States has steadfastly insisted on retaining its waiver. On the other hand, despite Canada's protests, it has in fact become committed to maintaining and strengthening the agricultural exception in GATT Article XI. In the 1970s Canada developed a complex supply management system for dairy, eggs, and poultry products administered by a new type of marketing board which has many more powers than most Canadian marketing boards.[33] The dairy, poultry, and egg boards are designed to provide adequate and stable incomes for producers through a system of administered prices, production quotas, and import controls. Although the import controls are permitted under the GATT Article XI

provisions relating to supply management, they have evoked a strong negative reaction from the United States. In 1975, for example, the U.S. government sought a GATT ruling regarding the legality of Canadian import quotas designed to facilitate the establishment of a national egg marketing board. The United States obtained some liberalization of Canada's quotas on eggs and poultry products under the Free Trade Agreement (Article 706), but Canada managed to uphold its right to retain these quotas. Thus, Article 710 of the FTA permits the parties to continue imposing quantitative restrictions on agricultural imports in accordance with GATT Article XI.[34] The Statement of Administrative Action accompanying the U.S. bill to implement the FTA indicated that the United States had "not yet succeeded in eliminating" Canadian quotas on supply-managed products, but that it would "seek to eliminate the remaining agricultural import barriers" through the GATT Uruguay Round and in further bilateral talks.[35]

Along with the United States, a broad range of Canadian groups criticized the fact that the FTA did not address the supply management issue. The Consumers' Association of Canada has consistently condemned supply management boards for establishing artificially high prices, some agricultural economists have maintained that the supply management system is rife with inefficiencies and inequities, and the Macdonald Royal Commission recommended that the supply management system be phased out.[36] Food processors are also dissatisfied because they must use higher-priced Canadian commodities as raw materials. The FTA will eliminate customs duties on a number of processed dairy and poultry products, and food processors warned in House of Commons hearings that they would not be able to compete with their American counterparts. It is difficult to ignore this issue, since food processing is Canada's second most important manufacturing industry.

The processing issue was particularly sensitive in the case of the protectionist dairy industry which is concentrated in Quebec and Ontario. Since the FTA would remove tariffs on processed goods, dairy farmers were concerned that they would be pressured to sell their raw product to processors at lower prices. After the FTA was concluded, the Canadian government therefore added processed dairy products, ice cream and yogurt, to the Import Control List. This decision was taken to assure producers that supply management would not be affected, and also to deal with the concerns of Canadian processors. The move was politically astute, since the Progressive Conservatives subsequently won the November, 1988, election with a sweep of Quebec rural seats.[37] It was predictable, however, that the United States as the main foreign supplier

of yogurt and ice cream to Canada would react negatively. When Ottawa turned down the Pillsbury Company's application to import Haagen-Dazs ice cream, U.S. officials requested in December, 1988, that a GATT dispute settlement panel be formed. They argued that the exception in Article XI applied only to raw agricultural products, and that Canada should therefore eliminate its import quotas for ice cream and yogurt.

In September, 1989, the panel determined that Canadian import restrictions for processed dairy products did not conform with GATT obligations. Although milk was subject to supply management, the panel maintained that processed foods such as ice cream and yogurt were not "like products" with milk. It recommended that the Contracting Parties ask Canada "either to terminate those restrictions or to bring them into conformity with its obligations under the General Agreement."[38] Canada could have vetoed the GATT Council's decision to formally adopt the panel's report, but this would have undermined its position as a supporter of stronger trade rules and would have damaged relations with the United States. Instead, Canada accepted the decision but deferred action until the conclusion of the Uruguay Round.[39] There was a precedent for this position, since the United States had failed to implement an earlier GATT decision for similar reasons.

While accepting the panel decision, Canada maintained that it was inequitable because "the US could use its waiver on agricultural products to limit imports of ice cream and yoghurt and at the same time could challenge restrictions of other GATT members without waivers."[40] In March, 1990, Canada also proposed that the GATT Article XI exception be expanded to permit import restrictions for "processed products which are made `wholly or mainly' from the fresh product under domestic supply control."[41] This position understandably created a rift between Canada and its free-trade allies, the Cairns group and the United States. Indeed, Canada refused to initial the October, 1990, Cairns group "Proposal for a Multilateral Reform Program for Agriculture," which endorsed the U.S. call for *tariffication*, or the conversion of all non-tariff import measures to tariff equivalents. Canada instead issued its own proposal which stated that quantitative restrictions should continue to be permitted under GATT Article XI.

Agriculture Canada did initiate a review of the country's agri-food policies, and one of the review task forces focused on the dairy industry. The Report of the Task Force on Dairy Policy, released in May, 1991, acknowledged that the supply management system needed to become more market responsive and do more to meet the needs of Canadian consumers and food processors. Nevertheless, the task force recommended that "the government continue to press for a clarification and

strengthening of Article XI:2(c)(i) in the Uruguay Round of GATT negotiations in order to maintain a system of supply management for the dairy industry in Canada." The task force also recommended that "in order to maintain the level of import and border control essential to effective supply management ... the federal government [should] urgently develop ways and means of addressing any erosion of domestic dairy markets caused by cross border shopping and by the importation of blended and mixed products."[42]

When the Uruguay Round negotiations were suspended in December, 1990, pressures on Canada to adopt a less protectionist stance regarding Article XI were temporarily alleviated. However, the United States indicated that it would not wait indefinitely for Canada to comply with the GATT Council's decision on processed dairy products.[43] Warning of retaliation, the U.S. stated that it had completed a preliminary list of products which could provide the basis of withdrawing concessions from Canada. The renewal of GATT discussions has raised hopes that an agreement including agriculture might eventually be concluded, and if this occurs Canada will probably be required to gradually phase out its supply management-related import barriers. Indeed, the Dunkel draft agreement of December, 1991, calls for the conversion of all non-tariff import barriers to bound tariffs. Although this "tariffication" would result initially in high levels of tariff equivalents, all tariffs (including tariff equivalents) would be reduced by an average of 36 percent over a seven-year period. If other GATT members reach a consensus on a Uruguay Round agreement that involves "tariffication," the Canadian government would feel strongly pressured to endorse the accord despite the objections of dairy and poultry farmers. Even if a GATT agreement is not concluded, it is likely that the United States will exert greater bilateral pressure on Canada to alter its policies in this area.

Our discussion thus far leads to several preliminary conclusions regarding the role of the Free Trade Agreement and the GATT. First, the FTA is clearly *not* a substitute for the General Agreement in resolving bilateral disputes over GATT exceptions and waivers. These bilateral differences will be settled only if the GATT clarifies its role with regard to agricultural trade. For example, Canada has refused to implement the GATT Council's decision on ice cream and yogurt until the Article XI exceptions are dealt with in the Uruguay Round. The United States has also declined even to consider relinquishing its 1955 waiver in the absence of a Uruguay Round agreement. Similarly, the issue of agricultural export subsidies on sales to third countries cannot be resolved within the FTA but must await the outcome of discussions on the GATT Article XVI exception.

A second conclusion is that it will be very difficult to remove the exceptions for agriculture in the General Agreement. Even countries such as the United States and Canada that are highly committed to agricultural trade reform follow contradictory policies, and they are exceedingly reluctant to alter their own protectionist practices. Both countries have criticized the GATT exceptions in recent years. Nevertheless, the United States has expanded its Export Enhancement Program and refused to relinquish its GATT waiver. While criticizing U.S. (and EC) export subsidies, Canada has employed questionable subsidy practices in its transportation and Wheat Board policies, and Canada has also wanted to preserve (and even strengthen) the GATT Article XI exception for quantitative restrictions on agricultural imports.

A third conclusion is that the Free Trade Agreement may in fact contribute to agricultural trade tensions in certain circumstances. By freeing trade in processed food products, the FTA posed a threat to Canada's supply management system which in turn led to the U.S.-Canadian dispute over dairy products. Only a GATT agreement that deals with both the Article XI exception and with the 1955 U.S. waiver is likely to resolve U.S.-Canadian disputes in this area.

TRADE RELIEF MEASURES

Export subsidies and quantitative restrictions are obviously not the only non-tariff barriers to trade. Other major trade-distorting practices include dumping and a wide variety of domestic production subsidies. The measures taken to offset these practices are *antidumping duties* (ADs) and *countervailing duties* (CVDs). ADs are assessed against sales of foreign goods at prices below those charged in the home or third-country markets, and CVDs are imposed to offset trade-distorting subsidies (which may be either domestic or export subsidies) in the exporting country. However, ADs and CVDs sometimes serve as trade barriers themselves in the guise of promoting "fair trade," and the 1979 GATT Subsidies Code is therefore ambivalent about such measures. While the Code seeks to ensure that "the use of subsidies does not adversely affect or prejudice the interest of any signatory," it also cautions that any "countervailing measures ... [should] not unjustifiably impede international trade."[44] Not surprisingly, the United States and Canada regularly challenge each other's AD and CVD decisions, and both the GATT and Free Trade Agreement have rules for dispute settlement in such cases.

Antidumping disputes between the United States and Canada have usually been more regionally-focused and less politically-sensitive

than countervail disputes. Furthermore, countervail frictions have been particularly intense in the agricultural area, because "`agriculture' is nearly synonymous with the word `subsidy' in the context of international trade."[45] This study therefore places more emphasis on CVD than AD disputes. A U.S. attorney who has examined agricultural trade issues notes that while trade relief (or "trade remedy") laws

> apply without distinction to agricultural and non-agricultural products alike, their application to imports of agricultural products raises issues that are not present when non-agricultural products are considered. These issues arise from the particular nature of agricultural production and marketing: typically hundreds of individual producers are involved; these producers sometimes are processors of their crops and sometimes are not; and many agricultural products are highly perishable.[46]

Accordingly, I first discuss the problems presented by trade relief actions in general. I then focus more specifically on two landmark countervail cases involving agricultural products: the case of American CVDs imposed on Canadian hog/pork exports, and the case of a Canadian CVD on U.S. grain corn exports.

A Comparison of American and Canadian Trade Relief Practices

Beginning with the passage of a countervail law in the Tariff Act of 1890, the United States was the first country to use countervailing duties. Antidumping legislation was enacted in 1916, and the U.S. trade relief system was incorporated in the Tariff Act of 1930. In the first three decades after World War II, American industries seeking trade relief through CVDs and ADs usually lost their cases. However, American balance of trade deficits since 1971 and the decline of tariffs resulting from the GATT negotiations contributed to produce pressures for changes in the trade relief legislation. The U.S. Congress responded by revising the rules and procedures so that industries could obtain relief more easily. Comparative figures reveal how frequently the U.S. has initiated countervail investigations. Of the 425 CVD cases initiated by the world's trading nations in 1980-85, ninety-one percent were brought by the United States and Chile, with the U.S. responsible for 252 and Chile for 135. Canada initiated only 11 countervail cases during this period.[47]

Agriculture was one of the few sectors where the United States continued to maintain a healthy export position in the 1970s, and it

aggressively sought to bolster its natural advantages in this area. But in the late 1970s and early 1980s the favorable U.S. balance in agriculture steadily eroded, and protectionist sentiments gained support among farm groups. There was a markedly increased use of trade relief legislation as a result of revisions in the 1979 Trade Agreements Act, and this had a major effect on Canadian agricultural producers. From January 1, 1980, to June 30, 1986, the United States completed six CVD and six AD investigations against Canadian food and agricultural producers. Duties were eventually imposed on Canadian sugar, raspberries, dried salted codfish, live swine, and groundfish.[48] Furthermore, the U.S. imposed a CVD on Canadian pork imports in 1989 that proved to be precedent-setting. After two binational panels under the Free Trade Agreement raised serious questions about the duty, the U.S. trade representative filed a request for an extraordinary challenge committee in March, 1991, to review one of the binational panel's decisions. This was the first time that the FTA's extraordinary challenge procedures had been invoked.

Canada has its own trade relief legislation, and it was in fact the first country to introduce antidumping duties in 1904. These duties resulted from claims that U.S. manufacturers were selling goods in Canada at prices well below those in the home market.[49] Although Canada included a countervailing duty provision in its 1955 Customs Tariff, like most industrial states other than the U.S. (including the EC, Japan, and Australia) it has rarely used CVDs. Canada relied almost exclusively on antidumping legislation to protect its producers until the mid-1980s, partly because the country's administrative procedures for AD duties were easier to implement.[50] While antidumping duties were applied automatically after an investigation favored the Canadian complainant, the federal Cabinet had to give final approval for the imposition of countervailing duties. Canada substantially revised its trade relief legislation after the antidumping and subsidies codes were concluded in the GATT Tokyo Round. Canada's Special Import Measures Act (SIMA) of 1984 introduced a quasi-judicial countervail procedure similar to the U.S. system which can be initiated privately and does not require cabinet approval. Since the passage of the SIMA, it has been easier for Canadian producers to launch countervail suits.

Canada's traditional preference for antidumping over countervail action has been evident in its interactions with the United States. From 1980 to 1985, Canada conducted 31 AD investigations against the United States, compared with only 10 U.S. antidumping investigations launched against Canada.[51] In contrast, Canada has imposed CVDs against American producers on only a few occasions even though the United

States has frequently resorted to countervail action. While Canadian antidumping investigations of U.S. exports between 1980 and 1986 mainly involved industrial products, some U.S. food and agricultural products such as citric acid and sodium citrate, potatoes, and refined sugar were affected. In the late 1980s Canada imposed a precedent-setting countervailing duty on U.S. grain corn imports which marked the first time that a foreign country had levied CVDs against U.S. producers.

In summary, the United States and Canada have both resorted to trade relief actions, and today their legislation is similar. Nevertheless, American countervail "can have a severe impact" on Canada, while Canadian countervail is likely to be "little more than another irritant to the United States."[52] The asymmetrical effects result from the fact that in Canada's smaller economy exports account for a larger share of production, and over 75 percent of those exports are directed to the United States. Hence Canada has a greater stake than the U.S. in limiting the use of import relief measures. The different American and Canadian perceptions are even evident from the terminology used. In the United States, CVD and AD laws are normally referred to as *trade remedy* legislation, a term with very positive connotations.[53] By contrast some Canadian analysts use fairly negative terms such as *contingent* or *contingency protection* measures to describe the U.S. trade laws. Since CVD and AD laws can provide *both* a remedy for unfair trade practices and an excuse for protectionism, I follow the practice of those few analysts who use more neutral terms such as *import relief* or *trade relief* laws.[54]

Canada's concerns regarding U.S. trade relief actions have been manifested in both its multilateral and bilateral behavior. In June, 1989, Canada was the first country to table a comprehensive proposal for new GATT subsidy/countervail rules in efforts to control the growing use of CVDs.[55] Furthermore, Canada's main motivation in seeking the Free Trade Agreement was to gain more assured access to the American market, and a major concern in this regard was U.S. trade relief law. During the FTA negotiations Canada wanted the United States to establish a joint subsidies code which would "define acceptable subsidy practices and render countervailing duties unnecessary," but the Commerce Department negotiators would not accede to this demand.[56] Instead the United States and Canada have both kept their own GATT-based antidumping and countervail laws. Trade complaints under the FTA proceed through normal domestic procedures in each country, with access to a binational dispute panel only after the domestic process has been completed. The binational panels, which consist of five members, are designed to take the place of judicial review of final AD and CVD decisions by American and Canadian courts. They determine whether

or not each country's disputed decisions are made in accordance with its own laws, and their findings are to be binding on both governments. This system is to exist for five to seven years, while a bilateral working group attempts to develop a new set of joint rules for the use of antidumping and countervailing duties. If no agreement is reached after seven years, either country can terminate the FTA on six months' notice.

As mentioned, the current American and Canadian countervail procedures have many similarities. In both countries a government department determines whether there is subsidization, and an independent quasi-judicial agency is mainly or wholly responsible for assessing material injury. In a U.S. countervail case, the International Trade Administration (ITA) of the Department of Commerce is charged with the subsidy determination, and the International Trade Commission (ITC) with the material injury determination. A CVD case is a four-part process involving both preliminary and final determinations by the ITA and ITC. In Canada, the deputy minister of national revenue for customs and excise decides whether imported goods are subsidized, and whether there is a reasonable indication that the subsidized goods are causing material injury. The Canadian International Trade Tribunal, which replaced the Canadian Import Tribunal in March, 1988, makes the final determination as to whether subsidization is causing material injury to Canadian producers. A difference between the two countries' procedures is that the U.S. ITC makes two material injury determinations while the Canadian tribunal makes only the final injury decision.[57]

While both countries claim that their trade relief laws and procedures are consistent with the GATT, some Canadian critics of the U.S. system have argued that there are significant differences. They maintain that the U.S. laws are unfair and less in accordance with the GATT subsidies code, and that the American trade relief process is more closely tied to politics. Thus, Rugman and Anderson refer to U.S. trade law procedures as a "system of administered protection," and argue that the ITC commissioners are political appointees who in essence "are servants of mercantilism." Skogstad feels that there is less political involvement in the trade relief process in Canada because of the country's "legacy of political independence of quasi-judicial agencies."[58] A number of Canadian agricultural economists also maintain that the American requirement for a causal link between foreign subsidies and material injury to U.S. producers is not at all rigorous. Although the GATT subsidies code states (in Article 6.4) that to impose a CVD "it must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury," various studies have presented evidence that U.S. trade law does not require that injury result from the subsidized imports (as

opposed to other factors). Indeed, the claim is made that "the most serious divergence between U.S. and Canadian countervail law is the absence of a proper test of causality in the U.S."[59] Critics also state that more attention is given in a U.S. countervail case to the arguments of domestic producers than to those of foreign suppliers, and that the subsidies received by American complainants are not even considered.

Other analysts perceive American trade relief practices in a more positive light. Some think that the U.S. legislation provides "a transparent, nonpolitical system for dealing with trade disputes that involve allegations of unfair trade and import disruptions," and that the U.S. trade law system is essential (regardless of its shortcomings) because "the absence of meaningful discipline would stimulate a competitive race-to-the-bottom in the realm of subsidies."[60] Others argue that Canadian trade law is not necessarily better than that of the United States. For example, Metzger points out that Canada's antidumping law in the 1970s had inadequate injury and causation tests, and Steger maintains that Canada's 1984 Special Import Measures Act includes CVD regulations patterned after those of the United States which have "a distinct procedural bias in favor of domestic complainants."[61] If one considers a broader range of trade relief cases, the statistics show that Canada applied safeguards, CVDs, and ADs 235 times between 1980 and 1985. Though this is considerably less than the 786 cases in the United States, it is a substantial number.[62]

To examine American and Canadian approaches to the use of trade relief law in agriculture, it is useful to compare the U.S. countervailing duty cases against Canadian hog/pork exports with the Canadian CVD case against U.S. corn exports. These episodes were selected because of their relative importance: the U.S. pork case involved a substantial amount of trade relative to other CVD cases and marked the first instance in which the extraordinary appeal mechanisms of the Free Trade Agreement were used. The Canadian corn case marked the first time that a foreign country levied a countervailing duty against U.S. producers.

Hogs and Pork

Canadian-American interdependence in the hog/pork sector is highly asymmetrical because of differences in production levels and market size. In 1984 the American hog slaughter was six times greater than the Canadian, and Iowa alone produces one-and-a-half times as many hogs as Canada. Canadian pork exports to the United States in 1984 accounted for 25 percent of Canadian production but for only 4 percent of U.S. consumption. In contrast, when American pork exports

to Canada were at their peak in 1977, they accounted for only one percent of U.S. production but for 15 percent of Canadian consumption. Despite the asymmetry Canada is the largest foreign supplier of hogs and pork to the United States, accounting for over 40 percent of U.S. imports. The EC is second, supplying the United States with about 30 percent. Understandably, Canadian hog/pork exports can loom large to American producers.[63]

Canada has normally been a net exporter of hogs and pork to the United States, but because of feedgrain shortages it became a net importer from 1975 to 1978. When Canada returned to its net export position in 1979, American producers (who had increased their own production in the interim) became concerned when Canadian live hog exports to the U.S. rose from a monthly average of about 37,000 in 1983 to 100,000 in early 1984. The U.S. National Pork Producers' Council (NPPC) subsequently filed a petition in November, 1984, seeking the imposition of countervailing duties against Canadian live swine and fresh, chilled, and frozen pork exports.

In June, 1985, at its final determination the U.S. International Trade Administration found that various Canadian programs conferred countervailable subsidies on both live swine and pork product exports. A month later, the International Trade Commission (ITC) also made an affirmative injury determination with regard to Canadian live swine imports but not for for Canadian pork exports. The Canadian producers launched several appeals of these rulings which were considered by the U.S. Court of International Trade (CIT). The CIT was responsible for judicial review of American AD and CVD decisions before the FTA established binational panel review. In May 1987, the Court upheld the ITA's decision that subsidies to Canadian hog producers were countervailable. However, it also ruled that the ITA could not view benefits to hog growers as constituting subsidies to pork producers without conducting an upstream subsidy investigation.[64] Since the Court subsequently upheld the ITC's negative injury ruling for pork, there was no reason for the ITA to conduct the upstream subsidy investigation. As a result, a CVD was imposed on Canadian live swine exports but not on pork exports.

About a month after the Court's rulings, an amendment to section 771B of the U.S. Tariff Act was presented in the U.S. Senate. One of the amendment's sponsors, Senator Max Baucus, criticized the Court's reversal of the ITA pork ruling and stated that section 771B "directs the Commerce Department to place duties on processed agricultural products if the raw agricultural product is being subsidized."[65] Section 771B reads as follows:

> In the case of an agricultural product processed from a raw agricultural product in which
>
> (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
>
> (2) the processing operation adds only limited value to the raw commodity, subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

Armed with this amendment, the U.S. producers filed a second countervail petition against Canadian pork producers in January, 1989. On this occasion both the ITA and ITC determined that a countervailing duty on Canadian pork imports was justified. The ITA applied the new section 771B in reaching its conclusion that Canadian subsidies for live swine production also constituted subsidies for pork products. There are interesting similarities between the Canadian-U.S. disputes involving pork and softwood lumber. In both cases producer petitions for CVDs were initially turned down but later approved as a result of new U.S. legislation or new interpretations of existing rules.[66]

Canada launched appeals of the U.S. trade rulings under both the GATT and the Free Trade Agreement. At the GATT panel proceedings, Canada argued that the American CVD on pork was greater than the amount of Canadian subsidies provided to pork producers. This was contrary to GATT Article VI:3 which states that the countervailing duty on a product should not exceed the subsidy "granted, directly or indirectly, on the...production...of such product." The GATT panel supported Canada's complaint in August, 1990, and it criticized the ITA for assuming that government subsidies to Canadian hog producers automatically flowed through to processors without requiring a supporting study.[67] The United States, however, refused to agree to the GATT Council's adoption of the panel report. The reason given was that the U.S. was awaiting the outcome of two binational dispute settlement panels which were also dealing with the Canadian complaints. It is therefore important to turn to an examination of the binational panels.

Under the Free Trade Agreement, various Canadian groups issued two appeals. First, they maintained that the ITC had used faulty statistics and analysis when determining that subsidized Canadian pork imports threatened damage to the U.S. industry. Second, they argued that the ITA had overestimated the amount of government subsidy paid to Canadian producers. Two binational dispute settlement panels were

established to deal with these appeals, and they both issued reports critical of the U.S. pork countervail.[68] The first binational panel concluded that the ITC had relied on inflated statistics for Canadian pork production which led it to overestimate the threat of increased exports to U.S. producers. The second binational panel maintained that the ITA's methodology was flawed when deriving subsidy figures for pork production from subsidies for live hogs. It also questioned the ITA's judgment that all the subsidies were limited to specific Canadian industries rather than being generally available.[69] As a result, the two panels remanded the pork case to the ITC and ITA for reconsideration.[70]

In late 1990 the ITC and ITA responded to the binational panels by basically reaffirming their earlier decisions that a pork countervail was justified. Not surprisingly, Canada again appealed these remand decisions to the two binational panels for reconsideration. In January, 1991, the binational panel for the ITC criticized the decision for a second time.[71] It judged that the ITC had committed errors of law and that the Commission's findings of material injury were still not adequately supported. In response to this second panel review, the ITC reversed itself and determined that the U.S. industry was not threatened with material injury from Canadian pork imports. Canadian officials described this as a great victory for the country's pork industry.

However, the ITC reversal did *not* mean that the pork levy would be immediately revoked. Under the FTA a government has 30 days to file one last appeal, an "extraordinary challenge", if it alleges that one of the following conditions has been met: 1) a panel member was guilty of gross misconduct, bias, or a serious conflict of interest; 2) a panel seriously departed from a basic rule of procedure; or 3) a panel exceeded its powers, authority or jurisdiction.[72] These conditions are highly unusual, for in eleven previous cases there had been no extraordinary challenges. But the pork case was different for several reasons. Although the ITC reluctantly retracted its injury decision, it decided to expedite one last appeal by criticizing the binational panel. Two Commissioners even charged that the panel decision "violate[d] fundamental principles" of the FTA and "contain[ed] egregious errors under U.S. law."[73] Then the National Pork Producers' Council exerted considerable pressure on the U.S. administration to launch an extraordinary appeal. The *New York Times* in fact estimated that the Council had lined up 38 senators and 51 members of the House of Representatives to press its case.[74] At this time the Bush administration was exceedingly vulnerable to Congressional pressure, since legislative support was necessary for fast-track authority to begin free trade negotiations with Mexico and to extend the GATT Uruguay Round.

Over strong Canadian objections, in March, 1991, the Office of the U.S. Trade Representative (USTR) therefore filed a request for an extraordinary challenge committee. In accordance with the FTA (Annex 1904.13) a committee of three former judges was formed. On June 14, it issued a unanimous ruling that "the allegations do not meet the threshold for an extraordinary challenge."[75] The Progressive-Conservative government of Brian Mulroney hailed the ruling as an indication that the FTA mechanisms were working, and the Bush administration indicated that it would accept the binational panel's decision. The United States also finally agreed to adopt the GATT panel report of almost a year earlier which had taken issue with the countervail on Canadian pork. But whether the U.S. actually changes its legislation on upstream subsidies remains to be seen.

In some respects the outcome of the pork countervail case seems to bode well for the FTA dispute resolution mechanisms. Unlike the GATT, panel decisions in the FTA dispute resolution process are binding on the parties involved. Since the U.S. extraordinary appeal was unsuccessful, the authority of the binational panel process was further strengthened. Hence it is less likely now that the United States and Canada will launch an extraordinary appeal primarily for political reasons, although the very fact that the extraordinary appeal process exists may provide the temptation to use it. Furthermore, since binational panels remanded the ITA and ITC decisions on several occasions, national investigatory bodies will feel pressure to adopt more objective and economically-sound procedures. This case also demonstrated that the FTA in no way prevents the U.S. and Canada from continuing to use the GATT mechanisms in settling their disputes. In fact, the GATT and FTA dispute resolution processes were complementary because they were examining different aspects of the pork case. Since a binational panel can only determine whether or not a country's CVD decisions are made *in accordance with its own laws*, the panel cannot make judgments about the laws themselves. In contrast, the GATT can determine whether or not a country's laws are consistent with the General Agreement. The GATT was therefore able to pass judgment on the U.S. upstream subsidy law, while the binational panels were limited to questioning the accuracy of U.S. methodology and statistics. Since the FTA and GATT panels made similar decisions in the pork case, the bilateral and multilateral processes were mutually reinforcing.

Still, the protracted and bitter nature of the pork countervail dispute provides some reasons for concern. First, one advantage attributed to the FTA supposedly was the more rapid procedure for appealing trade relief cases. Whereas Canadian groups appealing to the U.S. Court

of International Trade sometimes had waited two years for a decision, a 315-day deadline is built into the FTA's appeal process. But in the pork case two binational panel reviews followed by an extraordinary challenge review contributed to a lengthy appeal process. Furthermore, there is evidence that the FTA in some respects detracted from the GATT's authority. While the GATT procedures permit parties involved in a dispute to veto the adoption of Council reports, it is politically difficult for states to exercise such a veto. But in the pork case the United States justified an eleven-month delay in adopting the GATT report by maintaining that it was awaiting the outcome of the FTA panel investigations. A number of GATT members expressed concern over the U.S. delay, and the European Community and Japan viewed the pork case as demonstrating that the U.S.-Canada FTA was hindering the effective functioning of the GATT dispute resolution process.[76]

It is also uncertain that the FTA mechanisms were given precedence over domestic politics. The FTA stipulates (in Annex 1904.13) that an extraordinary challenge committee is to make a decision within 30 days of its establishment, and the committee's decision in the pork case was due on May 15, 1991. Congress had until June 1 to respond to the Bush administration's request for fast-track approval (for free trade negotiations with Mexico and an extension of the Uruguay Round), and there were fears that a negative pork decision would fuel opposition to the fast-track request. But the extraordinary challenge committee was granted an extra month to complete its work, delaying its ruling until *after* the Congress had approved fast-track authority. If this delay had not been possible, it is less certain that the United States would have so graciously accepted the ruling of the extraordinary challenge committee. The pork lobby's warning that it would continue to monitor Canadian shipments closely, and the U.S. decision in June, 1991, to increase the CVD on Canadian hog exports were reminders that the dispute still lingered. Canada, Quebec, and the Canadian Pork Council all have requested that a binational panel review this latest decision.

Corn

As with hogs and pork, the United States is a much larger producer of grain corn than Canada; in 1986-87 the U.S. produced 200.6 million metric tons of corn while Canada produced only 5.9 million tons. Cross-border trade in feed grains is relatively free of restrictions, and the United States has traditionally exported corn to the deficit eastern Canadian market. In recent years American exports have declined partly because of substantial increases in Canadian production. By 1986

U.S. corn accounted for only 4.5 percent of the Canadian market compared with about 20 percent six years earlier, and it had become a major crop in Ontario. Still, in the fall of 1986 the Ontario Corn Producers' Association launched a countervailing duty suit, claiming that U.S. corn subsidies were causing material injury to Canadian producers. The Association maintained that Canadian farmers were selling their corn at well below the cost of production because U.S. farm legislation had depressed prices.

In a final decision in February, 1987, the Department of National Revenue found that four U.S. programs conferred countervailable subsidies since they provided commercial benefits to producers and were targeted to particular groups (as opposed to being generally available). A month later the Import Tribunal judged that U.S. grain corn was causing material injury to Canadian producers. It found that the 1985 U.S. farm bill had lowered corn prices in an effort to recover lost export markets while giving American farmers deficiency payments to protect their incomes. The American industry was so large that subsidies encouraging increased production strongly influenced the world market price for corn, and the lower prices were rapidly transmitted to Canada because of close linkages between the two countries' corn markets. In fact, major purchasers of Canadian grain corn were able to insist upon prices which were no higher than those set at the Chicago Board of Trade.

The corn case was precedent-setting in that it was the first time a CVD was levied against U.S. producers. In Hart's view it was "not an accident that the first countervail case involving the United States was in the agricultural sector where the level of subsidization is high, the range of affected products is narrow and the exported quantities are relatively large."[77] Nevertheless, some questions could be raised about the Canadian corn case since countervail relief was granted even though an increased flow of subsidized imports into Canada could not be demonstrated. The GATT Subsidies Code (in Article 6.1) and Canada's Special Import Measures Act require that material injury result not simply from foreign subsidies but from subsidized *imports*. However, the Import Tribunal's decision was not based on the view that subsidized imports of U.S. corn were lowering prices in the Canadian market. The Tribunal explained this discrepancy by claiming that the term "*subsidized imports*" could include *potential imports*, and that U.S. grain corn imports would have increased substantially if Canadian producers had not lowered their prices. It is interesting to note that the Tribunal's affirmative injury finding was made in a split 2-1 decision, with the lone dissenter maintaining that it had not adequately related injury to subsidized imports.[78]

The effect of the countervail ruling on American corn producers was limited since only about one percent of U.S. corn exports is normally sent to Canada. But the ruling had more generalized implications because it demonstrated that CVDs could be levied against U.S. producers. The ruling embarrassed the Reagan administration, which had often criticized the subsidies of other states. An editorial in the *New York Times*, acknowledging that U.S. corn farmers were heavily subsidized, also cautioned that the decision's impact could be substantial because "other American commodities are subsidized in the same way, and Canada's action could serve as a precedent for other governments."[79] The far-reaching implications of the corn duty partly explain the strong negative reaction to it by American political leaders. For example, the secretary of agriculture argued that the corn CVD was inconsistent with efforts to bring about freer bilateral trade, and the Senate voted 99-0 to ask the U.S. trade representative to determine whether the CVD violated the GATT. However, a Washington, D.C. trade lawyer offered some penetrating comments about the U.S. response:

> This is a tremendously significant step because, until now, Congress has acted as if the United States was invulnerable. One of the reasons why countervailing duty cases are the United States' chosen weapon is that no one ever used that weapon against the United States.
>
> There is a clear perception within the U.S. government (both Congress and the administration) that the United States is pure and the rest of the world is unfair. It makes foreign companies dealing in the United States absolutely livid.[80]

A former Canadian finance minister expressed even stronger views, indicating that the corn CVD action exposed "United States subsidy practices...[and] the inconsistency of United States officials ... who have condemned the Canadian tribunal for doing precisely what the U.S. has been attempting to do to Canada and to others."[81]

It is interesting that a number of Canadian industry associations such as the Industrial Corn Users Group and the Association of Canadian Distillers also opposed the CVD since they had to pay more as corn users. Shortly after its affirmative injury decision, the Canadian Import Tribunal conducted a public interest inquiry, the first time such an inquiry had been held. Under Section 45 of SIMA the Tribunal can hold an inquiry if it feels that Canadian CVDs might not accord (wholly or partly) with the public interest. After hearing from Canadian producer, user, consumer and governmental interests, the Tribunal recommended that the CVD be retained, but at a lower rate. Although the CVD was

lowered, the Canadian Industrial Corn Users Group and the American Farm Bureau Federation launched separate appeals, claiming that Canadian producers were not injured by U.S. subsidies because imports into Canada had not increased. Still, the Supreme Court of Canada upheld the imposition of the countervail.[82]

Since the United States and Canada were unable to resolve their differences over the corn duty in bilateral consultations, in July, 1991, the U.S. government requested that a GATT panel be established to investigate the case. In February, 1992, the panel ruled that Canada had used incorrect methodology when imposing the CVD on U.S. corn. It supported the American claim that Canada had not adequately linked subsidized imports of U.S. corn with injury to the Canadian industry. As with the U.S. pork case, questions could also be raised about politicization of the process in the Canadian corn case. Indeed, the timing of the corn case is certainly of interest. The Canadian corn decision occurred only three weeks after the U.S. International Trade Administration had reversed itself in the softwood lumber case, and some analysts speculated about retaliation. Canada was also understandably disturbed by the disastrous effects of the U.S.-EC export subsidy war, and the corn case was possibly one means of confronting the United States on this issue. While the GATT faulted Canada for not drawing adequate linkages between subsidies and injury in the corn case, the fact remains that U.S. subsidy practices had received center stage in a CVD case for the first time. Hence the corn case remains of considerable importance when examining the evolution of countervailing duty issues.

It is interesting that the corn countervail expired in March, 1992, a month after the negative GATT panel decision, because SIMA has a "sunset provision" under which all CVDs automatically expire after five years. A duty can only be extended if the Tribunal conducts a public review and finds that the Canadian industry continues to be threatened by subsidized imports. Unlike the Canadian countervail system, the U.S. system permits countervailing duties to be imposed indefinitely without further review. The Canadian sunset clause reflects the spirit of the GATT Subsidies Code, which states (in Article 4.9) that "a countervailing duty shall remain in force only as long as, and to the extent necessary to counteract the subsidization which is causing injury." The Dunkel proposals for world trade reform more explicitly include a sunset provision similar to Canada's. If this new rule is adopted, GATT members could only apply CVDs for a period of five years. To extend a duty it would be necessary to review the case and demonstrate anew that foreign subsidies were still a source of material injury.

The hog/pork and corn cases demonstrate how problematic the issues of subsidies and countervailing duties can be in Canadian-American agricultural trade relations. First, disputes over trade relief measures are not limited to a few agricultural commodities where one or both countries are unduly protectionist:

> Commodities that have been the center of U.S.-Canadian trade disputes have not always been those where border protection—that is, tariffs, quotas, licenses—has been the most restrictive. Rather complaints have tended to focus on domestic programs that effectively alter the production function, terms of trade, or comparative advantage for one country's commodity(ies) over the other's...Disputes have arisen over corn and hogs because trade is relatively unhindered by restrictions and the products flow to the best return.[83]

The pork/hog and corn cases also demonstrate the need to establish common definitions of trade-distorting subsidies and clear guidelines for dealing with them. The Subsidies Code is an agreement on the interpretation and application of three GATT Articles (VI, XVI and XXIII) that deal with antidumping and countervailing duties, subsidies, and dispute settlement. Important elements of the Subsidies Code were subsequently incorporated in the 1979 U.S. Trade Agreements Act and the 1984 Canadian Special Import Measures Act. However, the Code does not explicitly define a trade distorting domestic subsidy, and it does not explain how an economic analysis of causality (i.e., whether subsidies cause material injury) should be conducted. A particularly difficult aspect of the hog/pork and corn cases was that most of the subsidies mentioned by American and Canadian complainants were not specifically export subsidies. The Subsidies Code is more readily understandable in cases where an exporter sells subsidized products at prices that are lower than domestic prices.[84]

Since a consensus on these issues is lacking, subsidy-countervail cases are vulnerable to politicization at the national level and to bilateral disputes and misunderstandings. In the hog/pork case, the U.S. trade relief process became highly politicized at various stages, stretching from the amendment of the law on upstream subsidy determinations to the decision to launch an extraordinary appeal. The repeated questioning of the American pork countervail decision in the GATT and FTA panels also raises serious questions about the objectivity and rigor of U.S. investigatory bodies, even in interpreting their own country's legal regulations. The timing of the corn countervail case, coming so soon after the U.S. Commerce Department reversed itself in the softwood

lumber case, suggests that the Canadian process also was unduly politicized. Furthermore, a GATT panel raised serious questions about the findings of Canada's investigatory bodies in the corn case. Finally, the Import Tribunal's vote in the corn case was split and several of the ITC and ITA decisions in the pork/hog case were also made with widely split votes and expositions of the law, indicating that the guidelines in countervail cases are open to markedly different interpretations.

Article 1907 of the Free Trade Agreement calls for a Canada-U.S. working group to "develop more effective rules and disciplines concerning the use of government subsidies," and to "develop a substitute system of rules for dealing with unfair pricing and government subsidization." Although negotiations on these issues are to be completed within five to seven years, they have been largely postponed. The hope is that the Uruguay Round will move towards developing a strengthened GATT Subsidies Code which would provide a basis for the establishment of common procedures in the FTA.[85] A stronger Subsidies Code is of particular importance to Canadian-American relations in the agricultural sector. The reasons relate to the high level of subsidization in agriculture and to the impact of third-country subsidies and trade barriers on North American agricultural producers. Thus the United States and Canada "agreed that domestic agricultural subsidies, and export subsidies into third markets for agricultural products, could only be negotiated multilaterally in the Uruguay Round of GATT negotiations."[86] Consequently some attention should be given to the role of international organizations in this area.

To compare subsidies in agriculture, the Organization for Economic Cooperation and Development (OECD) has utilized the concept of "Producer Subsidy Equivalents" (PSEs). The PSE "measures the value of the monetary transfers to farmers from consumers of agricultural products and from taxpayers resulting from agricultural policy."[87] OECD officials have viewed a rise in the total PSE of member countries in recent years as an indication of the resistance to agricultural reform. When PSE figures are expressed in terms of a percentage of the value of output, the two OECD countries with the lowest degrees of support in 1990 were New Zealand (5 percent) and Australia (11 percent). While Canada's 41 percent PSE in 1990 was below that of Japan's 68 percent and the European Community's 48 percent, it was well above the 30 percent figure for the United States.[88] Hence one should not underestimate the degree to which Canadian agriculture is subsidized. But the PSE is a controversial measure of agricultural support because it does not differentiate between subsidies which are, and are not, trade-distorting. The OECD and other organizations at both the national and international

levels also use different methods of calculating PSEs, and their findings are sometimes widely divergent. In addition, the overall subsidy figure for each country can be misleading if one does not also compare subsidies provided for individual commodities. Until the international community develops a consensus on appropriate methods of measurement, the accuracy of such comparisons is questionable.

Canadian officials sometimes argue that it is important to determine the *source* of higher subsidy levels as well as the amount of subsidies provided. They indicate that Canada did not initiate the move to higher subsidization of agriculture, and that the increase in Canada's PSE largely reflects income support payments made to grain producers to help insulate them from the price-depressing effects of EC and U.S. export subsidies. In the past ten years there has been massive support for Canadian farmers, with federal and provincial governments providing about 17 billion dollars in aid since 1980. Despite this assistance, the House of Commons agriculture committee has determined that the careers of almost 50,000 farmers, about one-fifth of Canada's farm population, are threatened. A major source of the problem is that prices for domestic grains and oilseeds, accounting for about 40 percent of the value of Canadian agricultural production and for over 70 percent of farm exports, are exceedingly low.[89]

The United States and Canada are both looking to a GATT Uruguay Round agreement to sharply reduce and eventually phase out agricultural export subsidies. The GATT also must arrive at a consensus on the terms and use of an aggregate measure of support (AMS) which would calculate the degree to which domestic subsidy measures for agriculture are trade distorting. Proposals have been made that domestic agricultural subsidies be classified under green, amber, and red categories, with the green programs not subject to CVDs, and the red programs most subject to countervail. Subsidies that are "decoupled" from production levels would not contribute to exportable surpluses and would therefore be viewed as green programs.

In summary, the FTA has moved beyond the GATT in some important respects with regard to countervail disputes. For example, the FTA's dispute resolution procedures are binding on the parties involved and are conducted according to a more rigorous timetable. Nevertheless, the U.S.-Canadian working group is unlikely to develop a set of bilateral rules on subsidies and CVDs in the 5 to 7-year period provided, since many subsidy issues, especially in agriculture, cannot be resolved bilaterally. As Schott has noted, "in the absence of multilateral discipline, any `bilateral disarmament' by the United States and Canada would put the two countries' exports at a disadvantage in world markets

vis-a-vis countries that maintained large subsidy programs, such as those in the European Community and Japan."[90] There are also some fundamental differences between U.S. and Canadian approaches to subsidies which are likely to be bridged only through multilateral rule-setting. For example, the United States has regularly considered Canada's regional development programs to be countervailable subsidies, while Canada has maintained that such programs are purely domestic economic measures.[91]

In the GATT Uruguay Round major efforts are underway to establish the necessary multilateral guidelines. Participants agreed to a multilateral negotiating framework for dealing with subsidies, CVDs, and dispute settlement procedures at the December, 1988, Ministerial Mid-Term Review in Montreal. Furthermore, the Dunkel proposals issued in December, 1991, could represent a major breakthrough in addressing these issues if they are adopted. The proposals provide a definition of a subsidy for the first time in an international agreement, and they also contain countervail improvements such as stronger rules for injury determination.

TECHNICAL STANDARDS AND REGULATIONS

As with trade relief measures, technical standards and regulations can serve both as remedies for undesirable conditions (such as inadequate health and sanitary conditions), and as an excuse for protectionism. The Tokyo Round "Agreement on Technical Barriers to Trade" (or the "Standards Code") points to this dual effect of standards in its preamble. On the one hand, the Code indicates that "no country should be prevented from taking measures necessary...for the protection of human, animal and plant life or health," and it recognizes "the important contribution that international standards and certification systems can make in...facilitating the conduct of international trade." On the other hand, the Code also endeavors "to ensure that technical regulations and standards...do not create unnecessary obstacles to international trade."[92]

The Standards Code was developed because of the General Agreement's shortcomings in dealing with this issue. For example, GATT Article XX(b) permits members to adopt and enforce measures "necessary to protect human, animal or plant life or health." No criteria are provided, however, for judging whether such regulations are necessary, and no dispute-settlement mechanism is outlined. Unlike the GATT, the Standards Code has a complex dispute settlement procedure which involves several stages of consultation. The Code deals with agricultural as well as industrial products, but agriculture was some-

what of an afterthought. Indeed, it was not until the latter part of 1978 that a number of amendments were added to the Draft Code to make it applicable to agricultural products before the Code was approved in its final form in March, 1979. While the Code has been fairly effective "in governing the use of standards in industrial trade, it has not been an adequate instrument in settling disputes among signatory countries over phyto-sanitary and sanitary restrictions" in agriculture.[93] The limitations of the Standards Code are understandable, since there are inherent difficulties in developing common standards for a large group of economically and culturally-diverse countries.

Historically, the United States and Canada have periodically accused each other of using technical regulations and inspection practices as a means of imposing agricultural trade barriers.[94] The Free Trade Agreement reaffirms the commitment of the two countries to the multilateral Standards Code, and also addresses the issue of standards in a bilateral context. Chapter 6 of the FTA deals with technical standards for non-agricultural goods, and Article 708 is designed to reduce regulatory barriers and harmonize health and sanitary regulations in food and agriculture. (Article 708 states that "where harmonization is not feasible", the two countries should "make equivalent their respective technical regulatory requirements and inspection procedures.") The ultimate goal is to establish "an open border policy with respect to trade in agricultural, food, beverage and certain related goods." To implement Article 708, nine working groups were established for animal and plant health, meat and poultry inspection, veterinary drugs, pesticides and so forth; these groups are to meet at least once a year. However, the first progress report of the Meat and Poultry Inspection group in early 1991 indicated that some of the border inspection problems were in fact increasing:

> The major focus of work has been Canadian concerns about U.S. border meat inspection practices. The response to these concerns is the proposed one-year experiment to eliminate reinspection of meat exported by federally inspected plants. Delays in implementing the experiment by the U.S. have prompted Canadian action to implement a reciprocal meat inspection process for imports of U.S. meat.[95]

A more detailed examination of this case will provide some understanding of the problems in dealing with technical standards and border inspection issues.

Border inspection of meat products had periodically been a contentious issue between the United States and Canada, and it re-emerged as

an important issue shortly before the FTA was enacted. The United States had originally inspected imported meat products only at their final destination, but the U.S. Department of Agriculture's OIG felt that inspectors at some plants were unqualified to perform this task. As a result, the 1987 Omnibus Trade Bill stipulated that point-of-entry inspection would become mandatory for all U.S. meat imports. To implement this measure the administration encouraged customs brokers to invest a substantial amount of funding to build private re-inspection stations at border points. Ironically, new re-inspection stations were being built at the same time as the United States and Canada were developing general guidelines for the harmonization or equivalence of standards in the Free Trade Agreement. Schedule 10 of Chapter 7 in the FTA deals specifically with meat, poultry and egg inspection, and stipulates that, when harmonization or equivalence is attained, the two countries should minimize inspections. Meat inspection was in fact selected as one of the first areas for harmonization, because the USDA and Agriculture Canada had already established similar inspection systems. As a result, the USDA's Food Safety and Inspection Service (FSIS) agreed in January, 1989, to adopt streamlined procedures in which Canadian meat imports were subject only to "spot checks" rather than inspections of every shipment.[96]

In the United States the streamlined procedures were highly controversial. Some officials pointed to an increased rejection rate of Canadian meat, and claimed that the new procedures provided inadequate protection which did not inspire consumer confidence. The private customs brokers also lobbied Congress for action, claiming that the U.S. government had encouraged them to build border stations in 1988 and that the frequency of inspections was much less than they had expected. Responding in the spring of 1989 the FSIS introduced an intensified program to inspect additional Canadian meat shipments and Canadian truckers had to contend with rising costs for each inspection. If a producing plant's shipment was rejected, the next fifteen loads from that plant were stopped and checked. Canadian shippers viewed the more vigorous U.S. meat inspections as a form of trade barrier that subverted the FTA and threatened to retaliate.

The USDA and Agriculture Canada held discussions in efforts to resolve this dispute. On February 26, 1990, they announced that a one-year experiment would be instituted in which the streamlined procedures would be replaced by an "open border" between the two countries. Thus, meat and poultry products approved and graded in one country would be accepted at the border by the other country without re-inspection. The open border plan could be implemented by cabinet order under Canadian law, but in the United States it had to be published

in the Federal Register and discussed during a period of public comment. This gave U.S. opponents such as the owners of private inspection stations, the unions representing meat inspectors, and their congressional supporters time to organize and express their complaints. The government's response to these complaints was inevitably affected by marked differences within the bureaucracy. For example, the Food Safety Inspection Service had determined that the Canadian and U.S. inspection systems were equivalent, as a deputy administrator of the FSIS told a subcommittee of the U.S. House committee on agriculture:

> Canada is, very simply, unique among the countries that export to the United States. Canada's inspection system is virtually the same as our own. On any given day, inspection in any Canadian meat or poultry plant is the same as in any U.S. plant. Canada does not have a different standard for its domestic products than for products exported to the United States. Like the United States, it has a single standard of inspection for all plants....To meet specific provisions of the [free trade] agreement, FSIS modified reinspection requirements for Canadian meat and poultry products. These modifications do not affect basic consumer protection. This is because the Free Trade Agreement did not change the way Canada inspects products at its plants.[97]

But the General Accounting Office was highly critical of this assessment, and it argued extensively that the FSIS findings were outdated and insufficiently documented. The GAO also questioned whether the open border proposal conflicted with requirements of U.S. meat inspection laws, and it indicated that Congress would have to amend the Federal Meat Inspection Act if a permanent open border was to be established.[98] In July, 1990, the USDA published details of the open border agreement for 30 days of public comment, but negative reaction was so strong that the comment period was extended.[99]

It is not the purpose here to offer judgments about competing claims regarding the relative quality of American and Canadian meat inspection standards. But it does appear that the lengthy period of public comment had the unfortunate effect of maligning the reputation of Canadian meat in the United States. The fact that Congressional support for many of these complaints occurred prior to the November, 1990, U.S. elections is certainly of interest. Senator Max Baucus, chairman of the international trade subcommittee of the committee on finance, is a Montana Democrat who is friendly to the U.S. meat industry. In September Baucus called hearings on bilateral trade frictions and much

of the discussion was devoted to the meat issue. A U.S. assistant secretary of agriculture defended the quality of Canadian meat and the open border agreement during the hearings, but there were also many critical comments, particularly from special interest groups. The press certainly contributed to rhetoric on this issue. For example, a *New York Times* article entitled "Poisoned Meat from Canada" began with the claim that "poisoned meat is being imported into the U.S. from Canada as a result of the fast-track procedure under which Congress approved the free trade agreement of 1988." This article drew an angry response from the Canadian ambassador to the United States. Adopting the other extreme, he argued that "Canada has the highest quality of meat inspection in the world."[100]

In contrast to the United States, Canada conducted import inspections, not at ports of entry, but at destination points where trucks were unloaded. The U.S. plant also did not have to pay a fee for using Canadian inspection facilities. But in July, 1991, the Canadian cabinet approved a system of border inspections patterned after the American model after concluding that the United States was not going to implement the open borders agreement. While Canadian officials still preferred open borders, their border inspections would continue in the interim. The U.S. Department of Agriculture formally withdrew from the open border agreement in October of 1991, claiming that it could not be implemented until Canada's inspection system was proved to be equivalent to that of the United States.[101]

The meat inspection dispute illustrates the difficulty of upholding national prerogatives to impose health and sanitary standards while ensuring that these standards are not used as an excuse to further trade protectionism. The dispute also demonstrates the inadequacies of the FTA and the GATT Subsidy Code provisions in resolving disputes on the basis of sound scientific evidence. There were major disagreements, not only between U.S. and Canadian "experts," but also among experts within each country; this was especially the case for the United States. Statistics on meat inspection also demonstrate great variation in the amount of Canadian shipments rejected at different U.S. border stations. The Sweetgrass, Montana, inspector's decisions were especially controversial, since his rejections accounted for 30 percent (by weight) of imported Canadian meat turned down in 1989 and for 39 percent in 1990. During the first seven months of 1991, rejection rates under the U.S. intensified program ranged from a low of 1.9 percent at the Buffalo point of entry to a high of 16.9 percent at the Sweetgrass station. The average rejection rate for all entry ports was 6.5 percent.[102]

The meat inspection dispute also provides further evidence that the FTA has contributed to bilateral agricultural trade disputes in some respects. Previously we noted that Canada added ice cream and yogurt to its import control list as a result of the planned removal of tariff barriers on processed foods under the FTA. The U.S. implementation of a border inspection system for meat imports actually preceded the enactment of the FTA, but there is no doubt that the FTA added impetus to the drive for a more rigorous American inspection system. The meat and dairy cases indicate that farming groups in both countries have sometimes felt threatened by open borders and have demanded protection.

It is evident that strengthened GATT guidelines in the area of technical standards would provide a needed boost to FTA efforts to promote more open borders. The framework for agriculture established during the Uruguay Round mid-term review in 1989 included a plan for dealing with sanitary and phytosanitary regulations in agricultural trade. The ministers agreed that there should be a harmonization of national regulations and that a work program should be implemented to achieve this goal. The work program was also designed to strengthen GATT Article XX so that health measures are consistent with sound scientific evidence, to establish effective notification and consultation procedures, to ensure transparency of regulations, and to facilitate the resolution of disputes.[103] The Dunkel proposal of December, 1991, also includes provisions for the application of sanitary and phytosanitary measures in agriculture, and it clearly indicates that this area will be covered by the GATT dispute settlement procedures.

While stronger GATT guidelines would be beneficial to the Free Trade Agreement, the U.S. and Canada must also look to resolving their differences in this area in a bilateral context. The two countries already have similar policies with regard to health and sanitary regulations, and FTA initiatives could have a positive "demonstration effect" in the GATT. The FTA's technical working groups have already made progress in a number of areas. For example, the United States and Canada have agreed to notify and consult each other before modifying regulatory programs, they are attempting to develop equivalent policies in a wide variety of animal health areas, and they are reviewing their pesticide policies and regulations with a view to harmonization. As with the other areas discussed in this paper, the extent to which multilateral and bilateral approaches to technical regulations are mutually beneficial depends in large part on the outcome of the Uruguay Round.

CONCLUSION

This study has dealt with several problematic areas of Canadian-American agricultural trade relations, including the GATT exceptions and waivers, trade relief (or trade remedy) measures, and technical regulations and standards. The GATT has failed markedly to deal with agricultural trade issues, largely because of the unwillingness of countries to subject their domestic agricultural policies to international discipline. Nevertheless, since many governments are so vulnerable to domestic pressures against agricultural reform, it is only within a multilateral context that they can eventually succeed in bringing about broad-ranging trade liberalization:

> Concerted policy-disarmament by all countries reduces the size of the adjustments required of each; reform is more politically acceptable if the economic costs of adjustment are seen to be widely and equitably shared; and externally-specified obligations can provide the political "cover" needed to effect changes that are desired but which are too politically sensitive to be tackled solely in a national context.[104]

Although the Free Trade Agreement deals with some aspects of agricultural trade, it simply cannot substitute for the GATT in this area, particularly because both countries send their all-important grains and oilseed exports primarily to third countries. Many disputes related to cross-border agricultural trade are also unlikely to be resolved in the absence of clearer GATT guidelines. This study has demonstrated that a new multilateral agreement is essential in a variety of areas, including the following:

1. The Free Trade Agreement bans agricultural export subsidies on commodities traded between the two countries, but it cannot deal effectively with the U.S. Export Enhancement Program which is directed to third-country markets. The GATT Article XVI exception for agriculture must be revoked or gradually phased out if the export subsidy issue is to be resolved. Furthermore, while the FTA addresses the issues of export pricing by public entities (such as the Canadian Wheat Board) and of transportation subsidies on exports between the two states, only the GATT can establish rules for the use of such practices with third countries.

2. The FTA calls for a small increase in Canada's global quotas for some supply-managed commodities such as chickens, turkeys and eggs, but it does not address the issue of quantitative restrictions in general. A resolution of bilateral differences regarding Canada's import restrictions for processed dairy and poultry products, and regarding the

United States' 1955 GATT waiver is unlikely in the absence of an Uruguay Round agreement. The tariffication proposal currently under consideration at the GATT could result in both an end to the Article XI exception for agriculture, and to the U.S. waiver.

3. The FTA has established a binational dispute settlement panel system and has set forth a five- to seven-year goal for developing joint rules for the use of subsidies and trade relief measures. However, the United States would be reluctant to move very far on this issue bilaterally while its main protagonists, the EC and Japan, continue to have large-scale subsidy programs. Hence the U.S. and Canada have delayed negotiations on this issue while awaiting GATT efforts to develop a stronger subsidies code. The Dunkel proposal provides a GATT definition of subsidies for the first time, and such a framework is necessary for a resolution of subsidy-related issues in the FTA.

4. The FTA has already registered some progress in the area of technical standards and regulations. Nevertheless, protracted bilateral disputes over issues such as meat inspection indicate the importance of GATT efforts to develop stronger guidelines regarding sanitary and phytosanitary regulations.

This study has also focused on some potentially detrimental effects of the Free Trade Agreement. Several instances were examined where the FTA actually contributed to heightened conflict, including the issues of Canadian import restrictions on processed dairy products and U.S. border restrictions on meat imports from Canada. One instance was also discussed where the FTA seemed to interfere with GATT's resolution of a dispute. In this case the United States waited for eleven months before agreeing to the adoption of a GATT panel report on its pork countervail. Its excuse for the delay was that it was awaiting the results of two binational dispute settlement panels and of an extraordinary appeal under the Free Trade Agreement. An effective Uruguay Round agreement in agriculture would provide more guidance for evolving U.S.-Canadian relations in this area and this would tend to delimit conflict resulting from the FTA.

Despite some negative effects of the Free Trade Agreement, on balance its impact in agriculture has been mainly positive. It is often easier for only two states to negotiate policy changes, particularly if they are as similar and and as interdependent as the United States and Canada. The FTA has moved beyond the GATT and has also served as a stimulus to the GATT in certain areas. For example, there is no consensus on the multilateral use of binding arbitration in dispute settlement, and the bilateral arrangements go further than anything feasible in the GATT in this area. Technical regulations and standards

are another area where the bilateral venue offers particular advantages. Both the GATT and the FTA are negotiating strengthened guidelines for sanitary and phytosanitary standards in agriculture, but it is more difficult to establish common standards for the economically and culturally-diverse membership of the GATT. Despite the difficulties discussed in the border dispute over beef imports, many issues related to standards can be best resolved in a bilateral context, and these initiatives can have an important demonstration effect in the GATT.[105]

To this point I have focused on bilateral and multilateral strategies for bringing about agricultural trade reform, but unilateral strategies should also be considered.[106] Unilateral strategies have often had destructive effects on agricultural trade liberalization, and the U.S.-EC export subsidy war is a prime example of the resultant problems. However, there are strong domestic pressures in OECD states today to decrease expenditures and reduce state intervention, and the question arises whether the United States and Canada (and also the EC) will move unilaterally towards agricultural trade liberalization. As Paarlberg states, international relations scholars have devoted too little attention to the possibilities for unilateral liberal policy reform:

> Among liberal internationalists..."unilateralism" has a bad name. The opposite approach—"cooperation"—is taken as something close to a supreme value. There is some historical basis for this association between unilateralism and illiberal policy (in the 1930s), and then in the post-war period between multilateralism and trade liberalization (at least in areas other than agriculture). But unilateral policies do not have to be illiberal, as the repeal of the Corn Laws by itself would seem to indicate. Nor do "cooperative" multilateral policies always reduce barriers to trade—witness the multifiber arrangement.[107]

There are some indications of unilateral liberal policy reform in both countries. For example, the United States has made its grain support programs more flexible and has converted its sugar import quotas into a system of tariffs and tariff quotas. Canada has been involved in a broad-ranging agri-food policy review with the objective of creating an agricultural system that is more self-reliant and market-oriented. As part of the policy review process, committees have been established to report on areas such as safety nets, competitiveness, the dairy and poultry industries, food safety, and transportation.[108] While unilateral strategies for reform are important, there is no doubt that they are complementary with bilateral and multilateral efforts. Thus, the more competitive environment created by the FTA and the prospects for

major changes in the Uruguay Round clearly provided major incentives for Canada to conduct its agri-food policy review.

This study has demonstrated that agricultural trade issues in the industrial states are particularly resistant to resolution. As a result, multilateral, bilateral and unilateral efforts are all essential to liberalization. It is uncertain whether these efforts will succeed, since even countries such as the United States and Canada which are committed to freer agricultural trade are subject to strong protectionist influences. For example, supply management groups are putting major pressure on the Canadian government to avoid any concessions at the GATT that would jeopardize the interests of dairy, poultry, and egg producers. Supply management is also a national unity issue, since dairy and poultry products account for about 45 percent of gross farm income in Quebec. As for the United States, it is uncertain whether Congressional supporters of various farm groups (e.g., those representing sugar, dairy, peanut and cotton growers) would be willing to accept some of the U.S. GATT proposals, even if they were endorsed by other countries.

The outcome of the GATT agricultural negotiations is therefore uncertain, but the stakes of success or failure are extremely high. When agricultural trade differences at the Uruguay Round could not be resolved in December, 1990, the entire set of negotiations was suspended. This development provides a warning that agriculture can no longer be viewed simply as an exception in the GATT, because a wide range of trading relationships is now at stake. Nevertheless, a resolution of multilateral (and bilateral) differences may involve a recognition that, while agricultural trade liberalization is essential, there might always be more protectionism in agriculture than in other sectors. Anderson and Hayami provide a detailed analysis of the reasons for agricultural protection, but a discussion of their findings is beyond the scope of this paper.[109] As Wilson and Finkle note, agriculture is simply "not seen as an economic activity like the others" for a variety of economic, political, and social reasons. Although classical economists would like agricultural trade to "be made as free and as unsubsidized as possible," governments might always tend to treat their agricultural sectors as an exception.[110]

GLOSSARY

AAA = Agricultural Adjustment Act
ADs = antidumping duties
AMS = aggregate measure of support
CAP = Common Agricultural Policy
CCC = Commodity Credit Corporation
CVDs = countervailing duties
CWB = Canada Wheat Board
EC = European Community
EEP = Export Enhancement Program
FSIS = USDA Food Safety and Inspection Service
FTA = Free Trade Agreement
GAO = General Accounting Office of the U.S. Congress
GATT = General Agreement on Tariffs and Trade
ITC = International Trade Administration of U.S. Department of Commerce
NPPC = National Pork Producers' Council
OECD = Organization of Economic Cooperation and Development
OIG = Office of Inspector General
PSEs = producer subsidy equivalents
SIMA = Special Import Measures Act
USDA = U.S. Department of Agriculture
USTR = Office of U.S. Trade Representative

NOTES

[1] References to the two agreements are taken from General Agreement on Tariffs and Trade, *Text of the General Agreement* (Geneva: GATT, July 1986), and Canada, Department of External Affairs, *The Canada-U.S. Free Trade Agreement* (Ottawa: External Affairs, December 10, 1987).

[2] Gardner Patterson, "Implications for the GATT and the World Trading System," in J. Schott, ed., *Free Trade Areas and U.S. Trade Policy* (Washington, D.C.: Institute for International Economics, 1989), 361.

[3] C. Michael Aho, "More Bilateral Trade Agreements Would be a Blunder: What the New President Should Do," *Cornell International Law Journal* 22 (Winter 1989): 30; Frank Stone, *The Canada-United States Free Trade Agreement and the GATT* (Ottawa: Institute for Research for Public Policy, November 1988), 7; Jeffrey J. Schott, "More Free Trade Areas?," in Schott, ed., *Free Trade Areas and U.S. Trade Policy*, 11. Lipsey and Smith suggest that the tendency to praise the Canada-U.S. FTA more than other free trade agreements results partly from "vague geopolitical sentiment" which "is at the root of many Canadians' concerns"; i.e., "since Canadians and Canada often appear indistinguishable from Americans and the United States...why not bless their union?" See Richard G. Lipsey and Murray G. Smith, "The Canada-U.S. Free Trade Agreement: Special Case or Wave of the Future?," in Schott, ed., *Free Trade Areas and U.S. Trade Policy*, 331.

[4] For a historical discussion of these third-country issues see Theodore H. Cohn, *The International Politics of Agricultural Trade: Canadian-American Relations in a Global Agricultural Context* (Vancouver: University of British Columbia Press, 1990).

[5] It should be noted, however, that Article XXIV's "substantially all trade" requirement has never been clearly defined, and that the European Free Trade Association had totally excluded trade in agriculture and fishery products.

[6] Leo V. Mayer, "U.S.-Canadian Negotiations and the GATT Round: U.S. Perspectives," in *Canada-U.S. Trade in Agriculture: Managing the Disputes* (Guelph: University of Guelph Department of Agricultural Economics and Business, October 1987), 40. For a discussion of the many analysts who doubted that agriculture would be included in the FTA or advised

against its inclusion see Cohn, *The International Politics of Agricultural Trade*, 164-67.

[7] James P. Houck, *The Tokyo/Geneva Round: Its Relations to U.S. Agriculture*—2, Prepared for the U.S. Subcommittee on International Trade, Committee on Finance, U.S. Senate, June 1979, 29.

[8] For a discussion of the hegemonic model and agricultural trade see Theodore H. Cohn, "The Changing Role of the United States in the Global Agricultural Trade Regime," in William P. Avery, ed., *International Political Economy Yearbook*, vol. 7 (Boulder: Lynne Rienner, forthcoming); and Robert L. Paarlberg, "Three Political Explanations for Crisis in the World Grain Market," in William P. Avery and David P. Rapkin, eds., *America in a Changing World Political Economy* (New York: Longman, 1982), 119-46.

[9] Jane M. Porter and Douglas E. Bowers, *A Short History of U.S. Agricultural Trade Negotiations* (Washington, D.C.: U.S. Department of Agriculture, August 1989), 3.

[10] See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (New York: Praeger, 1975), ch. 16.

[11] William J. Davey, "GATT Dispute Settlement: The 1988 Montreal Reforms," in Richard G. Dearden, Michael M. Hart, and Debra P. Steger, eds., *Living with Free Trade: Canada, the Free Trade Agreement and the GATT* (Halifax: Institute for Research on Public Policy, 1989), 175. See also Robert L. Paarlberg, *Fixing Farm Trade: Policy Options for the United States* (Cambridge, MA: Ballinger, 1988), 52.

[12] Various departments and branches of the U.S. government had different views of the EEP and of other programs and policies discussed in this study; for example, the EEP resulted primarily from efforts of the Senate leadership and the Director of the Office of Management and Budget. However, space limitations preclude a detailed discussion here of differences within the U.S. and Canadian governments.

[13] U.S. General Accounting Office (GAO), *Export Enhancement Program's Recent Changes and Future Roles*, GAO/NSIAD-90-204, June 1990, 8-9. One controversy centers around the extent to which these EEP sales have displaced U.S. sales that would have been made at commercial levels.

[14] The founding members of the Cairns group were Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand, and Uruguay. See Richard A. Higgott and Andrew Fenton Cooper, "Middle Power Leadership and Coalition Building: Australia, the Cairns Group, and the Uruguay Round of Trade Negotiations," *International Organization* 44 (Autumn, 1990): 589-632.

[15] For more detail on the Canadian position see Theodore H. Cohn, "Canadian and European Agricultural Policy: International Trade Challenges," in C.H.W. Remie and J.-M. Lacroix, eds., *Canada on the Threshold of the 21st Century: European Reflections on the Future of Canada* (Amsterdam: John Benjamins, 1991), 535-42.

[16] Barry Wilson, "Wise Wants Canadian Support for U.S. Subsidy Fight," *Western Producer*, September 10, 1987: 3.

[17] Statement of Allan I. Mendelowitz before several subcommittees of the House of Representatives Committee on Agriculture, November 16, 1989, GAO/T-NSIAD-90-12, 19-23.

[18] Robert L. Paarlberg, "The Mysterious Popularity of EEP," *Choices*, 2nd Quarter 1990, 16; Mendelowitz Statement to subcommittees, 20.

[19] T.K. Warley, "Europe's Agricultural Policy in Transition," *International Journal* 47 (Winter 1991-2): 112.

[20] Mendelowitz Statement to subcommittees, 17-18; Paarlberg, "The Mysterious Popularity," 14-15; Statement of Allan I. Mendelowitz before the Task Force on Urgent Fiscal Issues, House of Representatives Committee on Budget, June 28, 1990, GAO/T-NSIAD-90-53, 35; Garry Fairbairn, "World Governments Get More Candid As GATT Talks Go On," *Western Producer*, January 30, 1992: 6.

Estimates of EEP-induced exports often do not take account of the huge costs involved in maintaining the Program.

[21] GAO, *Export Enhancement Program's Recent Changes*, 41.

[22] William M. Miner, "The N.A.F.T.A. Negotiations—Agriculture: A Canadian Perspective" (Ottawa: Carleton University Centre for Trade Policy and Law occasional papers, September 7, 1991), 10; Barry Wilson,

"U.S. Must Curb Subsidies, Trade Negotiator Says," *Western Producer*, August 29, 1991: 3.

[23] Dale E. Hathaway, "Agricultural Trade Policy for the 1980s," in William R. Cline, ed., *Trade Policy in the 1980s* (Washington, D.C.: Institute for International Economics, 1983), 447.

[24] Andrew Schmitz, "Summing Up: The Canadian Perspective," in Kristen Allen and Katie Macmillan, eds., *U.S.-Canadian Agricultural Trade Challenges: Developing Common Approaches* (Washington, D.C.: Resources for the Future, 1988), 194-95.

[25] James G. Vertrees and Kristen Allen, "An American Perspective on U.S.-Canadian Agricultural Trade Issues," in "Canada-U.S. Agricultural Trade: The Current Agenda," *Canada-U.S. Outlook* 2 (May 1991): 28-29.

[26] The United States-Canada Free Trade Agreement Implementation Act, "Statement of Administrative Action," in *Communication from the President of the United States*, transmitting a statement of administrative action pursuant to 19 U.S.C. 211(e)(2), 2212(a), House Document 100-216, 100th Congress, 2d Session, July 26, 1988, 235.

[27] "GATT Could Limit Wheat Board Deficit," *Western Producer*, January 16, 1992: 1.

[28] For a discussion of the protracted domestic conflict over the Crow rates, see Grace Skogstad, *The Politics of Agricultural Policy-Making in Canada* (Toronto: University of Toronto Press, 1987), 121-56; and Barry K. Wilson, *Farming the System: How Politicians and Producers Shape Canadian Agricultural Policy* (Saskatoon: Western Producer Prairie Books, 1990), 214-32.

[29] The U.S. National Association of Wheat Growers protested this failure to abolish eastbound subsidies, but there was a reason for the differentiation. The transportation subsidy for shipments through west coast ports is conditioned upon export, while the transport subsidy for shipment through eastern ports is generally available; that is, it is used for products sent to Ontario as well as for those that are exported. The FTA does not deal with generally available subsidies.

[30] GATT Secretariat, "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations," MTN.TNC/W/FA, December 20, 1991.

[31] GATT Contracting Parties, 9th Session, "Summary Record of the 44th Meeting," Geneva, SR 9/44, March 15, 1955, 10.

[32] GATT Negotiating Group on Agriculture, "Proposal by Canada Regarding the Multilateral Trade Negotiations in Agriculture," MTN.GNG/NG5/W/19, October 20, 1987, 3.

[33] The first marketing boards were established in British Columbia and Ontario in the 1930s. The powers of most boards, such as those for pork, fruit, and vegetables, are very limited. See Wilson, *Farming the System*, 167-73.

[34] Canada was aided by the fact that GATT Article XXIV:8(b) permits the maintenance of agricultural trade restrictions among members of FTAs, when these are needed to support supply management programs. See U.S., House of Representatives, Hearing before the Committee on Agriculture, "United States-Canadian Free Trade Agreement," 100th Cong., 2d sess., February 25, 1988, 29; Agriculture Canada, "Notes for an Address by the Honourable John Wise, Minister of Agriculture, at the Annual Meeting of the Dairy Farmers of Canada," January 19, 1988, 3; Frank Stone, *The Canada-United States Free Trade Agreement and the GATT*, 6.

[35] "Statement of Administrative Action," 237-38. This Statement is prepared by the Executive for the U.S. Congress.

[36] *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Vol. 2 (Ottawa: Minister of Supply and Services, 1985), 430-32; Wilson, *Farming the System*, 174-78.

[37] Barry Wilson, "Sees Peril of Weakening Supply Management," *Western Producer*, September 28, 1989: 6.

[38] GATT, "Canada—Import Restrictions on Ice Cream and Yoghurt: Report of the Panel," L/6568, September 27, 1989, 30.

[39] "Canadian Government Responds to GATT Panel Ruling on Ice Cream and Yogurt," *Government of Canada News Release*, No. 298, December 4, 1989: 1.

[40] GATT Activities—1989 (Geneva: GATT, June 1990), 80. The EC, Australia and New Zealand expressed sympathy with Canada's argument against the U.S. waiver.

[41] Multilateral Trade Negotiations, "Canadian Proposal on GATT Article XI"; "Canada Tables Proposal for Strengthening and Clarifying GATT Article XI in Support of Supply Management Programs," *Government of Canada News Release*, March 14, 1990.

[42] *Growing Together—Evolution of the Canadian Dairy Industry*, Report of the Task Force on National Dairy Policy, May 31, 1991, 15, 17.

[43] "US-Canadian Disputes," *GATT Focus Newsletter* 78, January-February 1991: 4.

[44] "Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade," in *The Texts of the Tokyo Round Agreements* (Geneva: GATT, August 1986).

[45] N. David Palmeter, "Agriculture and Trade Regulation: Selected Issues in the Application of U.S. Antidumping and Countervailing Duty Laws," *Journal of World Trade* 23 (1989): 59. See also Gregory P. Marchildon and Vivian Noble, "Canada-U.S. Relations in Agricultural Trade: A Review of Recent Difficulties," in "Canada-U.S. Agricultural Trade: The Current Agenda," *Canada-U.S. Outlook* 2 (May 1991), 15.

[46] Palmeter, "Agriculture and Trade Regulation," 48.

[47] Chile's CVD actions were initiated in a relatively brief period before March, 1983, and were mainly directed against only four countries: Argentina, Brazil, Peru, and Spain. See J. Michael Finger and Julio Nogues, "International Control of Subsidies and Countervailing Duties," *The World Bank Economic Review* 1 (1987): 713-14.

[48] U.S. General Accounting Office, *International Trade Commission's Agricultural Unfair Trade Investigations* (Washington, D.C.: NSIAD-88-58BR, December 1987), 10-12.

[49] In 1859 the Canadian Tariff provided for an undervaluation duty, which was removed in 1904 when the antidumping duty was introduced. See John H. Young, *Canadian Commercial Policy* (Ottawa: Royal Commission on Canada's Economic Prospects, 1957), 135; and G.A. Elliott, *Tariff Procedures and Trade Barriers* (Toronto: University of Toronto Press, 1955), 180.

[50] The first Canadian CVD case (involving baler twine from Brazil, Mexico, and Tanzania) began in 1979, and was ended without duties

being imposed. Michael M. Hart, "The Future on the Table: The Continuing Negotiating Agenda under the Canada-U.S. Free Trade Agreement," in Dearden, Hart, and Steger, eds., *Living with Free Trade*, 105; and G.E. Salembier, Andrew R. Moroz, and Frank Stone, *The Canadian Import File: Trade, Protection and Adjustment* (Montreal: The Institute for Research on Public Policy, 1987), 127-33.

[51] It should be mentioned that most Canadian antidumping cases since 1980 have covered fairly small amounts of trade, 30 percent of the cases have involved $500,000 or less, and 65 percent have involved $5 million or less. See F. Lazar, "Antidumping Rules following the Canada-United States Free Trade Agreement," *Journal of World Trade* 23 (1989): 59.

[52] Rodney de C. Grey, *Trade Policy in the 1980s: An Agenda for Canadian-U.S. Relations* (Montreal: C.D. Howe Institute, 1981), 56-57.

[53] The first two definitions of "remedy" in *The American Heritage Dictionary* (1975) are "something, such as medicine or therapy, that relieves, pain, cures disease, or corrects a disorder"; and "something that corrects any evil, fault, or error." Some analysts maintain that Canada's high level of dependence on the American market is a reflection of the relative openness of that market.

[54] Murray G. Smith, "Negotiating Trade Laws: Possible Approaches," in Murray G. Smith, ed., with C. Michael Aho and Gary N. Horlick, *Bridging the Gap: Trade Laws in the Canadian-U.S. Negotiations* (Toronto: Canadian-American Committee, 1987), 5-6.

[55] "Canada Tables First Comprehensive Proposal for New GATT Subsidy-Countervail Rules," *Minister for International Trade News Release* 158, June 28, 1989: 1.

[56] G. Bruce Doern and Brian W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart, 1991), 186.

[57] Kevin C. Kennedy, "The Canadian and U.S. Responses to Subsidization of International Trade: Toward a Harmonized Countervailing Duty Legal Regime," *Law and Policy in International Business* 20 (1989): 696; Grace Skogstad, "The Application of Canadian and U.S. Trade Remedy Laws: Irreconcilable Expectations?," *Canadian Public Administration* 31 (Winter 1988): 542.

[58] Alan M. Rugman and Andrew D.M. Anderson, *Administered Protection in America* (London: Croom Helm, 1987), 1; Alan M. Rugman, "U.S. Protectionism and Canadian Trade Policy," *Journal of World Trade Law* 20 (1986): 367; Skogstad, "The Application of Canadian and U.S. Trade Remedy Laws," 564-65.

[59] Erna van Duren and Larry Martin, "The Role of Economic Analysis in Countervailing Duty Disputes: Cases Involving Agriculture," *Canadian Public Policy* 15 (June 1989): 170. See also A. Schmitz and D. Sigurdson, "Stabilization Programs and Countervailing Duties: Canadian Hog Exports to the United States," in G. Lermer and K. K. Klein, eds., *Canadian Agricultural Trade: Disputes, Actions and Prospects* (Calgary: University of Calgary Press, 1990), 81.

[60] Smith, "Negotiating Trade Laws," 5; Gary Clyde Hufbauer and Joanna Shelton Erb, *Subsidies in International Trade* (Washington, D.C.: Institute for International Economics, 1984), 17.

[61] Stanley D. Metzger, "The Amended Anti-Dumping Code and the Trade Agreements Act of 1979," in John Quinn and Philip Slayton, eds., *Non-Tariff Barriers After the Tokyo Round* (Montreal: Institute for Research on Public Policy, 1982), 160; Debra P. Steger, "Recent Canadian Experience with Countervailing Duties: The Case of Agriculture," in *Canada-U.S. Trade in Agriculture: Managing the Disputes*, 16.

[62] G. Lermer and K. K. Klein, "Problems and Prospects of Canadian Agricultural Trade: An Introduction," in *Canadian Agricultural Trade: Disputes, Actions and Prospects*, 20.

[63] D. L. Aube, *Canada's Trade in Agricultural Products 1982, 1983 and 1984* (Ottawa: Agriculture Canada, 1985), 17; Susan Epstein, *The U.S.-Canada Pork Dispute* (Washington, D.C.: Congressional Research Service, May 11, 1989), 4.

[64] An "upstream subsidy" is a transfer to a firm that results in a lower cost for inputs. It is often conferred on a product (e.g., hogs) that is used in the production of an exported product (e.g., pork).

[65] Senator Max Baucus, quoted in "United States-Canada Binational Panel Review in the matter of Fresh, Chilled, and Frozen Pork," Memorandum Opinion and Order, USA-89-1904-06, September 28, 1990, 19. Section 771B was originally adopted as section 1313 of the 1988 Omnibus Trade and Competititiveness Act.

[66] In the lumber case, the 1986 U.S. trade bill broadened the definition of a subsidy. The Commerce Department then reversed itself and ruled that Canadian stumpage policies were in fact a subsidy.

[67] GATT, "United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada," Report by the Panel, L/6721, September 5, 1990.

[68] See "Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement in the Matter of Fresh, Chilled, or Frozen Pork from Canada," Memorandum Opinion and Remand Order, USA 89-1904-11, August 24, 1990; "United States-Canada Binational Panel Review in the matter of Fresh, Chilled, and Frozen Pork," Memorandum Opinion and Order, USA-89-1904-06, September 28, 1990.

[69] U.S. countervailing duty law applies to benefits provided to a specific industry or group of industries, but not to benefits that are generally available. This is consistent with Article 11:3 of the GATT Subsidies Code, which states that production subsidies "are normally granted either regionally or by sector."

[70] The panels' instructions were consistent with Article 1904(8) of the FTA, which states that "the panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision."

[71] See "Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement in the Matter of Fresh, Chilled, or Frozen Pork from Canada," Memorandum Opinion and Order Regarding ITC's Determination on Remand, USA-89-1904-11, January 22, 1991.

[72] External Affairs, *The Canada-U.S. Free Trade Agreement*, Copy 10-12-87, Article 1904(13).

[73] Quoted in "Article 1904.13 Extraordinary Challenge Committee United States-Canada Free Trade Agreement in the Matter of Fresh, Chilled, or Frozen Pork from Canada," Memorandum Opinion and Order Regarding Binational Panel Remand Decision II, ECC-91-1904-01USA, June 14, 1991, 6.

[74] Clyde H. Farnsworth, "Canada-U.S. Panel Assailed in Congress on Pork Imports," *New York Times*, March 28, 1991: C1.

[75] "Extraordinary Challenge Committee Memorandum Opinion and Order," June 14, 1991. The USTR was contesting the binational panel's second remand decision with regard to the ITC.

[76]. "Canada Urges Adoption of Pork Panel Report," *GATT Focus Newsletter* 82, July 1991: 3.

[77] The corn case was actually the second time that the United States was the subject of a formal subsidy complaint. The European Community brought the first case (involving petrochemical feedstock), but it was settled without any duties being imposed. See Hart, "The Future on the Table," 105-106.

[78] Kennedy, "The Canadian and U.S. Responses to Subsidization," 736-38; G. Lermer, "Determining Economic Injury: The Canadian Corn Countervail Case," in *Canadian Agricultural Trade: Disputes, Actions and Prospects*, 143-46.

[79] "Read between the Lines: Trade War," *New York Times*, November 11, 1986: 22.

[80] Gary N. Horlick, "Comments," in *Bridging the Gap: Trade Laws in the Canadian-U.S. Negotiations*, 49-50.

[81] Hon. Donald S. MacDonald, "The Need for Bilateral and Multilateral Agreements Concerning Agriculture," in *Canada-U.S. Trade in Agriculture: Managing the Disputes*, 5.

[82] Kennedy, "The Canadian and U.S. Responses to Subsidization," 738-40; Ontario Ministry of Agriculture and Food, *Agri-Food Trade Update*, Issue No. 45, November 19, 1990, 8-9.

[83] Bob H. Robinson, Mary Anne Normile, Carol A. Goodloe, and Robert M. House, "U.S.-Canadian Trade Liberalization: Key Issues," in *U.S.-Canadian Agricultural Trade Challenges*, 69.

[84] van Duren and Martin, "The Role of Economic Analysis in Countervailing Duty Disputes," 164-65; Lermer, "Determining Economic Injury," 149.

[85] Daniel Schwanen, "Securing Market Access: Canada's Trade Agenda for the 1990s," *Commentary*, C.D. Howe Institute 32 (July 1991), 14-15.

[86] Jean-Francois Bence and Murray G. Smith, "Subsidies and the Trade Laws: The Canada-U.S. Dimension," *International Economic Issues*, The Institute for Research on Public Policy (April-May 1989), ii-iii.

[87] Organization for Economic Cooperation and Development, *Agricultural Policies, Markets and Trade: Monitoring and Outlook 1991* (Paris: OECD, 1991), 113.

[88] *Ibid.*, 115.

[89] Drew Fagan, "Farmers Rally to Get off Road Heading to Financial Ruin," *Globe and Mail* (Toronto), October 4, 1991: B1, B4; David Roberts, "Farms Still Going Bust Despite Billions in Aid," *Globe and Mail*, October 11, 1991: A4.

[90] "Symposia: Summary of Proceedings of the Seminar on Dispute Resolution Under the Canada-United States Free Trade Agreement," *Stanford Journal of International Law* 26 (1990): 174.

[91] Despite the Department of National Revenue's affirmative decision in the corn countervail case, it judged that certain U.S. regional programs were not countervailable. The Department in effect excluded regional programs from Canadian countervail law if they could only benefit certain regions because of their unique characteristics. This decision was made to avoid the dilemma of countervailing a U.S. regional program when there were similar programs in Canada. See Kennedy, "The Canadian and U.S. Responses to Subsidization," 733-35; Bence and Smith, "Subsidies and the Trade Laws," 11.

[92] "Agreement on Technical Barriers to Trade," in *The Texts of the Tokyo Round Agreements* (Geneva: GATT, August 1986), 1-25.

[93] Maury Bredahl and Kenneth Forsythe, "Harmonizing Phyto-sanitary and Sanitary Regulations," *The World Economy* 12 (1989): 190-91; Ivan Bernier, "Product Standards and Non-Tariff Obstacles: The GATT Code on Technical Barriers to Trade," in John Quinn and Philip Slayton, eds., *Non-Tariff Barriers After the Tokyo Round* (Montreal: Institute for Research on Public Policy, 1982), 199. See also Robert E. Sweeney, Jr., "Technical Analysis of the Technical Barriers to Trade Agreement," *Law and Policy in International Business* 12 (1980): 179-217.

[94] For a historical discussion of this issue see Cohn, *The International Politics of Agricultural Trade*, especially Chapter 7.

[95] "Joint Monitoring Committee Reports on Progress of Technical Working Groups," *Agri-Food Trade Update*, Ontario Ministry of Agriculture and Food, Policy Analysis Branch, No. 49, May 30, 1991, 3.

[96] Michael von Massow, Erna van Duren, and Larry Martin, "Resolving Trade Disputes with the United States: A Level Playing Field or a Vehicle for U.S. Vested Interests?," Discussion Paper DP91/01, George Morris Centre, University of Guelph, June 19, 1991, 11; U.S. General Accounting Office, *Inspection of Canadian Meat Imports Under USDA's Streamlined Procedures* (Washington, D.C.: GAO/T-RCED-92-18, October 31, 1991), 2-5.

[97] "Statement by Deputy Administrator, International Programs, FSIS," in *Review of the Inspection and Increased Importation of Canadian Market Swine and Pork Products*, Hearing before the Subcommittee on Livestock, Dairy, and Poultry of the U.S. House Committee on Agriculture, 101st Congress, 1st Session, May 19, 1989, 86-87.

[98] U.S. General Accounting Office, *Issues USDA Should Address Before Ending Canadian Meat Inspections* (Washington, D.C.: GAO/RCED-90-176, July 1990), 1-4, 14-20.

[99] Barry Wilson, "Where Did the Open Border Go?," special report, *Western Producer* (Saskatoon), December 6, 1990: 18, 20.

[100] Elaine Dodge and Christy Law, "Poisoned Meat from Canada," *New York Times*, May 31, 1991, A14; D.H. Burney, Ambassador of Canada to the U.S., Letter to the Editor, "Canada Doesn't Stint on Meat Inspection," *New York Times*, June 10, 1991, A11.

[101] "Ottawa to Step Up Meat Inspections," *Globe and Mail*, August 8, 1991, B4; "U.S. Withdraws from Meat Inspection Agreement," *Agri-Food Trade Update*, No. 52, December 9, 1991, 2.

[102] These figures exclude two small ports of entry. See GAO, *Inspection of Canadian Meat*, 6-7; GAO, *Issues USDA Should Address*, 7.

[103] Organization for Economic Cooperation and Development, *Agricultural Policies, Markets and Trade: Monitoring and Outlook—1990* (Paris: OECD), 84.

[104] K. D. Meilke and T.K. Warley, "Agriculture in the Uruguay Round: A Canadian Perspective," Paper for the Canadian Agricultural Economics

and Farm Management Society's Annual Meeting, Montreal, July 9-13, 1989, 19-20.

[105] For a discussion of other bilateral-multilateral intersections see T. K. Warley, "Linkages between Bilateral and Multilateral Negotiations in Agriculture," in Allen and Macmillan, *U.S.-Canadian Agricultural Trade Challenges*, 78.

[106] For a more detailed comparison of these three strategies in a Canadian context see Theodore H. Cohn, "Canada and the Ongoing Impasse over Agricultural Protectionism," in A. Claire Cutler and Mark W. Zacher, eds., *Canadian Foreign Policy and International Economic Regimes* (Vancouver: University of British Columbia Press, 1992).

[107] Robert L. Paarlberg, "Resolving Agricultural Trade Conflict: Multilateral, Bilateral, and Unilateral Approaches," Paper for the Annual Meeting of the International Studies Association, Washington, D.C., April 10-14, 1990, 29.

[108] The review began with the release of Agriculture Canada's *Growing Together: A Vision for Canada's Agri-Food Industry* (Ottawa: Minister of Supply and Services, 1989).

[109] Kym Anderson and Yujiro Hayami, *The Political Economy of Agricultural Protection: East Asia in International Perspective* (Sydney: Allen & Unwin, 1986). For a discussion of the Anderson-Hayami findings as applied to the U.S. see Robert L. Paarlberg, "Is There Anything `American' about American Agricultural Policy?," in Carol S. Kramer, ed., *The Political Economy of U.S. Agriculture: Challenges for the 1990s* (Washington, D.C.: Resources for the Future, 1989), 37-55.

[110] Barry Wilson and Peter Finkle, "Is Agriculture Different? Another Round in the Battle Between Theory and Practice," in Grace Skogstad and Andrew Fenton, eds., *Agricultural Trade: Domestic Pressures and International Tensions* (Halifax: Institute for Research on Public Policy, 1990), 14, 20.

CONTENTS

ISSN 1047-1073

CANADIAN-AMERICAN PUBLIC POLICY

Occasional papers on a wide range of issues in U.S.-Canadian relations

CAPP 1: April 1990— **Canada-U.S. Relations in the Bush Era**
Joseph T. Jockel

CAPP 2: July 1990— **Transboundary Air-Quality Relations: The Canada-United States Experience**
John E. Carroll

CAPP 3: October 1990— **Canadian Culture, the Canadian State, and the New Continentalism**
Allan Smith

CAPP 4: December 1990— **Forests, Timber, and Trade: Emerging Canadian and U.S. Relations under the Free Trade Agreement**
Thomas R. Waggener

CAPP 5: March 1991— **Change and Continuity in Canada-U.S. Economic Relations**
William Diebold

CAPP 6: June 1991— **Trade Liberalization and the Political Economy of Culture: An International Perspective on FTA**
Graham Carr

CAPP 7: September 1991— **If Canada Breaks Up: Implications for U.S. Policy**
Joseph T. Jockel

CAPP 8: December 1991— **Ogdensburg Plus Fifty and Still Counting: Canada-U.S. Defense Relations in the Post-Cold War Era**
Joel J. Sokolsky

CAPP 9: March 1992— **The Regulation of U.S.-Canada Air Transportation: Past, Present and Future**
Martin Dresner

CAPP 10: June 1992 —**Emerging Issues in the U.S.-Canada Agricultural Trade Under the GATT and FTA**
Theodore H. Cohn

* * *

Upcoming issues will deal with hydroelectric exports, FTA dispute settlement mechanisms, international trade unionism, an analysis of NAFTA, the future of the North American auto industry, and other vital topics.

Write for bulk-order classroom rates on single issues