GOVERNMENT SUBSIDIES FOR SMALL GRAINS FARMERS ALONG THE U.S.-CANADIAN BORDER: INTERNATIONAL IMPLICATIONS

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I. Introduction

The North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) have greatly impacted farmers near the Canadian-U.S. border since trade agreements have opened U.S. markets to an influx of Canadian grain. Allowing Canadian farmers to sell their grain at American prices hurts U.S. farmers who do not receive the same level of subsidies as competing Canadian farmers. Grain dumping and subsidization work together to falsify the price levels of the grain market on both national and international scales.

This paper will look at treaties and international economic and trade law with regard to small grains farming and subsidies on a global scale, but primarily between the United States and Canada. It discusses the actions that both nations have taken under NAFTA, the implications of those actions, and the potential solutions to the market problem that would allow both Canada and the U.S. to protect their farmers. First, the article will give a general explanation of subsidies and small grains, and the role they play in the international market, demonstrating how both U.S. and Canadian farmers have been affected by the WTO and NAFTA's trade policies, including the economic impact of dumping and subsidies on farmers. Next, the article will propose several possible solutions to the problem that small grains farmers face. In sum, this article argues that the economic impact resulting from the influx of Canadian-grown grain into the American market has lowered the market price of grain and ultimately made American farmers more dependent on subsidies. It further argues that distinguishing the economic justifications from trade policies would help solve the problem.

A. Subsidies' Integral Part in Small Grains Agriculture

One important aspect of the conflict between American and Canadian small grains farmers is the payment of government subsidies and the different forms that those payments can take. While subsidies are commonly used to support many different industries and sectors, this topic focuses on subsidy payments used to compensate farmers for the difference between market prices and the cost of production. In their most basic form, subsidies are a method of support given to those in need without any responsibility for paying back the support.[1] Although such payments would appear to be economically inefficient, most nations provide them to various industries in some form.[2] This has become necessary as markets become globalized and increasingly competitive.[3]

Section 771(5) of the amended Tariff Act of 1930 explains that "subsidy" has the same meaning as "bounty" or "grant," and is compensable under the language of Section 303[4] as follows:

> Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise . . . into the United States.[5]

Canada's definition of subsidies comes from the amended Canada's Special Import Measures Act:

> [A]ny financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, as a result of any scheme, program, practice or thing done, provided or implemented by the government of a country other than Canada, but does not include the amount of any duty or internal tax imposed on goods by the government of the country of origin or country of export from which the goods, because of their exportation from the country of export or country of origin, have been

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[1] *See* WEBSTER'S COLLEGIATE DICTIONARY 1174 (10th ed. 1996).

[2] *See* CONG. BUDGET OFFICE, *International Affairs, in* BUDGET OPTIONS 105, 108 (2000), *available at* http://www.cbo.gov/showdoc.cfm?index=1845&sequence=5.

[3] *See* James M. Sheehan, *Free Trade is Green Trade*, *in* ECOLOGY LIBERTY AND PROPERTY 149 (Jonathan H. Adler ed., 2000), *available at* http://www.cei.org/gencon/019,03111.cfm; *see also* Juan Felipe Ordóñez, *Planning in a More Globalized and Competitive World*, 39th[t] International Urban Planners Conference in Cairo, Egypt (Oct. 17-22, 2003), *available at* http://www.isocarp.org/Data/case_studies/375.pdf.

[4] 19 U.S.C. § 1303 (repealed 1994, reference to section 1677(26)).

[5] 19 U.S.C. § 1677(5).

> exempted or have been or will be relieved by means of refund or drawback.[6]

These definitions are only marginally helpful in understanding the basic definition of subsidies because both focus on subsidies as they are recognized primarily in the context of duties. However, this is important since subsidies have begun to play an important role in intergovernmental trade relations.

The General Agreement on Tariffs and Trade (GATT) addresses and regulates subsidies on an international level in the 1979 GATT Subsidies Code.[7] Because export subsidies distort trade, the GATT Code strictly prohibits export subsidies from being used in a manner that would create more than a fair share of the world trade on any primary product.[8] As Canada and the U.S. are both among the world leaders exporting wheat and other small grains as well as signatories to the GATT Subsidies Code,[9] these prohibitions apply and prevent both nations from applying export subsidies to small grains in order to gain a significantly larger share of the world market. While the GATT Code still fails to succinctly define subsidies, it continues to address and regulate them in a domestic context for non-primary products in an even more ambiguous way than it restricts primary products.[10]

B. The Importance of Small grains in the international market

Found in many forms and used for many purposes, small grains are typically produced and processed in the same way. Categorically, small grains typically include wheat, barley, durum, and oats. Small grains are an important food source, as they are used to make breads, pasta, cereal, liquor, and animal feed. In North America, these crops are grown primarily in the plains states of the U.S. and provinces of Canada, and are often the primary economic support of communities within those regions. Small grains do not require irrigation, and are therefore well-

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[6] Special Import Measures Act, ch. 25, 1984 S.C. 739, 743 (Can.).

[7] M. Jean Anderson & Jonathan T. Fried, *Subsidies and Countervailing Duties in the United States – Canada Free Trade Agreement,* 494 PLI/COMM 133, 135 (1989).

[8] *See id.*

[9] *Id.* at 137.

[10] *Id.* at 135.

adapted to the semi-arid climates frequently found on the plains.[11]

In the U.S., small grain crops are sold on a commodities market. Farmers haul their crops by truck to a grain elevator, where the grain is graded[12] and the amount of dockage[13] is determined. From this point, the grain is loaded onto railroad cars and shipped from the elevator to a centralized processing plant, usually either owned by the same company as the elevator or one holding a purchasing contract with the elevator.[14]

The process is similar for Canadian farmers except that the Canadian Wheat Board sets the market prices of the grain and controls and exports all of the wheat grown in western Canada.[15] From this point, much of the grain produced in both Canada and the United States is exported overseas.[16]

II. Farmers

Changes in trade agreements during recent decades have not helped small-scale farmers of either nation. In fact, while NAFTA helped to expand the role of large-scale farmers, smaller farmers have been marginalized by its trade policies.[17] Specifically, NAFTA has had an adverse impact on many American farmers living near the Canadian border and Canadian ports of entry. Opening the American border to the sale of Canadian

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[11] Benson Agriculture & Food Institute & Corporation, *Agronomy – Crop Planting Arrangements* (Oct. 11, 2001), *available at* http://benson.byu.edu/Publication/Lessons/EN/L1/Planting.htm. (last visited Mar. 8, 2005).

[12] The purpose of grading the grain is to determine its quality. For example, the price of wheat is reduced if it doesn't meet minimum protein requirements.

[13] Dockage refers to the reduction in price that the farmer receives for any dirt or roughage found in the grain.

[14] *See* Information Services, *The Retail Sales Act: Grain Elevators*, Bulletin No. 020, May 2003; *see also* Grain elevator, *in* Wikipedia Encyclopedia, *at* http://en.wikipedia.org/wiki/Grain_elevator (last visited Feb. 29, 2005).

[15] *Midwest Farmers Running Out of Options in Protest on Imports*, N.Y. Times, Sept. 23, 1998, at A23.

[16] *See, e.g.*, U.S. Wheat Associates News Release, *Port Shutdown Hurts Wheat Industry, From Farmers to Overseas Markets*, Oct. 7, 2002, *available at* http://www.uswheat.org/_85256F33004EF5C9.nsf/0/95BBACE1B10E4AA085256F810057D3C7?OpenDocument (last visited Feb. 19, 2005); *see also*, CWB Now, *Ottawa Must Outlaw Port Disruptions*, 2002, *available at* http://www.cwb.ca/en/news/now/2002/100902.jsp (last visited Feb. 19, 2005)

[17] Lucy Hornby, *NAFTA Experience Shows Potential FTAA Effects on Energy Sector*, Oil Daily, Nov. 25, 2003.

grain increased the total supply in the market, which in turn lowered the price of grain because the demand for grain marketed in the U.S. remained static.[18] Canada shipped nearly 91 million bushels of wheat into the U.S. market from June 1993 to May 1994 alone.[19] Restrictions imposed by NAFTA, GATT, and the WTO have made it difficult for U.S. farmers to decrease these exports headed into the U.S. grain market.[20] Many U.S. farmers foresaw the potential import problems that would accompany an influx of Canadian grain into the U.S. market and opposed NAFTA even before it was signed in 1993.[21] This economic impact has made American farmers more dependent on subsidies as Canadian-grown grain flows into the American market, inevitably lowering the market price that American farmers receive for their grain.

A. The Impact of Canadian Grain in the Small Grains Market on U.S. farmers

Since the implementation of NATFA, an overall reduction in the U.S. market price for small grains has occurred. This reduction arose, at least in part, because the exchange rate between the Canadian and U.S. dollar meant that Canadian farmers were receiving a better price for their grain in the U.S. market than in the Canadian market.[22] However, this influx of grain drove down the U.S. market prices, making it difficult for U.S. farmers to make a profit on the same price that improved the situation for Canadian farmers.[23] It is important to note here that even

[18] *Falling U.S.-Canada Trade Barriers Have Led to Lower U.S. Barley and Durum Prices*, NEWS FOR NORTH DAKOTANS, Mar. 12, 1998, *available at* http://www.ext.nodak.edu/extnews/newsrelease/1998/031298/02fallin.htm (last visited Feb. 19, 2005).

[19] *Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15.

[20] *See id.*

[21] Colin A. Carter & Donald MacLaren, *An Evaluation of the Canada – U.S. Wheat Agreement of 1994,* 79 AM. J. AGRIC. ECON. 703, 703 (1997).

[22] *See, e.g.*, Maio Xu, *The Exchange Rate and U.S./Canadian Relative Agricultural Prices*, Aug. 17, 2001, *at* http://scholar.lib.vt.edu/theses/available/etd-08312001-162006/unrestricted/All.pdf; *see also* Joel Severinghaus, *How Exchange Rates Affect Agricultural Trade*, Economics of Ag Issues 4, *at* http://www.iowafarmbureau.com/programs/commodities/pdf/eoa4.pdf. (last visited Feb. 19, 2005).

[23] Duane Dailey, *FAPRI Testifies. . . Ag Imports From Canada Affect U.S. Prices; but Not Cause of Current Weakness in Market*, Food and Agriculture Policy Research, (Oct. 22, 1998), http://www.fapri.missouri.edu/Press_Releases/1998/AgImportsCanada.htm.

though the Canadian grain influx is the focus of this paper, it is not the only cause of the low U.S. market prices.[24]

Decreases in American grain market prices made it necessary for the U.S. government to increase subsidies for American farmers at the same time that Canadian farmers were profiting from the exchange rate. This situation has changed slightly since the value of the American dollar decreased in 2001.[25] According to Louise Waldman, media relations manager for the Canadian Wheat Board, the amount of revenue per ton drops as the Canadian dollar strengthens in relation to the U.S. dollar.[26] This holds true even when Canadian grain is sold outside the U.S., since the transactions are based primarily on U.S. dollar competition.[27] The current strength of the Canadian dollar is now negatively impacting Canadian grain exporters and actually hurting Canadian farmers.[28] However, even though the gap in the exchange rate has narrowed, Canadian grain still continued to flood the U.S. market at levels that lead U.S. farmers to accuse Canada of dumping more grain than allowed under international law.[29]

There were reports of Canadian farmers flooding the U.S. market even before the introduction of NAFTA. The Canadian Free Trade Act, signed in 1989, opened trade between Canada and the United States which in turn opened the U.S. market to Canadian grain.[30] Such "flooding" of grain into the U.S. market has driven market prices dangerously low, and states along the Canadian border have taken various actions to counteract the problem and protect American farmers. In one case, North Dakota attempted to increase inspection of Canadian grain before it could enter the U.S. market, testing for pesticides that have been banned in the U.S.[31] Canada, however, has not sat by silently

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[24] For an examination of other causes, see *id.*

[25] *Strong Canadian Dollar Hurts Grain/Oilseed Exporters,* RESOURCE NEWS INT'L, Oct. 1, 2003.

[26] *Id.*

[27] *Id.*

[28] *See id.*

[29] *See* D. Demcey Johnson, *U.S. Perspectives on the Canadian Grain Problem: A Critical Appraisal*, Agricultural Economics Miscellaneous Report No. 182, Mar. 1998, *at* http://www.staff.ncl.ac.uk/david.harvey/AEF811/AEF811.6/USCanadaGrain.pdf.

[30] Kenneth Murray & James Gartner, *Opening Doors in a Burgeoning Regional Grain Market,* 11 AGEXPORTER, Jan. 1, 1999, at 27.

[31] *Canada to Challenge U.S. Over Trade Bill,* XINHUA NEWS AGENCY, Apr. 2, 1999.

through these attempts. In fact, Canada challenged North Dakota's proposed legislation after the U.S. listed its own complaints against Canada's allegedly unfair practices.[32] Leslie Swartman, spokeswoman for Canadian International Trade Minister Sergio Marchi, responded to North Dakota's proposed legislation saying that it was a clear violation of the national treatment provisions included in NAFTA because such legislation would greatly increase Canada's chemical testing burden without a legitimate scientific basis.[33]

Several midwestern and plains states, including Minnesota, Montana, North Dakota and Idaho, made similar attempts in 1998 to increase inspections of Canadian grain for diseases and banned drugs.[34] At the same time, U.S. farmers were also organizing ad hoc blockades of Canadian grain, claiming that Canada was driving down American market prices below what they had been in the previous year by unfairly subsidizing its farmers while sending grain across the border into the American market.[35] Canada considered such actions to be violations of NAFTA, and when trade agriculture representatives of the two nations met to resolve the dispute, the states declared a truce and suspended the inspections.[36] These reactions, on both governmental and individual levels, are indicative of the unrest and tensions created in the agricultural market between the two nations.

While Canada tries to improve conditions for its farmers, U.S. states are also still trying to find ways to restrict the flow of Canadian grain into the American market. For example, hundreds of North Dakota farmers protested by blockading border routes and positioning a tractor across railroad tracks to block a Canadian Pacific train near Portal, North Dakota.[37] In response, North Dakota and South Dakota officials began pulling over Canadian trucks to enforce stricter inspections on imported wheat.[38] Additionally, the U.S. government and the Bush administration

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[32] *Id.* These allegations against Canada included rail transportation subsidies on grain exported to the U.S. and secretive pricing policies undertaken by the Canadian Wheat Board. *See also* Dailey, *supra* note 23.

[33] *See Canada to Challenge U.S. Over Trade Bill, supra* note 31.

[34] Facts on File, *Canada: U.S. States Suspend Agricultural Blockade,* 58 Facts on File 705, 722 (1998).

[35] *Id.*

[36] *Id.*

[37] *Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15.

[38] *Id.*

have sought WTO arbitration to settle the dispute between Canadian and U.S. grain producers.[39] Later, in August 2003, the U.S. Department of Commerce ruled that the Canadian Wheat Board was in fact dumping grain into the U.S. market. It then imposed duties on Canadian durum and spring wheat.[40] These actions came about largely in response to the petitions of the North Dakota Wheat Commissioners, the U.S. Durum Growers Association, and the Durum Growers Trade Action Committee.[41]

The International Trade Commission became involved in the issue of market flooding when it was asked to investigate how the Canadian Wheat Board[42] has affected the U.S. market. In an October 2003 hearing, the ITC upheld the U.S. Department of Commerce's August 2003 duties on spring wheat but overturned the duties on durum.[43] Through it's investigation, the ITC found that Canadian wheat imports materially interfered with wheat price supports for American grain.[44] This investigation was the first official study showing negative effects on the U.S. wheat market from the interaction between Canadian and American grain.[45] In its report, the ITC confirmed the claims of the U.S. domestic farm lobby and Mike Epsy, U.S. Secretary of Agriculture, showing that U.S. market prices are in fact lowered by the influx of Canadian grain.[46] This, in turn, requires the U.S. government to pay higher subsidies to support domestic farmers.[47]

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[39] Press Release, U.S. Dept. of State, United States Requests WTO Panel in Dispute on Canadian Wheat Board (Mar. 7, 2003), *available at* http://usinfo.state.gov/regional/ar/trade/03030701.htm (last visited Feb. 21, 2005).

[40] News Release, U.S. Wheat Associates, U.S. Rules Against CWB Wheat Dumping: National Wheat Groups Congratulate North Dakota Wheat Commission and Durum Growers (Aug. 29, 2003), *available at* http://www.uswheat.org/_85256F33004EF5C9.nsf/0/BC8E5F4D91B81EC985256F810057D3B0?OpenDocument. (last visited Feb. 21, 2005).

[41] *See id.*

[42] The Canadian Wheat Board handles all exports of Canadian grain. *Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15. Does the Wheat Board handle all grain or just wheat?

[43] Robins, Kaplan, Miller & Ciresi, *International Trade Commission Ruling Retains Duty on Canadian Hard Red Spring Wheat Imports: American Farmers Get Relief from Unfair Trade by Government Monopoly*, Oct. 3, 2003, *at* http://www.rkmc.com/firm_news.asp?newsId=181&iba=Yes.

[44] Jeremy Kahn, *ITC Ruling Steps Up US Wheat Row With Canada,* FIN. TIMES, July 9, 1994, at 4.

[45] *Id.*

[46] *Id.*

[47] *Id.*

However, despite these victorious rulings from the ITC, U.S. farmers remain unsatisfied and are seeking reform from the Canadian Wheat Board in order to defeat what one North Dakota farmer is calling a "government monopoly that also happens to be the world's largest exporter of wheat."[48]

The involvement of the ITC shows how serious the problem has become between Canada and the U.S., and resolution of the disagreement will probably require WTO action as well as specific negotiations between the two nations. Meanwhile, the U.S. will continue to fight the influx of Canadian grain, and Canada will continue to fight the farm and agriculture policies of the United States to protect its own farmers.

B. Canadian Farmers' Objections to post-NAFTA Trade Practices

The Canadian agricultural sector views the same problem from a very different perspective than the U.S. As explained above, the recent changes in the value of the U.S. dollar have led to a comparative strengthening of the Canadian dollar, resulting in lower profit margins for Canadian farmers. In addition, while American farmers are complaining about unfair Canadian subsidies, Canadian farmers complain about the effects of the 2002 U.S. farm bill and the subsidies that it provides for American farmers. Just as Canadian subsidies allow Canadian farmers to profit from a lower market price, subsidies from the U.S. government will perform the same function for American farmers with an adverse impact on the Canadian agricultural sector.

With the creation of the 2002 U.S. Farm Bill, the Canadian federal government was under increased pressure to provide aid to its own farmers to help offset the impact of U.S. farm aid.[49] While the damaging effects of the U.S. Farm Bill were already heightened by the world pricing market, much of the Canadian agricultural community was also suffering from drought conditions resulting in decreased yields.[50] While the long term approach is to challenge the legality of the U.S. Farm Bill under

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48 *International Trade Commission Ruling Retains Duty on Canadian Hard Red Spring Wheat Imports: American Farmers Get Relief from Unfair Trade by Government Monopoly*, *supra* note 43.

49 Ian Elliott, *Pressures Mount on Canada to Boost Subsidies; for Agricultural Sector,* 74 Feedstuffs 5 (2002).

50 *See id.*

either the terms of NAFTA or the WTO, Canadian farm organizations and grain groups immediately requested monetary aid in the form of subsidies to counteract the farm crisis.[51] Without such payments, advocates like Dennis Jack, president of the Ontario Corn Producers' Association, claim that Canada's farmers will continue to struggle against the policies of the U.S. and other competing foreign grain markets until an international agreement can be reached.[52]

Finally, Canadian farmers and policymakers defend their actions against accusations by the U.S., saying that they are not guilty of dumping and have only satisfied customer demand.[53] The Canadian Wheat Board claims that processors demanded disease-free durum at a time when Canada could reliably make it available and much of U.S. durum was contaminated.[54] As long as the Canadian grain was not sold at a price below cost and the U.S. market demanded the disease-free grain, Canada argues that no dumping has occurred.[55] However, American producers rebut this argument by claiming that there was plenty of disease-free grain grown within the United States.[56]

III. Economic Impact

While independent stability and tradition are important to nations participating in importing and exporting, economics may play the most important role in international trade agreements and policies.[57] In fact, a recent debate surrounding WTO policies has argued the validity of linking an efficient market to typically non-economic factors such as protecting labor, human rights, and

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[51] *Id.*

[52] *Ontario Grain and Oilseed Farmers Welcome Federal Funding Announcement for Agriculture,* Can. News Wire, June 20, 2002.

[53] *See, e.g., Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15; *see also* General Agreement of Tariffs and Trade, Oct. 30, 1947, art. VI, 61 Stat. 173, T.I.A.S. 1700, 55 U.N.T.S. 187. *See also* News Release, SeedQuest, Western Canadian Farmers Don't Need to Dump Their High Quality Grain (May 2, 2003), *at* http://www.seedquest.com/News/releases/2003/may/5759.htm (last visited Feb. 21, 2005) [hereinafter SeedQuest].

[54] *Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15; SeedQuest, *supra* note 53.

[55] *Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15; SeedQuest, *supra* note 53.

[56] *Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15.

[57] *See* Paula Stern, *Working Toward New U.S. Competition Policy Related to Trade*, 4 USIA Econ. Persp. (1999), *at* http://usinfo.state.gov/journals/ites/0299/ijee/stern.htm (last visited Feb. 21, 2005).

the environment.[58] Those defending the WTO and NAFTA policies argue under the theory of comparative advantage, claiming that trade leads to economic growth because exports are an essential part of a strong domestic economy.[59] Attacks on linkage claim that trade functions more as a political and policy-making tool, and that past trade policies have failed to promote economic growth.[60] However, it appears unlikely that international policymakers will reject the linkage argument, as economic growth and development are concepts deeply rooted in the WTO. As stated in the opening paragraph of the WTO charter, its purposes include "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources."[61] Either way, the linkage argument, in itself, shows that economics plays an important role in trade policies.

Evaluating trade decisions from an economic perspective involves many aspects. For example, decisions involving exports are made on multiple levels, from the global market to specific international agreements, to each nation's individual decisions, to regional influences, and finally to the producers of each exportable product.[62] The import side involves the same transactional parties but adds additional levels such as consumers and merchandisers.[63] Thus, while economics plays an important role in imports and exports, its specific functions are very complicated and difficult to predict.

A. The Role of Dumping and Subsidies in the Conflict between U.S. and Canadian Farmers

Antidumping and anti-subsidy laws, commonly classified together under countervailing duty laws, have been a major problem for the international market. According to the General Agreement on Tariffs and Trade (GATT),

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[58] Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 Va. J. Int'l L. 285, 286 (2003).

[59] *Id.* at 286, 289.

[60] *Id.* at 287.

[61] *Id.* at 286 (quoting Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1144).

[62] *See* Stern, *supra* note 57.

[63] *See id.*

> dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.[64]

As mentioned above, both dumping and subsidies have played a significant role in the conflict between U.S. and Canadian small grains farmers. Each will be explained in further detail below.

1. Dumping

Dumping is a process used for a variety of economic purposes and has been recently employed by the Canadian Wheat Board despite the objections of the American farm sector. While the reasons for dumping are varied, some of the most common include: (1) taking advantage of a protected home market, (2) unloading excess capacity abroad to increase profits, (3) using cross-product subsidization to maximize profits, and (4) market domination and predatory pricing.[65] The first three are examples of practices that are often considered acceptable, while the fourth is usually unacceptable because it leads to inefficient resource allocation, weakened producers, and job loss.[66] In the first practice, a protected home market occurs when a nation sets tariffs so high that it becomes nearly impossible for other exporting countries to penetrate that national market. Profits are increased under these circumstances when the nation with the protected market can produce and export the product that it has protected from imports.[67] Such an exported product can often be sold overseas above marginal costs because the protected market has effectively raised the world market price.[68] Even more commonly, however, the product is sold within the protected home market

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[64] General Agreement of Tariffs and Trade, Oct. 30, 1947, art. VI, 61 Stat. 173, T.I.A.S. 1700, 55 U.N.T.S. 187. *See also*, SeedQuest, *supra* note 53.

[65] Terence P. Stewart, *U.S.-Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. L. 689, 697 (1999).

[66] *Id.*

[67] *See id.*

[68] *See id.*

where it was produced at a price considerably higher than world market levels.[69]

In the second practice, excess capacity is unloaded internationally when the product has exceeded the structural limits of the national or regional economy.[70] Where supply and demand patterns shift significantly and an excess of a product is created within a national or regional market, that product is often dumped abroad.[71] When this occurs, producers are often desperate to sell the product, even at prices far below the cost of production.[72] This lowers the world market price, risking an increase in subsidies for the same product in countries that wish to protect their own producers that cannot profit at the international market price.[73]

Similarly, the cross-product subsidization from the third practice occurs when an organization (like a government, company, or even an individual) uses the profits from one product to make up for the losses realized from another product.[74] While it may be less obvious, cross-product subsidization is still a form of dumping since the products are being sold in an international market at prices lower than production cost.[75] One reason for implementing cross-subsidization might be to obtain market- or client-based niches. For example, exposing a consumer to a product at a cheap price might lead that same consumer to purchase another product from the same organization. While this method of subsidization may seem ingenious and relatively harmless, Terrance Stewart credits it as "the most common form of subsidy not currently addressed under the WTO and the form that most seriously distorts international trade flows."[76] As such, cross-subsidization may pose the greatest problem to international markets as both a present and future negative influence.

[69] *See id.* at 699.

[70] *See id.* at 700.

[71] *See id.*

[72] *Id.*

[73] *See id.*

[74] *Id.* at 702.

[75] *See id*.

[76] *Id.* at 710.

2. *Subsidization*

Subsidization creates what appears to be a self-furthering problem for both Canada and the United States. There are many reasons why governments provide subsidies for products or industries within their national borders. Both political and social pressures play a large part in determining what sectors will receive subsidies,[77] but these pressures arise nationally as well as internationally. Regardless of their origin, subsidies have become a significant financial undertaking for many nations. According to Stewart, "Subsidies. . . have become an important element in world trade to the extent that, in some sectors, financial ability to subsidize exports has overridden competitive reality."[78] While subsidies may appear beneficial on a national scale, they are detrimental on an international scale. As demonstrated in the arguments above, subsidies create a false standard for the world market, in turn damaging national markets where resources are not efficiently allocated.[79]

The distorting effects that subsidization has on competition are often recognized by governments, even while they maintain the practice.[80] Continuation of subsidies implies that they are the result of an ulterior, albeit deeper, motive. This is particularly apparent in the agricultural trade sector. Stewart attributes subsidies in this particular area to concerns about food security, food shortages that have occurred in the past, and the emotional attachment that is placed on the historical and cultural value of farmers.[81]

While subsidies are ultimately uneconomical, it is understandable why nations tend to use the justifications listed above. Food shortages and food security risks could lead to a shift in the struggle for world power, and it is difficult to place a specific value on historical, cultural, and emotional attachments. A Mexican Energy Ministry official, commenting on NAFTA trade policies between Mexico and the U.S., inadvertently made an accurate description of border relations that also applies to the

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77 *See id.* at 702.

78 *Id.* at 703.

79 *See* Kevin Watkins & Joachim von Braun, *Time to Stop Dumping on the World's Poor*, 2002-2003 International Food Policy Research Institute Annual Report Essay, *available at* http://www.ifpri.org/pubs/books/ar2002/ar2002_essay01.htm (last visited Feb. 26, 2005).

80 Stewart, *supra* note 65, at 703–04.

81 *Id.* at 704.

U.S.-Canadian agricultural borderlands: "In reality we cannot forget that [the border] is not only an economic region, but a human region, comprising culture, trade, and cities that are integrated already."[82] The desire to achieve or maintain self-reliance is an important concern for all nations, including the U.S. and Canada, and serves as yet another justification for subsidies.

B. American Farmers vs. Canadian Farmers

The U.S. and Canada must be viewed together in order to effectively analyze the conflict between borderland small grains farmers of the two nations. The above economic analyses become particularly relevant to the small grains market along the U.S.-Canadian border following the allegations of Canadian farmers "dumping" their grain into the U.S. market. Canadian farmers can produce grain at a lower cost margin than U.S. farmers. However, this does not necessarily mean that Canadian farmers can produce wheat and other small grains more efficiently than U.S. farmers.

The primary concerns with countervailing duty laws are that market decisions are distorted and markets are inefficient.[83] While there are multiple factors causing distortion and inefficiency, subsidies are common culprits in creating this situation. Subsidies allow a producer to continue profiting from a product that it can only produce at a loss.

Even though a product may not be produced efficiently, government subsidies allow the producer to continue selling the product at a profit.[84] When these subsidized products enter the market, their price is often false.[85] This directly violates the basic supply and demand principle of economics because the supported price does not reflect the efficiency of the product. As a result, products often enter the global market from nations or regions that are not the most efficient producers. Stewart supports this principle by explaining how subsidies affect business decisions in the market:

> A manufacturer of a product that sells largely in his home market will make decisions about expansion within the

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[82] *NAFTA Experience Shows Potential FTAA Effects on Energy Sector*, Oil Daily, Nov. 25, 2003.

[83] *See* Stewart, *supra* note 65, at 690.

[84] Stern, *supra* note 57.

[85] *Id.*

> business or exit from the business on the perceived competitiveness of his product in the marketplace. Where dumping or subsidization has occurred, he may perceive that company is not competitive even though it remains the low cost producer. Stated differently, dumping or subsidization can send false market signals as to whether companies should enter, exit, or expand in businesses.[86]

Under this theory, Canadian grain farmers are able to profit from inefficiently produced wheat when they are able to sell it at a higher price in the U.S. market while collecting subsidies from the Canadian government. However, it is important to note here that the U.S. government and U.S. farmers are not guilt-free in this situation. Part of the blame also falls on the U.S., as American small-grains farmers are also highly subsidized. The subsidization of American crops adds to the falsity of the international market, thereby contributing to the trade problems and the tension between farmers of the two nations.

The problem becomes particularly interesting here in that the difference between the U.S. and Canadian dollar has historically meant that while both governments subsidize their farmers, Canadian farmers can still achieve a higher profit by selling their grain in the U.S. than American farmers receive by selling their grain in that same market. Arguably, this is partially caused by Canada's subsidization, which has driven the Canadian market price even lower than the U.S. market price, because farmers can afford to sell grain at a lower price when the costs of producing that same grain are subsidized at higher percentages. American farmers are forced to either sell their grain at a loss (even after accounting for subsidies) or hold out for a better price, while Canadian farmers can sell their grain at the same price and earn a profit.

C. The Interaction between the Small Grains World Market and Canadian and United States Farmers

The world market for small grains both affects and is affected by trade between Canadian and United States farmers. Support of inefficient production through subsidies is highly

[86] Stewart, *supra* note 65, at 694.

damaging to the world market. Resources are often misallocated, eventually reducing overall world wealth.[87] Certain forms of subsidies have actually been prohibited under the GATT.[88] For example, when American farmers pressed for quotas limiting the amount of Canadian grain allowed into U.S. markets in the early to mid-1990s, the U.S. government set limits on the amount of tariff-free grain that could be exported to the U.S.[89] Those quotas, however, were lifted in 1995 during GATT negotiations with the abolition of the law that the U.S. had used to impose the tariffs on Canada.[90]

GATT also provides remedies, penalties, or both for subsidies where serious prejudice or material injury results from the subsidy.[91] The WTO has also addressed harmful subsidies. Specifically, "[c]ountervailing provisions potentially permit such distortions to be neutralized at least vis-à-vis the importing market, and, under the World Trade Organization (WTO), options also exist to restrict or neutralize subsidies in the market of the subsidizer and in third countries."[92] However, even taken collectively, these measures still allow for broad national autonomy and the freedom to implement subsidies.

Many countries have taken advantage of national autonomy in order to protect themselves. Antidumping laws have been created, allowing nations whose industries are harmed by subsidies and other international price discrimination to neutralize that discrimination[93] and restore market signals in a truer form than those produced by subsidized prices.[94] As nations take independent action to protect themselves, it is becoming more apparent that an international solution, and possibly even intervention, is necessary.

The subsidy section of the WTO's Uruguay Round Agreement was introduced to provide greater clarification on what

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[87] *Id.* at 696.

[88] *Id.* at 692.

[89] *Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15.

[90] *Id.*

[91] *NAFTA Experience Shows Potential FTAA Effects on Energy Sector*, Oil Daily, Nov. 25, 2003 .

[92] Stewart, *supra* note 65, at 691.

[93] The discrimination referred to here is price discrimination, which occurs when products are sold below cost.

[94] Stewart, *supra* note 65, at 696.

kinds of actions will be considered prejudicial or actionable.[95] According to Stewart, it is hoped that the changes made in the Subsidy Agreement will encourage nations to minimize "trade-distortive-subsidy" practices.[96] Specific to agriculture, certain types of subsidies have actually been capped and will be gradually reduced over time.[97] Other types of subsidies are actually prohibited, such as subsidies contingent on the use of domestic over imported goods, which are consensually viewed as a distortion of trade.[98] On the other hand, other practices are labeled as non-distortive to trade by the WTO no matter how high the level of subsidization.[99] For those practices determined to be harmful, these changes in the Subsidies Agreement of the WTO have made them more clearly actionable.

Dumping has not been addressed as clearly by the international community. The consent of both the importing third country and the WTO is required to bring third-country dumping actions under Article VI of the GATT 1994, but no such dumping action had been successful through 1999.[100] While progress has been made, even the recent approval that the ITO gave to the U.S. Department of Commerce's decisions regarding Canadian dumping and U.S. duties was not enough to satisfy either party or set a clear standard.[101]

Such actions show promises of positive change for small grains farmers along the Canada-U.S. border, but they could bring harmful changes as well. If all subsidies were removed, farmers may be unable to survive without significantly changing their farming practices, if they could survive at all. This may be especially true if the United States and Canada removed their subsidies while other governments continued to support their farmers. At the very least, many farmers would be forced to discontinue operation for several years after price supports were removed. In other words, it would take years, if not decades, for the small grains market to correct itself and support only the most efficient producers.

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95 *Id.* at 704.

96 *Id*.

97 *Id.* at 705.

98 *Id.* at 709.

99 *Id.*

100 *Id.* at 710.

101 *U.S. Rules Against CWB Wheat Dumping*, *supra* note 40.

IV. Solutions

At this point, it is painfully clear that neither Canadian nor American farmers are winning under the current subsidy system. If Canada increases farm subsidies, the United States must do the same to match or improve conditions for its farmers. This begins a perpetual cycle, where each nation continues to add more subsidies, driving the world market to lower levels.

Mexico plays an important role in finding a solution to the farm crisis, largely due to its inclusion and participation in NAFTA. Large quantities of agricultural products are exchanged between the United States and Mexico, gaining much of the agricultural import and export attention.[102] As a result, any trade agreements between Canada and the U.S. will likely influence trade agreements between the U.S. and Mexico. Since all three nations are subject to NAFTA, any additional agreements between two of the participating nations would include implications for agreements with the third nation. However, it is important to note that much of the trade between Mexico and Canada involves non-agricultural products.[103] Much of the urban sector of Mexico benefited from more jobs and more consumer products, but the farming sector has endured increased hardship from NAFTA's policies.[104] Specifically, the Mexican agriculture economy has suffered from a lower rate of employment and increased competition.[105] Much of this competition comes from U.S. agricultural products, which are subsidized at a much higher rate than Mexican products.[106] Ironically, these accusations made by Mexico towards the U.S. echo those that the U.S. makes towards Canada.

There are, however, significant differences between the competitive accusations of the U.S. and Mexico. Despite the higher rate of subsidization provided by the Canadian government, small grains crops are highly subsidized in both Canada and the U.S. However, any subsidies that Mexican farmers are allocated rarely reach producers.[107] Instead, resources intended

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[102] *See* Jose Manuel Lopez & Alberto Barrientos, *Mexico Researchers Agree NAFTA Benefits Urban Groups, Not Farming Sector*, Reforma, Dec. 9, 2002.

[103] *See id.*

[104] *Id*.

[105] *Id.*

[106] *Id*.; Carlos Mari, *Mexico; Secretariat of Economy Warns on Renegotiating NAFTA*, Reforma, Nov. 13, 2002.

[107] *See* Lopez & Barrientos, *supra* note 102.

for producers are usually allocated to bureaucrats and conduits within the system before they reach small farmers.[108] In addition, the monopoly that the Canadian Wheat Board holds over the marketing of Canadian grain creates a significant difference between the U.S.-Canada debate and the U.S.-Mexico debate.[109]

Reopening negotiations for the agriculture section of NAFTA may help to ease tensions between farmers of the three participating nations, but such actions could cause additional problems. While the agriculture sectors of Canada, Mexico, and the U.S. all seem to have been damaged by NAFTA's policies, each nation has also received benefits in other areas affected by NAFTA.[110] Opening any part of NAFTA to negotiations may result in a demand to reopen other sections as well.[111] The risk that is making officials wary of renegotiating the agriculture portion of NAFTA is that, in the process of gaining agricultural trade benefits, the negotiating nation may also lose other benefits that are equally, if not more, important.

It is clear that any solution to end the conflict between Canadian and U.S. small grains farmers must involve drastic changes. The most effective solution may be to separate the economic justifications from the social and political purposes of international trade policies.[112] The results of WTO and NAFTA have both demonstrated that trade policies have not provided the economic benefits that they promised, especially in the agricultural sector.[113] This is apparent in that small grains farmers in Canada, Mexico, and the U.S. all complain of the subsidies provided by at least one of the other two nations, as explained above. Removing the economic justifications from trade policies would allow lawmakers to treat trade policy under principles of efficiency, as well as remove many of the risks posed by the false market indications created by subsidies and dumping.

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[108] *Id.*

[109] *See International Trade Commission Ruling Retains Duty on Canadian Hard Red Spring Wheat Imports*, *supra* note 43.

[110] *See* Mari, *supra* note 106.

[111] *Id.*

[112] Paul, *supra* note 58, at 286.

[113] *See id.*; *see also Midwest Farmers Running Out of Options in Protest on Imports*, *supra* note 15.

V. Conclusion

The impact of NAFTA has been negative for U.S., Canadian, and even Mexican farmers, but the trilateral agreement has been particularly harmful for U.S. and Canadian small grains farmers living near their shared border. Grain dumping and subsidization have worked together to falsify the price levels in the grain market, on both national and international levels. Under the current subsidy system, Canada and the U.S. are caught in a continuous cycle where each must repeatedly increase the small grains subsidies provided to farmers. Mexico and its farmers experience a similar situation in other farm sectors, as its farmers are unable to compete with subsidized Canadian and U.S. farm products. Farmers lose under this system, and the governments and citizens of each nation must ultimately pay to support farmers and ensure an internal food source. This flawed system needs reform, at a minimum. While NAFTA may be beneficial on certain economic, political, and social areas for the three participating nations, its policies do not help producers in the farming sector.