U.S.-CANADA AGRICULTURAL TRADE ISSUES[*]

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I. INTRODUCTION

U.S.-Canada bilateral trade in agricultural products topped approximately $15.6 billion in 1999, up from more than $14.9 billion in 1998 and more than $14.3 billion in 1997. International, and in particular U.S.-Canada, agricultural trade seems here to stay, and it is safe to predict that concomitant cross-border trade irritants will also always be with us.

However, it does not follow that those irritants will continue to take their traditional form of unilateral trade actions, with all of the disruptive effects of unilaterally imposed duties, quotas, and other import restraints. At first blush, the length of the recent list of irritants is not encouraging. Recent agricultural disputes make almost a full meal: beef and cattle problems, live swine issues, wheat and dairy disputes, market access disputes, and actions relating to consumer health and safety standards and regulations. With the Internet, potential U.S. petitioners have increased access to information on foreign government agricultural programs and industries, easing their task of bringing new trade actions.

The view alters through the lens of past U.S.-Canada agricultural trade disputes. From that perspective, there are tentative but distinct signs that cross-border industry-to-industry trade bashing is starting to give way to the more orderly

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process of government-to-government negotiations and international dispute settlement. This paper examines the evolving U.S. trade remedy landscape as applied to imports of agricultural products from Canada.

II. UNILATERAL VERSUS NEGOTIATED REMEDIES

The legal mechanism used to pursue a trade dispute can be crucial to its outcome. Hence, a review of the available trade remedy mechanisms is a helpful and necessary basis for assessing the list of agricultural trade disputes.

Trade actions are usually categorized by type—such as antidumping ("AD") and countervailing duty ("CVD") measures—or by source of authority—based on multilateral or regional agreements or unilateral national mechanisms. For U.S.-Canada agricultural trade, a useful variation is to look at these disputes as involving either unilateral or negotiated measures. The unilateral category would encompass all national measures (including those imposed under authority of a multilateral agreement), and the negotiated category would contain all disputes resolved pursuant to the North American Free Trade Agreement ("NAFTA") and World Trade Organization ("WTO") dispute settlement procedures.

In particular, unilateral national measures under U.S. law would include:

- antidumping actions, such as the U.S. case against live cattle from Canada, in which the aggrieved domestic industry charges that imports are unfairly priced because they are too cheap relative to home market prices and are injuring the complaining U.S. industry;
- countervailing duty actions, such as live swine from Canada, in which a foreign government is charged with unfair subsidization of exports to the U.S., which is injuring the U.S. industry;
- safeguard or escape clause actions such as the recent action on lamb, in which the U.S. industry claims that imports are a substantial cause of serious injury to the domestic producers; no unfair trade practices, however, need be alleged;
- so-called section 332 proceedings, which are not really trade actions but are studies of the conditions of competition (including competition from imports) of particular industries and can be trade action precursors;
- in theory, section 337 actions, in which unfair methods of competition and unfair acts in the importation of products into the U.S. are alleged to destroy or injure a domestic industry, "prevent the establishment of an industry, or restrain or monopolize trade and commerce in the U.S.;" these cases usually involve patent infringement claims and have never involved agricultural products; and

- section 301 actions, which address the enforcement of U.S. rights under bilateral and multilateral trade agreements and which may be used to address unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict U.S. commerce. The section 301 action is perhaps the most controversial U.S. trade remedy action. It empowers the U.S. unilaterally to challenge and impose sanctions against a foreign country's trade practices.

These unilateral remedies have certain common features. They:

- are instigated by domestic industry groups that target one or more exporting countries;
- involve written industry petitions that lay out the concerns and trigger intensive and intrusive government investigations of the challenged practices;
- apply standards that are frequently perceived as biased in favor of relief being granted; for example, in antidumping cases, whether any allegedly unfair pricing is at market-seeking levels is irrelevant to the antidumping duty calculation;
- usually follow very short deadlines that can significantly hamper a defense, particularly when the deadlines set tight time limits for responding to the investigating authority's sometimes overwhelming requests for information; and
- typically result in the assessment of additional duties or other import measures on the imported product, often at levels greater than might be necessary to remedy the injury.

Despite government "prosecution," these cases also usually entail intensive legal activity by the petitioning and defending industries, making them very costly.

A negotiated resolution, by contrast, offers a dispute resolution pursuant to agreed government-to-government processes, with a more balanced assessment of the issues, sometimes longer deadlines, and a considerably more flexible approach to the remedies. In addition, these processes are much more truly government-to-government, greatly reducing the time and cost demands on the industries involved in the dispute. Negotiated dispute resolution stems from these provisions. The NAFTA, which built upon the 1989 U.S.-Canada Free Trade Agreement (CFTA), establishes a mechanism for independent binational panels to review final U.S., Canadian, and Mexican AD and CVD determinations. Binational panel review of these determinations is available to any person entitled to judicial review of the final determination under the domestic law of the importing country. It incorporates the CFTA's "extraordinary challenge" procedure to deal with concerns that certain

actions may have affected a panel's decisions and threaten the integrity of the review process. In addition, the NAFTA creates a mechanism to address cases in which application of a country's domestic law undermines the panel process.

The NAFTA dispute resolution system for antidumping, countervailing duty, and other disputes is relatively intricate. Its chapters 18, 19, and 20 set out the procedures to be followed for dispute resolution. Chapter 20 on the general institutional arrangements for dispute resolution specifically provides that NAFTA signatories must at all times attempt to agree on the interpretation and application of the NAFTA, using consultations as the primary means of reaching a satisfactory resolution.

The NAFTA also provides methods for protecting signatory industries from injury or threat of injury from surges in imports through two safeguard provisions. A bilateral safeguard mechanism permits a temporary "snap-back" to the normal, non-NAFTA (i.e., most-favored nation or "MFN") tariff rates, and a global safeguard limits the right to impose measures on other NAFTA signatories as part of a multilateral action on imports from all countries.

The NAFTA also ensures that product standards, regulations, and conformity assessment procedures do not discriminate against other signatory exports or create needless barriers to trade. The agreement preserves the signatories' right to enforce their own product standards and regulations, particularly those designed to promote safety and protect the environment and human, animal, and plant life and health.

The GATT/WTO unified dispute settlement system subjects most trade disputes at the WTO to a single set of dispute resolution rules. It grants governments the right to initiate a panel review process and ensures that the initiation process (and the adoption of any resulting panel decision) is not subject to blocking. The system basically has four stages: (1) bilateral consultations where disputing parties meet to discuss the trade issue; (2) conciliation where trained professionals assist the parties in resolving their dispute; (3) panels and appellate body rulings where impartial panel members hand down "legalistic" decisions that are intended to be independent of the political and diplomatic negotiations processes; and (4) implementation and enforcement provisions to ensure that panel and appellate body reports are implemented when a country's practice has been found to be illegal by WTO standards.

The special WTO rules on agriculture also indirectly bear on negotiated dispute resolution because new disciplines on non-tariff barriers to trade and increased transparency of government support measures simultaneously reduce the sources of trade friction and channel agricultural issues into the WTO. The main characteristics of the WTO Agreement on Agriculture with these benefits are: (1) the phase-out of non-tariff barriers and the conversion of those barriers to tariffs (although temporary restraints may be imposed on imports when agricultural imports cause particular difficulties); (2) commitments on reducing domestic support levels; (3) agreement that certain governmental programs, such as general services and non-

production-related income support programs, are not actionable or countervailable and are not subject to the reduction commitment because they are non-trade distorting (so-called green box measures); (4) reduction in export subsidies—WTO members are obliged to reduce the amount of export subsidies over time; and (5) a peace clause—governments are obliged for the first nine years of the agreement to refrain from taking domestic countervailing duty and WTO action against certain agricultural practices.

A separate but related agreement on the application of sanitary and phytosanitary measures addresses product standards and health and safety issues.

The distinctions between the unilateral remedies described above and negotiated dispute resolution proceedings go to the heart of what may be a shifting balance in the nature of U.S.-Canada agricultural trade disputes.

III. RECENT AGRICULTURAL TRADE IRRITANTS

This review brings us to the most recent list of agricultural trade disputes between the two countries. The claims are summarized below:

- Live cattle: the Canadians were alleged to be selling too much cattle to cheaply in the U.S. because of dumping by Canadian cattle producers and subsidies by the Canadian federal and provincial governments (no remedies were imposed because of a final negative decision as to subsidies, and a final negative decision on injury in the dumping case).
- Lamb: imports of lamb meat from Canada and elsewhere were claimed to be causing serious injury to the U.S. industry (Canada was excluded from the remedy).
- Milk: Canadian milk marketing boards were alleged to be selling milk in Canada too cheaply as an input for dairy products to be exported, thereby subsidizing exported milk products. A WTO panel, confirmed by WTO appellate body review, ruled that the Canadian practices were an export subsidy.
- Barley: the Canadian Wheat Board ("CWB") was alleged to be selling too little barley to the U.S., causing barley to be sold too cheaply in Canada to cattle producers. The U.S. Commerce Department did not agree with this allegation in the live cattle case.
- Durum wheat: in contrast to its alleged practices as to barley, with respect to wheat, the CWB is claimed to be selling too much durum wheat too cheaply to the U.S., and the wheat is also alleged to be tainted.
- Meat labeling: Canada has agreed to abide by new U.S. rules on country of origin markings.

- Live swine: Canada was found to have subsidized exports of live swine through countervailable subsidies for a number of years before the subsidy rate declined to zero and the countervailing duty order was revoked.
- Tomatoes: two section 201 safeguard actions claimed that increased imports of tomatoes from Canada and elsewhere injured the U.S. industry, but on both occasions the petitions were unsuccessful.
- Bell peppers: peppers were included in the second of the two tomato safeguard actions.
- Broom corn brooms: a section 201 action on broom corn brooms found that imports from Mexico were causing injury, but not imports from Canada.
- Potatoes, apples, alfalfa products, and dry peas and lentils: these Canadian products have all been subject to section 332 investigations over the past decade.

These issues cross the major food groups and all possible legal weapons, including the antidumping law (live cattle, threat against durum wheat), countervailing duty law (live cattle, live swine), safeguard action (tomatoes, lamb), WTO actions (dairy), and NAFTA (meat labeling).

IV. HISTORICAL VIEW OF U.S.-CANADA AGRICULTURAL TRADE DISPUTES

To step back from the current disputes and take a wider perspective, U.S.-Canada agricultural trade disputes show unquestionable signs of an evolution from unilateral to negotiated remedies. Attachment 1 to this paper surveys U.S. trade actions against Canadian agricultural products from 1947 through the present. The survey starts with the General Agreement on Tariffs and Trade ("GATT") 1947, a comprehensive worldwide agreement on government regulation of cross-border trade, and uses the following significant trade events as milestones: the Tokyo Round of negotiations (under GATT auspices), which resulted in the U.S. enactment of the Trade Agreements Act of 1979 and the beginning of U.S. trade law as it is now applied; the 1988 CFTA; and the 1994 NAFTA, combined by proximity in time with the 1995 WTO agreements produced by the Uruguay Round of trade negotiations (also under GATT auspices).

Prior to 1979, the vast majority of U.S. trade actions were safeguard related under section 201. Between 1979 and 1988, the year the U.S.-Canada Free Trade Agreement came into effect, there was a sharp increase in the number of antidumping and countervailing duty actions. In the years since 1988, most U.S.-Canada agricultural trade disputes have been raised in GATT/WTO and NAFTA fora. Section 332 and 301 actions have remained relatively steady over the period,

although the latter should (at least in theory) decline over time, as the scope for the U.S. to use this most unilateral of remedies will likely diminish as WTO coverage expands.

The shift from safeguards to AD/CVD actions in the 1980s makes sense from a legal perspective. While antidumping and countervailing duty remedies were available under U.S. law prior to 1979, the procedures became subject to much greater transparency and legalization under the 1979 Trade Agreements Act. Antidumping and countervailing duty procedures are also usually more attractive to the domestic industry than section 201 actions because of the lower standard of proof of injury, and the inability of the President to veto relief.

Of greater long-term significance, is the move in the 1990s to GATT/WTO and NAFTA processes, discussed in the next section.

V. THE INFLUENCE OF NAFTA AND WTO DISPUTE SETTLEMENT

The influence of NAFTA and WTO dispute settlement can be seen in statistics on new trade actions. Attachment 1 illustrates that the CFTA (followed by NAFTA and the WTO agreements) coincided with a noticeable drop in antidumping and countervailing actions in the U.S. against Canadian agricultural products. From 1979 to 1988, there were fifteen such trade actions against Canada. Since 1988, there have been only five. In the same period (since 1988), agricultural trade issues ripened into CFTA, NAFTA, and WTO disputes or negotiations involving over a dozen commodities. There could be many reasons for the drop in number of disputes brought under national laws, but it seems reasonable to infer that CFTA/NAFTA and WTO disciplines on agriculture and the availability of bilateral dispute settlement at least contributed to the decline.

In some particularly prominent cases, NAFTA and WTO consultations have so far succeeded in diverting the U.S. from unilateral trade action. In March of 1998, for example, the U.S. (and New Zealand) established a WTO panel to examine whether Canada is violating its trade obligations under the WTO with respect to its dairy pricing system. The U.S. complained that Canada's programs providing cheaper milk to make products for export amount to an export subsidy and that Canada has not complied with a WTO agreement-based obligation to open a tariff-rate quota for fluid milk and cream. The U.S. action stemmed from the petition of three major U.S. dairy organizations to the U.S. Trade Representative under section 301 of the Trade Act. In the past, the U.S. could and likely would have more readily acted unilaterally in such a situation. Its embrace of the WTO dispute resolution system in this case (among others not involving Canadian agriculture) marks a turning point of sorts—traditional 301 action may be used to initiate an action, but the U.S. is prepared to have the WTO finish it.

Another example can be found in the long-running U.S.-Canada wheat dispute. The U.S. Government investigated Canadian and U.S. competition in the

durum wheat industry under section 332 in 1989-1990. In 1993, a panel formed under the CFTA upheld the Canadian interpretation of wheat "acquisition price" as the initial payment the CWB makes to Canadian producers plus storage and handling. For several years, the U.S. has claimed that this definition is too narrow. In April 1998, the U.S. requested an audit of the CWB that would include both durum wheat sales and other spring wheat—previously covered in a U.S.-Canada voluntary restraint agreement that expired in September 1995—and requested that the CWB's definition of acquisition price be broadened. According to publicly available sources, the purpose of the audit is to gather information for arguments in future agriculture negotiations in the WTO. While a trade action against wheat recently has been brought by the North Dakota Wheat Commission,. government-to-government consultations and dispute settlement will have held off that step for over a decade.

Another effect of the CFTA and NAFTA has been to keep Canada out of a spate of global safeguard actions on agricultural products (e.g., tomatoes, wheat gluten), as it did most recently in the case against imported lamb meat. In September 1998, the U.S. lamb industry filed a section 201 global safeguard petition claiming that there has been a surge of imports of inexpensive lamb, driving domestic lamb prices down. Special NAFTA rules for safeguard actions allowed Canada to be excluded from the remedy ultimately imposed. Canada was able to invoke the NAFTA provision that allowed safeguard actions against Canadian products only if the Canadian products separately are significant in volume and contribute importantly to the U.S. industry's injury.

VI. U.S.-CANADA AGRICULTURAL MOU

One of the most effective examples of U.S.-Canada cooperation diverting agricultural disputes came on December 4, 1998 when those countries signed a Memorandum of Understanding ("MOU") covering seventeen different irritants in their bilateral agricultural trade, some on the U.S. side and some on the Canadian side. The MOU defused a blockade by some northern border states of trucks bearing Canadian grains and livestock, which had threatened to kindle a major U.S.-Canada trade war. In response, Canada requested WTO and NAFTA consultations, initiating negotiations with the U.S. on the health and sanitary issues driving the blockade. The MOU resulted.

The understanding included commitments on multiple points of friction, including:

- increased access for U.S. hogs to the Canadian market by modifying Canadian testing and quarantine procedures (the required modifications came into force on October 7, 1999);

- facilitated access to the Canadian market for U.S. feeder cattle from states free of certain diseases; and
- an undertaking by Canada to review generally its phytosanitary regulations governing imports of animals and animal products.

In addition, under the MOU:

- the U.S. will work to eliminate inconsistencies between federal and certain state animal health requirements;[1]
- the U.S. will initiate regulatory changes to its requirements governing the importation of equine semen;[2]
- the U.S. will initiate regulatory changes to eliminate certain inspection requirements for imported horses;[3]
- the two countries will cooperate in the exchange of information related to cattle trade;[4]
- Canada will implement a system to facilitate the rail transport in-transit within Canada of certain grains from certain states that are free of specified grain diseases;[5]
- Canada will improve access for U.S. farmers to primary grain elevators in Canada;[6]
- wheat and other grains originating in specified disease-free states will be eligible for reduced phytosanitary testing on importation into Canada, pursuant to a phased-in schedule over several years;[7]
- the U.S. will implement a certification requirement for certain imports from Canada of sugar-containing products of Canadian origin.[8]

Finally, the two governments agreed:

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1. *See id.* at Annex 4.
2. *See id.* at Annex 4.
3. *See id.* at Annex 4.
4. *See id.* at Annex 5.
5. *See id.* at Annex 6.
6. *See id.* at Annex 7.
7. *See id.* at Annex 8.
8. *See id.* at Annex 17.

- to meet at least quarterly to consult on global grain production and marketing, with the consultation to include among other things an exchange of information on each country's projected quantity of certain grains likely to be exported to the other country in the current marketing year;[9]
- to develop initiatives to facilitate trade in seeds;[10]
- to take measures to avoid disruption in bilateral trade in veterinary drugs;[11]
- to take certain initiatives with respect to pest control products;[12]
- to work together to reduce sampling requirements for fresh produce;[13]
- to continue to cooperate in areas of biotechnology;[14] and
- that country of origin labeling requirements for food products must be consistent with NAFTA and WTO country of origin rules.[15]

While the MOU did not resolve all of the parties' outstanding disputes, it established a process by which the two governments worked together to advance their industries' interests in these areas without a forced resolution through unilateral trade actions. To date, it is the best encapsulation of the relative advantages of negotiated over unilateral trade action reviewed above—including reduced litigation costs to the disputing industries.

VII. REMAINING PRESSURES FOR UNILATERAL TRADE ACTION

All that being said, a logical next question is why the NAFTA and WTO agreements have not moved all U.S.-Canada agricultural trade disputes into an international forum. Four reasons suggest themselves.

First is that agriculture has been a notoriously difficult subject to negotiate at the multilateral level, due in part to the almost mythic importance many countries attach to their agricultural sectors. Decades of protectionism must be overcome.

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9. *See id.* at Annex 9.
10. *See id.* at Annex 10.
11. *See id.* at Annex 12.
12. *See id.* at Annex 13.
13. *See id.* at Annex 14.
14. *See id.* at Annex 15.
15. *See id.* at Annex 16.

The current NAFTA/WTO agriculture regime is just a first attempt at fixing long-running and intractable problems, with many issues still unresolved.

The second reason is that the main goal of the agriculture agreements has been to turn quotas into duties or tariff-rate quotas and phase them out over time. Experience on the manufacturing side, however, suggests that when high tariffs come down countries resort to more subtle non-tariff trade barriers. With new WTO agreements in traditionally unregulated areas such as standards on health and safety, governments will be somewhat constrained in the avenues they can take to change tariff to non-tariff barriers. Trade remedy actions, therefore, will continue to play a role in absorbing the stresses caused by increasingly open borders to agricultural trade.

Third, any new set of legal rules prompts skirmishing and testing over what the new rules mean. Although many institutional issues that otherwise might arise with respect to NAFTA had been settled through the CFTA experience, the same cannot be said for the WTO. Thus, disagreements on how the system actually works are to be expected.

Finally, trade remedy actions at the national level are unlikely to go away completely because of competition and politics. For better or worse, they allow companies and industries to slow or attempt to slow non-U.S. competitors with the costs and contingencies of trade litigation and any resulting import measure. They also allow governments to reassure their constituents that all legal remedies are available to domestic industries that truly are suffering the consequences of import competition.

However, continued work by governments to strengthen and extend agricultural trade disciplines in the next round of WTO negotiations, and vigorous and fair enforcement of agreed disciplines in the WTO dispute resolution context, should significantly diminish the number of disputes that are handled outside the WTO/NAFTA context.

VIII. CONCLUSION

Despite its seemingly scattershot nature, the list of current or recent U.S.-Canada agricultural trade disputes reflects the growing influence of NAFTA and WTO on absorbing or at least channeling the complaints of dissatisfied U.S. agricultural industries into different dispute resolution processes. New substantive rules and strengthened procedures allow disputes to be resolved in a less confrontational and more orderly manner than traditional industry-to-industry bashing under the antidumping and under trade remedy laws. The disciplines established by these agreements, coupled with government-to-government dispute settlement mechanisms, have already lifted several major agricultural trade irritants out of the disruptive realm of unilateral trade action into the more orderly world of government-to-government negotiation. If nurtured by governments and industries

and not waylaid by economic catastrophe, this process could substantially reduce the number of unilateral U.S. trade actions in the foreseeable future.