Winnowing the Chaff: Canadian Grain Trade and International Law

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People curse a man who hoards grain, waiting for a higher price, but they praise the one who puts it up for sale.

—Proverbs 11:26 (Old Testament).

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Like the neo-classic painting *American Gothic* by Grant Wood, farmers have a bucolic and innocent image. In contrast to this vision, contemporary farming is highly mechanized and nurtures us through agronomy—the science of crop management and food production. The agricultural industry is a strategic sector of the economy and is affected by technological advances and marketing exigencies. This article analyzes domestic grain regulation in Canada and the evolution of international agricultural policy. It discusses the Canadian situation in contrast to developments in the United States and the European Union, as well as the interplay with the General Agreement on Tariffs and Trade (GATT), now the World Trade Organization (WTO).

Although barley, rye, oats, canola, and other grains are significant, wheat is the undisputed "king" of prairie crops in Canada. The widespread exportation of grain surpluses produced in Canada earned it the title the bread-basket of the world.¹ These export markets are supported by various governmental programs, including marketing boards purporting to balance bargaining power between consumers and producers. The Canadian Wheat Board (Wheat Board) is Canada’s export marketing agency for wheat, oats, and barley grown on the prairies. Lately, the objectives of the national farm program changed in response to a market-oriented structure for world agricultural trade and a move towards free trade. The Canadian agricultural sector, therefore, faces re-regulation with a seemingly inevitable change in the Wheat Board’s operating procedures.

A whole generation of Canadian farmers cannot recall a time when government subsidies and production quotas did not exist. Their livelihood as they know it, however, faces extreme external pressures to liberalize international trade, move away from quotas, and put more emphasis on tariffication. Some farmers welcome the changing times and even protested the existing regime through acts of civil disobedience. They want an end to the existing policy whereby grain may be exported only through the use of the Wheat Board and favor a free market system where use of the Wheat Board is voluntary. If this happens, the American and Canadian grain markets, which were separate and distinct, would likely become a single continental market.

The protesting farmers are risking pecuniary fines and jail time by flouting the Wheat Board’s monopoly, yet the lure of higher market prices drives them on. Their discontent is being met by calls for reform of the existing system in addition to pressure from American farmers, fearing unfettered competition from their northern neighbors. Since the Canadian grain sector is a regulated industry, re-regulation affects the farmers’ bargaining power and contractual arrangements.

This article discusses the prospect of restructuring from an economic, historical, and international law perspective. Part II identifies the historical importance of Canadian grain trade, including salient regulatory characteristics and generic contractual aspects. The historical development of GATT is set out in Part III, while Part IV contrasts Canada’s policy with the agricultural regime in the United States. Part V summarizes the European Union’s impact on international grain trade, and Part VI outlines reasons for the existing dispute between the United States and Canada over grain trade.

II. THE CANADIAN PRAIRIE ETHOS

Prairie life is part of the great Canadian ethos. Despite a short
growing season, which averages only 110 frost-free days, the Canadian prairies are remarkably productive. Part of the reason why this immense arid area became a renowned grain-producing region is due to government intervention, including the old preferential "Crow's Nest Pass" railway freight rate for western farmers.\(^4\) Currently, government intervention in agriculture is extensive, with over 50% of farm revenue passing through various marketing schemes, shielding farmers from the impact of low prices in world markets. The intervention by Canada's federal government traditionally included an environment where "solidarity and mutual responsibility [were] fundamental social norms."\(^5\) The Wheat Board is the most visible interventionist agency, utilizing single-desk selling, price pooling, and a system of government guarantee to maximize the farmer's return.

**Single-desk selling** — The [Wheat Board] is the sole exporter of western Canadian wheat and barley. Canada's Parliament gave wheat and barley producers this monopoly so they would have more power and security in the marketplace. Instead of competing against one another, Canada's 110,000 wheat and barley farmers sell as one and therefore can command a higher price for their product.

**Price Pooling** — Pooling means that all sales are deposited into one of four pool accounts: wheat, durum wheat (used primarily for pasta production), feed barley, or designated barley. This ensures that all farmers benefit equally, regardless of when their grain is sold during the crop year. All farmers delivering the same grade of wheat or barley receive the same return at the end of the crop year.

**Government guarantee** — Farmers get an initial or partial payment upon delivery, which is guaranteed by the government of Canada. If returns to the pool exceed the sum of these total payments, then farmers receive a final payment. Should returns fall short, something that rarely happens, the federal government makes up the difference. As well, the government guarantees the [Wheat Board's] borrowings. This allows the [Wheat Board] to finance its operations at significantly lower rates of interest than any private sector company of comparable size and credit worthiness. A conservative estimate of the dollar value of this benefit to farmers would be more than $60 million annually. Considering the fact that it cost $44 million in 1994-95 for all the administrative costs at the [Wheat Board], that is a large advantage.

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The Wheat Board, therefore, tries to keep the price of wheat, oats, and barley artificially high through its role as the sole marketer of these crops. Constitutionally, it occupies a paramount position to the prairie provinces, which each have their own provincial marketing boards. In 1990, the Organization for Economic Co-operation and Development estimated that approximately $7.5 billion in subsidies were paid to Canadian farmers, most of which went to grain producers.\(^7\)

Like other government policies, the reasons for the current mix of free enterprise and government intervention stem from a combination of economic, financial, and historical factors. For example, the Canadian Pacific Railway (CPR) received over 25 million acres of land to induce its construction.\(^8\) The CPR was given preferential treatment because of Canada's need for a railway. Farmers in Ontario and Quebec benefited from the CPR by receiving manufactured goods by rail, however, they became very bitter over the exorbitant tariffs for shipping grain.

In time the CPR was blamed for almost every catastrophe on the plains. The story about the settler whose crop was flattened by hail and then devoured by grasshoppers, shaking his fist at heaven and crying, "God damn the CPR!" was not too far fetched.\(^9\) The CPR and the market forces it represented, coupled with adverse weather conditions, combined to frustrate farmers living at subsistence levels.

Agricultural production is directly tied to local weather patterns, and on the prairies the weather alternates from wet to dry cycles, each lasting up to a decade. When Captain John Palliser and Henry Hind explored the southern Canadian plains, they observed normal to dry conditions and reported that this part of the Great American desert was full of cracked, dry ground unfit for cultivation or settlement.

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8. See PIERRE BERTON, THE LAST SPIKE: THE GREAT RAILWAY 1881-1885 18, 255 (1971) (noting that in 1881 the CPR was granted rights, excepting gold and silver finds, covering 25 million acres of land in a belt 20 miles wide on each side of the railway). The federal contract also gave the CPR a controversial monopoly clause, whereby no competing federally chartered railway could come within 15 miles of the border for twenty years (until 1901). See id.
9. See id. at 255.
Conversely, during the wet cycle in 1879-80 a Canadian naturalist, John Macoun, tried to convince the government that this area was a lush paradise full of thick grasses and sedges. These cyclical changes wreaked havoc on farmers. In 1883 over 133,000 people settled in the area during the peak of immigration, but when the dry cycle returned thousands of homesteaders were forced to abandon their farms. During this time,

Evaporation was so rapid that the ponds and marshes were swiftly drained. Reservoirs had to be built in the ravines or dug out of the prairie soil to hold back the run-off. By 1886 the land was so dry in many places that cracks a foot wide opened up in the parched soil.

The homestead era ended in 1930 when the federal government transferred jurisdiction over crown land to western provinces. In addition, the 1929 United States stock market crash commenced a steady decline of grain prices, and during World War II 150,000 people left the prairies to serve in the armed forces or support industry. By 1971 there were only 600,000 people living on farms in the West, only half the number recorded in 1931. Nevertheless, production of grains and oilseeds rose to 1.5 billion bushels in 1971, with new records set nearly every ten years or so.

Although the prairie population dropped, increased mechanization and governmental intervention complemented the restructuring of the agricultural sector. Without governmental intervention, farmers could not stop producing in the same way a manufacturer closes a

10. See BERTON, supra note 8, at 14-15.
11. See id. at 22.
12. Id.
factory. Until they were economically stabilized, farmers tried increasing rather than reducing production, yet many still faced bankruptcy. For instance, one of the first government reactions to the change was the Wheat Bonus Act of 1931, a subsidy whereby producers in Alberta, Saskatchewan, and Manitoba received a five cent payment for every bushel of wheat grown and delivered to a government licensee. The Prairie Farm Assistance Act of 1939, the Canadian Farm Loan Act, and the Farm Improvements Act provided assistance to farmers during the inevitable bad years.

The introduction of efficient tractors, harvesters, and other farm machinery increased productivity in the agricultural industry greater than in other sectors. Market preferences also shifted in favor of certain types of Canadian grain. For instance, the baking industry in the United States began paying bonuses for high protein wheat with good quality gluten because it could absorb more water and withstand machine mixing. Nevertheless, by 1991 the census of agriculture recorded 280,043 farms in Canada, a 4.3% decline from 1986, largely because of the consolidation of smaller farms. While the Canadian prairies are still renowned for wheat production and 75% of production is exported, the amount exported fluctuates sharply, depending on harvests and market forces around the world.

At one time agriculture was central to the Canadian economy, but it now accounts for only 3% of total employment and 2% of gross domestic product, yet through productivity and mechanization involves approximately 68 million hectares.

### A. FEDERAL JURISDICTION OVER CANADIAN GRAIN TRADE

Both the federal and provincial governments exert jurisdiction over Canadian grain trade. The federal government, however, exerts greater influence because it controls grain handling and marketing. In

16. Prairie Farm Assistance Act, S.C., ch. 50 (1939) (Can.).
17. Canadian Farm Loan Act, R.S.C. ch. 66 (1927) (Can.).
18. See Blanchard, supra note 13, at 45 (explaining that protein content is a grading factor, in addition to such factors as the quality of gluten and moisture determination).
19. See Country Profile (Canada), supra note 7.
Regina v. Eastern Terminal Elevator Co., a grain elevator refused to surrender overages from its terminal at Fort William to the Board of Grain Commissioners. The Federal Minister of Justice unsuccessfully sued the elevator company; the court held that federal regulatory competence was judicially denied. Jurisdiction was ultimately assumed over the grain trade following a declaration by Parliament that grain elevators and related mills were works for the general advantage of the country.

During the first decade of the twentieth century, the focus of farmer discontent focused on the terminal elevators at the head of Lake Superior in Thunder Bay. Their frustration heightened when the companies owning the country elevators began buying terminal facilities to monopolize their hold over the farmers and the grain trade. As early as 1899, a Member of Parliament, J.G. Rutherford said: "[a]nyone who has had the opportunity to observe the condition under which the grain trade of the country is carried on, must be aware of the constant friction, the never ending irritation, which characterizes the transactions between the farmers and the grain dealers." In response to farmer discontent, in 1907 the predecessor of the Canadian Grain Commission recommended public control of the terminals and suggested remedies for complaints about dirty grain, weight discrepancies, and differences in opinion about dockage.

Between 1911 and 1931, the population employed in Canadian ag-
Agriculture rose from 282,000 to 443,000. The resulting export of increasing amounts of grain and oilseeds strengthened the lobbying power of farmers, securing passage of the Agricultural Instruction Act of 1921 and enabling the procurement of $10 million to build agricultural colleges and to reestablish the Wheat Board, which temporarily existed during World War I.

After the war, foreign markets began to shrink as major customers for Canadian grain moved toward self-sufficiency and others erected tariff barriers and subsidized their farmers. Near the end of World War II, Parliament passed the Agricultural Prices Support Act\textsuperscript{25} to prevent a possible drop in prices like the one that followed World War I. This and subsequent legislation subsidized farmers and fostered peculiar attitudes about nationalism.

Although the federal government shares jurisdiction with the provinces, it does not share the hegemony. The primacy of federal powers was considered in \textit{Shur Grain Division v. C.A.W.}\textsuperscript{26} where two questions were raised concerning the ability of the federal government to occupy the field otherwise exclusively enjoyed by provincial governments. The issues were whether the applicant's feed mill in Nova Scotia was a work declared to be for the general advantage of Canada pursuant to section 76 of the Canadian Wheat Board Act\textsuperscript{27} and, if so, whether the labor relations at the mill fell within federal jurisdiction. The Canada Labor Relations Board found that the primary activity of the applicant's operation was milling grain for livestock and poultry feed.\textsuperscript{28} Federal jurisdiction over a work declared for the general advantage of Canada extends to labor relations that govern the relationships between the labor directly involved in the work and the employer.\textsuperscript{29}

Federal powers over the grain industry constrain the ability of individuals to make private agreements. This is illustrated in \textit{Montana


\textsuperscript{27} See Canadian Wheat Board Act, R.S.C., ch. C-24, § 76 (1985) (Can.) (stating that feed mills are works for the general advancement of Canada).

\textsuperscript{28} See \textit{Shur Grain Div.}, 85 D.L.R.4th at 317.

\textsuperscript{29} See \textit{id}.
Mustard Seed Co. v. Continental Grain Co.\(^3\) In order to maintain the integrity of the grade names of grain, the Canada Grain Act requires grain dealers to hold licenses.\(^1\) This has the effect of voiding any contract by an unlicensed grain dealer for the purchase of grain. Even though the operation of the licenses affects property and civil rights within the provinces, the effects of the licensing are justified as requirements are valid as incidental to the main purpose.\(^2\)

While the federal government possesses the formal ability to regulate the marketing of wheat and barley, the conundrum concerns the federal function of this regulation. The purpose of regulation should be periodically re-examined because regulation of the grain trade inhibits freedom of contract. Generally speaking, the freedom of contract principle assumes relatively equal bargaining power between the parties and the sanctity of contract (\textit{pacta sunt servanda}). Courts will not interfere with the free play of economic forces that determine the conditions on which the parties bargain. Indeed, “[f]reedom of contract was the legal corollary to economic laissez-faire.”\(^4\) This is contrasted, however, with the principle that the circumstances surrounding agreements may change, necessitating variation in the agreements (\textit{rebus sic stantibus}). The freedom of contract attitude continues to color our perception of commercial agreements; a rebuttable presumption exists that the parties intend to create legal relations and make a contract.\(^5\) Arguably, legislation requiring the possession of a government license to export wheat or barley from Canada is in accord with this presumption.

1. Canadian Grain Commission

The Canadian Grain Commission (the Commission) was originally created in 1912 as the Board of Grain Commissioners. Its mandate is

\(^{30}\) [1974] 49 D.L.R.3d 72 (holding that licensure for grain dealers is within the powers of Parliament).

\(^{31}\) See 10 S.C., ch. 7, § 43 (1970) (Can.).

\(^{32}\) See id.

\(^{33}\) See CLIVE M. SCHMITTOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE 8-12 (2d ed. 1981).

\(^{34}\) Id. at 9.

\(^{35}\) See Muirhead & Turnbull v. Dickson, 7 Fr. 686, 694 (Sess. Cas. 1905) (noting through Lord President Dunedin, that “[c]ommercial contracts can not be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say.”).
to administer the Canada Grain Act and the regulations thereunder. The Commission regulates grain handling in Canada, establishes and maintains standards of quality for Canadian grain, and ensures a dependable commodity for domestic and export markets. The Commission sets minimum tariffs for grain handling and issues official certificates for exports. The Grain Futures Act of 1939 regulates aspects of the futures market and requires the Commission to issue a “Certificate Final” for each export shipment of grain, which is internationally recognized as the Commission’s guarantee of quality and quantity.

Interim payments for feed wheat are an advance on the final payment farmers receive for their grain, which is marketed by the Commission. Interim payments are unusual and are only made when there is a substantial amount left in the pool account after the marketing year is over. Crops must be free of blight and deficiencies in quality, yet 15% of a deficiency is considered a “total write-off.” Interim payments are not fully paid, and consequently brought an action against the government for breach of statutory duty and negligence.

The Commission operates a grain research laboratory to monitor the quality of grain, including seed structure, enzyme systems, protein and oil components, infra-red analysis, varietal identification, and pesticide residue analysis. The Commission licenses large terminal elevators in Thunder Bay, Vancouver, Prince Rupert, and Churchill that total approximately 1700 primary, process, and transfer elevators. Producers usually enter their grain into the system by “producer car delivery,” where grain is loaded into a rail-car for direct shipment to a terminal elevator, weighed, graded, stored, and loaded onto ships.

In Brewer Brothers v. Canada, plaintiff grain producers were creditors of a licensed elevator. When the grain elevator failed financially, the plaintiffs were not fully paid, and consequently brought an action against the government for breach of statutory duty and negligence.

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36. Cf. Scott Edmonds, Fungus Plagues Manitoba, CALGARY HERALD, Oct. 23, 1993, at E11 (defining a fungus called tombstone disease, or fusarium graminearum, as a fungus which strikes plants during the flowering stage, flourishes in damp weather, and causes wheat kernels to turn white and shrivel up).


gence. The Commission’s policy until 1981 relied on licensees’ monthly financial reports to determine their ability to perform elevator operations. Various reports on this system indicated that licensees’ reports were often unreliable, and many elevators, including this one, were in poor financial condition. The Commission scheduled an audit for the elevator, but in February of 1982 it was determined that insufficient personnel were available for this purpose. Additional security was requested, and a licensing officer of the Commission (not an auditor) conducted an inspection of the elevator.

This officer reported favorably, but failed to mention a $500,000 bank overdraft. In this case, the plaintiffs succeeded at first instance. The Federal Court of Appeal affirmed that Parliament had expressly provided for the protection of holders of documents for the payment of money or delivery of grain issued by the Commission. Therefore, the Crown owed a duty of care to that class of persons. The failure, over many months, to conduct an adequate audit amounted to a breach of that duty, and it could reasonably be inferred that the breach of duty caused the plaintiffs’ loss. There was no objection that the loss was purely economic because the whole purpose of the relevant statutory sections protected persons in the plaintiffs’ position against economic loss.

39. See id. at 321. The Commission was empowered to issue licenses to operators of grain elevators, and according to section 36(1)(c) of the Canada Grain Act “[n]o license . . . shall be issued unless the applicant . . . establishes to the satisfaction of the Commission that . . . he is financially able to carry on the proposed elevator operation and has given security . . . sufficient to ensure that all obligations . . . will be met.” Id. As per section 38 of the Canada Grain Act, the Commission was empowered to require additional security where “the Commission has reason to believe and is of opinion that any security given by the licensee . . . is not sufficient to ensure that all obligations to holders of documents . . . will be met.” Id.

40. See Brewer Bros., 80 D.L.R. 4th at 330 (discussing the existing reporting system prior to 1981 and the influence of the report written by J. C. Blackwell).

41. See id. at 330-33.

42. See id. at 333-35.

43. See id. at 335 (reporting that “[a] bank overdraft of some $500,000 proved of no significance to him”).

44. See id. at 338-54.
2. Canadian Wheat Board—Policy & Purpose

The Canadian Wheat Board, established in 1935, operates as a statutory monopoly using delivery quotas to regulate the flow of grain. In 1941 it became the sole marketer of wheat in western Canada, and by 1949 it assumed responsibility for oats and barley processed for human consumption. The marketing of grain with federal government quotas, however, began in an earlier thirty year conflict with the advent of the Car Order Book system that was run by the Canadian Grain Commission. This system was intended to give the producer the freedom over the timing and mode of shipping grain.

The system coped with problems in the multimodal Canadian grain transportation system. While huge government subsidies were given to create the Canadian Pacific Railway in the 1880s, more public money bailed out the other principal rail system in the 1930s, creating the Canadian National Railway. Even when the railways managed to provide enough rolling stock at peak season, labor trouble often arose in the form of strikes by grain handlers in the terminal elevator ports at Thunder Bay and Vancouver. Although strike action strengthened the collective bargaining position of grain handlers, it earned the enmity of farmers. This curious hostility continues today as part of a governmental attempt to regulate an enormous industry full of disparate interest groups.

In January 1994, a shortage of about 5,000 rail-cars and a labor disruption in the port of Vancouver left ships waiting to be loaded for a month. Fearing financial penalties for the disruption, both the Canadian Pacific Railway and its state owned competitor, the Canadian National Railways, increased their fleet to a combined 28,500 rail-way cars. Nevertheless, the increased emphasis on road transportation rendered many small elevators and branch lines unviable.

As a major shipper, the Wheat Board used to have a great impact

45. See Canadian Wheat Board Act, supra note 27, § 3.
46. See id. § 45.
47. See BLANCHARD, supra note 13, at 74.
49. See Scott Edmonds, Grain Farmers Fear Rail Car Shortage, GLOBE & MAIL, Aug. 12, 1994, at B4. The core of the fleet, about 18,000 cars, is owned by the federal government, the Canadian Wheat Board, Alberta and Saskatchewan.
on the rates charged for shipping grain on the Great Lakes, an area where the Board of Grain Commissioners possessed regulatory responsibilities. The setting of tariffs was no longer solely a Grain Commission function, as the Wheat Board’s massive special handling agreements with the elevators caused the Grain Commission to be bypassed to a certain extent. The Canadian Grain Commission had responsibility under the Inland Water Freight Rates Act of 1923 to set maximum freight rates for the carriage of grain on the lakes if, as in 1932, they thought the rates were discriminatory. While the Board ceased to set maximum rates in 1959 with the opening of the St. Lawrence seaway, the federal government continued to intervene in the transportation system with subsidies.

In order to make Canadian prairie grain available to all consumers at similar prices, the federal government paid a portion of transportation costs, popularly known as the “Crow’s Nest Pass Rate,” pursuant to the Western Grain Transportation Act. Now abolished, the “Crow’s Rate” tended to raise the price of grain in farm provinces. The Feed Freight Assistance Program and the “Crow Rate” payment were transportation subsidies resulting in higher farm gate prices for grain, thereby shifting production from livestock towards grain. Alberta established the Alberta Crow Benefit Offset Program that provided certificates to registered feed users and grain merchants, which could be used as partial payments for grain purchased from grain producers. Canada also transferred significant benefits to the prairie provinces. A wartime measure reducing the cost of transporting feed grains from the prairies existed for many years.

In his 1995 budget, Federal Finance Minister Paul Martin announced the end of the Crow Rate transportation subsidies for the movement of grain by rail to dockside. This program affected the

50. See BLANCHARD, supra note 13, at 64.
51. See id. at 70
52. Freight Assistance Program of the Livestock Feed Board of Canada, R.S.C., ch. L-10 (1985) (Can.).
55. See Canadian Agriculture Braces For End of Transport Subsidy, MILLING & BANKING NEWS, Apr. 11, 1995, at 1 (explaining the impact of the subsidy’s
transportation market by giving West Coast ports up to a $6 per ton advantage over water-borne eastbound shipments. Users of the Great Lakes–St. Lawrence seaway system benefit the most from the $522 million in subsidies dispersed under the Western Grain Transportation Act. Although it is difficult to predict how the Crow’s demise affects freight rates, the seaway is undoubtedly in a better position after the cessation of the subsidy.

The Canadian Wheat Board Act provides for the incorporation of the Canadian Wheat Board, whose objective is the efficient marketing of grain grown in Canada for interprovincial and export trade. No person other than the Wheat Board may export any wheat or wheat products, except as permitted in limited circumstances by the Canadian Wheat Board Regulations. Under section 14(a) of the regulations, the Wheat Board may grant licenses for the export of wheat, wheat products, barley, or barley products upon the condition that the export does not adversely affect the Wheat Board’s interprovincial or international marketing of Canadian grain.

Qualified grain producers are issued an export license under the terms of the Canadian Wheat Board Act, as evidenced by a permit book that is valid for that year. The act is qualified by the terms of subsection 29(2), permitting the federal government to promulgate regulations that allow producers to deliver grain to an elevator or railway car without a license.

56. See Canadian Agriculture Braces For End of Transport Subsidy, supra note 55, at 1 (explaining the impact of the subsidy’s elimination).
58. See Canadian Wheat Board Act, supra note 27, at § 5.
59. See id. at §§ 45, 46(c) (noting that the Governor in Council promulgates the regulations in question and may extend the application of sections 45 and 46 to barley).
60. See Canadian Wheat Board Regulations, C.R.C., ch. 397, § 14 (1978) (Can.).
61. See Canadian Wheat Board Act, supra note 27, at § 47 (subjecting only wheat, wheat products, and barley to the Wheat Board’s monopoly). These two grains are often referred to as “Board grains,” while all other grains are known as “Off-Board grains.” See id.
62. See id. at § 29(2).
3. Civil Disobedience & Challenges to Wheat Board

When faced with the 1994 cap on grain exports to the United States, some Canadian farmers decided to protest the Wheat Board’s monopoly on marketing western Canada’s grain. A few prairie farmers seeking higher spot market prices attempted to truck wheat and barley into the United States without export permits from the Wheat Board. During one protest, nearly 150 farmers drove their trucks through downtown Winnipeg and then rallied at the international border in Manitoba to protest the monopoly.

In Regina v. Sawatzky, the Provincial Court of Manitoba acquitted a farmer of two counts of failing “to provide to the Chief Officer of Customs a license granted by the Canadian Wheat Board for the export of grain, contrary to the Customs Act and Regulations.” The case is interesting because of its narrow, legalistic approach and its exemplification of the difference between malum in se and malum prohibitum. In the decision Judge Connor said:

This is not a case about the Canadian Wheat Board’s monopoly over interprovincial and international trade in grain. This is not a case about the powers of the Canadian Wheat Board to control the export and sale of grain and to grant licenses therefor. This is not a case about free enterprise in a democratic society nor is it about the benefits of marketing boards versus the benefits of free enterprise. This is not a case to resolve the apparent debate between farmer and farmer or between farmers and the government as to which is the best method to market grain. This is not a case about David versus Goliath. This is a case about a man who is alleged to have exported grain to the United States of America and, at the time he crossed the border with the grain, did not show a license to export the grain to the appropriate customs official.

The court found that the legislation did not require Mr. Sawatzky to provide any information, certificates, licenses, permits, or other documents to the Chief Officer of Customs relating to the $2 million

63. See Craig Turner, Going Against the Grain Board in Canada, L.A. TIMES, Apr. 27, 1997, at D1 (describing farmers’ opposition to the Wheat Board’s monopoly).
64. See id.
67. Id. at 1.
(Can.) of wheat and barley Mr. Sawatzky exported.\textsuperscript{68}

Two months earlier, however, in \textit{Regina v. McMechan},\textsuperscript{69} farmers were convicted by the same court for failure to provide customs agents with an export license granted by the Wheat Board.\textsuperscript{70} In a defiant act of the lawful procedure, McMechan shipped over $300,000 (U.S.) of grain through the United States port of entry at Antler, North Dakota.\textsuperscript{71} McMechan's motivation for this act was purely economic. At the time, the market price for barley in the United States was higher than the price being offered in Canada.\textsuperscript{72}

The defendants in \textit{McMechan} unsuccessfully challenged the validity of the agreement dated June 20, 1994, between Canada and the United States, regarding mutual assistance and cooperation between customs administrations. After interpreting the legislation, the court found that both defendants knew an export license was required by the Canadian Wheat Board Act, both knew that they could apply for a license, but both chose not to do so.\textsuperscript{73} As with most decisions, the \textit{McMechan} court considered both commercial and legal issues in its analysis. Apparently, the court was concerned that buyers of Canadian wheat would be concerned that below par grades of wheat would be accepted for delivery by grain service companies. Alternatively, the court feared that the wheat in question might be blended with other grades purchased for human or animal consumption. It is apparent that the court was trying to protect Canadian wheat's reputation as a safe product.

In spite of the court's concern, some farmers do not value this emphasis on single market stability. Many farmers prefer a dual market

\textsuperscript{68} See id. (convicting Mr. Sawatzky for failing, without lawful excuse, to attend court in accordance with a valid summons).


\textsuperscript{71} Regina v. McMechan, summarized at 32 W.C.B.2d 69 (Man. Q.B. 1996).

\textsuperscript{72} See id. at 101.

\textsuperscript{73} See 32 W.C.B 2d 69.
system that would allow them to use the Wheat Board or opt to market their wheat and barley privately. Mr. McMechan spent five months in jail after his attempt at private marketing, an infraction that some commentators have called a “crime of commerce.”\textsuperscript{74} Support for McMechan and his actions was publicized by the National Citizens Coalition, which generated enough public pressure to free McMechan for Christmas in 1996.\textsuperscript{75} Despite being wrong in a positive law sense, McMechan became a hero for many farmers experiencing the moral dilemma that fueled his act of defiance.\textsuperscript{76}

Public opinion on the merits of the current system is split and passionate, with over 100 cases of individual civil disobedience illustrating the opposition to the Wheat Board’s monopoly. In addition, farming organizations and private citizens combine lawsuits challenging the constitutionality of the Wheat Board’s monopoly.\textsuperscript{77} Prior to World War II, farmers had a choice of selling on the market or through the Wheat Board, but the Canadian government mandated the Wheat Board’s use to meet its commitment to supply Britain with wheat.\textsuperscript{78} The groups opposed to the Wheat Board, especially younger farmers, view the system as an offensive holdover from the wartime measure enacted over 50 years ago.\textsuperscript{79}

In response to these political tensions, the federal government established a panel in 1995 to prepare a comprehensive examination of western grain marketing issues. Completed in June 1996, the panel’s report concluded that the issue of primary concern was whether wheat and barley should continue to be marketed through a single desk system.\textsuperscript{80} The panel also noted division among the farmers, with many supporting the existing system, while others sought more options and flexibility in the marketing of their grain.\textsuperscript{81} A universal cri-

\textsuperscript{74} See Diane Francis, \textit{Originally a Savior, Wheat Board Has Become an Oppressor}, FIN. POST, Feb. 18, 1997, at 21 (discussing farmer opposition to the Wheat Board).
\textsuperscript{75} See id.
\textsuperscript{76} See Against the Grain, FIN. POST MAG., Mar. 1997, at 14-22.
\textsuperscript{78} See id.
\textsuperscript{80} See WESTERN GRAIN MKTG. PANEL REP., supra note 2, at 1.
\textsuperscript{81} See id. at 2.
tique of the system focused on the lack of accountability and general inflexibility in the Wheat Board's operating policies. After its investigation, the panel's report recommended that the Wheat Board operate under the governance of a Board of Directors, which would include several representatives from the federal government but a majority of members from elected farmers. The report also proposed amendments to the Canadian Wheat Board Act itself, including allowing the Wheat Board to make cash purchases of grain, to make payments to farmers for the storage of grain, to close pools earlier, and to allow farmers to cash out of pools or to trade negotiable pool certificates.

Despite the concerns expressed by farmers, the panel did not propose an end to the single desk system. It felt that the advantages of the current system should be preserved for use with major wheats, but modified to allow farmers to obtain a cash price from the Wheat Board for a portion of their sales that could then be marketed outside the pool. The panel concluded that the Wheat Board should take a different approach for each commodity because of the differing markets for commodities. Barley is used mainly in the domestic market, feed barley is used in both domestic and export markets, and wheat is largely an export commodity. The panel decided that the Wheat Board should continue its marketing monopoly for wheat in order to maintain the wheat's reputation for quality and consistency.

In April 1997, the Trial Division of the Federal Court of Canada rendered its decision in Archibald v. Canada, in which the plaintiffs challenged the Wheat Board's monopoly as an abridgement of their freedom of association. The court found that the Wheat Board's monopoly was valid in law. The court also held that the Canadian Wheat Board Act does not breach the plaintiffs' rights and, even if it did, the Act constitutes a justifiable limit on those rights. The court noted that "freedom of association comports with it the notion of freedom

82. See id.
83. See id.
84. See id.
85. [1997] D.L.R.4th 499 (listing the Alberta Barley Commission, the Western Barley Growers Association, and others as joining Archibald in his suit opposing the Wheat Board's monopoly).
86. See id. at ¶ 65 (citing the Supreme Court of Canada in Lavigne v. OPSEU, 2 S.C.R. 211 (1991)).
not to associate.”\textsuperscript{87} Such a right is a qualified right, containing necessary and desirable limitations that must be affixed to any negative right to associate.\textsuperscript{88}

The court affirmed the current interpretation of the Charter of Rights and Freedoms, which, unlike law in the United States,\textsuperscript{89} does not protect an individual’s economic or commercial aspirations.\textsuperscript{90} Despite evidence that certain aspects of the Wheat Board’s operations seem unjust, inefficient, or even dishonest, the Charter of Rights and Freedoms is not the proper vehicle to solve what may be categorized as a political problem.

\textbf{4. Grain Contracts}

Aside from the peculiarities of the Canadian grain marketing regime, private law elements continue to influence transactions in practical ways. Three generic types of contracts create different rights and duties for buyers and sellers of Canadian grain. For instance, in “Free on Board” (FOB) arrangements the seller must load the grain on whatever mode of transport is chosen by the buyer. The buyer is then furnished with the documents required to collect the cargo from the carrier upon arrival at its destination. “Cost Insurance Freight” (CIF) and “Cost and Freight” (C&F) transactions oblige the seller to supply grain as required in the purchasing contract and load it on a vessel provided by the seller at the time(s) stipulated in the contract. In this arrangement, the seller must deliver the grain to the loading dock and supply the vessel required for its transport. Un-

\textsuperscript{87} See id.
\textsuperscript{89} See Norman L. Cantor, \textit{Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association}, 36 \textit{RUTGERS L. REV.} 3, 25 (1983) (stating that “[w]hile it would be nice to avoid all spiritual and ideological affronts to persons forced by government to pay monies, the critical issue for first amendment purposes is whether the payor is required to associate with or appear to endorse in some fashion a distasteful cause selected by government”).
\textsuperscript{90} See Archibald, D.L.R.4th 499 (noting the plaintiffs’ allegation that the Wheat Board breached one or more rights and freedoms guaranteed to individuals under the Canadian Charter of Rights and Freedoms); see also \textit{CAN. CONST.} pt. I, § 2.
der normal contracts, the buyer provides the marine insurance; a CIF contract, however, places this duty on the seller.

In cases where grain is found to be defective, the last buyer in the string of contracts usually tries to sue others higher up in the chain of sub-buyers. In string contracts in the grain industry, the grain is usually only transported once, with title being transferred multiple times before receipt at the final destination.\(^9\) In contracts of this kind, principal contractual elements, including quantity, quality, and shipment period, likely will be the same throughout the string of buyers.\(^9\) Whereas “[t]he price of grain in each contract obviously will vary, since the economic reason for the existence of the ‘string’ is the change or anticipated change occurring in the market.”\(^9\) If there is a string, each buyer and seller of the grain is responsible for his or her own performance and may not avoid liability even though someone else in the string committed a breach. Privity of contract dictates that eventually the party committing the breach is liable.

Warranties in a string contract pass along the whole chain of sub-buyers, entitling those served third party notices to recover damages paid in an original action plus costs incurred in the claims against them.\(^9\) Provisions are typically made for when the string becomes a circle contract,\(^9\) because goods might not be declared and the documents not delivered. Despite this eventuality, “string business with-

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91. For example, after the vessel nomination reaches A, the latter will, if required by the contract, designate a loading port and/or berth. This information will be transmitted through the string to D, whose ship will be ordered, at the proper time, into berth for loading. When the vessel picks up the grain a delivery notice is sent from A to B and from B to its buyers; thus the one delivery notice is passed through the entire string and the shipment of grain goes in satisfaction of all the contracts in the string.


93. See *id.*

94. See *Pinnock Bros. v. Lewis & Peat Ltd.*, 1 K.B. 690 (1923) (holding that defendant vendors could be held liable for damages where subsequent purchaser sued plaintiff upon a defect of goods, notwithstanding an arbitration clause in the original contract); *see also* *Kasler & Cohen v. Slavouski*, 1 K.B. 78 (1928) (holding that a warranty of fitness for a particular purpose binds each vendor in a string contract).

95. See *Tradax Export Ltd. v. Carapelli*, 2 Lloyd’s Rep. 157 (1977) (concerning the nature of string contracts). In the case of circle contracts, each buyer in the circle must satisfy their liability towards the seller by paying the difference between the lowest price in the circle and the amount of the seller’s invoice.
out necessarily having the intention of carrying out a physical transaction is as much business as contracts made between parties who intend throughout to ship or charter ships to load goods.\textsuperscript{96}

In the United States and Canada, grain is usually sold by the metric ton. Loading tolerances are usually included in any contract for the sale of grain and take into account the uncertainty of the volume of grain a particular vessel holds. The party chartering the transporting vessel is bound to deliver to the vessel a quantity of grain in conformity with the contract terms, taking into consideration the agreed-upon tolerance. In FOB contracts, the loading tolerance is set at the option of the buyer, while the seller sets the tolerance in CIF and C&F contracts.\textsuperscript{97}

The time of payment under these contracts is also of crucial importance, with cash sales exposing farmers to the most risk since market prices are usually lowest at harvest time. To alleviate some of the risk, grain farmers sometimes agree to forward contracts with the elevator buying their produce, whereby they agree to deliver a certain quantity and quality of grain on a specified date. This arrangement assures farmers of a market and set price, allowing control over their grain until time of delivery. The risk of insolvency, however, lies between execution and delivery.\textsuperscript{98} Another marketing option is Minnesota's legislation permitting voluntary extension of credit contracts:

For the purchase of a specific amount of grain from a producer in which the title to the grain passes to the grain buyer upon delivery, but the price is to be determined or payment for the grain is to be made at a date later than the delivery of the grain to the grain buyer. Voluntary extension of credit contracts include deferred or delayed payment contracts . . . and all other contractual arrangements with the exception of cash sales and grain storage agreements evidenced by a grain warehouse receipt.\textsuperscript{99}

\textsuperscript{96} See id. at 165.

\textsuperscript{97} See Bunge Corp. v. Tradax Export, 2 Lloyd's Rep. 1 (1982) (explaining the measure of damages in breach of FOB contracts); see also Toprak v. Finagrain, 2 Lloyd's Rep. 98 (1979) (distinguishing between the measure of damages in FOB contracts and CIF contracts).


\textsuperscript{99} MINN. STAT. § 223.16 (1984); see also Gillingham, supra note 98, at 229 (proposing that these credit contracts presume that title passes to the elevator upon
Forward contracts are more popularly called futures contracts,\textsuperscript{100} an arrangement that first developed into continuous use in the mid-1850s in Chicago. In the United States, most futures contracts are dealt with on exchanges regulated by the Commodities Futures Trading Commission (CFTC), although off-exchange futures contracts, commonly known as leverage contracts, have been permitted since 1972.

Particulars of these early contracts for sale of a commodity for future delivery were publicly reported. In 1883, the Chicago Board of Trade formalized the “ring settlement method,” which allowed commodity traders to offset or reverse a contractual obligation with one party by selling a current obligation to another. “Ring settlement” is referred to as “string” trading in cash grain trades where transfer of physical commodities is expected. Futures markets facilitate the forecasting of future prices, supply, and demand. They shift the future price risk to traders willing to “hedge,” and encourage standardized terms, contract liquidity, and the creation of clearinghouses to settle trades.\textsuperscript{101} These arrangements focused on consumers and middlemen, while farmers banded together for marketing purposes. Presumably the rationale of the Wheat Board is that it can market grain better than the farmers.

Farmer-owned cooperative companies (or pool movements) were formed as far back as 1907, with the founding of the farmer-owned United Grain Growers (UGG).\textsuperscript{102} The Saskatchewan Cooperative Elevator Company, formed in 1911, operated until taken over by the Saskatchewan Wheat Pool in 1924.\textsuperscript{103} These grain cooperatives grew in sophistication and organization, as evidenced by the contracts delivery, and provide no bond coverage).

\textsuperscript{100} See Nina Swift Goodman, Trading in Commodity Futures Using Nonpublic Information, 73 GEO. L.J. 127, 128 (1984) (citing Liest v. Simplot, 638 F.2d 283, 286 (2d Cir. 1980)) (noting that in a futures contract the seller promises to deliver a particular commodity during a specified future month, while the buyer promises to accept the commodity and pay the price the parties agree upon when entering the contract).


\textsuperscript{103} See id. at 202 (highlighting the impetus for the Saskatchewan Wheat Pool’s formation).
signed by 45,000 farmers in 1924, which pledged two cents from each bushel of grain sold and one percent of the value of a cash ticket to create their pool of capital. A final payment was based on the average return for the whole pool. Wheat pools of this variety were organized in each of the prairie provinces, and by 1930 they controlled 37% of the inland elevators and owned terminals at Thunder Bay, Vancouver, and Prince Rupert.

Cooperatives became important grain markets following the refusal of the federal government to nationalize grain marketing functions. Today, these cooperatives run major grain-handling networks with combined gross revenues of $5 billion per year. Recently, a competitive feud simmered among the prairie wheat pools. The Manitoba Pool Elevators and the Alberta Wheat Pool have lodged a hostile takeover battle for UGG. The former, however, dropped their bid when faced by the real threat that UGG would trigger a poison pill, effectively diluting the pool’s stake in UGG.

Despite this strength, storage capacity in licensed grain elevators has diminished from approximately eleven million tons in the early 1970s to less than seven million tons by 1993. As a result, the Wheat Board established a delivery policy that expanded the range of delivery contracts available to grain farmers and applied quotas only to wheat, durum, and barley. Three series of contracts will be available for wheat and durum grades and protein counts. The range of contracts gives farmers considerable flexibility in agreeing to specific grades and quantities.

104. See Saskatchewan Wheat Pool, Focus on Saskatchewan Wheat Pool 3 (undated); see also Heavin, supra note 102, at 202-04.
105. See Heavin, supra note 102, at 201 (discussing the incredible growth and power of cooperatives in the early 1900s).
106. See BLANCHARD, supra note 13, at 18 (stating the arguments against government ownership, and in support of government financial backing for farmer owned cooperatives).
107. See AGRICULTURE AND AGRI-FOOD CANADA, POLICY STATEMENT: CHANGES IN WESTERN GRAIN MARKETING 2 (1996) (indicating that the wheat industry’s $5 billion annual sales revenue makes it one of Canada’s most significant business industries).
109. See id. (discussing UGG’s response to the threat of being taken over by the Alberta or Manitoba wheat pool cooperatives).
110. See CANADIAN WHEAT BOARD, A NEW APPROACH TO DELIVERY POLICY
Fortunately for the grain industry, long stagnant grain prices soared in 1996 and the price of corn has doubled since 1995. However, many farmers are locked into future contracts with grain elevators, promising to deliver corn at roughly $2.70 (U.S.) a bushel, almost half of 1996 market prices. Indeed, many farmers in the United States face losses on “hedge-to-arrive” contracts with local grain elevators, a hedge to avoid a market downturn. The traditional contract arrangement, on the other hand, made with a commodities broker who initially absorbs margin calls, protected many farmers’ interests. This agreement ultimately leaves responsibility for margin calls with the elevators who buy highly leveraged futures contracts on the farmers’ behalf, but have huge margin calls as grain prices soar. For instance, an elevator selling a corn futures contract in 1995 at $2.70 a bushel for delivery in July 1996, paid nearly twice that amount to buy back the contract to avoid actually delivering the grain. As elevators are squeezed, they are claiming contribution from farmers under these contracts. Many farmers feel they should not be held accountable for this loss and are withholding delivery of the grain they promised co-operatives.\textsuperscript{111}

5. Crop Insurance & Price Stabilization

Since farmers often negotiate from a disadvantageous position, forming a bargaining association increases negotiating leverage in relation to a farmer’s relative size and assets. Cooperatives, or bargaining associations, are an economic self-help remedy that control the timing of the sale of crops and improve the market intelligence available to farmers.\textsuperscript{112} They assist the development of a market plan to control the timing of entry into the market, as well as the final terms of sale.\textsuperscript{113} Thus, the agriculture sector privately apportions risk externally through futures contracts in the commodities markets and internally by trade associations.\textsuperscript{114} It also apportions risk through


\textsuperscript{113} See \textit{id}. at 436.

\textsuperscript{114} See Baumel & Kober, \textit{supra} note, 101, at 151 (explaining how futures contracts function in the grain trade); \textit{see also} Goodman, \textit{supra}, note 100, at 127.
publicly funded crop insurance that is government funded.115

Crop insurance is typically underwritten by the government in order to protect the significant cash investment that farmers have in their seeded crops. In Canada, the federal and provincial governments provide financial assistance, which enables farmers to purchase crop insurance at less than half the total cost otherwise payable. The Crop Insurance Act116 provided financial protection against crop loss caused by uncontrollable natural calamities. Additionally, the Act operates against waterfowl habitat by encouraging crop specialization and discouraging activities more compatible with waterfowl, such as raising livestock. In doing so, the Act reduced the risk associated with dependence on a single farm crop such as grain. In addition, crop insurance, as with other programs, such as the CWB quota system, encourages farmers to cultivate marginal lands with eligible crops. Among other reasons, yields on marginal lands may fall significantly below the recent yield history for the eligible crops in the area. As a result, effective coverage might occur as high as 100 percent or more of a given field’s capacity for crop production. Nevertheless, this yield effect does not disappear entirely despite the considerable decline as more marginal land is cultivated in the region.

In the spring of 1991, the Farm Income Protection Act (FIPA) replaced the Crop Insurance Act, the Agricultural Stabilization Act, and the Western Grains Stabilization Act.117 As part of this legislation, the Wheat Board deducted an annual levy from participating farmers’ grain sales to stabilize the income of western grain farmers.118 Under the program of “stabilization of earnings,” approximately one-third of the funding comes from producers and two-thirds from the federal government.119 Distributions from the program are

117. See FIPA, supra note 116; see also Western Grain Stabilization Act of Canada, ch. 87, §1 (1974-76) (Can.).
118. See Peterson, 106 D.L.R.4th 293, 294-95 (discussing the purpose and function of the Western Grain Stabilization Act).
119. See id.
determined by averaging the net grain revenues of the preceding five
years and applying that amount to each crop year the producer is en-
titled to a payout.

Since the termination of the special Canadian grains program by
the FIPA, the federal government has provided farmers with various
annual subsidy payments. Also, the provincial and federal govern-
ment sponsored the creation of a new program called the “Farm
Safety Net.” The program includes the Gross Revenue Insurance
Plan (GRIP) which provides an incentive for farmers to plan and
manage operations more efficiently by guaranteeing revenue for the
time allotted to seeding and provides coverage based on a target
revenue and on historical yields and prices.120 The program also in-
cludes the Net Income Stabilization Plan (NISA), which sets forth a
revenue protection plan that provides the yield protection formerly
available though crop insurance.

NISA is a voluntary program designed to help producers stabilize
their farming income.121 The program allows producers to deposit
money annually into their NISA account, which is then matched by
the provincial government.122 By way of additional incentive, pro-
ducer deposits also earn 3% interest above the competitive rates of-
fered elsewhere.123 By allowing the account to build, farmers build
their own security for use when needed during lower income years.
The program is highly beneficial to its participants and is open to
anyone filing an individual tax return reporting farming income or
loss.124

NISA functions to ensure members’ annual income does not fall
below their five-year average income, while GRIP’s purpose is to di-
rectly subsidize farmers.125 According to Agriculture Canada, “the

120. See Canada-Manitoba Crop Insurance, All Risk Crop Insurance (1993); see also
Canada-Manitoba, Questions and Answers on GRIP 1 (undated).
c.ca/nisa/n9608e.html> (describing the NISA program designed to subsidize farmers
in Canada).
122. See id. (explaining the structure of the NISA program).
123. See id. (describing the form of government subsidies available through the
NISA program).
c.ca/nisa/n9608e.html> (highlighting the eligibility requirements for Nisa programs).
125. See Van Kooten, supra note 115, at 765-66 (indicating the different func-
tions of NISA and GRIP); see also Agriculture Canada, Federal Government An-
program promotes environmental sustainability because it does not encourage production of one commodity over another," however, the large subsidies provided under GRIP and the manner in which they are calculated actually encourage cultivation of marginal lands and land degradation.\(^{127}\)

The Canada-Manitoba Crop Insurance Program, established in 1960, offers farmers a voluntary program that provides financial protection against crop loss due to natural hazards like water damage and crop pests. Under this program, the two tiers of government contribute 50% of the total premium and 100% of the administration costs to eligible applicants. Participating farmers are guaranteed a certain number of tons of coverage for each insured crop and are also insured against incidents beyond the control of the insured, such as drought and excessive rainfall. Farmers may also purchase optional coverage for other types of damage, for instance, protection against the inability to seed land due to excessive moisture or protection against hail damage. Although state-funded crop insurance is effectively a subsidy, the practice is ubiquitous, and the global trade concern is focused on other non-tariff barriers like import quotas.

At one time agriculture was the center piece of the Canadian economy, but now it only provides about 3% of total employment and only 2% of GDP.\(^{128}\) Although over 50% of farm revenue passes through various marketing schemes, Canadian farming has experienced a very difficult period since the late 1980s. Even though the total farm subsidy was approximately $10 billion (Can.) in 1991, the government's support, however, has shielded farmers from the most damaging impact of prices in world markets.\(^{129}\) While current supports are high, the impact of world price competition since 1984 has

\(^{126}\) See Van Kooten, supra note 115, at 765-66.

\(^{127}\) See R. Gray et al., A New Safety Net Program for Canadian Agriculture: GRIP, Choices, 3rd Quarter, 1991, at 34; see also Van Kooten, supra note 115, at 766.


\(^{129}\) See id. (suggesting that the impact of world competition has been softened by farm subsidies).
resulted in some liberalization in the Canadian agricultural sector.\footnote{130}

III. ECONOMICS & GATT

Global economics dramatically influenced the Canadian agriculture regime by providing both additional markets and additional competitors. Generally speaking, the seminal justification for state intervention was written by John Maynard Keynes during the Great Depression. Keynes challenged the widely held belief that capitalist economies, when left alone, had equilibrating or self-adjusting forces.\footnote{131} Keynes suggested that a degree of market dominance coupled with government intervention produced stable income and employment levels.\footnote{132} Keynes shifted the focus away from production and supply concerns, emphasizing economic stability as a means of generating healthy aggregate demand. His demand-side position was a “middle path for capitalistic economic recovery, a path that side-stepped both the conservatives’ concern with providing optimal conditions to encourage savings, and the socialists’ demand for the public ownership of the means of production.”\footnote{133} Keynes believed that elaborate social policies promoted aggregate demand and that “[t]his spending was legitimized, not as charity, but as ‘automatic stabilizers’ built into the economy to sustain aggregate demand in periods of cyclical downturns.”\footnote{134} This economic philosophy was successfully combined with the dynamic political leadership of President Franklin

\footnote{130. \textit{See id.} at 20-21 (demonstrating the liberalization of the Canadian agricultural sector since 1995). In the 1987/88 crop year, federal subsidies to agricultural producers increased from $C0.5 billion in the 1982/83 crop year to $C3.6 billion, but decreased to $C2.2 billion in 1989/90. Of the three principle provinces, Saskatchewan received the most amount of subsidies. According to recent estimates, farmers in the province received average payments exceeding $C40 per cultivated area over a five-year period from the mid to late 1980s. \textit{See} C. Rubec et al., \textit{Wetland Utilization in Canada}, in \textit{WETLANDS OF CANADA} (1988); J. Girt, \textit{COMMON GROUND} (1990). On average, each Saskatchewan farmer received approximately $C16,000 per year over the five-year period 1985-1989.


Roosevelt, whose interventionist New Deal policies were partially imitated in Canada by the Liberal Prime Minister William Lyon MacKenzie-King.\textsuperscript{135}

Following World War II, the United States emerged as the dominant world economy, highlighted by steady growth and low interest rates.\textsuperscript{136} Unlike Western Europe and Japan, whose economies were forced to endure physical and political reconstruction, the post-war era was an age of contentment for North America.\textsuperscript{137} During this period of economic benevolence, however, the United States, its allies, and the former U.S.S.R. were locked in a Cold War for global hegemony. Additionally, new competitors like West Germany, Japan, Taiwan, and Singapore utilized innovation and productivity to increase their share of the market.

Keynesian policy came under increased attack during the 1970s when recession, coupled with inflation, created substantial debt in Canada's government. Some Keynesian economists argued that balancing the economy was more important than balancing the budget.\textsuperscript{138} In contrast, in the late 1990s it seems that balancing the budget in Canada is more important than many “social contract” programs, whose governmental funding is being cut from previous levels.

Despite the North American impetus for free trade, there remains pressure for protectionism in Canada as the United States’ agriculture sector is in a cyclical liquidity crisis. In the early 1970s the United States abandoned the gold standard for valuation of its currency, causing dollar held commodities to decrease in value and a run on the North American grain stocks. In 1980, the industrialized countries started manipulating money supplies to dampen inflationary expectations for many agricultural commodities and energy. In North America, interest rates and the value of the dollar began to rise, while

\textsuperscript{135} See John Kenneth Galbraith, The Culture of Contentment 23 (1992) (highlighting the 1960s political and economic climate in both the United States and Canada).
\textsuperscript{136} See id. at 3.
\textsuperscript{137} See id. at 23 (discussing the economic stability of the 1960s as experienced in North America).
the commodity sector subsidized an economic recovery. The appreci-
cation in the value of the American dollar versus other currencies
led to a decline in American predominance over agricultural markets.
During this time, grain prices fell while combating inflation tight-
ened money supplies. Third World countries, formerly good custom-
ers, became so indebted that they could not purchase except through
economic assistance. Thus, the capital markets redefined the Cana-
dian prairies and Middle America.\textsuperscript{139}

A. POST-WAR RESTRUCTURING

During World War II, the United States and Britain inauspiciously
signed the Atlantic Charter, pledging to "endeavor . . . to further the
enjoyment by all States, great and small, victor and vanquished, of
access, on equal terms, to the trade and the raw materials of the
world which are needed for their economic prosperity."\textsuperscript{140} This
Charter recognized that quotas and other protectionist measures
adopted by industrialized nations prevented the free flow of interna-
tional trade and partially led to World War II.\textsuperscript{141}

In 1944, the Bretton-Woods Conference established the World
Bank, the International Monetary Fund, and contemplated the crea-
tion of an International Trade Organization.\textsuperscript{142} In 1946, the Economic
and Social Council of the newly created United Nations drafted a
charter for an International Trade Organization,\textsuperscript{143} which never came
into existence because the United States Congress refused to approve
the charter in 1948 due to the mounting tensions of the Cold War.
The multilateral trade agreements, however, were adopted under

\begin{itemize}
  \item \textsuperscript{139} See \textit{Government Policies and Great Lakes Shipping: Perspectives
    on U.S. and Canadian Maritime Policies}, (Minnesota Sea Grant; Duluth, Min-
  \item \textsuperscript{140} See \textit{Harrison et al., The Great U-Turn: Corporate Restructuring
    and the Polarization of America} 191 (1988) (setting forth the trade arrange-
    ment between the United States and Britain following World War II).
  \item \textsuperscript{141} See \textit{John H. Jackson, The World Trading System: Law and Policy
    of International Economic Relations} 31 (1990) (suggesting that perhaps
    quotas and high tariffs are merely an economic version of the individual and col-
    lective desire for hegemony).
  \item \textsuperscript{142} See \textit{id}. at 27-28 (discussing the international financial institutions de-
    veloped during the aftermath of World War II).
  \item \textsuperscript{143} See Economic and Social Council Records 13, U.N. ESCOR, U.N. Doc.
    E/22/1946 (1946).
\end{itemize}
separate trade authority. Although lacking a central institution, the 1948 General Agreement on Tariffs and Trade (GATT) established the framework for the modern international economy by effectively reducing quotas and tariffs on certain internationally traded goods.

GATT rules follow two main principles: (1) trade barrier reductions, and (2) Most Favored Nation (MFN) status. MFN status requires non-discriminatory treatment of GATT members, preventing the preferential treatment of one or more members at the expense of another. An exception to the MFN principle stipulates that the GATT will not prevent the formation of customs unions, such as the European Union, whose members need not grant internal trade privileges to outside parties.

GATT also seeks to reduce non-tariff barriers that include quantitative restrictions, subsidies, and dumping of domestic goods on foreign markets. Another GATT principle is tariffication, which is the replacement of non-tariff barriers with tariffs. This transformation is preferred because the impact of tariffs is easier to appraise, [and] tariffication will create a trade environment of greater certainty


146. See id. at 200.

147. See id. (suggesting that equal treatment means that every contracting party should be treated as favorably as the most favored party).

148. See id. art. XXIV.


151. See GATT, supra note 145, art. VI; see also Jacob Viner, Dumping: A Problem in International Trade 3 (1966) (describing dumping as “price-discrimination between national markets.”).


153. See GATT, supra note 145, art. XI(1).
and openness."

For instance, the average tariff in the United States in the 1930s stood at 50%, whereas current tariff levels are substantially lower. Currently, the industrial tariffs of the developed market economies are lower than at any time since the late 1870s and substantially lower than during the 1930s. Between 1947 and 1987, the average tariff rates worldwide on manufactured goods fell from 40% to between 5% and 6%. The GATT process has successfully reduced overt trade barriers and has induced the integration of the world's economy. At the same time, however, economic integration intensified the spillover effects of domestic policies that may induce international conflict. In contrast, when different countries insulate themselves from one another by implementing high trade barriers, spillover effects inhibit domestic policies.

Under GATT, importing countries are allowed to impose a countervailing duty when a foreign producer benefits from a subsidy. In such cases, the amount of the duty equals the amount of the subsidy, where the subsidy on imported products threatens or causes material injury to domestic producers. For instance, in National Corn Growers Ass'n v. Canada, Canadian corn producers in Ontario, Quebec, and Manitoba alleged that subsidies paid to corn producers in the United States were injuriously lowering domestic prices. The Deputy Minister of Revenue made an investigation into this suggested linkage and consequently imposed a provisional countervailing duty on American corn. A subsequent inquiry by the Canadian Import Tribunal affirmed the determination that the dramatic decline

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154. See Strating, supra note 150, at 309.
156. See OTTAWA ECONOMIC COUNCIL OF CANADA, MANAGING ADJUSTMENT FOR TRADE SENSITIVE INDUSTRIES 1 (1988).
158. See generally Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, art. 4, 31 U.S.T. 513, 523 (outlining conditions for the imposition of countervailing duties).
160. See id.
in the international price for grain corn was a direct consequence of the 1985 omnibus United States Farm Bill.\footnote{161} The Federal Court of Appeals dismissed the case on the grounds that the decisions of the Tribunal may be subject to judicial review only in limited circumstances.\footnote{162} While the court may interfere with the Tribunal’s ruling in the event its conclusions are “patently unreasonable,”\footnote{163} the court held that references to the GATT served as a reasonable interpretive aid to the statute.\footnote{164} Section 42 of the Special Import Measures Act required the Tribunal to determine whether subsidization of imported goods is likely to cause material injury.\footnote{165} In this regard, the Supreme Court held that it was not patently unreasonable for the Tribunal to consider potential imports as well as actual imports. In addition, economic factors such as price undercutting, productivity, and the potential for substantial loss of market share were also considered.

Most parties to GATT have countervailing duty laws that conform to the GATT subsidies code.\footnote{166} Since 1947, GATT has lowered tar-

\footnote{161. See id. at 449; see also Food Security Act of 1985, 7 U.S.C. § 1281 (1986).}
\footnote{162. See National Corn Growers Assoc., [1990] 74 D.L.R., at 450; see also Special Import Measures Act, ch. 25 (1984) (Can.) [hereinafter SIMA] (providing for judicial review of the Tribunal’s decisions upon application in certain cases).}
\footnote{163. See National Corn Growers Assoc., [1990] 74 D.L.R., at 450.}
\footnote{164. See SIMA, supra note 162, § 2(1). Under SIMA, the definition of “material injury does not preclude the interpretation of ‘subsidy’ and ‘subsidized goods.’” Id.}
\footnote{165. Material injury means, in respect of the dumping or subsidizing of any goods, material injury to the production in Canada, of like goods, and includes, in respect only of the subsidizing of an agricultural product, an increase in the financial burden on a federal or provincial governmental agricultural support program in Canada; Subsidized goods means (a) goods in respect of the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of which a subsidy has been or will be paid, granted, authorized or otherwise provided, directly or indirectly, by the government of a country other than Canada, and (b) goods that are disposed of at a loss by the government of a country other than Canada... Subsidy includes any 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... 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 exempted or have been or will be relieved by means of refund or drawback... Id.}
\footnote{166. See, e.g., Special Import Measures Act, R.S.C., ch. 15 (1985) (Can.); see also Tariff Act of 1930, 19 U.S.C. §§ 1671-1671(h), 1675, 1677-1677(k) (1988);
iffs on products made in factories and from natural resources, including forest products and mined materials. GATT has also successfully lowered tariffs on farm products, although until now it has not dealt effectively with export subsidy programs that the United States and European Union use to dominate export markets at the expense of Canada and other countries. For example, in the past, GATT excluded textiles from those products covered by the separate Multifibre Agreement.\(^\text{167}\)

The Uruguay Round, commenced in September 1986 in Punta del Este, Uruguay, is the eighth series of negotiations to ameliorate the 47-year-old agreement. The Uruguay Round originally expired in 1990, but two subsequent deadlines passed, forcing Presidents Bush and Clinton to seek congressional permission to extend negotiating authority. The Uruguay Round was ultimately concluded by 117 nations in Geneva on December 16, 1993, and on July 1, 1995. It cut tariffs, reduced subsidies, widened market access, and applied the GATT regime to service industries such as financing, banking, insurance, telecommunications, transport, consultancy, accountancy, films, and television.\(^\text{168}\) GATT negotiations were conducted upon the principles of mutual advantage, mutual commitment, and overall reciprocity. As a result, Canadians and Americans were asked to make changes in some of their domestic farm programs that restricted imports of commodities.\(^\text{169}\) For Canada, the most likely commodities are those in which Canada is a high cost producer.\(^\text{170}\)

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The benefits of trade liberalization inevitably cause economic dislocation. For such reasons, while the majority of United States members of Congress supported ratification, forty Republican Senators were prepared to oppose GATT unless the estimated $40 billion in tariff revenue eliminated by the agreement was compensated. Opponents of the agreement further feared that the United States would surrender sovereignty to another international organization like the United Nations. Highly charged partisanship and distrust surrounded the issue.

B. END OF QUOTAS & DEMISE OF MARKETING BOARDS

When the new GATT was implemented in July 1995, quotas were replaced by tariffs that must decline by at least 15% over six years. Canada imposed these tariffs at the conclusion of the Uruguay Round, including a tariff on eggs at 192%, chicken at 280%, milk at 283%, butter at 351%, yogurt at 279%, and ice cream at 326%. Federal Trade Minister Roy MacLaren said that the tariffs "will help insure we feed ourselves," that American officials had some say in setting the levels, and that the GATT rules concerning Canadian tariffs will not be challenged by the United States-Canada Free Trade Agreement, which otherwise prohibits new tariffs. Ironically, the Canadian food service industry condemned the negotiated tariffs for poultry and dairy products. Canadian Restaurant and Food Services Association President, Douglas Needham, said the tariffs were "obscene," and protected the supply management system from com-

its domestic market. Accurate measurements of economic efficiency, however, tend to be masked by the effects of government intervention.

171. See Nancy Dunn, GATT Caught in Congress Crossfire—A Look at the Threat to U.S. Ratification of Uruguay Round, FIN. TIMES, July 14, 1994, at 4 (referencing budget rules and requirements that fees be added or programs cut to compensate for expected loss in tariff revenues over the next five years).

172. See id. (noting opposition from opponents on the left, such as Ralph Nader, and opponents on the right, including Pat Buchanan and Pat Robertson).

173. See id.

174. See Peter Morton, Canada: Farm Boards Face Collapse, Minister Warns, FIN. POST, Dec. 17, 1993, at 4 (discussing the shift from border quotas to tariffs).

175. See Eric Reguly, Canada Guards Farm With Tougher Tariffs, FIN. POST, Dec. 16, 1993, at 11 (noting the imposition of unexpectedly high tariffs on Canadian poultry and dairy products).

176. See id.

petition.

Under the Blair House Agreement, the 1993 GATT reduced subsidized wheat exports by 21% over six years. Although Canada officially opposed subsidized exports, it will begin the phase-in period of the reductions at the end of this decade, or perhaps later. GATT negotiators initially sought to prevent "sub-national" governments, including provinces, from making industrial development grants. If the target region is economically deprived, a province may still make the grants. Therefore, Quebec still qualifies, while Alberta does not because it is a large recipient of these grants. Anti-dumping measures also expire after five years. Before the imposition of anti-dumping measures, domestic industries as a whole, as opposed to individual manufacturers, must prove harm resulting from cheap imports.

Under the GATT agreement, roughly 34,000 Canadians with livelihoods regulated and protected by a network of marketing-boards face new competition from more efficient foreign farms. These protected industries opposed replacing quotas and other import restrictions with tariffs. The end of supply management, however, was perceived to benefit food processors and restaurant chains, which stand a better chance of survival in the North American free-trade zone with wide-open access to the cheapest available goods. The consensus was that "Canadian grain and oilseed growers would welcome any reduction in the level or rate of subsidies." The farm deal, however, was not welcomed by supply management marketing boards for chickens, turkeys, eggs, and dairy products, who had maintained higher prices by setting domestic production levels and imposing stiff quotas on imports. Alberta egg producers, for exam-

178. See Canada Guards Farms With Tougher Tariffs, supra note 175, at 11.
179. See id.
180. See id. (noting Canada's success in GATT negotiations in maintaining the issuance of industrial grants in certain areas).
181. See id.
182. See id.
183. See id.
184. See id.
186. See id.
ple, were allotted a nine percent quota for the 423 million dozen eggs consumed annually in Canada. The provincial quota of 33 million dozen eggs is divided among Alberta’s 200 producers.

Ironically, the effect of the GATT came at a time when world grain prices were rising. Canadian producers, for example, received increased wheat payments in 1994 from the Wheat Board. Canadian Western Red Spring Wheat, with 14.5% protein, went up from $10 to $183 per ton. The price for first and second grade spring wheat, with 13.5% protein, jumped to $150 and $144, respectively.

This increase, however, was not perceived as a sign that world prices were recovering. In Saskatchewan, according to Agricultural Minister Darrel Cunningham, western Canadian grain farmers were not happy with the December 1993 GATT that was expected to reduce export subsidies by approximately 20% over six years. Cunningham noted, “[i]t was a watered-down deal but there may be a psychological effect on the market, pushing up grain prices.” Any psychological effect, however, would be tempered by real increases in farmers’ productivity.

Canada’s supply management formally ended July 1, 1995, with the termination of import quotas that kept out cheaper foreign products; it was replaced by a tariff system. The shift away from supply management, however, casts a shadow over the future of marketing boards. A study by the Consumers’ Association of Canada observed that the “supply management system persists in plucking consumers instead of chickens.” Unless provincial farm marketing boards find other ways of limiting agricultural production, then, according to Ontario Agricultural Minister Elmer Buchanan, they will collapse amidst internal Canadian trade wars.


188. See id.


190. See id.

191. See Morton, supra note 174.

192. See id.

193. See id.


195. See Morton, supra note 174, at 4 (noting the possibility of farm groups raising production quotas to increase market share).
Canada and the provinces recently concluded an inter-provincial Agreement on Internal Trade, which was ratified in 1995. It aims for uniform standards and regulations which covers procurement, investment, labor, mobility, consumer-related measures and standards, agriculture, food, alcoholic beverages, natural resource processing, energy, communications, transportation, and environmental protection. In addition to the general principles of equal treatment of persons, goods, services, and investments, and the reconciling of relevant standards, the Internal Trade Agreement also recognizes the need for exceptions and transition periods. Chapter nine, covering agricultural and food products, is evolutionary and progressive and applies to measures relating to internal agricultural trade within Canada. The agreement also makes trade barriers resulting from differences in agricultural regulation standards without a policy basis immediately subject to the agreement, while those with a policy basis become subject to the agreement by September 1, 1997. The agreement also requires that no sanitary or phytosanitary measures restrict “internal trade.”

The Agriculture Ministers of Canada and the provinces were to undertake a review of the scope of the chapter before September 1, 1997. Article 903 pertains to supply management and subsidy issues. It calls for a review of the Western Grain Transportation Act and farm safety net programs within a time frame that complies with Canada’s international treaty obligations.

IV. U.S. AGRICULTURAL POLICY

Agricultural productivity in the United States has recently increased at four times the rate of non-farm productivity. In the

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196. See Agreement on Internal Trade, Aug. 23, 1994, Internal Trade Secretariat; see also Alexander J. Black, Canadian Lawyer Mobility & Law Society Conflict of Interest, 18 FORDHAM INT’L L.J. 118 (1995) (describing the Agreement on Internal Trade and the barriers to the movement of professionals).
197. See Agreement on Internal Trade, supra note 196, art. 101.
198. See id. art. 904(3).
199. See id. art. 901(4).
200. See id. art. 903(2)(b).
201. See id. art. 903(2)(c).
1980s, the United States produced 74% of the world's trade in corn, 53% in soybeans, and 39% in wheat.\textsuperscript{203} The United States experienced an export boom in 1979, when exports totaled $7.2 billion, and rose to a peak of $43.8 billion in 1981. This sharp increase in exports ended abruptly in 1982, leaving $39.1 billion in exports for that year. Exports continued to drop to approximately $26.5 billion in 1986.\textsuperscript{204} Alarmed at these sharp reductions, Congress created the National Commission on Agriculture Trade & Export Policy\textsuperscript{205} to study possible improvements to export policy and plan the recapture of export markets. Not surprisingly, the Commission failed to recommend a reduction in farm production in response to the imbalance of supply to demand.\textsuperscript{206}

Traditionally, the United States has treated agriculture as a special economic sector. "Every state has passed some form of 'right to farm' legislation, primarily protecting farmers from nuisance liability and giving them priority if they were located there first, operated reasonably or complied with 'generally accepted agricultural practices.'"\textsuperscript{207} Agriculture today, however, is less homogeneous than when many of these laws were passed. Changing patterns in agriculture resulted in large scale commercial farms and small or part-time farms, requiring policies tailored to the particular needs of each type.\textsuperscript{208}

The romantic aura surrounding agriculture is part of the reason for

\textsuperscript{203} See Pierre R. Crosson, Scenarios of Future U.S. Agricultural Production and Technology and Their Environmental Costs, 107 RESOURCES 6, 7 (1992); see also Terence J. Centner, Changes Impacting Production Agriculture: NAFTA and New Environmental Regulations, 24 U. TOL. L. REV. 371, 374 & n.27 (1993) (citing ECON. RES. SERV., U.S. DEPT. OF AGRIC., PUB. NO. 246, AGRICULTURE IN A NORTH AMERICAN FREE TRADE AGREEMENT 2 (1992)) (reporting that the leading United States agricultural export customers are Canada, the European Union, Japan, Korea, and Mexico).

\textsuperscript{204} See Alagia, supra note 202, at 273-74.


\textsuperscript{206} See Alagia, supra note 202, at 275 (stating that in a 1986 executive summary, the Commission's recommendations ranged from aggressive action to meet foreign unfair trade practices to centralization of agricultural-related decision making within government).


\textsuperscript{208} See id. at 219.
this special treatment. Thomas Jefferson envisioned an ideal agrarian republic where the yeoman farmer promoted democracy through closeness to and dependence on the land. In contrast, he viewed cities as "cankers" that ate at the republic's heart and constitutional soul. Jefferson proposed four pillars for national prosperity: agriculture, manufacturing, commerce, and navigation. He believed in the moral superiority of farm life, its productivity, and its conducive-ness to virtue and independence. Since Jefferson's time, events have changed this popular perception: "Agriculture has distanced it-self from the land—with corporate, absentee, non-organic farm management—the reverence for agriculture in American society has diminished." Indeed, many farmers were forced off their land as a result of drought, urbanization, industrialization, and depressed prices following World War I and the Great Depression. United States protectionism followed soon after the 1929 stock market crash, through the passage of the Smoot-Hawley Act of 1930. The act sharply increased import duty rates as a recession fighting measure to an average ad valorem rate of approximately 60%. The United States unleashed successive rounds of protectionism against its trading partners, which many economists believe caused a worldwide depression.

The Dust Bowl of the early thirties covered southwestern Kansas, western Oklahoma, the panhandle of Texas, northeastern New Mexico, southeastern Colorado, and North and South Dakota. The

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210. See Jefferson, supra note 209.
211. See Malone, supra note 209, at 5.
212. See id.
213. Id. at 49.
214. See e.g., Donald Webster, Dust Bowl: The Southern Plains in the 1930s 182-85 (1974) (describing events in the first half of the twentieth century, causing a reallocation of labor).
216. See McGeorge, supra note 170, at 376.
217. See id.
218. See Webster, supra note 214, at 11-12 (describing the drought period of
droughts, poverty, farm losses, and aid under the Roosevelt Administration’s New Deal concentrated in these regional areas. Yet the dry years of the 1930s were a predictable part of the moisture cycle in semi-arid regions like the North American prairies. Settlers failed to recognize the aridity and sensitivity of the prairie ecosystem, where native grasses held soil together in wet and dry years.

Despite these difficulties, agronomy triumphed over ecology. The New Deal’s economic goal created adequate incomes for farmers by encouraging better cultivation techniques, including marginal land. Following World War II, the United States Government created a system of flexible price supports and production limits for farmers so as to prevent a return to the depression of the 1930s. Price supports and production limits became widely accepted and were combined with post-war reliance on chemicals, machinery, and borrowed money to encourage intensive farming.

The most important part of the New Deal farm legislation was the Agricultural Adjustment Act of 1938, which still exists as basic farm law in the United States. The act provides a scheme for paying farmers parity prices, imposing acreage allotments, and determining marketing quotas on non-perishable farm commodities. This act introduced price support programs that provide non-recourse loans at a stated minimum price to eligible farmers in exchange for their crops. Under this program, if market prices exceed the loan,

1930-36, wherein the southwestern parts of the United States experienced violent dust storms).

219. See id. at 184-85 (stating that although other parts of the United States also experienced the effects, the Roosevelt Administration concentrated relief programs on the “Dust Bowl” region).

220. See id. at 69-70.


222. See id. at 465.

223. See id. (stating that during World War II, demand was brought in line with supply).

224. See id.


226. See id. at 7 U.S.C. § 1304.

227. See e.g., 7 U.S.C. §§ 1311-1314 (marketing quota and acreage allotment for tobacco).

228. See Pub. L. No. 75-430, § 302, 52 Stat. 43 (codified as amended at 7
farmers can use the proceeds to pay the balance. If prices fall below the loan price, the farmer can discharge the loan by forfeiting the crop to the government.\footnote{See Pub. L. No. 75-430, §§ 101-02, 52 Stat. 33-34 (codified as amended at 16 U.S.C. § 594(h) (1994)).} Under the so-called section 22 waiver,\footnote{See Limitations on Imports, 7 U.S.C. § 624.} the United States waives the prohibition on quantitative restraints when imports threaten to render farm programs ineffective.\footnote{See McGeorge, supra note 170, at 385 (noting that in 1950 Congress amended section 22 in response to foreign complaints about United States trade practices). The amendment provided that no trade agreement (including GATT) could be implemented in a manner contrary to the requirements of the Agricultural Adjustment Act. See id.} Using this waiver, the United States has imposed quotas on cotton, peanuts, dairy products, oats, rye, and other products.\footnote{See id. at 385.} Nevertheless, because of the United States' dominant bargaining power during the creation of GATT,\footnote{See id. at 384.} negotiators designed the treaty to conform to existing domestic agricultural price support and production control programs in the United States.\footnote{See id. (stating that the contracting parties to the GATT made special provisions for agricultural imports because Congress would not ratify an agreement requiring the United States to dismantle agricultural programs). Thus, it was the United States agricultural programs that shaped GATT's agricultural trade provisions. See id; see also GATT, supra note 145, art. XI, 2(c), 4 B.I.S.D. at 17-18 (stating an exception to the general elimination of quantitative restrictions on imports and exports where such restrictions curb domestic production and relieve surpluses).}

Since the signing of the United States-Canada Free Trade Agreement,\footnote{Free Trade Agreement, Dec. 22, 1988, U.S.-Can., 27 I.L.M. 281.} total Canadian agricultural and food exports have risen from $3.4 billion to $7.4 billion, with wheat sales increasing over $173 billion. Although the United States has repeatedly failed to prove that Canada has sold wheat below cost or unfairly subsidized its exports, the Canadian government has agreed to the United States' sanctions under the threat of more severe unilateral sanctions.\footnote{See Exports Say Wheat Deal Just Start of Canada Trade Push, STAR TRIBUNE, Aug. 7, 1994, available in 1994 WL 8451674 (stating that Canada agreed to the United States' wheat sanctions in exchange for not seeking wider reaching restrictions on flour, barley, and malt).} Initially, the United States sought to invoke GATT remedies, but GATT would
permit Canada to retaliate against a wide variety of goods from the United States. The American farm lobby seized the window of opportunity and relied upon the wide-ranging section 22 waiver in the United States Agricultural Adjustment Act,\footnote{See 7 U.S.C. § 624.} under which sanctions can be imposed against any imports hindering domestic farm support programs.\footnote{See Barrie McKenna, Lobbies, Not FTA, Culprit in Wheat Deal, GLOBE & MAIL, Aug. 5, 1994, at B4.}

A. U.S. AGRICULTURAL EXPORT PROGRAMS

The Great Depression served as a catalyst for interventionist farm programs in the United States. The conceptual predecessor of contemporary programs was the Foreign Market Development Program (the Cooperator Program),\footnote{See Agriculture Trade Development and Assistance Act of 1954, Pub. L. 83-480, 68 Stat. 454 (codified as amended at 7 U.S.C. § 1691) (noting that the act, also referred to as the “Food for Peace Act,” sought disposition of surplus commodities, reduction of storage costs, agricultural stability, expansion of foreign markets, and promotion of foreign policy).} which gave the Department of Agriculture the power to conclude cooperative agreements with “Cooperators”\footnote{See 7 C.F.R. § 1550 (1997) (setting forth the basic administrative procedure for a cooperative program agreement under the Farm Service Agency).} (typically non-profit agricultural commodity associations) aimed at developing markets for surplus commodities.\footnote{See David. R. Purnell, A Critical Examination of the Targeted Export Assistance Program, Its Transformation Into the Market Promotion Program and Its Future, 18 N.C. J. INT’L L. & COM. REG. 551, 554 (1993) (stating that wheat, cotton, and soybean were the primary commodities promoted by the program).} In order to enhance foreign market development efforts the Farm Service Agency, with support from “cooperators,” contributed foreign currencies from states under the Food For Peace program. “Cooperators” had flexibility and could use third party distributor contributions in cash or in kind.\footnote{See Market Development Project Agreements, 7 C.F.R. § 1550.3(e) (1997).}

In addition to the Cooperator Program, various trade promotional programs in the United States assist United States agriculture by offering direct credit, credit guarantees, food aid, domestic price support, and the disposal of surplus commodities. These programs were revised following the relative decline in American exports, from a
28% share of world markets in 1962 to 20% in 1980. Congress reacted to this decline in 1985 by establishing the Export Enhancement Program (EEP). This program is an overt export subsidy program that challenges unfair trade practices that hurt United States producers. Under the EEP, a bonus is paid to American exporters to help the sale of certain commodities to targeted destinations. This bonus translates to discounted grain for foreign buyers. The bonus is calculated by figuring the difference between the cost of the United States commodity in a country and the cost of competitor commodities in the same country. The bonus is payable by the Commodity Credit Corporation (CCC), in kind or by generic commodity certificates redeemable for cash or commodity payments. Another example of a bonus program is the Sunflower Oil Assistance Program, which induces the sale of sunflower oils to targeted countries like Egypt and Algeria.

The Targeted Export Assistance Program, created by authority of the Food Security Act of 1985, offered short-term federal financing to assist development of export markets for American commodities. It was criticized, however, for problems in its administration, implementation, effectiveness, and desirability. Indeed,

246. See Purnell, supra note 241, at 559.
247. EEP Hearing, supra note 245, at 41.
248. See Purnell, supra note 241, at 559-60 (stating that the CCC reaches beyond financing, since grain warehouses in the United States must comply with CCC regulations governing how elevators may conduct business); see also Thomas R. Zinkula, Dealing With Grain Dealers: The Use of State Legislation to Avert Grain Elevator Failures, 68 Iowa L. Rev. 305, 310 & n.54 (1983).
250. See Purnell, supra note 241, at 560.
252. See Purnell, supra note 241, at 551.
The complexity of [federal farm commodity] legislation arises not so much from any particular law but from the way in which many laws fit together. . . . The legal basis for policy . . . is contained in separate laws, written at different times, which have widely varying policy instruments and executive authorities.

The 1990 Farm Bill was a reaction against the worst farm crisis since the Great Depression. Many farmers who borrowed excessively during the boom years of the late 1970s, faced bankruptcy as commodity prices and land values declined in the face of high interest rates and increased commodity surpluses. The new act promotes intervention to achieve income stabilization for farmers and price stabilization for consumers. These objectives will be satisfied by resource conservation, management of excess supply through storage, and export promotion.

1. Agriculture and the Environment

One indicator of a strong market economy is steady growth. An annual increase in a country’s Gross National Product (GNP) is usually associated with the economic health of that country. But “[t]he world’s population and our production of pollution are expanding exponentially.” For instance, the cost of all goods and services would double in eleven years at an inflation rate of 6.3%. Increased economic growth and agricultural production can have a detrimental effect upon the environment. The challenge of capitalism is to balance economic growth with sustainable development.

Agriculture has been accused of inflicting widespread environ-

255. See 135 Cong. Rec. H2426-02 (Statement by Rep. Dorgan) (characterizing the impact of the economic environment in conjunction with recent droughts, as the worst since the Great Depression).
256. See 134 Cong. Rec. S15167-02 (Statement by S. Conrad) (proposing tax relief efforts to salvage delinquent loans brought on by the 1980s recession in agriculture).
257. See 136 Cong. Rec. S834-02 (Statement by S. Boschwitz) (outlining the measures taken to achieve price and income stabilization in the 1990 Farm Bill).
259. See id. at 106-07.
mental harm, such as contributing to water pollution through contamination by fertilizer residues, insecticides, fungicides, dissolved minerals, and animal-associated bacteria.\(^\text{261}\) Conversely,

Liberalizing protectionist agricultural policies in the high income countries is therefore likely to (i) cause the world's food to be produced with fewer chemicals, which in turn would reduce chemical residues in food in the natural environment; and (ii) have at most a very modest impact on the rate of deforestation. It would also increase the availability of land for recreational and aesthetic uses - including the replanting of forests - in several high income countries as marginal farm land was taken out of production. Thus, in all likelihood there would be a substantial increase in global environmental quality following agricultural trade liberalization, even if no new environmental policies were introduced.\(^\text{262}\)

GATT addressed the interaction of trade and the environment in a study suggesting that reduced agricultural subsidies shift production to lesser-developed nations, which tend to use fewer chemical fertilizers and pesticides.\(^\text{263}\)

Article III of GATT generally prohibits taxation measures that treat products of GATT contracting parties less favorably than domestic products. This aspect of GATT, however, can be subverted through discriminatory environmental legislation. For instance, the 1986 Superfund Revenue Act,\(^\text{264}\) which was enacted to fund the Superfund cleanup program, included the imposition of a higher tax on imported petroleum than on domestic petroleum.\(^\text{265}\) Canada, Mexico, and the European Community challenged this differential tax by invoking GATT dispute settlement procedures under Article XXIII.\(^\text{266}\) The panel ruled against the United States and required the United States to eliminate the offending provision.\(^\text{267}\)


\(^{262}\) See id. at 34.


\(^{265}\) See id. § 512(c) (setting the tax at 11.7 cents per barrel for foreign petroleum and 8.2 cents per barrel for domestic petroleum).

\(^{266}\) GATT Dispute Settlement Panel Report on the United States Superfund Excise Taxes, 27 I.L.M. 1596, 1601 (1988) (noting that both Canada and Mexico asked for a panel, pursuant to Article XXIII rather than XXII).

The GATT Tuna/Dolphin dispute between the United States and Mexico magnified environmental concerns about trade liberalization. Pursuant to the United States Marine Mammal Protection Act of 1972 (MMPA), Congress blocked imports of tuna from Mexico and several other countries after it determined that fishing fleets from these countries used the dolphin-unfriendly purse seine net. The MMPA placed an embargo on imports of tuna, even if they were caught in foreign or international waters, from any nation using this net and catching a large number of dolphins. While GATT Article XI generally prohibits quantitative restrictions on imports, subsection 2 excepts agricultural and fisheries products under certain conditions, making this provision the weakest link of the GATT system. These exceptions allow certain quotas on agricultural imports and subsidies on exports, distorting trade with the result that "current patterns of agricultural trade often have little to do with comparative advantage."

In the Tuna/Dolphin dispute, Mexico challenged the United States' action on the grounds that it was an illegal trade barrier that violated Mexico's right to fish the ocean. In August 1991, a dispute settlement panel ruled in Mexico's favor, finding that none of the exceptions listed in Article XI applied to the United States' em-


270. See id. § 102(a)(2), (3).

271. See GATT, supra note 145, at art. XI(2)(c) (setting forth exceptions to GATT's general prohibition on quantitative restrictions). It provides that the prohibitions shall not extend to import restrictions on agricultural products necessary for the enforcement of governmental programs that limit production or remove temporary surpluses from the market. See id. art. XI (2)(c). These exceptions were made at the insistence of the United States, which first enacted legislation protecting American farmers in the 1930s. See Sherwin Lyman, The Canadian Approach to Regulating Agricultural Commodities in International Trade, 14 CAP. U. L. REV. 559, 563 (1985).

272. See McGeorge, supra note 170, at 371 (summarizing GATT policies regarding agricultural trade).


274. See id. at 1598.
The embargo of imported yellowfin tuna.\textsuperscript{275} The GATT Council, however, never adopted the panel report because the United States and Mexico reached a bilateral resolution.\textsuperscript{276} Adoption of the report would have forced the United States to conform the provision to its GATT obligations by lifting the embargo, compensating adversely affected GATT partners, or facing retaliation against United States exports by adversely affected GATT contracting parties.\textsuperscript{277} Thus, the Tuna/Dolphin dispute reveals the limitations of GATT regarding environmental issues.

Both Canada and the United States have relatively well-developed environmental law regimes that force producers to be more productive than producers in countries with lower standards. Lower yields resulting from the enforcement of environmental regulations, such as fertilizer and pesticide use restrictions, increase the price of affected agricultural commodities.\textsuperscript{278}

These regulations are a response to environmentally destructive farming practices. By the 1970s, more than twenty-five soil erosion programs existed in the United States, complemented by a boom in “fence row to fence row” planting practices and agricultural exports.\textsuperscript{279} High grain prices militated this result by luring investors onto marginal lands. In response, conservation organizations lobbied and secured the inclusion of conservation provisions in the 1985 Farm Bill.\textsuperscript{280} The legislation prohibits “sodbusting,” which is the production of an agricultural commodity on highly erodible virgin land,\textsuperscript{281} and “swampbusting.”\textsuperscript{282} The program also sets forth conser-

\textsuperscript{275} See id. at 1616-21 (finding the prohibition on imports inconsistent with Article XI’s ban on quantitative restrictions).


\textsuperscript{277} See id. at 172 & n.21 (describing the scenarios that follow the adoption of a panel report).

\textsuperscript{278} See Centner, supra note 203, at 382 (discussing the Conservative Reserve Program).

\textsuperscript{279} See Malone, supra note 209, at 9 (noting the reasons for the renewed interest in agricultural policy).


\textsuperscript{281} See 7 C.F.R. §§ 12.2(a)(10), (15) (1996). Highly erodible cropland will only be considered “predominate” if one-third of fields over fifty acres has an
vation compliance components to protect topsoil—farmers must meet wetland and soil conservation standards in order to be eligible for price and income supports, disaster payments, and crop insurance.283

In comparison, the Canadian Wheat Board promotes the cultivation of marginal land and summerfallow through a quota system based on total cultivated land area.284 Summerfallow directly and indirectly impacts the habitats of livestock and waterfowl. Besides resulting in excessive soil erosion, which causes ponds to fill in, fallow also results in inadequate nesting coverage for waterfowl. Furthermore, fallow contributes to soil salinity, indirectly impacting livestock and waterfowl habitats. In order to prevent soil salinity, farmers may drain sloughs on their land. This drainage results in the reduction of breeding grounds for waterfowl and the decreased availability of suitable drinking water for domestic animals.285

The negative sanctions in the 1985 Farm Bill stand in contrast to the Conservation Reserve Program, established in 1985 to reimburse farmers for removing fragile cropland from production.286 The program established a set of management plans for certain types of cropland, including decisions about location, land use, tillage systems, and conservation treatment measures.287 The 1990 Farm Bill288 eradibility index of eight or more. See id. The eradibility index numerically expresses the potential erodibility of the soil in relation to its soil loss tolerance value in the absence of conservation practices. See id. The definition of highly erodible land includes land that erodes at an acceptable rate, but has an inherent potential to erode eight times faster than it is rebuilding. See id.


284. See G. LeBlond, Growing Together, REP. OF CANADA'S AGRIC. COMM. ON ENVIRONMENTAL SUSTAINABILITY 13 (1990). The Federal-Provincial Agriculture Committee on Environmental Sustainability indicated that “agricultural drainage has eliminated 1.2 million hectares, or 40 percent of wetland habitat, resulting in significant declines in waterfowl populations.” Id. at 20.


286. See Food Security Act of 1985, supra note 280; see also 7 C.F.R. § 12.1.

287. See 7 C.F.R. §§ 12.20-12.30 (setting forth the criteria for highly erodible land conservation).

re-authorized these conservation measures by creating an umbrella program, the Environmental Conservation Acreage Reserve Program, to further soil and wetlands conservation.  

2. Uniform Commercial Code & Agriculture

After World War II, government funding in the United States was widely accepted even though the emergency of the 1930s no longer existed. Nonetheless, private sector lenders complained about alleged unfair competition from the various federal programs. Hence, the drafters of the Uniform Commercial Code (UCC) sought to balance the private and public credit sectors' interests. Described as "the most progressive commercial enactment of the western world," the UCC formulates novel solutions to many troublesome problems in international trade law and serves as an example of successful unification of the laws of different jurisdictions.

Article 9-312(3) of the UCC encourages the uniformity and availability of financing by encouraging asset-based financing and loans for production expansion. Specifically, Article 9 creates a floating lien on future goods, including the growing of crops. Furthermore, it establishes a recording or notice system that protects secured creditor priorities. Pursuant to section 9-312(2) of the UCC:

A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

289. See Malone, supra note 209, at 4, 9-12 (discussing the broad-based environmental programs in the 1990 Farm Bill, stating that they "represent a quantum leap beyond the soil erosion control initiated in the 1985 Farm Bill").
290. See Barnes, supra note 221, at 468 (describing the economic climate in the United States prior to the drafting of the UCC).
291. See Schmitthoff, supra note 33, at 8-12 (noting major developments in twentieth century commercial law).
292. See id.
293. See Barnes, supra note 221, at 474 (arguing that article 9 "favors agronomy over ecology.").
294. See Uniform Commercial Code, § 9-312(2) (1994) ("Priorities Among
Article 9 creates two lender categories. The first one entails a land financier extending long term credit by securing a floating lien in the current crop and a mortgage on the land. He repays the initial loan using proceeds from the sale of the future crop. Hence, "[f]armland is unique. It not only serves as security itself, but its productivity is the key to retiring both long-term and annual debt." 

The "defensive domain" of the 1980s eliminated the flexible lending practices of the 1970s and resulted in weak markets, falling collateral, and decreased credit availability. As a result, creditors required more financial analysis and documentation, a practice not strictly adhered to a decade before. By 1985, lenders within the farm credit system, especially in the Midwest, faced enormous bad loans that resulted from years of low farm profits and depressed land prices. The total losses approached $2.9 billion, and in 1987 Congress enacted legislation to bail out the farm credit system. The credit system, itself, however, had partially caused the need for the bail-out. The use of asset-based financing under the UCC enabled many farmers to obtain machinery loans secured only by their land and future crops.

3. "Iraqgate" and United States' Agricultural policy

The United States government has used, and has sometimes abused, agricultural policy as an instrument of foreign policy. The scandal known as "Iraqgate" illustrates how the American and Brit-

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295. See Barnes, supra note 221, at 483 (discussing the difference between the lending practices of agricultural and other commercial sectors).
296. See id. at 488-89 & n.165 (noting the shift in lending practices from the 1970s to the 1980s).
297. See id. (describing the economic environment leading to the depression of the farm market in the 1980s).
299. See Barnes, supra note 221, at 492-93 (discussing the UCC's asset-based model).
ish governments, under George Bush and Margaret Thatcher, colluded to break laws and stated policies in order to arm Saddam Hussein during the 1980s. Following the Gulf War in 1991, both administrations mounted a cynical cover-up to hide the truth from their legislative bodies. During the 1980s, the Bush Administration subverted well-established grain export programs to build up Iraq’s military arsenal. Instead of using the United States Export-Import Bank, State Department officials financed Saddam Hussein through the Commodity Credit Corporation (CCC), an obscure government loan-guarantee program that was originally established in order to help American farmers develop new export markets.

The United States ultimately advanced billions of dollars to the program, beginning in February 1983 and lasting until the invasion of Kuwait, which lead to the Gulf War in 1991. The National Security Council and the Central Intelligence Agency colluded to obstruct domestic agencies like the Federal Bureau of Investigation from examining allegations of “widespread and blatant” irregularities in the CCC program. These irregularities included the suspected diversion of American commodities to places other than Iraq, the alleged use of CCC money for arms purchases, and the overpricing of some commodities to double or triple wholesale prices.

V. EUROPEAN UNION COMMON AGRICULTURAL POLICY

Agriculture accounts for two-thirds of the European Union’s (EU)
Disagreement regarding the EU’s Common Agricultural Policy (CAP), therefore, necessarily abounds. In 1961, the European Economic Community imported 21 million tons of wheat and coarse grains, which decreased to 6.5 million tons by 1978-79. The EU continued this transformation, and by 1985-86 the member states were net exporters of 17 million tons. By 1986, the United States and the EU were locked in a trade war that centered on agricultural protectionism. The CAP seeks to create a single market by consolidating the agricultural policies of member states into a unified effort aimed at certain objectives, including increased productivity through technology and efficiency, stabilized markets, assured availability of supplies, and reasonable prices. Under the principle of financial solidarity, the CAP balances costs and benefits under the aegis of the European Agricultural Guidance and Guarantee Fund. CAP’s final principle is community preference, which requires members to give priority to community produce over non-community imports.

The Council of the EU controls the community’s grain markets. For instance, each market year the Council sets a target price for grains and determines the intervention price, which is the guaranteed minimum price paid to producers. The difference between the two prices reflects transportation costs and marketing margins among the areas of greatest grain deficit (Duisberg, Germany) and surplus (Ormes, France). Minimum import or threshold prices for grain are

306. See McGeorge, supra note 170, at 395 & n.100.
307. See id.
308. The Treaty of Rome specifically requires the EU to “extend to agriculture and trade in agricultural products.” EEC Treaty, supra note 149, art.38(1) (defining agriculture); see also Strating, supra note 150, at 318-19 (discussing CAP’s three central principles).
309. See EEC Treaty, supra note 149, art. 39(1) (setting the objectives of common agricultural policy).
310. See Strating, supra note 150, at 318-19.
311. See generally DOMINICK LASOK & JOHN W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (1991) (noting that the Council contains one representative from each of the member states and that foreign members usually attend Council meetings).
312. See id. at 321 (noting that the target price is usually above world prices to reflect higher community production costs).
313. See id.
maintained by variable import levies, whereas the EU’s exports are facilitated by export restitution payments. These export refunds engender the greatest number of complaints from community trading partners because the actual amounts paid to EU exporters are usually higher than the intervention price, which enables EU exporters to undercut competition. Although maximum guaranteed quantities set a production ceiling, the guaranteed outlet at a set price encourages overproduction.

The tight disciplines that govern industrial products have historically excluded agriculture. "Insofar as the Community is concerned with mitigating the external effects of its farm program, it appears to emphasize international market stabilization through the organization of world commodity markets, rather than trade expansion through liberalization." Some large producers favor abandoning subsidies to comply with the GATT/WTO, while smaller producers vigorously support subsidies. Although there is little common ground among producers from different member states, the reduction in aid payments means that many are trying to keep costs down by using fewer agro-chemicals and fertilizers. Others are diversifying, for example, growing crops used for biofuels—a market that...

314. See id. at 322 (discussing protective measures for both imports and exports).
316. See Strating, supra note 150, at 321-23 (discussing the EU’s proposed reforms, whereby the Commission suggested a 36% reduction in grain support prices and elimination of stabilizer arrangements, such as the MCQ, by 1996). Farms larger than 20 hectares must set aside 15% of their arable cropland in order to receive direct payments, compensating farmers for the decrease in support prices. See id. at 324 & n.136 (citing RAY MCSHARRY, Forward to COMMISSION OF THE EUROPEAN COMMUNITIES, THE DEVELOPMENT AND FUTURE OF THE COMMON AGRICULTURAL POLICY: PROPOSALS OF THE COMMISSION (1991)).
318. See Warely, supra note 169, at 69.
319. See Deborah Hargreaves, Looking for Common Ground on EU Farm Policy, FIN. TIMES, July 13, 1994, at 34 (reporting the diversity of opinion regarding agricultural policy reform).
is well established in France due to French government subsidies.  

Many of the GATT panel reports that were blocked by a contracting party involved agriculture and the EU. For instance, in the “Chicken War” and the pasta-citrus disputes of the 1960s, the EU ignored adverse GATT panel reports and eventually negotiated a settlement with the United States on its own. The United States and the EU also disagreed over oilseeds. In the oilseeds dispute, the United States threatened to retaliate against the EU after the EU refused to comply with two panel findings that EU oilseed subsidies violated GATT. One of the GATT panels found that the oilseed subsidies harmed the United States. In response, the United States proposed to levy duties on approximately $1 billion of selected EU imports. Indeed, the farm subsidy war between the United States and EU was the biggest stumbling block to completing the most recent GATT round. During the Uruguay Round of GATT negotiations, the United States originally linked an agreement on agricultural trade issues to the EU’s acceptance of proposals on all other items of the Uruguay Round, including high-tech products, trade-related aspects of intellectual property rights (TRIPS), trade-related investment measures (TRIMs), and trade in services. Due to the conflicting positions of GATT parties, the original deadline for the conclusion of the Uruguay Round was extended from December 1990 to 1994.

In 1993, the United States and the EU ultimately agreed to average, over a number of products, the 21% reduction in exports of subsidized farm produce that the parties worked out in 1992 negotia-

320. See id. (defining biofuels, which include di-ester (a petrol additive made from Canola or oilseed rape) and ethanol (made from wheat and sugar beet)).
321. See Strating, supra note 150, at 311 & n.39 (noting “famous examples” of disputes between the United States and the EU over agriculture policy).
322. See Sowing Trouble, ECONOMIST, May 30, 1992, at 66 (reporting the United States’ objection to the EU’s “massive subsidies” for oilseed producers, since the increased production of European oilseeds directly caused a sharp decrease in American exports to the EU).
323. See Strating, supra note 150, at 311 & n.39; see also U.S. to Proceed With Sanctions Against EC Over Oilseeds Dispute if No Offer Received, 9 Int’l Trade Rep. (BNA) 961 (1992).
324. See U.S. to Proceed With Sanctions Against EC Over Oilseeds Dispute if No Offer Received, supra note 323, at 961 (announcing American plans for retaliation).
The reduction was averaged among products like cereals, meat, milk, and certain fruits and vegetables, rather than cutting 21% in each category. The compromise also allows access to each other’s market in certain products equal to 3% of consumption, rising to 5% over time. The Canadian government continued to seek alternative protection for Canadian farmers during the final negotiations in December 1993, advocating the maintenance of quotas and import restrictions, which comprise Canada’s farm supply-management system. Canada stood alone, however, in support of its proposal to enhance article XI of GATT, maintain the quota system and thereby partially protect the supply-management system. In 1997, however, the EU, which produces 10% of the world’s wheat, announced that drought conditions demanded a cessation in export subsidies for the 1996-97 crop year. The temporary end to EU export subsidization caused wheat future prices to climb, adding to a trend of increased market volatility.

VI. FREE TRADE & GRAIN

Historically, Canada has avoided reciprocity with the United States because many Canadian leaders have feared the political consequences of economic integration. If Canada chooses to economically integrate with the United States, Canada must concomitantly become subject to the United States’ power and value systems. United States values reflect classical liberalism, a concept now popularly referred to as “neo-conservative” economics.

325. See Madelaine Drohan & Barrie McKenna, Canada Putting Chickens, Eggs First in GATT Talks, GLOBE & MAIL, Dec. 4, 1993, at A1 (reporting on a settlement between Canada and the United States that impacted the GATT negotiations).
326. See id.
327. See id.
332. Cf. McBride & Shields, supra note 133, at 9 (stating that “[n]eo-
sical liberalism allows the marketplace to essentially define social values, does not restrict big business, and places a high value on the individual. While Canada values trade, it balances economic liberalism with communitarian values. In other words, Canada has long accepted a higher degree of government intervention to lessen the effects of economic and social imperfections.

The effect of the FTA and NAFTA, however, is re-regulation of the marketplace. The United States Department of Agriculture (USDA) anticipates that implementation of NAFTA results in increased sales of agricultural commodities. Canadian import licenses, however, are no longer needed on exports of wheat, oats, and barley from the United States, when support levels for these grains equal or fall below comparable support provided to Canadian producers. Furthermore, NAFTA requires each partner to take into account the other's export interests in the use of export subsidies on agricultural products exported to third countries.

The United States-Canada Free Trade Agreement prohibits the use of export subsidies on agricultural goods shipped to the other country, with the objective of removing all tariffs and subsidies affecting agriculture over a ten-year period. The FTA also created a 50%

333. See Laxer, supra note 331, at 3.
334. See id.
335. See id.
336. Cf. Centner, supra note 203, at 373 (stating that a major issue for agriculture is whether NAFTA will affect or jeopardize any of the farm programs that provide price supports and other benefits for American farmers). Although NAFTA encourages the reduction of domestic supports and export subsidies, it does not provide for their abatement or elimination; rather it emphasizes the reduction of tariffs and quotas. See id.
337. See Also in the News, Int'l Trade Rep. (BNA) No. 24 at 1028 (June 1, 1994) (discussing the general framework of the agreement and stating that in 1992 barley would remain subject to import license requirements); see also Also in the News, Int'l Trade Rep. (BNA) No. 29, at 876 (June 10, 1992) (discussing the exemption of barley from import license requirements).
340. See id.
local content rule for American and Canadian goods, but the rules for defining local content remain imprecise.\textsuperscript{341}

Under the FTA, Canada eliminated transportation subsidies under the Western Grain Transportation Act for agricultural goods originating in Canada and shipped to the United States via West Coast ports.\textsuperscript{342} Indeed, a FTA panel confirmed the determination of the United States Department of Commerce regarding the distorting influence of the Canadian Federal Government's Feed Freight Assistance Program,\textsuperscript{343} which was designed to provide users of feed grains in certain regions with transportation cost assistance.\textsuperscript{344} Thus, North American regional free trade is altering the agricultural sector.

NAFTA incorporates an intricate and distinct group of dispute resolution procedures. In 1996, its Chapter 20 procedure was used as a response to certain agricultural tariffs. This controversy progressed to the second dispute settlement stage, which involved a gathering of the Free Trade Commission. The five-member Chapter 20 panel, including two Americans, decided that Canada's high tariffs on American dairy, poultry, and egg products adhere to the terms of NAFTA.\textsuperscript{345} The panel decided that the NAFTA participants planned to exclude Canada's domestic supply management scheme for particular agricultural products from the overall NAFTA obligation to eliminate all tariffs.\textsuperscript{346} As a result of the panel's decision in favor of Canada, Canada will not have to take any further action and the dispute will not progress to Chapter 20's implementation phase.


\textsuperscript{342} See\textit{ Office of Canada, supra note 338}.

\textsuperscript{343} See In re Live Swine From Can.,\textit{ supra note 53}, at 11-14.

\textsuperscript{344} See id. at 3-4. Indeed, the transportation system plays an integral part in Canadian agricultural policy and direct transportation subsidies accounted for over 26% of total federal agri-food expenditures in 1985-86. See\textit{ Government Policies and Great Lakes Shipping, supra note 139}, at 11. So complex is the issue of subsidies that some grain is actually being shipped to Europe from Canada's west coast, defying apparent economic logic. See id.


\textsuperscript{346} See Agricultural Products,\textit{ supra note 345}, at 58, 61.
The United States has available to it a variety of possible responses to the loss in the agricultural products dispute. These responses range from accepting the ruling and moving on, trying to negotiate a compromise with Canada, retaliating against Canadian agricultural exports, or withdrawing from NAFTA altogether. Precedent exists for United States noncompliance with binational panel rulings in trade disputes with Canada. On the one hand, failure by the United States to respect the panel’s ruling in the agricultural products case may do irreparable damage to the NAFTA dispute resolution mechanism. On the other hand, full compliance with the decision, regardless of the domestic political cost, could greatly strengthen Chapter 20.

Another dispute materialized when the United States National Pork Producers Council petitioned under the GATT that Canadian subsidies to pig farmers resulted in import injury to American producers from Canadian pork. The issue involved the definition of domestic industry and its relationship with similar products. When the United States imposed a countervailing duty on Canadian pork, Canada brought a case against the United States under the General Agreement rather than the subsidies code. Canada criticized the United States’ methodology, arguing that the countervailing duty was greater than the Canadian subsidy. The root of the Canadian complaint lay in the method of determining the duty, based on the wording of section 771(b) of the Tariff Act of 1930.


348. See id. art. 2205 (providing for the withdrawal of a party from NAFTA).


350. See Lopez, supra note 345, at 203.


352. See id. at 6-18 (describing the United States’ desire to use an “upstream” analysis of the swine producers).

353. See id. at 4-11 (recounting the complaint and filings with the domestic tribunals before the need to resort to the claim under the agreement).

354. See id.

Under this provision, a subsidy to a producer of a raw agricultural product is provided to products processed from the product if “the demand for the prior stage product is substantially dependent on the demand for the later stage product” and “the processing operation adds only limited value to the raw commodity.” The panel narrowly interpreted the agreement and found that the determination of the United States was not based on all of the facts necessary to meet the requirements for exception to the basic principle of GATT Article VI. The panel found that the United States erroneously concluded that:

[S]ubstantial dependence of the demand for swine on the demand for pork and the limited value added in the production of swine into pork, could not justify the conclusion that the subsidies granted to swine producers had led to a decrease in the level of prices for Canadian swine paid by Canadian Pork producers below the level they have to pay for swine from other commercially available sources of supply and that this decrease was equivalent to the full amount of the subsidy.

The panel ordered the United States to compensate for the countervailing duties. The GATT proceedings, however, were terminated before the GATT Council adopted the panel report because a panel established under the FTA found no injury to American industry as a result of the Canadian imports.

Another example of the FTA’s effect upon trade barriers is the Softwood Lumber dispute. A binational trade panel, set up pursuant to the FTA, ruled against the United States’ imposition of punitive

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357. See Pork Panel Report, supra note 351, at 6-18.
358. See id. at 17-18.
359. See id. at 18.
360. See THE GATT URUGUAY ROUND 1666 (Stewart ed. 1993). The FTA panel examined (i) the National Tripartite Stabilization Scheme for Hogs, which is a farm income stabilization program funded by the Canadian government, the provincial governments, and by farmers, see In re Live Swine From Can., supra note 53, at 13-27, (ii) the Quebec Farm Income Stabilization Insurance Program, a provincial farm income stabilization program covering agricultural production in Quebec, see id. at 27-38, (iii) the British Columbia Farm Income Insurance Program, also a provincial farm income stabilization program, see id. at 39-42, and (iv) the Alberta Crow Benefit Offset Program, a provincial program designed to compensate grain users in Alberta for the extra cost of grain resulting from the FTA’s effect on the grain market, see id. at 42-47.
tariffs on billions of dollars\textsuperscript{361} of Canadian softwood lumber.\textsuperscript{362} This panel considered whether Canadian softwood is unfairly subsidized.\textsuperscript{363} The softwood battle began in 1982 and is the longest trade dispute between the two countries.\textsuperscript{364} In 1986 Canada imposed a 15\% export tax on Canadian shipments in order to avoid the imposition of similar duties by the United States,\textsuperscript{365} and then lifted the tax in 1991.\textsuperscript{366} The United States immediately commenced an investigation of its trade case against various provinces, particularly British Columbia.\textsuperscript{367} In May 1993, the panel concluded that the United States Commerce Department provided insufficient reasoning in its decision to impose border tariffs,\textsuperscript{368} whereupon the Commerce Department increased the 6.51\% tariff to greater than 11\%.\textsuperscript{369} This forced the panel to re-examine the matter again, and in a majority decision, the panel found that the United States Commerce Department failed to provide a "rational basis" for concluding that tariffs were appropriate because of low priced provincial stumpage charges.\textsuperscript{370}

In other words, the panel effectively affirmed the Canadian Forest Industries Council's belief that "Canada did not subsidize its softwood lumber exports,"\textsuperscript{371} while criticizing the United States Department of Commerce's decision that the Canadian lumber industry unfairly benefited from government subsidies and restrictions on the

\textsuperscript{361} See Maclaren Says Canada Expects Payment of Lumber Duties Despite Legal Action, 11 INT'L TRADE REP. (BNA) No. 37, at 1444 (Sept. 21, 1994) (stating the United States withheld duties amounting to $600 million).


\textsuperscript{363} See id. at 11-14.


\textsuperscript{365} See Softwood Lumber Dispute, \textit{supra} note 362, at 7.

\textsuperscript{366} See id. at 8.

\textsuperscript{367} See id. at 12-14.

\textsuperscript{368} See id.

\textsuperscript{369} See Commerce Increases Subsidy Amount on Remand in Canadian Softwood Case, 10 INT'L TRADE REP. (BNA) No. 37, at 1575 (Sept. 22, 1993).

\textsuperscript{370} See Softwood Lumber Dispute, \textit{supra} note 362, at 11-14; see also Fagan, \textit{supra} note 364, at B1; see also BLACK'S LAW DICTIONARY 1424 (6th ed. 1990) (defining "stumpage" as the fee for a license to cut).

export of raw logs. Under the FTA, binational panels created to re-
view the decisions of Canadian and American trade bodies cannot di-
rectly overturn a ruling, but can only interpret the trade laws in the
two countries and require a reconsideration of a controversial deci-
sion. The United States International Trade Commission did not
change its decision.

This panel considered whether Canadian softwood exports harm
competitors. The panel again rebuked the ITC’s ruling, stating that
the facts and analysis “do not constitute substantial evidence of price
suppression by reason of imports of softwood lumber from Canada
or are otherwise not in accordance with law.” Thus, the United
States’ only chance to prevail was to file an extraordinary challenge,
the only appeal possible since a panel rendered a ruling under the
United States-Canada pact. An extraordinary challenge can only be
initiated by the Canadian and United States governments and is heard
by a panel of three judges performing a limited review of the panel’s
ruling. Ultimately, victory for Canada in the softwood lumber dis-
pute followed an August 1994 decision by an “extraordinary chal-
gen” binational trade panel, which upheld the earlier ruling that
the United States did not have grounds to collect a 6.51% tariff. The
ruling could mean repayment by the United States of $800 mil-


373. See FTA, supra note 372, at ch. 19; see also Fagan, supra note 364, at B1.
374. See id.
376. See Softwood Lumber Dispute II, supra note 375.
378. See id.
379. See id.
380. See id.
381. See Barrie McKenna, MacLaren Swallows Trade Principles, GLOBE & MAIL, Aug. 12, 1994, at B1, B4.
NAFTA dispute resolution follows the FTA’s lead of providing an effective regional trade forum. Certain FTA panel decisions, however, generated great concern on the part of the United States with the standard of review that a NAFTA panel uses in cases of countervailing and anti-dumping duties.

A. CANADA – UNITED STATES GRAIN DISPUTE

American farmers complain that a glut of subsidized Canadian grain has forced their prices below the cost of production. As part of subsidized foreign sales, some American grain growers obtained an end-use certificate on imported Canadian grain to prevent exportation to third countries. Some believe that Canadian grain competition is merely displacing United States grain exports.

United States Senator Max Baucus, a Democrat from Montana, chaired the Senate Finance Subcommittee when he informed the International Trade Commission that the Canadian Wheat Board is a “secretive, nationalistic cabal” manipulating the market. Baucus accused the Wheat Board of acting as “a barrier to imports by refusing to buy U.S. grain” and as a source of export subsidies that creates predatory pricing in international markets. American farmers who have oversold their own stocks, argue that free trade between the United States and Canada has stuffed elevators in border communities and clogged the distribution system. In 1994, United States Secretary of Agriculture Mike Espy accused Canada of dumping low-priced wheat into Brazil at the expense of Argentina.


384. See Laura Eggertson, Tension Between Old Neighbours, CALGARY HERALD, July 16, 1994, at E1 (quoting Bruce Doenz, a Canadian farmer).


386. See id.

387. See Eggertson, supra note 384, at E1.

Max Baucus and North Dakota Senator Kent Conrad even facetiously suggested that “the U.S. retarget its North Dakota nuclear missiles to help resolve the wheat fight.”

Indeed, Argentina voiced concern to Canadian officials through diplomatic channels, suggesting that subsidies or other price distorting mechanisms were used in a wheat sale of around one million tons made by Canada’s Wheat Board to private sector millers in Brazil. Interestingly, Brazil is not only Argentina’s main wheat buyer, but also its main trading partner. Both are also part of the Cairns Group of Nations that opposes subsidies for farm exports. The Cairns Group advocates tariffication of agricultural trade barriers. The Wheat Board defended its policy of targeting Brazil; Brazil offers Argentina preferential tariffs under a regional trade agreement. Argentinean sources said the Canadian wheat was sold at $104 per ton while Argentinean exporters were selling wheat at $112 per ton.

Donald Campbell, *Ambassador Feels the Heat*, CALGARY HERALD, May 28, 1994, at A3 (reporting that Washington lawmakers were angered at comments that an ambassador traveling with Espy made during a visit to South America that repudiated Canada’s practices).


390. See *Argentina Voices “Concern” Over Canada Wheat Sale*, [BC Cycle] REUTERS FIN. SERV. (Reuters) (Dec. 9, 1993) [hereinafter Concern] (stating that Canada’s chargé d’ affaires David Cohen was summoned by Alfredo Merrelli, Argentina’s minister in charge of the North American Section of the Argentina Foreign Ministry, for connections concerning the issue).

391. See id.


393. See Richard A. Higgott & Andrew F. Cooper, *Middle Power Leadership and Coalition Building: Australia, the Cairns Group, and the Uruguay Round of Trade Negotiations*, 44 INT’L ORG. 589, 601 (1990) (defining the Cairns Group as composed of 14 significant yet diverse agricultural exporting countries: Argentina, Australia, Brazil, Canada, Chile, Columbia, Fiji, Hungary, Indonesia, Malaysia, the Philippines, New Zealand, Thailand, and Uruguay).

394. See id.


396. See Concern, supra note 390 (stating that, not only did Canada defend its actions, but would continue the targeting of Brazil).
ton. In 1991, Argentina had protested a proposed sale of subsidized American wheat to Brazilian millers and convinced Brazilian authorities to impose a higher import duty on the American grain.

Between January and March 1994, hundreds of American farmers in several towns, with elevators in North Dakota and Montana, staged peaceful demonstrations and blockades. Canadian farmers blame the situation on the United States Export Enhancement Program, which subsidizes private export companies in order to drive up domestic prices. The North Dakota Grain Growers Association says approximately 90 million bushels were imported during the 1993-1994 crop year, compared with 50 million bushels for the 1992-93 crop year, contributing to congestion at border elevators and forcing some farmers to truck their grain elsewhere. The American farmers are upset over unfair transportation subsidies and, therefore, seek import quotas.

Looking for a scapegoat, the United States National Association of Wheat Growers feigned displeasure at the outcome of the trade negotiations. The United States administration, however, chose to seek a negotiated settlement with Ottawa, partly because certain United States interests feared retaliatory action by the Canadian government. An association study concluded that freer trade demonstrates that the two countries' markets could be combined. The trade balance in agri-food products remained proportionately steady

397. See id.
398. See id.
399. See MacAfee, supra note 382, at E4.
400. See id.
401. See id.
402. See id.
403. See id. In order to qualify for transportation subsidies, however, the grain must pass through one of the ports in Thunder Bay, Ontario, Manitoba, Prince Rupert, or Vancouver. See id
404. See Warley, supra note 169, at 67 (stating that "the United States has had legitimate complaints about several features of Canadian commercial policy, agricultural programs and marketing arrangements, including the ... freight assistance provided for prairie feed grains consumed in Eastern Canada [and] some marketing practices of the Canadian Wheat Board which distort and impede trade.").
406. See id. (indicating that the association also noted advantages and disadvantages for both countries).
under free trade. In 1991, United States exports to Canada increased to $4.9 billion, giving the United States a $360 million trade surplus. In 1992, Canada's exports jumped to $5.8 billion, giving it a $265 million surplus. Canadian government figures show a 146% increase of grain and grain products shipments to the United States between 1988 and 1992, compared to a 93% increase in shipments from 1983 to 1988, before free-trade. Durum production in the United States declined 33% between 1985 and 1993, as the United States government encouraged farmers to switch crops or leave their land fallow. The 300% increase in durum shipments means that Canadian exports account for 20% of the American market, or $85 million annually.

In August 1994, the United States and Canada agreed to establish a binational panel to review the roots of the agricultural dispute and the agreement that imposed one year quotas and tariffs on Canadian grain sales to the United States. The newly negotiated cap limits Canadian exports at roughly 1.5 million tons, while allowing an additional 550,000 tons of mostly Ontario wheat into the United States at existing tariff levels. Federal Trade Minister Roy MacLaren states that a long-term solution to the regional trade friction lies in the NAFTA partners agreeing on a common understanding of what constitutes dumping and subsidies, as well as the more ambitious goal of establishing a single set of competition laws.

VII. CONCLUSION

When trading partners fight each other for individual advantages, both tend to lose. Yet, where free markets in different countries are constrained by different regimes that tightly regulate the farm econ-
omy, infighting inevitably occurs. In Canada and the United States, the agricultural sectors are now going through a process of redistribution, after insulation for decades from the full forces of the international trade system. The trend to integrate the global marketplace is accelerating the pace of this redistribution, affecting domestic supply-management systems. Another reason for redistribution is the spiraling cost of the government subsidy programs designed to encourage agricultural exports. Although the process continues, a radical alteration of the current supply-management or stabilization program is inevitable.

Prior to World War II, global grain prices and production were depressed, then accelerated upward during and after the war, ultimately peaking in the 1970s. Powerful farm lobbies in North America influenced domestic and export agricultural policy, preying upon the conventional wisdom that their competitors possessed unfair trade advantages. The supply-management systems offered benefits that resulted in higher production, regardless of market demand. Before the global economy started to restructure in the late 1970s, these systems were driven by concern for food security and initially they stabilized domestic markets. The system now ingrains the best of agricultural subsidies, quotas, crop insurance, and other interventionist incentives altering the investment-backed expectations of farmers. Farmers learned to farm the government.

Indeed, the concern for stabilization was a euphemism for government programs aimed at achieving a politically perceived "fair" return for labor and investment.

[However,] there is no rational economic ground for the wheat export subsidies which have existed in the United States since 1965. . . . In the area of feed grains, the United States is probably the world's lowest cost producer. Yet the United States administers a farm program that transfers a significant amount of income from the treasury to grain farmers, who are not, by and large, poor people.

All subsidies distort international trade, but despite distortion, all producing countries, including the United States and Canada, employ

416. See Johnson, supra note 54, at 6.
interventionist farm policies. Both are important producers, but Canada arguably needs more access to the American grain market and the United States needs access to the Canadian grain market. Thus, because Canada is in a weaker bargaining position, NAFTA helps limit the economic power of the United States.

This places the regulated agricultural industry into a process of re-regulation. Domestic agriculture, however, is subject to external competition and is different from other regulated industries such as the various public utilities. Also, agriculture is distinct because it is a renewable natural resource. Therefore, agricultural stewardship needs new regulatory programs that can meet the changing context of trade liberalization.

Today, external forces have once again engendered a political re-evaluation of intervention in the Canadian agricultural sector. In western Canada, the debate is currently led by neo-conservatives. The main ingredients of neo-conservatism—its mixture of classical liberal economic doctrines, somewhat refurbished to meet the conditions of the late twentieth century, and elements of a more traditional conservatism emphasizing social order and hierarchy and the importance of the family and religion—have been combined into a doctrine calling for a reduced social and economic role for the state.417

The interests of consumers to obtain food at lower prices guides agricultural policy, rather than the interests of producers. This reduced-price food policy radically departs from the western Canadian history of freight rate subsidies, price supports, and marketing boards. If carried out, the reduced-price food policy has the potential to destroy the Canadian family farm. Presently, farmers are in a greater danger of bankruptcy since the 1930s and grain prices are actually comparatively lower than the so-called “dirty thirties.”418

Compare this potentially ruinous plan to the current regime, where the Wheat Board can only take delivery of wheat for which there is a market. The ironic tautology is that the Wheat Board defines the

417. McBride & Shields, supra note 133, at 165.
418. See MURRAY DOBBIN, PRESTON MANNING AND THE REFORM PARTY vii, 139 (1991). “Where circumstances allow, this would mean a shift from a government dominated and supported agricultural industry to an industry shaped by free operation of comparative advantage between regions and commodities, free entry into all sectors of production and marketing and free trade on a global basis.” Id.
market, and thus paternalistically determines the public interest. Farmers seeking greater choice in marketing arrangements are strapped within an old system of agricultural regulation. Discontent is spreading because farmers feel they could obtain better prices on the open market rather than through a monopolist marketer like the Wheat Board. Ironically, the raison d'être of the Wheat Board was, and impliedly remains, to promote higher collective prices for the farmer.

Yet, for all of the differences of Canadian agriculture, the Canadian grain trade exhibits similarities to other regulated industries. One similarity is seen in how regulatory lag affects policy. It was not until the Federal Court decision in Archibald ostensibly validated the Wheat Board's domination of the Canadian grain industry that this long-lasting policy was truly defined. Nevertheless, this decision most likely is not the last word in the legal skirmishes, nor the end to political interest group intrigue. Invariably, agricultural law in Canada must change to reflect new long-term objectives and conceptions about comparative advantage in the global marketplace.