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International Agricultural Trade Disputes: Case Studies in North America[1]

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Border disputes between the United States, Canada, and Mexico over agricultural products as well as lumber are numerous and appear to be escalating. This was the subject of a recent conference of economists, lawyers, and private industry representatives that was held in Gainesville, Florida, March 20 and 21, 2003. The event was sponsored by the Farm Foundation; Ben Hill Griffin, Jr. Chair, University of Florida; Agriculture and Agri-Food Canada; American Farm Bureau Federation; Center for Agricultural Business, Fresno State University, Center for Agricultural Policy and Trade Studies, North Dakota State University; Center for North American Studies, Texas A&M University; Centre for Studies in Agriculture Law and the Environment, University of Saskatchewan; Florida Farm Bureau; International Agricultural Trade and Policy Center, University of Florida; and the College of Law, University of Saskatchewan.

Research presented during this conference, which is summarized in this paper, revealed that the number of trade disputes is likely to increase in the future—primarily from less developed countries, arguing that U.S. farm policy is a vehicle by which the United States is dumping export products abroad. There is also a wide discrepancy between trade law and economics; however, this discrepancy is narrowing. Trade law, for example, cannot deal adequately with perishable agricultural products where often U.S. farmers, like foreign competitors, sell below the cost of production. Here a normal business practice criterion should be used as a basis for determining whether dumping has occurred. In addition, there is considerable controversy over the appropriateness of the models used in assessing whether there is material injury in cases where dumping is occurring. (A compilation of the abstracts for the papers presented can be accessed at: http://www.fred.ifas.ufl.edu/conference/fre/agtradedispute).

Economic Considerations

Dr. Cathy Jabara, with the International Trade Commission (ITC); John Skorburg, with the American Farm Bureau; and Professors Andrew Schmitz and James Seale, of the University of Florida, discussed trade remedy measures used by the United States, Canada, and Mexico in international

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trade. These measures provide a means for governments to protect domestic industries from competition due to allegedly unfair import surges.

Dr. Jabara pointed out that these trade remedies are World Trade Organization (WTO)-legal mechanisms, and are contentious due to concerns that they can be used to unfairly block trade. In the United States, trade remedies can be applied based on findings of relevant government agencies that a domestic industry is injured, or is facing threat of injury, due to imports and their effects on prices and production. Use of trade remedy actions affects a very small part of U.S. agricultural trade with North American partners.

Mr. Skorburg emphasized that trade dispute resolution policies have been around as long as trade disputes. The ongoing rise in U.S. agricultural imports, coupled with the slowing of U.S. agricultural exports, has led to increased interest in dispute resolution policies. Currently, many resolution options are available, but for every option, more questions have risen as well. Both positive and normative economics are used to explain how our current system has evolved—hopefully pointing towards potential new solutions to resolve more quickly the numerous trade disputes in agriculture.

There are winners and losers in trade lawsuits. Those who initiate a trade dispute action hope to gain, and, on the surface, producers from countries who are being sued are expected to lose. However, as Professor Schmitz pointed out, there are instances where this has not been the case. For example, in the Canada-U.S. potash dispute, the imposition of countervailing duties in the long term benefited Canadian potash producers at a huge cost to U.S. corn producers.

In the context of international trade disputes, contentious issues arise. For example, in the case of fresh produce, often the standard criteria for dumping are questionable since it is a normal business practice for producers of perishables to sell below their cost of production. Frequently, border disputes are resolved with the end result that producers in both countries are made better off. This can often occur through formal or informal price agreements. State trading enterprises are common and continue to be the basis for several ongoing lawsuits. The impact of state trading enterprises on trade is not well understood, and certainly the law is not clear on how to deal with trade undertaken by state trading enterprises.

Professor Seale pointed out that the Continued Dumping and Subsidy Offset Act of 2000 allows manufacturers, which successfully petition the United States to impose anti-dumping tariffs on imports, to keep the proceeds of those tariffs. He analyzed the welfare implications of the so-called “Byrd” Amendment by deriving an *optimal anti-dumping tariff* for U.S. producers that receive the anti-dumping tariffs and comparing it to the optimal revenue and optimal welfare tariffs.

Legal Viewpoints

Well known trade lawyers examined trade agreements and dispute settlements. Kevin Brosch, of the law firm of DTB Associates in Washington D.C., examined the discontinuity between U.S. trade policy as reflected by the positions taken in international trade negotiations and the agreements entered into by the United States and U.S. trade policy as exhibited in its domestic laws. Mr. Brosch argued that U.S. agricultural trade policy results in reduced subsidies and increased market access while U.S. law continues to subsidize agriculture at significant levels and often operates to limit market access for imports. He pointed out that a major cause of this diversity could be attributed to various aspects of the U.S. Constitution. The first point he covered was the basic constitutional division of powers between the Executive and Legislative branches, with Congress granting the President power to negotiate treaties while giving Congress sole power to lay duties and to regulate commerce with foreign nations. In addition, the Constitution created a bicameral legislative scheme under which rural and agricultural states are represented to a degree disproportionate to their populations. Finally, he pointed out that a U.S. trade policy favoring liberalization is largely a post-World War II phenomenon. A large and complex body of import relief laws—countervailing duty law, anti-dumping law, section 201 safeguard actions—were developed before the existence of the WTO or the North American Free Trade Agreement (NAFTA), along with a significant import relief industry.

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Stephen Powell, of the Levin College of Law at the University of Florida, spoke about the differences between the WTO and NAFTA Dispute Settlement systems. For illustrative purposes, Mr. Powell used the imposition of anti-dumping duties by Mexico on U.S. imports of High Fructose Corn Syrup (HFCS), clearly illustrating the important differences between the two dispute settlement systems that a litigant might consider. Some of the differences examined were how the process is invoked, how a panel is formed, the panel's jurisdiction, what standard of review is used, how the panel will treat precedents, what role private counsel will play in the process, the nature of an appeal of a panel's decision, and how the decision will be implemented.

Anti-dumping was further examined by Mel Annand of the University of Saskatchewan and the Annand Law Firm. Mr. Annand examined Canadian anti-dumping law as it applies to agricultural products. The Canadian anti-dumping case against U.S. corn exported to Canada in 2000 was examined in detail to show how the sale of U.S. corn below the cost of production could result in anti-dumping duties in Canada. Mr. Annand also discussed how anti-dumping duties in agriculture are a good method of dealing with structural domestic subsidies that result in trade distortion. Anti-dumping duties may result in a net benefit to the domestic economy as a whole, concluding that anti-dumping law is good for agriculture when it is used to prevent the long-term dumping of agricultural products at prices below the cost of production.

Professor Colin Carter, of the University of California-Davis, demonstrated that trade remedy laws on agricultural imports generally do not bring about the desired results because of trade diversions where countries search for alternative sources of imports. Trade remedy law is viewed as a major vehicle for protection in U.S. agriculture. Professor Carter summarized the use of trade remedy law by U.S. agriculture and highlighted examples of where the use of these laws conflicts with free trade agreements such as NAFTA. Empirical evidence was presented of the effects of U.S. trade remedy laws on agricultural imports—evidence was found consistent with trade diversion on positive rulings and an *investigation effect* on negative ruling.

Country-of-Origin Labeling (COOL)

Professors Par Rosson, III and Flynn Adcock, of Texas A&M University, spoke to the recently enacted country-of-origin labeling (COOL) provisions found in the Farm Security and Rural Investment Act (FSRI) of 2002, highlighting perceived inconsistencies and misconceptions and the potential for trade retaliation. Issues related to beef, pork, fruits, vegetables, and peanuts were discussed, and the potential impacts on selected regions, consumers, and the food supply chain were examined, including explicit costs associated with labeling. One example that was highlighted cited the United States Department of Agriculture's (USDA) cost estimates of compliance to be two billion dollars during the first year of mandatory labeling, beginning October 1, 2004. Further discussion was given to the fact that the Food Marketing Institute believes that suppliers should bear the brunt of these types of costs, while many suppliers think the costs should be shifted to the retailers. There are obviously mixed impacts and unintended consequences of the COOL provisions.

Brian Paddock, of Agriculture and Agri-Food Canada, discussed the Canadian point of view on COOL. The Canadian COOL program under the FSRI Act of 2002 has little if anything to do with meeting consumer demands. Rather it is a response to demands from producers for new forms of protection from imports. The legislation is misguided because it is unlikely to significantly benefit the producers or consumers of included products and will negatively impact small producers/processors for whom the record keeping will be particularly burdensome. In addition, Mr. Paddock pointed out that it will re-direct value added activities from the United States and encourage other countries to use similar types of programs to restrict market access, concluding that COOL diverts attention away from food chain issues of more valid concerns.

Contested Trade in Logs and Lumber

The United States and Canada have been at loggerheads over the softwood lumber and log trade for over two decades. According to Professor Peter Berck, of the University of California-Berkeley, the

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low stumpage paid for logging on Crown Lands in Canada and the ban on log exports are the principal targets of U.S. countervailing duties. Both countries have long banned the export of raw logs to reap the benefits of local milling. While the tariff aspects of the lumber dispute have received considerable attention, the basic issues surrounding the log export ban are less well-investigated. In order to analyze the ban, two interrelated markets were studied: the market for logs and the market for finished lumber. A formal model was developed that illuminates cases where these markets are unaffected by the export ban. Also examined was the market responsiveness of both Canadian and U.S. administered forests. The study concluded that the Canadian method better approximates a competitive market outcome than the Pacific Northwestern (PNW) method.

Professor Janaki Alavalapati, of the University of Florida, discussed softwood lumber trade patterns to highlight the importance of the U.S. market to Canadian producers and Canadian lumber imports to U.S. consumers. The economics and politics behind recent bilateral actions relating to the softwood lumber trade dispute were discussed. It was noted that unusual alliances are developed among stakeholders, reflecting the rent-seeking behavior in both countries. Drawing on recent studies, the welfare impacts of alleged subsidies and counter tariffs on producers and consumers in the United States and Canada were discussed, concluding that the trade dispute saga will remain so long as the U.S. market is critical for Canadian exporters.

Sweetener Disputes

Professor Thomas Spreen, of the University of Florida, and Luis Chavez, of the Universidad Autonoma Chapingo, Mexico, examined the U.S. sweetener market disputes. They discussed the implementation of NAFTA, which resulted in a gradual opening of the U.S. sugar market to Mexican imports, as well as a phasing out of Mexican tariffs on imports of high fructose corn syrup (HFCS) from the United States. Given the political sensitivity of the sweetener market in both countries, market liberalization in the United States and Mexico has resulted in controversy, including a dumping suit filed by the Mexican government against HFCS producers.

Professors Charles Moss and Andrew Schmitz, of the University of Florida, and Professor David Orden, of the Virginia Polytechnical Institute and State University, looked at the imposition of duties on U.S. HFCS imported into Mexico. In January 1998, Mexico made a final determination of dumping against HFCS entering Mexico from the United States. The United States appealed the imposition of these duties using the dispute resolution mechanisms of both the WTO and NAFTA. The legal bases for both appeals were numerous; however, two issues were of particular note from an economics perspective, namely the definition of like products and the boundaries of the market affected by dumping. First, Mexico defines like products to include both HFCS and sugar while the United States does not. Second, in the computation of damages from dumping, Mexico only considered the industrial sweetener market (i.e., the manufacturers of soft drinks).

Canadian Dairy Disputes

Hartley Furtan, of the University of Saskatchewan, reviewed a WTO case against the Canadian dairy industry that was initiated in 1999. Both the United States and New Zealand made the claim to the WTO that exports of dairy products from Canada benefited from the high domestic price of raw milk. According to this claim, the protected domestic dairy market enables Canadian exports of dairy products because the farmers use income earned in the domestic market to subsidize processors who export their milk. They argued that enabling is a cross-subsidization between the domestic market and the export market, so therefore Canadian dairy exports are benefiting from an export subsidy. The WTO agreed with the appellants.

Further insights into the Canadian dairy industry were presented by Carol Goodloe, Senior Economist, Office of Chief Economist, United States Department of Agriculture. Canada's two-tiered pricing scheme for dairy is characterized by a high domestic price that covers average total costs and a lower export price that covers marginal costs such that total milk output is enhanced. The WTO Appellate Body ruling that a benchmark of average total cost of production is the appropriate standard by which to measure

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whether an export subsidy existed unnecessarily further reflects a lack of understanding about the relationship between border protection, domestic support, and export subsidies. This ruling mimics the same logic that permeates anti-dumping laws, which are especially problematic when applied to agricultural products. This ruling also has implications for the use of subsidized inputs used in processed agricultural exports.

Shrimp Import Controversy

Professor Charles Adams, of the University of Florida, and Sal Versaggi, of the Versaggi Shrimp Company, addressed the growing import controversies within the U.S. shrimping industry and the need for possible trade barriers such as import quotas and tariffs. The consumption of shrimp products by U.S. consumers has risen steadily over the last decade. To meet this growing demand, imports of shrimp products have become the dominant source of products for the domestic market. Of the total domestic supply of shrimp during 2001, imported products represented 85 percent, with the remainder being provided by domestic harvesters. Shrimp imports (of which a growing share is cultured) have increased steadily from 694,000 pounds in 1992 to 1.2 million pounds in 2001. The increase in supply has placed downward pressure on the price received by the domestic harvesters, with average real dockside prices falling from $3.52 per pound in 1997 to a historic low of $2.47 per pound in 2001. This decline in price has created a financial crisis among U.S. vessel owners and fleet operators. Faced with falling prices for shrimp and increasing costs of production (the latter being linked to environmental concerns and rising fuel prices), an unprecedented number of vessel owners in the Gulf of Mexico and South Atlantic region are currently facing bankruptcy. Representatives of the shrimp harvesting sector have initiated efforts to identify ways to reduce the downward pressure on dockside prices that is being attributed to increasing amounts of imported shrimp products.

Fresh Garlic

Professor Mechel Paggi, of the California State University-Fresno, discussed the November 16, 1994, U.S. anti-dumping order covering fresh garlic imports from China. The investigation and subsequent anti-dumping duty were in response to a petition filed on behalf of the Fresh Garlic Producers Association (FGPA) following a 636 percent increase in fresh garlic imports from China between 1992 and 1993. The anti-dumping duty on most fresh garlic imports from China remains in place today. This case provides an excellent example of the process and procedures of U.S. trade remedy law as applied to protect the interests of domestic specialty crop producers. Professor Paggi called into question many of the operational details in the application of trade remedy law and contrasted U.S. anti-dumping investigation procedures with those of other countries, with a view toward developing an alternative to existing practices.

U.S.-Canada Trade Disputes in Grains

Agricultural trade between the United States and Canada and has been contentious since the inception of the Canada-U.S. Free Trade Agreement (CUSTA) in 1989, mainly because of significant increases in Canadian exports of wheat and barley to the United States while U.S. exports remain unchanged. The asymmetric trade flows of wheat and barley between the two countries, caused by differences in trade policies, farm subsidies, and marketing institutions, have resulted in several trade disputes between the two countries under U.S. trade remedy laws. Professor Won Koo, of North Dakota State University, maintains that the gradual harmonization of trade policies, farm subsidies, and marketing institutions may reduce trade disputes between the two countries in the future. However, disputes seem likely to continue as long as the surge of Canadian exports remains unabated. Professor Koo maintains that in order to diffuse the threat of future trade disputes, a Canada-U.S. joint research team should be formed to deal with the matter through better understanding for bilateral trade of agricultural commodities/products, especially wheat and barley, between the two countries.

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R-CALF Cattle Case Against Canada

In its final determination in 1999, the U.S. ITC said that live cattle from Canada are not causing, or threatening to cause, material injury to the U.S. cattle industry. Professor Michael Wohlgenant, of the North Carolina State University, and Professor Andrew Schmitz, of the University of Florida, reviewed the basis for the ITC's decision and discussed the economic rationale for the decision. Particular attention was given to evaluating the quantitative impact of imports on domestic cattle prices. They concluded that the ITC seemed to give considerable weight to conventional economic analysis, and that conventional price analysis, modified to allow for less than perfect substitution between imports and domestic production, is a powerful tool for quantifying the effect of imports on the domestic cattle industry. The United States also ruled in favor of the Ranchers-Cattlemen Action Legal Fund's (R-CALF) countervailing duty charges against the Canadian cattle industry. They presented arguments as to why duties should not have been imposed.

Tomatoes and Anti-Dumping Reform

During 2001, both Canada and the United States filed anti-dumping suits against each other's tomato industry (first by the United States and later by Canada). In both cases, dumping was determined to have occurred. However, in the U.S. case, injury due to Canadian hothouse tomatoes was found not to have occurred. The Canadian case was subsequently withdrawn, suggesting it was brought largely as a tit-for-tat response. In neither case did the claim of dumping make any economic sense. Rick Barichello, of the University of British Columbia, maintains that these cases prove the need for reforming the Anti-Dumping Agreement to prevent its abuse as a protectionist response to normal competitive pressures, particularly for cases arising in the agricultural sector.

Anti-dumping cases involving fresh tomatoes are not unique to the Canadian-U.S. relationship. Professor John VanSickle, of the University of Florida, examined the long contentious relationship between the United States and Mexico. Florida producers filed their first anti-dumping petition against Mexico in 1978. During the 1980s and early 1990s, Mexico imposed minimum quality standards that had the effect of controlling the volume of produce they shipped to U.S. and Canadian markets. With the implication of NAFTA, a new era was created, which brought with it more trade disputes that were taken to the U.S. ITC and U.S. Department of Commerce (USDC). When fresh tomato imports increased in the 1995-96 season, prices were again depressed. The USDC's investigation of the anti-dumping case resulted in a preliminary determination in October 1996 that fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value. An agreement establishing a floor price for imported Mexican fresh tomatoes was negotiated, which put the anti-dumping case on hold.

Sources

Economic Considerations

Economic Considerations Speakers: Cathy Jabara, U.S. International Trade Commission, Washington, DC; John Skorburg, American Farm Bureau Federation, Chicago, IL; and Andrew Schmitz, University of Florida, Gainesville, FL

Legal Considerations

Legal Considerations Speakers: Stephen Powell, University of Florida, Gainesville, FL; Kevin Brosch, DTB Associates, Washington, DC; and Mel Annand, CSALE, University of Saskatchewan; Estey Centre, and Annand Law Firm, Saskatoon, Canada

Trade Disputes: Case Studies

Trade Disputes: Case Studies Speakers:

- Dairy Disputes: Hartley Furtan, University of Saskatchewan, Saskatoon, Saskatchewan, Canada, and Carol Goodloe, Office of Chief Economist, United States Department of Agriculture, Washington, DC

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- Sugar Disputes: Charles Moss, University of Florida, Gainesville, FL; Andrew Schmitz, University of Florida, Gainesville, FL; and David Orden, Virginia Polytechnic Institute and State University, Blacksburg, VA
- Rent Dissipation and International Trade Disputes: James Seale, Jr., University of Florida, Gainesville, FL
- Trade Remedy Laws and NAFTA: Colin Carter, University of California-Davis, Davis, CA, and Caroline Gunning-Trant, University of California-Davis, Davis, CA
- Resolving Mexico-US Trade Disputes: Thomas Spreen, University of Florida, Gainesville, FL; Luis Chavez, Universidad Autonoma, Chapingo, Mexico; and Darren Hudson, Mississippi State University, Mississippi State, MS
- US-Canada Lumber Disputes: Peter Berck, University of California-Berkeley, Berkeley, CA; Janaki Alavalpati, University of Florida, Gainesville, FL; and Jeff Doran, Florida Forestry Association, Tallahassee, FL
- US Shrimp Import Controversy: Charles Adams, University of Florida, Gainesville, FL, and Sal Versaggi, Versaggi Shrimp Company, Tampa, FL
- Canada-US Tomato Disputes: Richard Barichello, University of British Columbia, Vancouver, British Columbia, Canada
- US-Mexico Tomato Disputes: John VanSickle, University of Florida, Gainesville, FL
- US-Canada Grain Disputes: Won Koo, North Dakota State University, Fargo, ND
- Fresh Garlic from China: US Trade Remedy–Promises and Problems: Mechel Paggi, Fresno State University, Fresno, CA, and Meko Paggi, Fresno State University, Fresno, CA
- Country of Origin Labeling: Parr Rosson, III, Texas A&M University, College Station, TX; Flynn Adcock, Texas A&M University, College Station, TX; and Brian Paddock, Agriculture and Agri-Food Canada, Ottawa, Ontario, Canada
- Canada-US Beef Dumping and Countervailing Disputes: Michael Wohlgenant, North Carolina State University, Raleigh, NC, and Tom Wahl, Washington State University, Pullman, WA