BLAME CANADA: AMERICAN TRADE COMPLAINTS AGAINST THE CANADIAN WHEAT BOARD

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The Canadian Wheat Board (CWB) is the largest grain marketing board in the world. In its 7th decade of operation, the Winnipeg-based CWB enjoys a legislated monopoly over the sale and export of wheat grown in western Canada. Over the past decade various American interests have challenged the allegedly unfair trading practices of the CWB. These challenges include complaints under both the Canada - United States Free Trade Agreement and the North American Free Trade Agreement, as well as various pieces of domestic US legislation. The most recent complaint against the CWB comes from the North Dakota Wheat Commission under s. 301 of the Trade Act, 1974.

Despite the many American investigations and complaints the CWB continues in operation. This paper studies the American challenges to the CWB, including the s. 301 investigation, and asks whether the CWB is an anomaly in an era of expanded global trade and free enterprise. It concludes that many factors favour the continued operation of the CWB, including concern about domestic control of our food supply. Finally, from the perspective of Canadian agricultural and trade policy, any decisions on the future abolition of the CWB should result from the desires of the Canadian farming community rather than the doggedness of American interests in filing trade complaints.

I. INTRODUCTION

> 'The NDWC [North Dakota Wheat Commission] charges do not reflect the realities of the global grain market,' said [Canadian Wheat Board President and CEO Greg] Arason. 'It appears they need someone to blame for low world prices and the easy thing to do is to blame Canadians.'[1]

THE CANADIAN WHEAT BOARD (CWB) is the largest grain marketing board in the world, accounting for approximately 20% of world wheat exports.[2] Under the *Canadian Wheat Board Act* (CWBA) west-

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[1] Canadian Wheat Board, News Release, "American Trade Investigation Based on Politics, Not Facts" (23 October 2000), online: Canadian Wheat Board <http://www.cwb.ca/publicat/nr/2000/oct232000.html>.

[2] In 1999 The North Dakota Wheat Commission (NDWC) estimated that the CWB controlled "about 20 percent of the world wheat and barley trade." See

ern Canadian farmers[3] are required to sell all of their wheat and barley intended for human consumption to the CWB, which in turn markets these grains for foreign or domestic consumption. It is doubtful whether any Canadian agency in the past decade has been as consistently challenged by the United States (US) government over its trading practices.

The purpose of this essay is to review the challenges that have been made against the CWB over the 1990-2001 period by various actors in the US; to evaluate the likelihood of success of the action against the CWB lodged by the North Dakota Wheat Commission (NDWC) under s. 301 of the Trade Act, 1974; and to discuss whether the CWB is an anomaly in a period of expanded global trade and turbocapitalism.[4]

The recent history of the CWB serves as a good introduction to the various trade agreements covering Canada and the US. The actions of the CWB have been challenged under the Canada - US Free Trade Agreement (FTA), the North American Free Trade Agreement (NAFTA), and various pieces of domestic US legislation (the Tariff Act, 1930; the Agricultural Adjustment Act; the Trade Act, 1974). The s. 301 investigation is seen by some American interests as a source of leverage against the CWB in the upcoming round of World Trade Organization (WTO) negotiations that will update the General Agreement on Tariffs and Trade (GATT). Despite numerous investigations and persistent American political pressure, the CWB has continued in operation and seems likely to remain in place unless domestic political forces lead to its elimination.

"About U.S.-Canada Wheat Trade: Neighbors. Allies. Trading Partners. Competitors." *Grains of Truth* (February 1999) 6. The United States General Accounting Office estimated that the CWB controlled 22% of the world wheat trade. See the United States General Accounting Office, *Report to Congressional Requesters, Canada, Australia, and New Zealand: Potential Ability of Agricultural State Trading Enterprises to Distort Trade United States General Accounting Office,* 1996, GAO/NSIAD-96-94 at 5. The CWB's own position is that "Canada's share of world wheat exports has remained stable near 20 percent" over the past 25 years. See "Some Factors in Canada-United States Wheat Trade" (June 2000) at 5, online: Department of Foreign Affairs and International Trade: Embassy of Canada – Washington D.C. <http://www.canadianembassy.org/issues/agriculture/wheat.pdf>.

[3] The CWBA covers farmers within a "designated area," defined by s. 2(1) to be Manitoba, Saskatchewan, Alberta, and the Peace River District of British Columbia. R.S.C. 1985, c. C-24. This area produces at least 95% of the wheat grown in Canada. "Some Factors in Canada-US Wheat Trade" (June 2000) at 2, online: Department of Foreign Affairs and International Trade: Embassy of Canada – Washington D.C. <http://www.canadianembassy.org/issues/agriculture/wheat.pdf>.

[4] "Turbocapitalism" taken from E. Luttwack, *Turbo-Capitalism: Winners and Losers in the Global Economy* (London: Weidenfield & Nicolson, 1998).

II. THE HISTORY OF CANADIAN WHEAT BOARD

In 1935 the Canadian federal government established the CWB.[5] The origins of the CWB grew out of the early part of the 1900s. Farmers first banded together in pooling arrangements in an effort to cope with the fluctuations in the sale price of grain from one season to the next. After an initial experiment with the CWB during World War I, the federal government was pressured into restoring the board in the 1930s due to severe problems in the farm economy during the Depression. Between 1935-43 the CWB functioned in a dual-marketing environment where it competed with private grain companies. In 1943 the government created the current monopoly system for wheat marketing, adding barley to the CWB's mandate in 1949.

Section 45 of the CWBA gives the CWB exclusive (or single-desk) control over the export and inter-provincial trade of wheat, barley, and related products.[6] The CWB pays farmers, upon delivery of their crops, an acquisition price estimated to be 70-75% of the final market price. Following sales (and after deductions for CWB expenses) farmers receive the balance owing to them through an interim and final payment. The wheat board determines the final payment associated with each type of grain by placing revenues into four different pools: wheat, durum wheat, barley, and designated (high quality) barley.

The CWB's role in export sales is critically important due to the fact that Canada exports about 70% of its wheat crop. The CWB has grown into a major international operation, with some 500 staff, sales revenues between $4-6 billion per year, and sales of wheat and barley in over 70 countries. It is one of Canada's largest exporters by sales volume, and its largest net earner of foreign currency. The CWB exports 680 million

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[5] "The Canadian Wheat Board", an information bulletin from the Canadian Wheat Board, 423 Main Street Winnipeg, Manitoba R3C 2P5.

[6] Section 45 states:

> Except as permitted under the regulations, no person other than the Corporation shall (a) export from Canada wheat or wheat products owned by a person other than the Corporation; (b) transport or cause to be transported from one province to another province, wheat or wheat products owned by a person other than the Corporation; (c) sell or agree to sell wheat or wheat products situated in one province for delivery in another province or outside Canada; or (d) buy or agree to buy wheat or wheat products situated in one province for delivery in another province or outside Canada.

R.S.C. 1985, c. C-24.

bushels of wheat per year, far exceeding the 228 million bushels controlled by Cargill,[7] the biggest American wheat exporter.

The constitutionality of the CWBA has repeatedly been upheld by Canadian courts. Most notably, in *Murphy v. Canadian Pacific Railway Co.* the Supreme Court of Canada (SCC) held that export/import powers given to the CWB were a valid exercise of federal power under the "trade and commerce" power found in s. 91(2) of the Constitution Act, 1867.[8] In *R.* v. *Klassen* the Manitoba Court of Appeal concluded that the ratio in *Murphy* extended to grain trade conducted entirely within provincial boundaries.[9] A more recent attack on the CWB under the Charter of Rights and Freedoms came from the Alberta Barley Commission in *Archibald* v. *Canada.* The plaintiffs argued that the CWBA violated their Charter rights of freedom of association (s. 2(d)), freedom of movement (s. 6), and equality (s. 15). These arguments were forcefully rejected by the Federal Court of Canada and the Federal Court of Appeal. In addition, the SCC denied leave for appeal.[10]

The Canadian government has identified the CWB as a "state trading enterprise" (STE) for the purposes of Article XVII of the GATT. This provision of the GATT allows government funded or operated agencies to engage in import or export activities, provided that the STE makes "any such purchases or sales solely in accordance with commercial considerations."[11]

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[7] "About U.S.-Canada Wheat Trade: Neighbors. Allies. Trading Partners. Competitors." *Grains of Truth* (February 1999) at 6.

[8] [1958] S.C.R. 626.

[9] (1960), 20 D.L.R. (2d) 406.

[10] (1997), 146 D.L.R. (4th) 499 (F.C.T.D.); (2000), 188 D.L.R. (4th) 538 (F.C.A.); (2000), S.C.C.A. No. 458.

[11] Article XVII, s. 1(a) states:

> Each contracting party undertakes that if it establishes or maintains a State enterprise... such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement....

General Agreement on Tariffs and Trade, 30 October 1947, 55. U.N.T.S. 187.

III. CANADA'S WHEAT AND BARLEY TRADE WITH THE US

THE EXPORT OF CANADIAN WHEAT to the US has grown dramatically since the late 1980s.[12] The increase in durum wheat exports from 1990-1997 has been estimated at 57%, while the increase in Canadian red spring wheat exports for the same period is estimated at 2,000%.[13] CWB figures suggest growth in excess of 500% in bulk wheat (including durum) exports to the US between 1989-1999, and growth of about 300% in durum wheat exports.[14] Reasons for this growth are not definitive, though the introduction of the FTA, the declining value of the Canadian dollar relative to the US dollar, and increased demand for pasta products (made from durum wheat) are all viable explanations. Clearly, the increase in exports to the US has triggered repeated American attacks on the legitimacy of the CWB.

Despite this growth in exports, Canadian wheat still supplies only six percent of the US domestic market. Moreover, the US itself remains the world's largest exporter of wheat, representing about 30% of the world exports in 1999-2000, while Canada ranks second with 20%.[15] It is important to note, however, that the Canadian specialty in red spring and durum wheat[16] has particularly upset North Dakota growers, who also

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[12] The United States General Accounting Office places the start of this trend at 1986. United States General Accounting Office, *Report to the Honorable Byron Dorgan, U.S. Senate, U.S. Agricultural Trade: Canadian Wheat Issues*, 1998, GAO/NSIAD-99-21 at 63. The NDWC, however, attributes the increase to the inception of the *Canada-United States Free Trade Agreement* on 1 January 1989. *Supra* note 7 at 2, 3.

[13] United States General Accounting Office, *Report to the Honorable Byron Dorgan, U.S. Senate, U.S. Agricultural Trade: Canadian Wheat Issues*, 1998, GAO/NSIAD-99-21 at 3.

[14] "The Canadian Wheat Board 1998-1999 Statistical Tables" at tables 12-13, online: Canadian Wheat Board <http://www.cwb.ca>.

[15] "Some Factors in Canada-US Wheat Trade" (June 2000) at 3, 5, online: Department of Foreign Affairs and International Trade: Embassy of Canada – Washington D.C. <http://www.canadianembassy.org/issues/agriculture/wheat.pdf>.

[16] In 1998 - 1999 Canada had a 66% market share of world durum exports. Canadian Wheat Board, *Canadian Wheat Board 1998-1999 Annual Report*, online: Canadian Wheat Board <http://www.cwb.ca/publicat/annual/html9899/index.htm>. In 1999-2000 Canada accounted for 58.8% of the world's exports in durum wheat. "Table 34: Exports of Durum Wheat (including semolina) by Principal Exporters" (2000), online: Canadian Wheat Board <http://www.cwb.ca>. In February 2001, the CWB indicated Canadians had a 60% share of world durum exports. "Grain Matters Newsletter" (January - February 2001), online: Canadian Wheat Board <http://www.cwb.ca/index.htmindex.htm>.

specialize in these varieties of wheat.[17] Interests in the two countries have also repeatedly conflicted regarding quality of the respective wheat crops. Canadians allege first that US importers prefer higher quality Canadian wheat, and second that there is not sufficient domestic US supply, while North Dakotans reject both of these arguments.

IV. THE TRADE COMPLAINTS OF 1990-2001

A. Investigation by the US International Trade Commission

In 1990, the US federal government's International Trade Commission (USITC) launched an investigation into the competitiveness of the US and Canadian durum wheat businesses. This investigation was conducted pursuant to s. 332(g) of the Tariff Act, 1930, which provides that the USITC can investigate tariff relations with foreign countries, as well as "... conditions, causes, and effects relating to competition of foreign industries with those of the United States...."[18] The section only provides for investigations, not for an enforcement remedy. The study concluded that there was no evidence that prices paid by American purchasers for Canadian durum wheat were significantly different than prices paid for durum wheat grown in the US.

B. Complaint Under the Free Trade Agreement (FTA)

The FTA, which came into effect on 1 January 1989, included provisions on agricultural trade between Canada and the US. The liberalization of agricultural trade between the two countries prompted one analyst to state that "*FTA* 701(2) goes much further than the *GATT Agricultural Agreement* in that it completely eliminates export subsidies on trade in agricultural goods...."[19] One of the steps required of Canada under the FTA (Article 701(5)) was the abolition in 1995 of the Western Grains Transportation Act, 1984, which had subsidized rail transportation rates for Canadian grain being shipped through west coast ports and destined for the US. Despite this repeal, the issue of subsidized rail transport

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[17] North Dakota is the largest producer of red spring wheat and durum wheat in the US. "Section 301 Petition of North Dakota Wheat Commission" (8 September 2000) at 5.

[18] 19 U.S.C.A. § 1332.

[19] J. R. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide.* (Aurora, Ontario: Canada Law Book, 1994) at 180.

remains a "sticking point" between the two countries and is named in the NDWC's s. 301 complaint.[20]

In May 1992, the US filed a complaint against the CWB, citing the pricing policies used for export of Canadian durum wheat. The Americans asserted that the CWB was violating Article 701(3) of the FTA, which requires that neither country export wheat, or other agricultural goods, to the other country at a price below the domestic acquisition price.[21] The dispute centered on the definition of "acquisition price." The CWB argued that the definition should include only the original payment made to farmers (the 70-75% estimate of final sale price), and that the interim/final payments represent distribution of profits. The Americans argued for a more expansive definition that would include all payments.

The final report from the bi-national dispute panel (February 1993) upheld the Canadian definition.[22] The panel first determined that only costs incurred by the CWB itself, not the Canadian government, should be included in the determination of acquisition price, stating:

> Article 701.3 is aimed at prohibiting export-like subsidies, not domestic subsidies. Including in the computation of the costs referred to in Article 701.3 all costs which the Canadian government may incur ... in connection with every other activity related to the production and marketing of grain could clearly sweep in domestic subsidies, i.e., subsidies not conditioned on export, a result which the Parties did not intend.[23]

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[20] *Supra* note 17 at 46.

[21] Article 701(3) states:

> Neither party, including any public entity that it establishes or maintains, shall sell agricultural goods for export to the territory of the other Party at a price below the acquisition price of the goods plus any storage, handling or other costs incurred by it with respect to those goods.

Canada-United States Free Trade Agreement, 1 January 1989, online: Canada-United States Free Trade Agreement <http://wehner.tamu.edu/mgmt.www/nafta/fta/complete.pdf>.

[22] *In the Matter of: The Interpretation of and Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales*, Final Report of the Panel Under Chapter 18 of the Canada-United States Free Trade Agreement, CDA-92-1807-01 at Part IV 1a), para. 75, online: SICE Foreign Trade Information System <http://www.sice.oas.org/DISPUTE/uscanfta/Cc9201e.asp>.

[23] *Ibid.* at Part III C), para. 47.

The panel went on to hold that the American position could not be supported because the interim and final payments do serve as distribution of "profits."[24] Furthermore, since the final payments to producers are not determined until 17 months after the original payment, it would be impractical to require the CWB to sell its product without knowing what the actual acquisition price would be. The complaint by the US did succeed on one ground as the panel held that "... freight costs absorbed by the CWB for shipping the grain into the United States do fall within ... Article 701.3."[25]

The NDWC remains bitter over the FTA panel's decision on acquisition cost, insisting in a press release that ".... [a]cademic economists agree that this definition is ludicrous."[26] In the s. 301 petition the NDWC refers to the "ridiculousness" of the panel's "absurd" interpretation.[27] This issue is part of the on-going complaint by various American actors about the "lack of transparency in CWB pricing."[28]

The FTA panel also encouraged the parties to form a bilateral working group in order to audit CWB operations. This group found minor violations of the FTA in a sample survey of CWB contracts for export.

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[24] *Ibid.;* Section 7(2) of the CWBA states:

> Profits realized by the Corporation from its operations in wheat under this Act during any crop year, other than from its operations under Part III ... shall be paid to the Receiver General....

Part III deals with the marketing of wheat, including interim and final payments to producers. R.S.C. 1985, c. C-24.

[25] *Ibid.* at Part IV 1d), para. 112.

[26] North Dakota Wheat Commission, News Release, "Petition Filed Today: USTR Receives Complaint Against Trade Practices" (8 September 2000), online: North Dakota Wheat Commission <http://www.ndwheat.com/in/news/news_detail.asp?ID=118>.

[27] *Supra* note 17 at 23.

[28] See, for example, Office of the United States Trade Representative, News Release, "Joint Statement of Ambassador Charlene Barshefsky and Secretary Daniel Glickman Regarding U.S.-Canada Grains Issues" (17 September 1996), online: Office of the United States Trade Representative <http://www.ustr.gov/releases/1996/09/96-71.html>.

C. Complaint under the Agricultural Adjustment Act, 1933

In January 1994 President Clinton requested an investigation of the CWB by the USITC under s. 22 of the *Agricultural Adjustment Act* (AAA).[29] This investigation focused on whether wheat and related products were being imported under such conditions "... as to render or to tend to render ineffective, or materially interfere with..." the price support program conducted by the US for wheat.[30] The USITC filed its report in July 1994, with three of the six commissioners finding that the wheat imports from Canada were in violation of s. 22. This finding gave the president the power under s. 22 to "... impose ... fees not in excess of 50 per centum ad valorem or such quantitative limitations ... shown by such investigation to be necessary...."[31]

In response to the threat of import quotas, Canada negotiated a one-year Memorandum of Understanding (MOU) with the US in September 1994. Under the MOU the parties set a limit on the amount of Canadian wheat exports to the US, and the Americans imposed a new tariff schedule on wheat. As part of the MOU, the parties also agreed to establish a Joint Commission on Grains. The commission issued its report in October 1995, making numerous recommendations, including the elimination of "excessive discretionary pricing practices" in both countries.[32] As its findings did not bind either party, the commission had little impact.[33] The MOU was not renewed upon its expiry in September 1995. Following the Uruguay Round of GATT negotiations, s. 22 of the AAA can only be used against goods from non-WTO members, closing the door on any future action against the CWB under this provision.

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[29] United States General Accounting Office, *Report to Congressional Requesters, Canada, Australia, and New Zealand: Potential Ability of Agricultural State Trading Enterprises to Distort Trade United States General Accounting Office,* 1996, GAO/NSIAD-96-94 at 47.

[30] 7 U.S.C.A. § 624.

[31] *Ibid.*

[32] *Supra* note 29 at 48.

[33] In the view of the NDWC, however, the Commission uncovered "... evidence of routine CWB dumping on the world market...." *Supra* note 26.

D. Complaint under the North American Free Trade Agreement (NAFTA)

With regard to agricultural trade between Canada and the US, the NAFTA largely preserves the earlier FTA provisions. Specifically, Annex 702.1 of NAFTA, which applies only to Canada and the US, states:

> Articles 701, 702, 704, 705, 706, 707, 710, and 711 of the *Canada-United States Free Trade Agreement* apply, as between Canada and the United States, which Articles are hereby incorporated into and made a part of this Agreement.[34]

In July 1995 the US requested a dispute settlement panel under NAFTA, Article 2008, in response to increased tariffs on barley and other agricultural goods (dairy, poultry, eggs, and margarine) imposed by the Canadian government on imports from the US. The panel's final report in December 1996 upheld the Canadian position that increased tariffs were permissible (and in fact necessary), due to the requirements under the new GATT Agreement on Agriculture that "tariffication" of non-tariff barriers take place.[35]

E. General Accounting Office Studies

North Dakota Senator Byron Dorgan has taken the lead in requesting two separate studies of CWB operations from the US federal government's General Accounting Office (GAO). The first study, requested in 1995 and completed the following year, also looked at the operation of the Australian Wheat Board and the New Zealand Dairy Board. This study focused on the ability of STEs to engage in "trade distorting activities." The study found little evidence of concrete wrongdoing by the CWB, stating that "US Department of Agriculture (USDA) officials acknowledged that they did not have any evidence that CWB was violating existing trade agreements."[36] However, the study also concluded that the CWB could

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[34] *North American Free Trade Agreement Between the Government of the United States, the Government of Canada and the Government of the United Mexican States*, 17 December 1992, 32 I.L.M.

[35] "In the Matter of Tariffs applied by Canada to Certain U.S.-Origin Agricultural Products," (2 December 1996) CDA-95-2008-01, online: North American Free Trade Agreement Reports <http://www.wellesley.edu/Economics/lindauer/nf.NAFTA.html>.

[36] *Supra* note 29 at 8.

use its monopoly powers in three ways in order to "potentially distort trade:"

1. as an STE the CWB enjoys government subsidies of any operational deficit it occurs, and receives a lower interest rate on commercial loans;
2. it is able to cross-subsidize between wheat and barley exports, and between foreign and domestic sales because of its control over both commodities (an allegation denied by the CWB because of its pooling of revenues for different grains); and
3. the delay in making final payments to producers could allow the CWB increased flexibility in negotiating sales contracts with foreign buyers.

The GAO Report did not make any specific allegations against the CWB, and cautioned that:

> Because complete transaction-level data needed to fully evaluate potential trade-distorting activities were not available, GAO is not in a position to say whether or not trade-distorting activities have actually occurred.[37]

This note of caution did not deter Senator Dorgan from requesting another study from the GAO in 1998, this time specifically focusing on the operations of the CWB. Perhaps unsurprisingly, the 1998 GAO study (released 1999) also found data collection problems regarding the CWB, stating that "[l]ittle information on actual CWB contracts is publicly available."[38] The study reiterates familiar complaints about lack of transparency in CWB pricing, though acknowledging that the CWB believes that "it reveals as much about its prices as its competitors in the private sector."[39] The report made no recommendations, and largely served to reiterate the concerns cited in the previous GAO study regarding CWB borrowing costs, possible rail-line subsidies, and price flexibility arising from the CWB definition of acquisition costs. Despite the inconclusiveness of these two GAO studies, in 1999 Senator Dorgan followed up by calling on his fellow Democrat President Clinton to fire his US Trade Representative (USTR), Charlene Barshefsky, unless she launched a trade action against the alleged "dumping" of Canadian wheat in the US.[40]

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[37] *Ibid.* at 5.
[38] *Supra* note 13 at 6.
[39] *Ibid.*
[40] F. J. Frommer, "Canada Wheat Board to be Probed" *Associated Press* (23 October 2000) DBAP2K.

F. The s. 301 Trade Act, 1974 Complaint

The most recent complaint against the CWB came from NDWC in September 2000. The NDWC filed a petition pursuant to s. 302 of the Trade Act, 1974,[41] requesting that the USTR investigate, under s. 301, whether the CWB is harming the interests of American wheat producers.[42] The broad, discretionary powers found in s. 301 are designed to allow domestic US action against any foreign government practices that impact on the competitiveness of US commerce. Owing to the breadth of these powers s. 301 has been described as, "... the wild card in the deck of the US trade laws."[43]

The petition asserts predatory pricing, over delivery on quality factors (effectively, predatory pricing), and cross subsidization in developing

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[41] "Any interested person may file a petition with the Trade Representative requesting that action be taken under section 2411 of this title and setting forth the allegations in support of the request." 19 U.S.C.A § 2412(a)(1).

[42] If the United States Trade Representative determines... that (B) an act, policy, or practice of a foreign country... (ii) is unjustifiable and burdens or restricts United States commerce; ...b) (1) an act, policy or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce ... the Trade Representative shall take any appropriate and feasible action authorized under subsection (c).

19 U.S.C.A. § 2411. The United States Trade Representative's (USTR) notice of the investigation states:

> An act, policy or practice is unjustifiable if it is in violation of, or inconsistent with the international legal rights of the United States. An act, policy or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair or inequitable.

"Initiation of Section 302 Investigation and Request for Public Comment: Wheat Trading Practices of the Canadian Wheat Board" (16 November 2000) vol. 65, No. 222 *Federal Register* at 69362. It is this broad wording that earns this provision the "wildcard" label mentioned above. The North Dakota Wheat Commission, in its petition, claims that the CWB actions are both "unreasonable" and "unjustifiable." *Supra* note 17 at 3. However the USTR notice states that the actions alleged are merely "unreasonable" – another example of the inconsistencies found in the s. 301 petition.

[43] D. Steger, *A Concise Guide to the Canada-United States Free Trade Agreement*, (Toronto, Ontario: Carswell, 1988) at 93.

country markets.[44] The NDWC claims that the government-granted rights allow the CWB to operate without commercial risk and provide it with pricing flexibility not available to private wheat traders.[45] This monopoly position is repeatedly contrasted with "truly commercial" operations, as the petitioners decry the "inherent inefficiencies" of the CWB, which leave Canadian farmers in a "stifling situation."[46] This ideological resentment of government controlled marketing boards is shared by other American agricultural organizations, such as the US Wheat Associates, which claimed in January 2001 that export-oriented STEs are "incompatible with free market operations."[47] A NDWC press release even suggests that Canada, Australia, and Argentina have undertaken steps to establish an international wheat cartel which could take effect in mid-to-late-2001.[48] The NDWC seems to perceive the CWB as a rogue operator, hiding behind secretive pricing arrangements, a view confirmed by its administrator's memorable statement: "[j]ust because the CWB hasn't always been found guilty [in eight separate US government investigations] does not make the government monopoly innocent."[49]

As a remedy, the petitioners are asking the USTR to impose import restrictions on Canadian spring wheat and durum (either through a quota, tariff-rate quota, or voluntary restraint), as well as a "long-term solution that addresses the Canadian government's monopoly over the procurement and sale of Canadian wheat."[50] In short, the petitioners seek the eventual elimination of the CWB.

In addition to their requested relief under the Trade Act, the petitioners acknowledge that the s. 301 complaint is meant to give US negotiators leverage against STEs in the agricultural sector in the upcoming

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[44] *Supra* note 17 at 7.

[45] *Ibid.* at 20.

[46] See *supra* note 26; *supra* note 7; North Dakota Wheat Commission, News Release, "Section 301 Investigation into Canadian Wheat Trading Practices Advances" (20 November 2000), online: North Dakota Wheat Commission <http://www.ndwheat.com/in/news/news_detail.asp?ID=130>.

[47] North Dakota Wheat Commission, News Release, "N.D. Wheat Commission Encouraged by Continued Support" (26 February 2001), online: North Dakota Wheat Commission <http://www.ndwheat.com/in/news/news_detail.asp?ID=138>.

[48] North Dakota Wheat Commission, News Release, "USTR Committed to Investigating Allegations Against CWB" (23 October 2000), online: North Dakota Wheat Commission <http://www.ndwheat.com/in/news/news_detail.asp?ID=124>.

[49] *Supra* note 26.

[50] North Dakota Wheat Commission, News Release, "Report to Senate and House Agriculture Committees" (12 January 2001), online: North Dakota Wheat Commission <http://www.ndwheat.com/in/news/news_detail.asp?ID=135>.

round of GATT negotiations.[51] This opposition to STEs is enunciated in the Public Summary of US Position released by the US Government in advance of the Free Trade Area of the Americas agricultural negotiations. In its position statement the US calls for:

> ... the staged elimination of exclusive export rights granted to state trading enterprises engaged in the export of agricultural products by permitting private traders to participate in, compete for, and transact for exports of agricultural products. In the transition period ... the state trading enterprises would be required to provide data on pricing ... and national governments would be prohibited from providing government funds... to those entities.[52]

G. The s. 301 Investigation

The then-USTR Charlene Barshefsky announced on 23 October 2000 that her office would initiate an investigation of the CWB based on the NDWC petition. Barshefsky stated that the investigation would focus on the CWB's marketing of wheat in developing countries, and in the US.[53] A spokesperson from the office of Ralph Goodale, the minister responsible for the CWB, denounced Barshefsky's announcement, claiming that eight different American investigations over the past decade had upheld trade practices of the CWB.[54] The CWB echoed these comments in its press release, describing the petition as inaccurate and unsubstantiated, and the investigation as a product of presidential politics.[55] This latter assertion seems a bit simplistic, given that the Gore/Lieberman ticket

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[51] The NDWC states: "[t]he action is viewed as leverage for the United States that could bring Canada to the negotiating table in the World Trade Organization." *Ibid.* The Commission also states: "The NDWC agrees with the U.S. government's ranking of STE's as a high priority on the WTO agenda and says the 301 investigation can provide meaningful leverage for the negotiations." *Supra* note 48.

[52] FTAA Negotiating Group on Agriculture, "Public Summary of U.S. Position," online: Office of the United States Trade Representative <http://www.ustr.gov/regions/whemisphere/agri.html>.

[53] "USTR Accepts Section 301 Petition on Canadian Wheat" (23 October 2000), online: Office of the United States Trade Representative <http://www.ustr.gov/releases/2000/10/00-74.pdf>.

[54] "Federal Government Disappointed with American Wheat Decision" (23 October 2000), online: Agriculture and Agri-Food Canada <www.agr.ca/cb/news/2000/n01023ae.html>.

[55] *Supra* note 1.

was clearly headed for defeat in the major wheat-growing states such as North Dakota and Kansas.

In accordance with s. 301 of the Trade Act, the USTR filed notice in the Federal Register on 16 November 2000, asking any interested parties to reply in writing to the petition, and requested consultations with the Canadian government.[56] Since the posting of the notice in the Federal Register, the Bush administration has assumed power in Washington. The new USTR, Robert Zoellick, announced his support for continuing the s. 301 investigation during his confirmation hearing by the US Senate.[57] Zoellick has one year from the time that the petition was filed to issue a report. The U.S. government proceeded with a public hearing on the trade practices of the CWB on 6 June 2001, in Washington.[58] The CWB and the Canadian government refused to appear before the US International Trade Commission but did issue massive pre-hearing and response briefs, blasting the legal foundations of the investigation and the evidence presented in support of the allegations.

V. PROSPECTS FOR SUCCESS OF THE S. 301 PETITION

THE S. 301 PETITION MAY HAVE SOME SHORT-TERM IMPACT, but it is unlikely to lead to the American farmers' longer-term goal of phasing out the CWB. The petition is largely anecdotal, with most of the emphasis on CWB's dealings with developing countries rather than with the US itself. While the petitioners claim, in their press releases, to have "... unprecedented information from a network of field representatives from around the world,"[59] the actual sources of this information are the US Wheat Associates field staff – hardly disinterested observers. The "evidence" provided by field staff consists of unsubstantiated statements including: "Moroccan importers report that the CWB sometimes provides a hold of #1 wheat under a #2 contract" or, in regards to Guatemala, "... the CWB has convinced major buyers in the country to buy CWB at good

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[56] "Initiation of Section 302 Investigation and Request for Public Comment: Wheat Trading Practices of the Canadian Wheat Board" (16 November 2000) vol. 65, No. 222 *Federal Register* at 69363.

[57] *Supra* note 47.

[58] B. McKenna, "U.S. Targets Canada's Wheat Trade" *The Globe and Mail* (7 June 2001) A1.

[59] North Dakota Wheat Commission, News Release, "Key Points: Section 301 Petition Targeting the Canadian Wheat Board" (7 September 2000), online: North Dakota Wheat Commission <http://www.ndwheat.com/in/news/news_detail.asp?ID=116>.

prices while offering higher quality wheat than specified."[60] The petition also claims, without documentary proof, that the CWB has negotiated "... secret long-term marketing arrangements with customers" in developing countries.[61] The petition tends to rely on broad statements such as: "[t]he subsidies provided by the Canadian government make the Canadian Wheat Board even stronger than the typical STE,"[62] without accompanying explanation.

The NDWC states that "the CWB has publicly admitted that it has the ability to charge different prices in various export markets as part of its export strategy," and argues that this is a violation of "WTO export subsidy commitments."[63] In fact, there is nothing to prohibit differential pricing under the FTA, NAFTA, or GATT Article XVII, as long as the STE involved respects commercial considerations. The petitioners also complain about the CWB providing a "subsidy" via research and development, even though the Uruguay Round Agreement on Agriculture exempted government support for agricultural research from any reductions.[64]

The assertion that the railways still give preferential treatment to Canadian wheat also seems dubious. The petitioners claim that the CWB benefits from a statutory cap on grain rates, rail cars dedicated to grain transport, and preferential allocation of these railway cars, which constitute further subsidies.[65] The first of these allegations presumably refers to ss. 150(1) and 151(1) of the Canada Transportation Act, which place a ceiling on the revenues that CN and CP Rail can derive from the movement of grain in western Canada.[66] The movement of grain to British Columbia for export to the US is expressly exempted from this ceiling[67] so

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[60] *Supra* note 17 at 52-53.
[61] *Ibid.* at 7.
[62] *Ibid.* at 35.
[63] *Ibid.* at 13.
[64] *Agreement on Agriculture* at Annex 2.2(a), online: World Trade Organization <http://www.wto.org/english/docs_e/legal/e/docs_e.htm>.
[65] *Supra* note 17 at 13, 49.
[66] Section 150(1) states:

> A prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year may not exceed the company's maximum revenue entitlement for that as determined under subsection 151(1).

Section 151(1) provides a formula involving six variables, such as previous revenue, previous tonnage shipped, and length of shipments. R.S.C. 1996, c. 10.
[67] Section 147 states: "... 'movement' in respect of grain ... does not include the carriage of grain to a port in British Columbia for export to the United States for consumption in that country." *Ibid.*

the only basis of complaint would be that the statutory provision subsidizes exports to developing countries. While this might be deemed "unfair" under a s. 301 complaint, it certainly does not appear to violate any provisions of GATT,[68] nor would it violate NAFTA or the FTA because of its mixture of domestic and export subsidy. The CWB does own 1,900 rail hopper cars, but it does not control the transportation system. In fact, the CWB successfully filed complaints at the Canadian Transportation Agency against both CN and CP Rail, due to the low priority given by the railways to grain shipments during the winter months of 1996-97.[69] Finally, the CWB initiated a new program in 1999 to facilitate the movement of US grain on Canadian railways. Overall, the railway "subsidy" allegation does not seem like a serious challenge to the CWB.

The viability of the whole s. 301 process in an international trade environment is also doubtful, as the European Union is currently challenging the legality of its use.[70] Given that the CWB has survived eight investigations by various US governmental bodies since 1990, it does not seem likely that the s. 301 complaint will lead to a dramatic breakthrough in undermining the CWB. And, as the complainants themselves seem to [illegible]arguing that the petition is simply a strategic move designed to influence [illegible]s at the WTO, the prospects for success seem even more unlikely.

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[68] Article 9.1 of the *Agreement on Agriculture* states:

> The following export subsidies are subject to reduction commitments under this Agreement ... (e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipment.

This is unlike the CWB situation where grain for both domestic consumption and export is treated in the same manner. *Supra* note 64.

[69] "In the Matter of a Complaint Filed by the Canadian Wheat Board Pursuant to Sections 113 to 116 and Sections 26 and 37 of the Canada Transportation Act, S.C. 1996, c. 10, Against the Canadian National Railway Company and the Canadian Pacific Railway Company Regarding Their Service Obligations for the Receiving, Carrying and Delivering of Wheat and Barley," (30 September 1998) No. 475-R-1998, online: Canadian Transportation Agency <http://www.cta-otc.gc.ca/rulings-decisions/decisions/1998/R/475-%-1998_e.html>.

[70] Canadian Wheat Board, News Release, "American Trade Investigation Based on Politics, Not Facts" (23 October 2000), online: Canadian Wheat Board <http://www.cwb.ca/publicat/nr/2000/oct232000.html>.

VI. THE CWB IN WTO NEGOTIATIONS

In its list of priorities for the WTO negotiations, the CWB encourages the Canadian government to ensure that future negotiated agreements maintain Canadian control over wheat marketing.[71] Understandably, the NDWC argues that ending the CWB's monopoly has been important to US wheat farmers for many years, and that eliminating STEs of this sort should be a priority for the upcoming round of WTO negotiations. The prospects of the CWB surviving the WTO negotiations are good, given its importance to Canada and the tenacity of the government's defence of the agency in recent years. Additionally, while Americans have adopted a bargaining position that calls for the abolition of STEs, the integrity of STEs is well-established, and is protected under both NAFTA[72] and GATT Article XVII.[73]

Though s. 301 petitioners object to the concept of government-controlled monopolies, the GATT has recognized the viability of STEs since its inception in 1947. The Uruguay Round of GATT negotiations produced an Understanding on the Interpretation of Article XVII of GATT, which defines an STE as:

> Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights and privileges ... in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.[74]

But beyond this definition the parties made little reform to the traditional wording pertaining to STEs. Moreover, at least 15 other countries have

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[71] Canadian Wheat Board, "Canadian Wheat Board World Trade Organization (WTO) Position" (July 1999), online: Canadian Wheat Board <http://www.cwb.ca/publicat/wto/index.htm>.

[72] Article 1502(1) states: "Nothing in this Agreement shall be construed to prevent a Party from designating a monopoly." Article 1503(1) states: "Nothing in this Agreement shall be construed to prevent a Party from maintaining or establishing a state enterprise." *Supra* note 34.

[73] See *supra* note 11.

[74] *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994*, s. 1, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/08-17.pdf>.

reported to the WTO that they have STEs in the grains sector,[75] so adoption of the American position would presumably be opposed by other countries. The single-desk export model is still strongly endorsed in Australia, for example.[76]

There is also a structural problem in making dramatic progress on any agricultural issues in WTO talks. One analyst argues that:

> ... the trade in agricultural goods is conducted largely outside of GATT disciplines. The problem with the world trade in agricultural products stems from support programs maintained by countries for their agricultural sectors.... The Uruguay Round Agreement on Agriculture is the first serious attempt under the GATT to provide a framework for the resolution of the problems encountering the world trade in agricultural goods.[77]

In short, trade in agriculture does not seem likely to be overhauled in this round of talks. It is also worth noting that both the FTA and NAFTA liberalized trade in agriculture beyond the GATT provisions, and the CWB has already survived challenges under both of these treaties.

VII. IS THE CWB AN ANOMALY, OR IS IT WORTH KEEPING?

> The CWB is labouring to appease its critics and justify its existence. In a climate that is increasingly moving towards a free market, the monopoly wheat organization is engaged in a life-or death battle, and its recent actions indicate that it doesn't plan to go down without a fight.[78]

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[75] They are: Australia, Cyprus, Czech Republic, Finland, India, Indonesia, Israel, Japan, Norway, Poland, Slovak Republic, South Africa, Spain, Turkey and the United States (Commodity Credit Corporation). Most of these are import-oriented STEs. *Supra* note 29 at 18.

[76] The Australian Wheat Board (AWB) is dedicated to maintaining the current system of wheat marketing for Australian wheat. See "Single Export Desk," online: Australian Wheat Board <www.singledesk.awb.com/au/index1.htm>.

[77] Johnson, *supra* note 19 at 171, 173.

[78] J. McFarland, "Wheat Board Works to Justify its Existence" *The Globe and Mail* (7 July 2001) B7.

IN AN ERA OF FREE TRADE AND PRIVATIZATION OF STATE FUNCTIONS, is the 67-year-old CWB a remnant from a by-gone era that should be abolished, or at the very least, phased out of existence? The answer to this question depends in part on the importance Canadian society chooses to place on maintaining family farming, and in keeping grain supplies out of the control of private actors. Certainly, legal challenges from within Canada do not appear likely to bring down the CWB. Two recent high-profile objectors to the monopoly powers of the CWB have both been convicted and sentenced to substantial fines and/or jail terms.[79] As stated earlier, the constitutionality of the CWB was upheld by the SCC in *Murphy v. Canadian Pacific Railway Co.*[80] This decision was recently affirmed by the Manitoba Court of Appeal in *R.* v. *Bryan.*[81] Finally, Charter challenges to the CWB were dismissed by the Federal Court of Appeal in *Archibald* v. *Canada.*[82]

Some farm groups, such as the Western Canadian Wheat Growers Association, are publicly opposed to the CWB, claiming in a recent press release that "a majority of prairie farmers ... want the freedom to market their own grain..." and that "[t]he monopoly is on an irreversible path ... a voluntary marketing system is inevitable."[83] However, most farmers still seem to support the operation of the CWB. In 1998 the federal government passed amendments to the CWBA to give farmers more control by allowing for direct election of a majority of the CWB's board of directors.[84] The majority of these farmer-elected directors do not favour dissolution.

Some farmers advocate a "dual marketing" scheme that would give

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[79] *R.* v. *McMechan*, [1996] M.J. No. 472 (Prov. Ct.). The incarceration was later reduced to three months and his fines were reduced by 50%. [1997] M.J. No. 192. Application for leave to appeal was dismissed. [1998] M.J. No. 189. *R.* v. *Bryan*, [1998] M.J. No. 114. Smith, J., rendered a sentence of $9,000 in fines and a two-year suspended sentence. Application for leave to appeal was dismissed. [1999] M.J. No. 49. The protest against the CWB continues to garner some attention though. *The Brandon Sun*, for example, states that one book on the protestors "compared McMechan's arrest to 'human rights abuses in some third-rate South American banana republic.'" L. Behm, "Furor Over Wheat Board Monopoly Isn't Dead, Author Says" *Brandon Sun* (15 July 2001) 1.

[80] *Supra* note 8.

[81] *Supra* note 79.

[82] *Supra* note 10.

[83] Western Canadian Wheat Growers Association, News Release, "CWB Options Ignore Desire for Freedom of Choice" (21 February 2001), online: Western Canadian Wheat Growers Association <http://www.wcwga.ca/news/news_feb_21_01.html>.

[84] *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended by R.S.C. 1998, c. C-24.

farmers choice as to where to market their grain. The federal government remains opposed to this concept, with the minister responsible for the CWB arguing that such a concept would weaken the CWB's ability to market its products and to demand the best price possible. The historic experience with dual marketing, from 1935-43, left the then-minister of agriculture less than impressed, stating that private traders profited while leaving the government to cover deficits whenever its initial estimates of world grain prices were too high.[85] In light of these criticisms, the future of the CWB seems more likely to be retention or abolition, rather than some half-measure.[86]

It would seem that in 2002 Canadian farmers want more assistance from the government (judging by the critical response to the $500 million assistance announced by the federal government in February 2001) rather than being forced into a strictly privatized, "survival-of-the-fittest" wheat-growing sector. Canada could adopt a marketing system where farmers lived with the "live or die" pressure to cut costs celebrated by Frank Sims, President of the North American Grain Division of Cargill.[87] But there does not seem to be demand from most rural groups for such a "live or die" alternative to the current farming sector.

Should we be troubled by an STE enjoying such control? Canadians should not give in to demands to phase out the CWB, given its critical role in maintaining some government control over our food supply. American critics seem genuinely upset that sovereignty over food production is not being ceded to private actors, rather than remaining in government hands. The NDWC fumes that the CWB, "... unlike any U.S. based multi-

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[85] Agriculture Minister Jimmy Gairdner stated:

> The result was that when the Board set an initial payment which turned out to be above the world price the Board got all the wheat and paid a subsidy to the producer ... when the Board (initial) payment was lower than the world price the Board got no wheat and the trade received all the wheat and hence all the profit. This resulted in the Treasury covering all the deficits and the trade taking all the profits. This is what I mean by saying the legislation of 1935 was a triumph for the advocates of speculation.

M. Buchart, "Wheat Board Under Siege: (Some) Farmers Forget Why Their Predecessors Lobbied for Its Creation" *Links Magazine* (Spring, 1996) 7 at 15.

[86] One other option for reform would be to follow the Australian example. On 1 July 1999, full ownership of the former Australian Wheat Board was transferred to Australian grain growers. *AWB Limited Annual Report* (2000) at 3.

[87] North Dakota Wheat Commission, News Release, "Notable Quotes on State Trading Enterprises" (7 September 2000), online: North Dakota Wheat Commission <http://www.ndwheat.com/in/news/news_detail.asp?ID=117>.

national grain company, has sole government-granted control over the purchase and sale of grain in Canada for export or domestic human consumption."[88] It seems questionable how much control any government can exercise over such a multinational grain company, regardless of whether or not it claims to be based in one nation. The grain economy remains vitally important to Canada and control over the sector should not pass into foreign ownership if we are to retain control over our own future policy in food supply and agriculture. Clearly, the GATT envisages a role for STEs that act in accordance with commercial concepts. The American opposition to these bodies on some purported ideological principle should not be enough to determine the future of the CWB. If the agency is to be eliminated it should be because of demand from domestic producers rather than American doggedness in filing trade complaints.

On 15 February 2002, the Office of the United State Trade Representative finally released its decision on the s.301 complaint filed by the North Dakota Wheat Growers Association ... and both countries claimed victory. The Americans found that the CWB received unfair transportation subsidies from the federal government, and that its monopoly status gave it an unfair advantage in making low-price sales to third country markets. The CWB, however, observed that the Americans had not found enough justification to impose tariffs on Canadian wheat, and stated that it would continue to expand into the U.S. market. As the USTR decision promised further action against state monopolies in the coming round of WTO negotiations, it seems certain that, even after a decade of fending off American trade challenges, the CWB will be in for trade-related battles with the U.S. for years to come.

[88] *Supra* note 48.