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Countervailing Subsidization: Another Missile in the Trade Law Arsenal?

François E.J. Tougas*

I. Introduction

This article concentrates on the findings of the Canadian Import Tribunal (CIT, predecessor to the Canadian International Trade Tribunal) in their report entitled, *Subsidized Grain Corn from the United States of America* (hereinafter referred to as *Grain Corn*).¹ The CIT's report focused on the determination of whether subsidized American grain corn had caused "material injury" to the domestic Canadian industry of "like goods" pursuant to section 42 of the Special Import Measures Act (SIMA).² Notably, this was not the Canadian government's first look at the issue of subsidization. Previously, pursuant to section 31 of the same statute, the Department of National Revenue, Customs and Excise had initiated an investigation into various United States subsidies practices.

The Department's study determined that many farm programs conferred domestic subsidies upon United States' grain corn producers which inured to the benefit of those producers.³ Surprisingly enough, the question of whether subsidies existed was not at issue. The problem, however, was whether, in order for an investigating country to apply countervailing duties to the subsidized imports of another, a causal relationship between the injury and the impugned subsidizing practice must be found to exist.

In this case, the import levels into Canada were so low that it could hardly be said that American imports of any kind were caus-

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² Canadian Import Tribunal, *Subsidized Grain Corn from the United States of America*, CIT-7-86 [hereinafter Grain Corn].


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ing material injury. The argument of counsel for the petitioners, however, was that subsidization of United States grain corn rather than subsidized imports was the cause of the injury, so that the absence of injurious imports was quite irrelevant to the cause of action. Europeans, intrigued by the idea, monitored the Canadian investigation closely, while the Americans, as well as many Canadians, balked at the findings of the investigation. The question of material injury and its link to subsidization rather than imports remains the more intriguing aspect of the case as the Tribunal adjudicated upon a claim arguably outside countervailing duty law as envisioned by international agreement.

To understand the nature of the problem with which the CIT dealt, it will be necessary to look at some of the background and peculiarities of the regulation of international trade in commodities. After a brief discussion of international and comparative discipline in the area of trade impact, of which material injury is a part, Canadian case law will be examined in order to establish trends in the causal relationship between subsidization and material injury. This examination will then proceed to a scrutiny of the findings of the Tribunal with respect to Grain Corn and the real issue at hand, the countervailability of subsidization rather than subsidized imports. A brief summary of the decision of the Federal Court of Appeal will follow.

Finally, alternate courses of action are analyzed for efficacy. This analysis includes a comment on the futures of both the grain trade in general and on practice before the Canadian Import Tribunal.

II. Background

International competition in commodities in the twentieth century, beset with a myriad of historical and sociological complexities, is fast approaching rationalization. The location of production is shifting to developing countries at an unprecedented pace. This pace has led, in turn, to a deterioration of the flimsy rules established to regulate trade in what the General Agreement on Tariffs and Trade (GATT) terms “primary products.” Indeed, as has been pointed

4. The Ontario Corn Producer’s Association.
7. 1 General Agreement on Tariffs and Trade [hereinafter GATT], Basic Instruments and Selected Documents 16:3, (1955) [hereinafter BISD]. See also Agreement on Interpretation and Application of Articles VI, XVI, and XXIII [hereinafter “Subsidies Code”].
8. Basic Instruments and Selected Documents, supra note 7.
out, "although one cannot conclude generally that there are no rules governing international trade in commodities, such rules as do exist tend often to be ignored or to be very 'primitive,' in the sense of being either ambiguous or minimal in their impact." For a country such as Canada, the flexibility afforded by this lack of discipline has been a two-edged sword. While the benefits of flexibility have protected domestic farm interests from the price and income fluctuations inherent in commodities trade through the allocation of costs and protection to consumers, in foreign markets the Canadian treasury (again represented by the collective taxing of a broad population base) has been no match for the goliaths of the agricultural world, the European Community and the United States.

For Canada, and for other countries, therefore, agricultural trade is far removed from the free-flowing trade envisioned by the classical economists. Admittedly, little of the world's trade is free-flowing, but trade in agricultural commodities is particularly prone to distortions exceeding those of non-primary products (today, this principally means non-agricultural products). Primary products may, however, be subsidized to the detriment of aggrieved importing nations. A common remedy for injury due to non-primary products lies in the application of countervailing duties pursuant to the international discipline of GATT Article VI. For primary products, however, the likely policy response is the application of a countervailing subsidy, rather than a duty. Without much foresight, one can see the implication: depressed world prices. Additionally, a huge burden on treasuries results and, as pointed out earlier, since a small treasury can only subsidize by countervailing to the extent of its revenue base, big treasuries survive longer than small treasuries.

It is no wonder then that Canadian corn growers were anxious to be relieved of their plight in 1986 by requesting an investigation of U.S. grain corn subsidies and their impact on Canadian producers. The output of American grain corn producers exceeded Canadian production by twenty-five times and a floor price mechanism, such as that provided by the Canadian Wheat Board, was unavailable. These two factors, coupled with the inability of the domestic industry to attract countervailing subsidies with which to compete, were indicative of a deeply-rooted problem which could not have been alleviated solely by imposing a countervailing duty. Desperation

10. See GATT, supra note 7.
11. This is called Track I retaliation.
13. Id. at 34.
was, in any event, a convenient reason for allowing the complainants, who were primarily the Ontario Corn Producers' Association (OCPA), to proceed with the investigation.¹⁴

III. The Discipline of Trade Impact

Trade impact refers to the effect of unfairly traded goods upon domestic producers. Subsidized goods imported from abroad generally must have some sort of adverse impact on domestic producers of similar products or "like goods." The particular standards used in various circumstances has evoked debate over the years, and is born of two particular schools of thought: the injury-only school and the antidistortion school. The platforms of the two schools are described by prominent researchers as follows:

Briefly, the injury-only school believes that a country should retaliate against foreign subsidies only when those subsidies exert a significant impact on trade, and further, the remedy should be designed to redress that impact. By contrast, the antidistortion school believes that subsidies are a fit subject for retaliation even if they exert only a slight impact on trade, and that retaliation should be precisely designed to offset the subsidy.¹⁶

Against this background several standards exist which are applied domestically and internationally to determine the appropriate impact required to justify retaliation by one country against imports from another country. The standards relevant to the discussion of the Grain Corn case are those outlined in the GATT and the Subsidies Code.¹⁷ They are known primarily as the standards of material injury and adverse effects.¹⁸ "Adverse effects" includes the standards of "nullification and impairment"²⁰ and "serious prejudice."²¹ An additional standard, "equitable share,"²² refers to the claim by one country that another country may subsidize its exports as long as the result does not give the exporting country "more than an equitable share of world export trade in that product . . . ."²³

These standards are used for different, though sometimes overlapping purposes. "Material injury" is used when one country unilaterally²⁴ investigates the subsidy practice(s) of another and further

¹⁴. The OCPA represents approximately 35,000 Ontario farmers.
¹⁶. See supra note 1.
¹⁷. Id. See also infra note 18.
¹⁸. Subsidies Code, supra note 7, Art. 6:3 (interpreting GATT Art. VI).
¹⁹. See Subsidies Code, supra note 7, Arts. 8:4, 11:2.
²⁰. GATT, supra note 7, Art. XXIII.
²¹. GATT, supra note 7, Art. XVI:1.
²². GATT, supra note 7, Art. XVI:3.
²³. GATT, supra note 7, Art. XVI:3.
²⁴. Unilateral investigation is equivalent to Track I retaliation. See supra notes 11 and
determines its impact on producers or competitors of like products within the investigating country's jurisdiction (Track I retaliation). This standard, while not the highest, requires a significant impact on the importing country's industry. The criteria for determining that impact are outlined in, but not limited to, Article 6 of the Subsidies Code.

"Adverse effects," and the standards associated with it, is used in the context of multilateral retaliation, known as Track II retaliation. Under various circumstances, an aggrieved government may petition the Subsidies Committee to establish a panel to seek redress for import injury in circumstances where, in the case of either of the adverse effects standards, the impact is felt in the importing country, the subsidizing country, or in a third-country market.

Primary products, defined for our purposes as unprocessed agricultural products, are accorded deferential treatment for both Track I and Track II retaliation purposes. The reason behind that treatment is largely historical and has attracted the ire of developed and developing nations alike. In any event, agricultural subsidies, especially export subsidies, have been the subject of successful unilateral investigations. Multilateral retaliation has had to differentiate between the impact standards depending on the location of the impact, leading to mixed results. In the words of Hufbauer and Shelton-Erb, "subsidies on agricultural products remain virtually free of international discipline. The only effective remedy is self-help."

With these considerations in mind, the OCPA could have pursued unlikely reprieve in Geneva or presented a novel argument in Ottawa before the CIT. Because the latter approach was chosen, a discussion of the jurisprudence in this area will ensue.
It is important, however, to understand the nature of the complainant producer's argument before discussing jurisprudence. While it is true that considerable subsidization was found, the material injury necessary to be proved in this case was alleged to stem not from United States imports, but from the effects of United States legislation which drove down the commodity futures price in Chicago. Because of the "open nature of the Canadian market these lower prices were transferred to Canada, with substantial adverse effect on Canadian producers." What seemed to be required under international law—a causal connection between subsidized imports and injury to the domestic industry—was relaxed so as to permit the imposition of countervailing duties if complainants could establish a sufficient connection between subsidization anywhere in the world, regardless of the presence of imports in Canada and their impact on the Canadian industry.

IV. Causality as Demonstrated Through the Cases

Bearing in mind the nature of the complainant's argument in the Grain Corn case and the international discipline surrounding unilateral retaliation under Article VI of the GATT, one must acknowledge that a sufficient nexus between the subsidies and the injury is required. Whether or not subsidized imports must be the cause of the injury to the domestic industry was the main issue in Grain Corn. In order to determine where such an argument might have had its genesis, some case law will be reviewed.

A. Whole Canned Tomatoes

Within the rubric SIMA, dumping and subsidies are dealt with in a way which provides for specified periods of time in which the Deputy Minister of National Revenue, Customs and Excise and the CIT examine margins and injury respectively. While there are separate SIMA provisions affecting dumping or subsidies exclusively, in the case of injury determinations by the CIT, those provisions only affect an issue subordinate to the principal question of past, present and future injury.

On the surface, it would appear that injury determinations

37. Approximately one dollar per bushel on an average price of $2.39 per bushel.
40. See Grain Corn, supra note 1. (dissenting opinion of Member Bissonnette).
41. This is also called Track I retaliation. See supra note 11 and accompanying text.
42. See supra note 2.
43. SIMA provisions, for instance, would only deal with whether imposition of retroactive duties is necessary. See supra note 2, at § 42(1)(b), (c).
should be treated identically since the cause of the injury, in order to
merit retaliation, must be the result of low-priced imports. Prior to
SIMA, however, the Anti-Dumping Tribunal, the Anti-Dumping Act, usually treated subsidy cases in much
the same way as dumping cases; perhaps because subsidized imports "were also being dumped and could therefore be dealt with by
means of anti-dumping proceedings." For example, in two cases involving Whole Canned Tomatoes, the earlier case treats subsidies explicitly as dumping pursuant to section 16 of the then applicable
statute, while in the second and later case, while still under the
authority of section 16, the CIT makes an attempt at least to treat
the alleged injury as stemming from subsidized imports.

Perhaps because dumping and subsidy cases have historically
been treated in the same manner, enacting SIMA appears to have
accomplished little in providing a remedy to this problem. In fact,
the bifurcated approach utilized by the GATT and the two Codes
which deals with these unfair trade practices are poorly reflected
even in SIMA. However, the two practices do require different treat-
ment. This is principally because dumping by definition involves im-
ports, whereas subsidization does not. Due to this difference, it is
possible to argue, as does the antidistortion school, that the relatively high standard of material injury is not required to be reached
before countervailing duties can be applied. Complainant's counsel
in the second Whole Canned Tomatoes case presented the follow-
ing argument. Counsel suggested that because the request to investi-
gate injury had come by Order-in-Council, pursuant to section 7 of
the Customs Tariff, the appropriate standard was injury, not mate-
rial injury. The Tribunal disagreed, preferring the argument of re-

At this point, it is important to appreciate the connection be-
tween the threshold or standard of injury and causality (between
subsidy and injury). The standard of material injury requires impact
to be of a fairly substantial nature. This is the standard that was
adopted by the Contracting Parties to the GATT and signatories to

44. The Anti-Dumping Tribunal was the forerunner of the Canadian Import Tribunal.
46. R. Paterson, Canadian Regulation of International Trade and Investment
142 (1986).
48. See supra note 45.
49. ADT-IC-83.
50. See supra note 15 and accompanying text.
51. ADT-IC-83.
53. ADT-IC-83 at 38.
54. ACT-IC-83, AT 39.
the Subsidies Code, and consequently by Canada. This effectively means that the standard used by the antidistortion school is not part of the law of Canada. Causality, therefore, cannot be found merely because there is distortion in the marketplace as a result of subsidization in one or several countries. Subsidized imports, on the other hand, where they cause material injury to domestic producers of like products, are countervailable.

It is tempting, however, to treat the difference between those injuries due to subsidized imports and those due to subsidization as a question of direct and indirect injury. Were one to do so, a decision of the Federal Court of Appeal might obstruct such treatment. Justice Hugessen, in speaking for the court in the Acieries case, described the difference between those injuries due to dumped imports and those due to dumped inventories as follows:

I do not find it helpful, in these circumstances, to talk in terms of "direct" and "indirect" causes; nor does the glorification of those expressions with Latin tags (causa causans, causa sine qua non) bring any enlightenment. In law, as opposed to metaphysics, the study of causes is the examination of the potency of certain facts in the production of certain results. Realistically this is a question of fact. It only becomes a question of law by the device of a reviewing tribunal declaring it to be so and asserting, generally on an a priori basis, that the alleged cause could not have produced the alleged effect. The present case is a far cry from anything of that sort. Simple common sense would indicate that the introduction of a large amount of goods at low prices into a market at a time when it is in a process of rapid contraction is capable of producing material injury to the other participations in that market. That is exactly what was found as a fact by the Tribunal in the exercise of the expertise which is its raison d'être. Conceivably it was wrong to do so, but it committed no error of law or jurisdiction. For these reasons, I would not interfere with its finding that the dumping has caused and is causing material injury.

B. Boneless Manufacturing Beef

From this case emerged perhaps the most significant factor underlying the CIT's treatment of Grain Corn. The facts of the case reveal that United States imports of European Community Beef had

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56. 60 N.R., at 375.
58. Grain Corn, supra note 1.
been limited to 5000 tons annually; while Canada, in 1984, had imported five times that amount. Canadian importers acted as a conduit to the “prime export destination” (the United States) of that beef; as a result the United States National Cattlemen’s Association and Congress had threatened Canada with retaliation. This threat was considered to be a material injury, not conjectural or speculative, because “the livestock market will remain a North American market; . . . [and] United States pricing will remain the principal determinant of Canadian pricing . . . .”

Both of these findings arose in *Grain Corn*. The main difference was that duties were applied against injurious imports, while the causal element occurred in a continental market with a continental price.

Could it be that the CIT in *Grain Corn*, faced with a similar dilemma only eight months before in the *Boneless Manufacturing Beef* case, sought to remedy an apparent cavity in the Canadian trade arsenal? In both cases, the CIT was dealing with the threat of injury when it made critical findings in the face of considerable dispute from respondents’ counsel. By recognizing the continentality of market and price, future claimants would be able to look to conditions outside Canada, extrinsic to the territory of importation, and, in turn, base an action on those conditions. Insufficiently armed to retaliate against generally unfair trade practices, the CIT in *Grain Corn* appears to have taken upon itself the magnitude of the United States President’s powers in section 301 of the Trade Act of 1974.

C. *Dry Pasta*  

The effects of pricing mechanisms and a continental market have been previously considered by the CIT. In the *Dry Pasta* case, intra-industry price competition was the most significant factor in deciding against a finding of injury. The existence of a domestic price fixed by the Canadian Wheat Board distinguished this case from *Grain Corn* because Canadian wheat, an input into dry pasta, acted within a solely national market. It could not be said that a price set in Chicago was the same price for which Canadian producers competed. Conditions outside Canada, therefore, were irrelevant to the determination of causality, while no indication is given as to whether the CIT might otherwise have considered the Chicago price.

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60. C.I.T.-2-86 at 21. See also, 12 C.E.R. 84 (1986).
64. C.I.T.-5-86. The finding was dated January 28, 1987.
D. *Fresh, Whole, Yellow Onions*<sup>65</sup>

In the *Fresh, Whole, Yellow Onions* case, the western regional market was separated pursuant to SIMA.<sup>66</sup> British Columbia prices for onions were determined by Washington prices,<sup>67</sup> and the necessary causal link between dumping and injury was established by reference to the volume of imports, the large inventories upon which British Columbia importers could call to fill demand, and the need for British Columbia producers to "dispose of their crop at market prices which were established on the basis of, and fluctuated with, prices prevailing in the United States."<sup>68</sup> Because imports were involved, there was no indication whether, absent imports, the U.S.-dictated price would have been sufficient to find a threat of material injury.

From these cases, it is difficult to establish whether *Grain Corn* is an aberration or whether continentality remains a factor,<sup>69</sup> if not a dominant characteristic, in developing a causal connection test that meets Canada’s international obligations. Whatever the case, *Grain Corn* is a startling departure from those obligations and, therefore, merits pensive review.

V. *Grain Corn*<sup>70</sup>

The argument presented by complainant’s counsel and accepted by the majority of the CIT (member Bissonnette dissenting) in *Grain Corn* has already been set forth.<sup>71</sup> A possible explanation for the conclusion reached has also been canvassed,<sup>72</sup> speculative though it may be. Respectfully, the preferred opinion is that rendered by Member Bissonnette, at least as a matter of principle. The result is another question entirely and will be approached later.<sup>73</sup> It is unnecessary to review the entire content of the Tribunal’s decision. Therefore, only issues critical to the determination of the finding will be discussed.

A. The Majority Decision

One of the many factors to which the CIT will look in determining the impact of subsidized goods is the "increase in the financial

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<sup>65</sup> CIT-1-87. The finding was dated April 30, 1987. This investigation concerned dumping rather than subsidies.
<sup>66</sup> SIMA, *supra* note 42, at § 42(3).
<sup>67</sup> CIT-1-87 at 3.
<sup>68</sup> *Id.* at 8.
<sup>69</sup> *See* Colour Television Receiving Sets, CIT-13-85; 11 C.E.R. 168 (1985).
<sup>70</sup> *Grain Corn, supra* note 1. The finding was dated March 6, 1987.
<sup>71</sup> *See supra* notes 37-40 and accompanying text.
<sup>72</sup> *See supra* note 63 and accompanying text.
<sup>73</sup> *See Part V, infra.*
burden on a federal or provincial government agricultural support program in Canada.” The Tribunal had no difficult finding the necessary increased burden on the Canadian treasury, but the minority differed as to the issue of causality. The CIT characterized the respondent’s argument as follows:

Counsel representing parties in opposition to this complaint argued that the material injury claimed to have been suffered must relate to subsidized imports and not simply to the fact of subsidization found by the Deputy Minister to exist in a foreign country. Use of the term “subsidized imports” in Article 6 of the Code on Subsidies and Countervailing Duties (Subsidies Code), which sets out conditions for the determination of injury, is relied upon by counsel in support of this argument. While no identical term appears in the Special Import Measures Act, and specifically in section 42 which is the authority under which inquiries of the Tribunal are conducted, counsel submitted that the expression “subsidized goods” is used in such a way that there is an underlying assumption that the only subsidized goods the Act is concerned with are imported subsidized goods.

The Canadian producer’s counsel argued for a broad, relief-oriented reading of section 42 of SIMA, claiming that a narrow interpretation would undermine the original intent and purpose of the Act which was to provide protection for Canadian producers from unfair and harmful import competition. The majority, in looking to the Subsidies Code for guidance, eventually sided with the complainant. In the Subsidies Code, the majority found a policy basis on which it could base its conclusion:

Both the Special Import Measures Act and the GATT Subsidies Code exist for the express purpose of dealing with unfairly traded goods which cause or threaten injury. Necessarily, their provisions must be interpreted, not in the abstract, but within the context of the environment within which they apply, namely, international trade. Since the economic and commercial realities of international trade dictate that price be met or market share lost, the majority of the panel is persuaded to adopt the broader interpretation of “subsidized imports,” that is, that cognizance be taken of potential or likely imports in the determination of material injury. To do otherwise, in the view of the majority of

74. CIT Rules, SOR/85-1068, no. 35(c)(iii). See also, Subsidies Code, supra note 7, at art. 6:3.
75. Grain Corn, supra note 1, at 28, notes 7, 8.
76. Id. at 15.
77. SIMA, supra note 42.
78. Grain Corn, supra note 1, at 15.
79. Id. at 15-16.
the panel, would be to frustrate the purpose of the system.\textsuperscript{80}

To this author's surprise, and undoubtedly to the respondent's as well, the focus on imports was ill-conceived in the view of the majority:

In the case of grain corn, imports into Canada have existed in recent years, albeit at modest levels. The issue, therefore, is not whether imports have taken place, but whether they would have increased substantially in the absence of a price response by the domestic producers to the subsidized United States corn. Given the openness of the Canadian market, much higher levels of imports would have been a certainty. (emphasis added)\textsuperscript{81}

Respectfully, the assertion that imports should ever be outside the focus of the Tribunal's inquiry is unsupportable. The very name of the Tribunal expressly identifies its duties. Member Bissonnette, in the dissenting judgment, took exception to the conclusion.

B. The Minority Decision

In the view of Member Bissonnette, serious injury resulted from world oversupply to which the United States' subsidization program had contributed. As a result of export-oriented corn production due to the United States' role as world supplier, Chicago prices set world prices. Consequently, Canadian suppliers must sell within their own market at United States prices. Nevertheless, this "has nothing to do with subsidization."\textsuperscript{82} The answer is simply that even without a single export to Canada, Canadian prices rise and fall with the United States price as long as an "open trading policy" exists. The injury is due to the Canadian obligation to dispose of crops, as in Yellow Onions,\textsuperscript{83} at the depressed United States price.\textsuperscript{84} Yet, without imports to contribute to the injury, Member Bissonnette was unable to find any merit to the countervailing claim.\textsuperscript{85}

Upon reviewing the actual effects of the 1985 United States Farm Bill\textsuperscript{86} and trade statistics dating back beyond the investigation period, Member Bissonnette commented that the real purpose of the 1985 Bill was to cut back on the level of subsidization hitherto present, and to return to more competitive market forces by cutting down on United States production. Member Bissonnette also reviewed other factors contributing to the injury suffered by Canadian

\textsuperscript{80} Id. at 16. (Emphasis added).
\textsuperscript{81} Id.
\textsuperscript{82} Grain Corn, supra note 1, at 23.
\textsuperscript{83} CIT-I-87. See supra notes 65-68 and accompanying text.
\textsuperscript{84} Grain Corn, supra note 1, at 23.
\textsuperscript{85} Id. at 24.
\textsuperscript{86} See supra note 38 and accompanying text.
growers:

Because of the array of factors other than subsidization which impacted world prices it was all the more important, in my opinion, that the injury suffered be related to subsidized imports, and not simply to the availability of trans-border stocks at depressed world prices.\(^{87}\)

Member Bissonnette referred to SIMA, the Subsidies Code and the GATT to emphasize the need for subsidized imports in establishing a causal relationship with the injury. He noted that Rule 36 of the CIT's General Rules of Practice and Procedure\(^{88}\) particularly adopts the Code criteria.\(^{89}\) He then compared the approach taken by other members of the GATT, notably the United States and the European Economic Community.\(^{90}\)

In concluding, Member Bissonnette stated that while there were some United States imports entering Canada, it was not the subsidized imports which caused the injury but world oversupply. The injury suffered "is not the kind for which SIMA and the GATT have provided a remedy..."\(^{91}\) The theory of indirect injury created by the \textit{Acieries} decision\(^{92}\) was broadened by the majority, but may have been confined to its facts had the minority prevailed.

A short time after the decision was issued, the CIT, for the first time, asked for public interest representations to be made pursuant to section 45 of SIMA. The purpose of the section is to inquire whether a reduction in or the elimination of a duty is in the public interest. Issuing a lengthy report, the CIT decided that a reduction would best serve the public interest.\(^{93}\) Indeed, not only consumers, but producers, exporters and importers would benefit from the reduction as well.

Whether resort to other remedies, either domestic or international, should have been pursued initially remains a question of strategy, the details of which are not known to this writer. Those remedies will, in any event, be examined. First, however, brief mention of the decision of the Federal Court of Appeal is in order.

The issues were clearly defined as the dispute moved to the Federal Court of Appeal.\(^{94}\) First, the Court considered whether countervailing duties could be imposed in the absence of significant amounts

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\(^{87}\) Grain Corn, \textit{supra} note 1, at 27.
\(^{88}\) SOR/85-1068. \textit{See supra} note 74 and accompanying text.
\(^{89}\) Subsidies Code, \textit{supra} note 7, at Art. 6.
\(^{90}\) Grain Corn, \textit{supra} note 1, at 30.
\(^{91}\) \textit{Id.} at 34.
\(^{93}\) \textit{Report on Public Interest Representations}; \textit{see Grain Corn, supra} note 1.
\(^{94}\) National Corn Growers Association v. Canadian Import Tribunal; St. Lawrence Starch Company Limited et al. v. CIT; American Farm Bureau Federation v. CIT (1988) 2 Trade and Commodity Tax Cases 4053; 1 Canada Trade and Sales Tax Cases 2085.
of imports of the subject goods. On this point, the majority concluded that duties could be imposed on the basis of its reading of SIMA section 42. The majority also concluded that the statute was clear and unambiguous in its terms and that it further authorized the finding of material injury as the CIT had concluded. This conclusion was based on a plain reading of the section which, far from making any reference to imports, refers instead to the "subsidizing of the goods." Secondly, because of the majority's construction of section 42, it was unnecessary, in the eyes of the Chief Justice, to go behind the legislation and make reference to extrinsic materials. The Chief Justice stated:

To hold that "imports" should be added to Section 42 so that the Section is to be interpreted by the terms of the underlying treaty provisions puts the Court into a role of assuming that Parliament unequivocally intended to abide by specific provisions of international agreements in spite of its use in clear language to the contrary. Courts are not authorized to do this; indeed it is wrong for them to do so. Intrinsic provisions of the legislation can be looked at to conclude that parliament intended to implement the treaty, but that fact cannot be used to have the treaty words and meaning override what is otherwise clear language in Section 42.95

Numerous portions of the decision by the majority further support the acceptance of the supremacy of Parliament as opposed to the international obligations imposed by treaties and agreements to which Canada is party.96 The minority was considerably less inclined to follow the course dictated by the majority and insisted on the intent of Parliament, which was undoubtedly to implement Canada's obligations as they are found in the GATT and the Subsidies Code.

VI. International and Domestic Remedies

A. International Remedies

In Part II, ante, reference was made to Track II retaliation as distinguished from unilateral retaliation. Track I retaliation has the obvious advantage, where it is available, of allowing private complainants access to essentially domestic remedies. Track II retaliation, on the other hand, has two distinct disadvantages. First, because the forum is international, private parties lack standing, requiring the efforts of the aggrieved party to marshal government

95. 2 TCT 4059; 1 TST 2094.
machinery to act on its behalf. Consequently, political and diplomatic considerations may interfere in the decision whether to make an appeal to the GATT. Second, because the remedy is multilateral, a certain degree of unanimity is also required on the part of Contracting Parties to the GATT or Signatories to the Code.

It is no wonder then that the OCPA\textsuperscript{97} preferred the remedy available through SIMA. Coincidentally, the choice was rewarding because the majority of the CIT preferred their position, as did the Federal Court of Appeal. Member Bissonnette remarked that neither the GATT nor SIMA provided a remedy for this particular injury. An argument could have been made on the basis of SIMA section 7.\textsuperscript{98} which would require an investigation to be ordered by the Governor in Council\textsuperscript{99} when the Deputy Minister of National Revenue has determined the amount of the subsidies,\textsuperscript{100} when the Track II procedure has been initiated, and when the Subsidies Committee "has authorized Canada to impose countervailing duties on such subsidized goods,"\textsuperscript{101} and all of which follow on the recommendation of the Minister of Finance.\textsuperscript{102} Whether Member Bissonnette intended to limit the use of section 7 relief by his comment is not clear.

Alternatively, by request of the Government of Canada, the OCPA could have turned to the GATT's Art. XXIII "nullification or impairment" remedy. This approach requires a demonstration that measures taken by the United States subsequent to tariff negotiations nullified or impaired Canada's benefits (namely, tariff concessions). "The primary question in a nullification or impairment case is whether the subsequent measures have a harmful trade effect that defeats the legitimate expectations of the impacted country."\textsuperscript{103} Pursuant to Subsidies Code Art. 8:3, signatories have an obligation to avoid causing through the use of any subsidy:

(a) injury to the domestic industry of another signatory,
(b) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement, or
(c) serious prejudice to the interests of another signatory.\textsuperscript{104}

Finally, Article 10 of the Code, concerned solely with export subsidies on certain primary products, can offer relief. Utilization of this article, however, requires a showing that the 1981 and 1985

\textsuperscript{97} Ontario Corn Producer's Ass'n, complainant in Grain Corn, \textit{supra} note 1.
\textsuperscript{98} SIMA, \textit{supra} note 42, at § 7(1).
\textsuperscript{99} Id.
\textsuperscript{100} Id. at § 7(1)(a).
\textsuperscript{101} Id. at § 7(1)(b).
\textsuperscript{102} Id. at § 7(1).
\textsuperscript{103} G. HUFBAUER AND J. SHELTON-ERB, \textit{supra} note 15, at 33.
\textsuperscript{104} Id.
United States Farm Bills actually grant export subsidies in the form of production or domestic subsidies; this is an argument which is not likely to stand.

B. Domestic Remedies

While section 7 of SIMA is arguably quasi-domestic/international remedy, in that it provides international relief via municipal legislation, section 7 of the Customs Tariff is purely domestic and offers the widest scope for relief in Canadian trade law. The act states:

(2) Notwithstanding this or any other Act of Parliament, for the purpose of
   (a) enforcing Canada's rights under a trade agreement in relation to a country, or
   (b) responding to acts, policies or practices of the government of a country that, as a result of discrimination or otherwise, adversely affect or lead directly or indirectly to adverse effects on trade in Canadian goods or services,

the Government in Council may, on the recommendation of the Minister of Finance and the Secretary of State for External Affairs, by order do any one or more of the following things in relation to that country:

(c) suspend or withdraw rights or privileges granted by Canada under a trade agreement or an Act of Parliament;

(d) make any goods that are the product of that country or any class of such goods subject to a surtax in an amount, over and above the rate of customs duty specified in Schedule A for such goods or class of goods, not exceeding thirty-three and one-third per cent ad valorem;

(e) include on the Import Control List established under section 5 of the Export and Import Permits Act any goods that are the product of that country; and

(f) establish, in respect of any goods or class of goods that are the product of that country, rates of customs duty, not exceeding at the maximum the rate to which the customs duty on such goods or class of goods could be increased under paragraph (d), that vary from time to time as the quantity of such goods or class of goods imported into Canada during a specified period of time equals or exceeds specified totals.106

105. SIMA, supra note 42, at C-41.
It has been argued elsewhere that pre-authorization from the Subsidies Committee would be necessary prior to the use of section 7 if Canada is to stay within its international obligations. It is plausible, but not likely, that the provision is simply the statutory authorization for the imposition of such sanctions pursuant to Track II authorization. In the absence of diplomatic considerations, one may envision the use of section 7 in a manner similar to section 301 in the United States. On a reciprocal basis, section 301 no more conforms to international discipline than does section 7 of the Customs Tariff, although there is a requirement that the United States “initiate consultations and, if necessary, dispute settlement procedures in GATT . . . .” Realistically, however, the remedies go far beyond what is available internationally and require little, if any, multilateral authorization. The President of the United States, in other words, “can use his section 301 powers even in the absence of a GATT recommendation.”

The Canadian section 7 of the Customs Tariff could then be used as a form of foreboding retaliation, as in the case of United States section 301, pursuant to which an action is most fruitful when threatened. Assuming the necessary ingredients of credibility and competence around which a threat can be sustained, grain growers might obtain a hope of relief. On the other hand, the American provision has had its share of problems as well, and the economic brinksmanship of retaliatory strikes may be the kind of war that neither the Canadian diplomatic ethic nor its treasury could sustain.

Perhaps the harshest threat of all would be the imposition of a quota. Of course, the threat of the reciprocal treatment of Canadian grain abroad mitigates the use of such a threat. Nothing so harsh, therefore, is suggested.

VII. Conclusion

A. The Future of Grain Trade Regulation

Three events have occurred around which a grain trade regulation framework might be established. Some have given rise to regulatory documents, while some are in their formation stages. These include the Canada-United States Free Trade Agreement, the Agenda of the (Uruguay Round), of Multilateral Trade Negotia-

106. R. Paterson, supra note 46, at 146-47.
107. The case law is an empty set, however. This makes it difficult to determine the legislative intent of the section.
108. Trade Act of 1974, see supra note 63 and accompanying text.
109. J. Jackson and W. Davey, supra note 9, at 804.
111. The Canada-U.S. Free Trade Agreement, Canada-United States Free Trade Implementing Act, S.C. 1988, c.65, Schedule-Part A.
tions, and the Reagan Proposals of July 6, 1987. Their pertinence to the issues at hand, settling of the grain corn dispute and alleviating the plight of Canadian grain corn growers, are only generally apparent but point to the resolution of these and other grain trade problems in the future.

First, the Free Trade Agreement contains several provisions which could substantially alter trade in grain corn. The parties duplicate their already publicly-declared intention to work together to achieve the global elimination of subsidies. Furthermore, the parties commit to neither "introduce nor maintain any export subsidy" on goods destined to remain within the free trade area, nor to allow public bodies to dump within the area. An attempt to manage export competition in third country markets also finds itself in the agreement. Article 703 gratuitously sets to print a promise for the parties to work together to eliminate the trade barriers to each other's agricultural markets.

Corn is conspicuously absent from Article 705:1-4, but reappears in Article 705:5 to provide for the retention of the parties' pre-existing rights to introduce quotas on certain conditions. This is an apparent rift in the inevitable continental market which may have preceded the Free Trade Agreement in any event. Obviously, since domestic subsidies on grain are not covered by the agreement, the decision in Grain Corn probably would not have been decided any differently; at least not for the reasons elicited, but the judicial review provisions might have made the difference.

The second event, the Uruguay Round, produced a skeletal agenda assuring the contracting parties to the GATT that agriculture is back on the negotiating table. Within this forum, Canada's agricultural interests are being pursued along three fronts. Unilaterally, Canada is assuming a trade posture that would reduce the current levels of subsidization in commodities. Moreover, as previously stated, the United States and Canada have agreed that they will work with each other bilaterally and in the GATT to further improve and enhance trade in agriculture. Multilaterally, Canada forms a part of the Cairns Group of Nations dedicated to eliminating subsidies in agriculture. The group has formed a negotiating alliance for the Uruguay Round.

The third and perhaps most precatory event, emanates from a United States proposal to end all agricultural subsidies by the year

112. GATT, Draft Ministerial Declaration on the Uruguay Round, MIN (86)/w/19, 20 Sept. 1986, Punta del Este, Uruguay, p. 11.
114. Agreement, supra note 107, Ch.7 at Arts. 701, 703 & 705. There are other provisions dealing with agricultural products as well.
115. Id. at Art. 701:1-4.
2000. The few days surrounding the press release generated discussion mostly devoted to criticism, but this writer takes exception to the attack on the substance of the proposal. The critics' assault focuses on the wrong question. The very suggestion that the elimination of subsidies is an acceptable option bodes well for Canada's interests.

B. Lessons from the CIT

Many questions remain concerning the injuries resulting from Canada's grain trade problems. Should complainants now be able to bring actions against importers and their sources based on indirect injury? What kind of defenses will be available to respondents and how will they prepare for remedies arguably extrinsic to that sanctioned by international agreement?

Clayton Yeutter, the former United States Trade Representative and present Secretary of Agriculture, is reported to have said that "if this finding were to be followed by other countries it could severely damage the credibility of the countervailing duty and safeguard process everywhere and lead to a rash of protectionist actions throughout the world." The latter clause is no doubt instigated by self-interest. Other countries have foreseen the fact that the United States programs could be subject to countervailability within their respective trade regimes. The former clause, however, is symptomatic of the deterioration in subsidies discipline since the gains made during the Tokyo Round. Exaggeration aside, Secretary Yeutter is probably correct. If countries adopted the reasoning of the majority of the CIT, anomalous results and a breakdown of the international subsidies framework, which requires direct injury prior to unilateral retaliation, would ensue.

Future complainants can now, with impunity, raise arguments addressing allegations of indirect injury. Because of the similarity of the two regimes, anti-dumping complaints might involve the same strategy as subsidization complaints in injury determinations. Respondents, on the other hand, should continue to argue against the application of any test which permits indirect injury to be considered. Because indirect injury is so closely connected to questions of threats of injury or future injury, respondents might further apply for stringent standards to be used in assessing the likelihood of injury from the alleged perpetrator. Also, respondents should prepare, but only as a last resort (so as to not appear to be tacitly accepting the legitimacy of indirect injury), arguments demonstrating the non-

injurious nature of the practice complained of while maintaining the need for the complainant to show the likelihood of injurious imports.

Exporters from Canada are also affected in that they can expect retaliatory measures unrelated to the corn trade to be levelled against them in the event that other countries duplicate the Canadian action against the United States. The logic here is that a spate of retaliatory actions, which would damage Canadian exports, will be levied by the United States to combat the imposition of arguably unjustified countervailing duties against exports of United States grain of all kinds, not just corn.

Consequently, the creation of a new non-tariff barrier by the CIT is neither in the best interests of Canadian importers and exporters, nor is it sanctioned internationally. Apparently, only domestic judicial review, the preferred route, or international judicial determination, which is considered the most costly and embarrassing choice, will remedy the decision in Grain Corn.118

118. The United States sought “emergency consultations” under the auspices of the GATT on April 27, 1987. The Subsidies Committee is to have considered the matter and decided whether to establish a dispute panel. See also supra note 96.