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RELATIVE ROLES OF STATES/ PROVINCES IN REGULATING AGRICULTURE AND THE RESULTING IMPACT ON CROSS-BORDER TRADE

*Kevin J. Brosch**

The topic that we have been asked to discuss today is whether trade in agricultural goods under the North American Free Trade Agreement (NAFTA) could be undermined by state or provincial actions that interfered with trade, that condoned interference with trade, or that subsidized exporters or producers. Because I have no expertise in, and only very limited experience with, Canadian law, I will limit my remarks to the situation in the United States.

Let me begin with an assessment of the extent of the problems that we have experienced thus far with state attempts to interfere with U.S.-Canada trade in agricultural products. As far as I am aware, there have only been three incidents of any significance over the past thirty years.

In 1970, the State of Maine attempted to apply its own state marketing and grading regulations to imports of potatoes from Canada. The federal government quickly stepped in and asserted federal preemption on the basis of the authority granted under the Agricultural Marketing Act and the state relented. In 1984, South Dakota banned imported pork from Canada because of alleged health concerns over an animal drug that was being used in some Canadian production. But, of course, South Dakota is not a significant import market for Canadian pork and when other states failed to follow suit, this effort dissipated. In 1998, the states of Montana, North Dakota and South Dakota took some short-lived actions against imports of Canadian grain and meat products. I will discuss this incident, which is the only significant state disruption of U.S.-Canada agricultural trade since the NAFTA came into force, in more detail later in this paper.

Three short-lived incidents in thirty years certainly do not constitute a crisis. They represent occasional and politically nettlesome trade irritants, but, in the larger view, not really significant problems. Although this issue

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of the potential impact of state action on NAFTA is interesting to discuss, I fear, given the infrequent and ineffective attempts by states to block U.S.-Canada agricultural trade, that simply by putting this topic on the agenda, we may be blowing its significance way out of proportion.

The increased interest in this topic, of course, arises because NAFTA is supposed to create a free trade area on this continent, and there is an accompanying expectation that unwarranted interferences with liberal trade will cease. The NAFTA has been in force for approximately eight years. During that time, there has been a substantial amount of rhetoric from various state politicians about the problems that NAFTA has created for their various producer sectors. In spite of the rancor, we have experienced very few attempts by states to interfere with trilateral trade in agricultural products.

There have been five highly visible situations in which trade blockage in agricultural products has been threatened, but in only two of those cases has there been any real state action to interfere with trade. Two noted trade problems often discussed are those that involved imports into the United States of avocados from Mexico and of potatoes from Eastern Canada. While politicians respectively in California and New England have been very vocal in their opinions that imports should be restricted, in fact the regulations at issue are not state actions but restrictions that have been imposed by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) under the federal regulatory regime. Despite occasional threats that states will take some action, that has not yet occurred and, in my view, are unlikely to happen; or if they do, are unlikely to have any real commercial impact. Another issue with high visibility has been imports of softwood lumber from Canada, but that case involves the issues of alleged subsidies and the proper application of federal import relief laws, *i.e.*, the U.S. antidumping and countervailing duty laws.

The only situations truly relevant to the discussion today are two actions that were taken in the early autumn of 1998. One was an action by the governors of various Northern Plains states to block shipments of Canadian livestock and grain; and the other actions by the State of Florida involving imports of Mexican tomatoes and winter vegetables.

In the case of Canadian imports, the problem began with a four-hour blockade by farmers and ranchers of the border-crossing point at Sweetgrass, Montana. The farmers and ranchers had been experiencing declining

commodity prices and blamed their problems on imports of Canadian goods. Responding to this populist sentiment, state officials in North and South Dakota announced that those states would begin pulling over Canadian trucks carrying agricultural goods – cattle, hogs and grain – under what was termed “tougher inspection programs.” It was not clear what precisely the states would be looking for in those inspections, or what risk they were asserting needed to be protected against. North Dakota and Montana did institute increased stops and inspections; the Governor of South Dakota ordered that the state highway patrol turn away trucks attempting to cross into that state.

While these actions may appear to be irrational, they were in fact quite calculated. The farmers’ action and the governors’ response occurred roughly six weeks before a very important mid-term congressional election in the United States. All of the governors of the states involved were Republicans; the sitting federal administration was Democrat.

Canada immediately requested consultations under both the WTO and the NAFTA. Shippers and trucking interests, disappointed with the lack of an immediate federal legal response, threatened to bring action in federal court. Within a week, on September 29, USDA Secretary Dan Glickman met with the governors of six Great Plains states and reached an agreement under which he would seek bilateral consultations with Canada on an appropriate list of state grievances in return for an agreement by the governors to end state action against Canadian trucks. Through an exchange of letters between USTR Charlene Barshefsky and Canadian Minister Sergio Marchi on October 2, bilateral consultations were agreed and Canada suspended its requests for WTO and NAFTA formal consultations, subject to the conditions that all state actions against Canadian shipments cease. After this agreement was reached, the state actions against Canadian shippers effectively stopped.

The Clinton Administration subsequently asked the governors to submit a list of grievances that it could pursue in these talks with Canada and requested that the list be reasonable and focused. The list that it received reflected various issues, but interestingly many had to do with lack of access for U.S. producers to the Canadian market, or various perceived advantages that Canadian producers allegedly enjoyed because of U.S. regulatory actions. (For example, the states asserted that their farmers were unable to use pesticides available to Canadian farmers because those pesticides had not

yet been approved for use by U.S. regulatory agencies). The list contained nothing that suggested a problem justifying inspection of Canadian trucks.

The subsequent consultations between the United States and Canada did not turn out quite the way that some interests on this side of the border had initially hoped. Naturally, Canada came to the table with its own set of issues, a fairly long list of topics most of which the United States was not interested in talking about. By December there had been several meetings but discussions had focused mostly on developing a new process to improve dialogue between the countries on agricultural trade issues of concern, and on methods for ensuring greater state and provincial participation in that process.

In late December, farmers in Montana announced that they were not satisfied with discussions over “process” and threatened to renew their blockade. However, the situation had changed in one important respect – the election was over. State officials made very little noise and the commotion subsided.

The episode in Florida began in almost the same way and at the same time – a short time before the mid-term congressional election. The Florida Commissioner of Agriculture announced that Florida would need to institute additional state inspections of imports from Mexico to ensure that state production of tomatoes and vegetables was not placed at risk by the introduction of exotic diseases. Inspection of imported product for this purpose, of course, is a function regularly performed by the federal government, specifically by the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture. There had been no indication that APHIS had been derelict in its duties, and there had been no new or significant plant disease or pest problems.

Nonetheless, Florida suddenly called for additional state inspection at Tampa and other major ports, and began to stop trucks carrying Mexican produce as they crossed into Florida on the highways. Initially, Florida officials indicated that they would conduct roadside phytosanitary inspections of the trucks; however, it soon appeared that all that they were doing was checking the truckers’ documents to ensure that the produce was accompanied by proper APHIS inspection documents. From a regulatory perspective, it was not clear precisely what Florida was doing, or what it was attempting to accomplish.

The response by the Clinton Administration was very similar to its response in the Canadian situation. Administration officials promised Florida officials that they would immediately initiate consultations with Mexico. Secretary Glickman promised to speak directly with his counterpart, the Mexican agricultural minister. USDA offered to send additional APHIS personnel to Florida to work with state inspection officials. Within a few weeks, state interference with shipping had ceased. And then the election came and went, and the issue disappeared.

It seems to me that there are several observations we can make, and lessons that we can draw from these two episodes:

There have only been two incidents of state interference with shipments of agricultural goods from a NAFTA partner, and both took place at the same time, roughly six weeks before a congressional mid-term election.

1. In each case, the actions were taken by states whose governors were members of the opposition party.
2. In each case, the state action was initially, although weakly, justified as some form of necessary regulatory action that required increased inspections to safeguard local agriculture.
3. In each case, the Federal Government diffused the situation, not by hauling the state into court, but by promising to pursue grievances with the NAFTA partner.
4. In each case, state officials grabbed the fig leaf offered and withdrew from the field as soon as the elections were over.
5. In each case, there have been no repeated incidents since that time.

The question that has been posed is whether states can be prevented from unfairly interfering with NAFTA trade. The answer, as a legal matter is yes, and I will come to that in a moment. However, as this recounting of past events suggest, there is always the possibility that farmer unhappiness with NAFTA trade will elicit a knee-jerk political response under certain circumstances. We could have periodic reoccurrences of the types of incidents that we saw in 1998, but it is likely that they will be episodic and short-lived.

Since the Great Depression, federal regulation has dominated the U.S. agricultural landscape and is like to continue to dominate for many years to come. The federal government operates all of the major crop support and subsidy programs, most agricultural marketing programs, and a nearly comprehensive system of animal and plant quarantine and meat inspection. In these arenas, the federal regulatory schemes clearly preempt the field. There are no comparable state schemes of any real importance.

If a state were to step in and interfere with one of these regulatory schemes, could the federal government assert legal preemption to end this interference? In almost all cases, the answer is probably yes. And in an earlier era, where political issues of state-federal comity were not so acute, the federal government was more willing to threaten to flex -- or in some instances even to flex -- its legal muscle. The case cited earlier of Maine attempting to interfere with imports of Canadian potatoes in the 1970's is a good example.

Today, the federal government is much less willing, as a political matter, to haul a state into court. This is especially so in an election year. So the strategy is different. The federal government waits for the political moment to pass and for the incident to peter on its own. And, experience tells us, this is probably a wise decision. State officials drawn suddenly to a political response have to commit limited state resources to enforce ill-conceived and often undeliverable schemes, all with the understanding that, should the federal patience wear thin, they would almost certainly lose a court battle. State officials who may perceive a short-term political advantage initially in taking actions against imported products, quickly see that there is also political reality in retiring from the field at the first convenient moment.

Are state subsidies to agriculture a potential threat to NAFTA? Not really. Nothing in our law prevents states from subsidizing their producers. In fact, there are a few small state subsidy programs -- some water subsidies and some assistance to dairy producers. But the fight over subsidies occurs in Washington. Simply put, states simply do not have the revenues to play in this game. States have not been major players in the subsidy game up to now, and there is no reason to think that will change.

There are other problems with subsidies -- *e.g.*, they are countervailable. This is one of the things that American agriculture is quickly learning. The more that governments -- federal or state -- subsidize producers or interfere in the operation of the markets, the more U.S. exports are the target of trade

relief actions in other countries. There was a time during which almost all countervailing duty or antidumping actions took place in U.S. courts and administrative tribunals. Nowadays, trade relief actions are commonplace in many parts of the developing world where the U.S. attempts to sell its agricultural products.

Finally, is state-condoned or state-permitted private action to block trade a threat to NAFTA? I don't think so. Trade blockage along the border is difficult to sustain. There is a wide and open border between the United States and Canada, and blocking a single border crossing can have only limited and short-term effect. Farmers and ranchers really don't like to spend their time away from their businesses blocking a road. What they want to do is to induce state action, to bring state officials into the fight, so that they can go home. If state officials do not act, there really is no natural force to sustain prolonged private action.

There are, of course, other reasons why private action to block trade is unlikely. Everyone in the United States – and that includes farmers and ranchers – are aware of the problem of potential tort liability. If a farmer is out on a road blocking the highway with his tractor, he is taking some risk. If he forgets this in the heat of the moment, his wife will quickly remind him when he gets home: “If someone gets into a traffic accident because you are blocking the road with your tractor, we're going to get sued.” No farmer wants to lose his farm to a tort lawyer from Minneapolis or Chicago.

Because this is a legal conference, I should conclude my talk by turning from these largely political discussions to analysis of a real legal issue. I mentioned earlier that the federal government could, but is often reluctant for political reasons, to take a state official to court when that official takes an unjustified action to block trade. The question is whether, if the federal government is unwilling to litigate with the state, a private litigant could bring an effective challenge? I bring this up because I recently read a law review article¹ in which the author argued that the NAFTA implementing statute, and specifically section 102(b), establishes that only the federal government may challenge state actions that interfere with NAFTA trade; and that, where the federal government was reluctant to sue a state, private actions attempting to pursue a NAFTA violation would be unavailing.

¹ Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, *249 (October 1995).

I do not agree with this conclusion, and I would like to explain why. Section 102(b) provides:

No state law or application thereof may be declared invalid as to any person or circumstances on the ground that the provision or application is inconsistent with the agreement [*i.e.*, the NAFTA], except in an action brought by the United States for the purpose of declaring such law or application invalid.²

I would respectfully suggest that the key phrase in this statute is “inconsistent with this agreement.”

The NAFTA and other recent trade agreements – e.g., the WTO Agreements resulting from the Uruguay Round negotiations – are not “treaties” in the Constitutional sense. They are what are termed “congressional-executive agreements.” Although the U.S. executive goes out and negotiates these arrangements with foreign governments, the final agreements reached are not submitted to the Senate for ratification. As a result, the agreement itself (often loosely referred to as a trade “treaty”) never becomes part of U.S. law. Instead, the Administration returns from the negotiation and drafts “implementing legislation.” That legislation alters existing domestic law in whatever manner is necessary to allow the United States to meet the trade obligations it has undertaken. However, the trade agreement itself never becomes a part of U.S. law.

Assume for a moment that a state official took an action such as the ones I described earlier in the 1998 South Dakota and Florida examples, and that a private party found itself aggrieved by that action. I suggest that section 102 would not effectively prevent that private party from bringing a lawsuit or from prevailing if the facts so merited. I would submit that the alert private litigant with an intelligent lawyer would bring the lawsuit without ever alleging that the state action was “inconsistent with NAFTA.” Indeed, the smart litigant would never mention NAFTA at all.

Let us take the example of Florida where state officials blocked trade in Mexican produce on the grounds that they need to “inspect” trucks for some unspecified health purposes. Long before anyone ever even thought of NAFTA, Congress had passed a series of laws creating a nearly comprehensive scheme of federal regulation to prevent the movement of

² North American Free Trade Agreement, Section 102. U.S.-Canada-Mexico, Dec. 17, 1992, 32 I.L.M. 605 (1993).

animal or plant diseases. APHIS had authority to regulate both imports and interstate commerce under the Quarantine Act, the Plant Pest Act, the Virus-Serum-Toxin Act and other statutes. The Food Safety Inspection Service has authority to regulate the movement of meat, poultry and egg products. Whenever states have attempted to impose additional, inconsistent restrictions that interfere with these federal regulatory schemes, the courts have held the federal scheme preemptive.

The courts have also ruled that private litigants may assert federal preemption in these areas to invalidate inconsistent state action. You do not need to be the federal government to bring such a case. For example, in the recent *Symens v. SmithKlein Beecham* case,³ private defendants successfully invoked the federal preemptive effect of APHIS' regulatory scheme under the Virus-Serum-Toxin Act to defeat inconsistent state law-based tort and warranty claims.

Is this not a more straightforward way of dealing with questionable state actions like the unnecessary and harassing inspection of trucks? Why bother to assert that such action is "inconsistent with NAFTA?" Why mention NAFTA at all? Why not simply assert, as the *Symens* defendants did, that this action is inconsistent with a preemptive federal regulatory scheme – in this case, APHIS's system of quarantine and inspection.

Despite what section 102(b) appears to suggest, NAFTA itself is irrelevant when situations like those that occurred in South Dakota or Florida present themselves. NAFTA is not a treaty, was never ratified, is not, in itself, U.S. domestic law. The NAFTA is not implemented under our law as a treaty; it is implemented by modifying or amending existing law. It seems to me that the wise litigant – and his wise lawyer – would frame his action on the grounds of federal preemption and would avoid altogether arguing about "inconsistency" with NAFTA.

In summary: the question that was posed was whether state action, state subsidies, or state-condoned private action are significant threats to NAFTA. As a legal matter, the answer is no. As a political matter, state action may periodically appear as an irritant, but is unlikely to be sustained for long.

³ *Symens v. SmithKlein Beecham*, 152 F.3d 1050 (8th Cir. 1998).

