
SANITARY BARRIERS AND INTERNATIONAL TRADE GOVERNANCE ISSUES FOR THE NAFTA BEEF MARKET

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INTRODUCTION

One has a very hard time persuading a vet that animal disease is not an important phenomenon of veterinary science that also has financial implications, but is fundamentally an economic problem that has some veterinary science aspects.¹

Until recently, in North America livestock disease issues benefitted from a low profile. This low profile had continued over a considerable period. As a result, public veterinary services were able to go about their business with little public scrutiny and received little attention from politicians. Their work was perceived as being in the purview of scientific experts and best handled by knowledgeable professionals. Of course, the low profile was largely the result of the past successes of the public veterinary services in eliminating or effectively controlling a range of animal diseases in their respective domestic markets. If North America had been isolated as effectively from the international media as it had been from

¹ McNerney (1996), p. 301.

livestock diseases, probably little would have changed. Events that unfold in far off places, however, are now instantaneously on the evening news and the general public needs to be reassured that what they are witnessing on television cannot happen close to home.

There is little doubt that the revolution in electronic communication has altered the environment within which public veterinary services in North America operate. The stark and disturbing images of the burning carcasses of animals slaughtered in the fight to control foot and mouth disease in the United Kingdom in 2001 put the topic of animal disease control into the living rooms of millions of (urban) North Americans, whether American, Mexican or Canadian. When the last widespread outbreak of foot and mouth disease in a major developed country took place, it was reported on less emotionally charged newspaper pages as a problem of interest only to the farming community. The internet provides instantaneous information on almost any topic, including animal diseases, for anyone sufficiently concerned by the images presented on their televisions who wish to know more. Of course, the internet provides no check on the validity of the information presented and is open to misinformation provided by those with particular agendas. Public veterinary services and officials responsible for food safety have had to become much more proactive in their provision of information and in debunking misinformation.

There are, however, a large number of other issues that have raised the profile of animal diseases and food safety among members of civil society. The world is becoming globalized not only because of the revolution in electronic information, but also due to the increased movement of people and commodities arising from improvements in transportation. The large scale transatlantic movement of individuals raised worries about the ability of people to act as a vector for foot and mouth disease. Of course, the problems that British authorities had in controlling the recent outbreak of foot and mouth disease relative to past outbreaks arose because animals are now moved much longer distances and more quickly. The distances traveled are not solely the result of improvements in transport but also reflect economies of scale in livestock slaughtering.

The appearance of a new livestock disease- -bovine spongiform encephalopathy (BSE) with its apparent ability to affect human beings, new variant Creutzfeldt-Jacob Disease (vCJD), and a “made for media” common name of mad cow disease- -has also done much to put animal disease issues on the radar screen of many consumers. The difficulties authorities in the United Kingdom had in dealing with the evolving information concerning the possible linkages between BSE and vCJD, as well as the widespread perception that the veterinary service was captured by farming interests, had a profound effect on public confidence in the systems for animal disease control and food safety, in Britain and in the entire European Union (Gaisford et al., 2001). The scrutiny with which animal disease control administrations were subject to in the EU in the wake of BSE had some spillovers in North America. In addition, there were more direct personal effects of BSE in North America such as the prohibition on giving blood for individuals who had spent time in Britain- -again tending to increase the profile of animal disease concerns. Further, the suggestion that BSE may have resulted from feeding animal products to beef cattle raised suspicions among urban consumers regarding the ethics of production methods used in intensive livestock operations and tied animal management directly to food safety.

Of course, the other major change affecting the profile of the regulation of animal industries has been rising concerns over food safety. As the veterinary profession has a role in food safety inspections for meat products and residual traces of drugs and hormones used to treat animals, as concerns over the safety of food have risen, so has the level of scrutiny to which regulators have been subjected.

The bottom line of all these changes is that animal diseases and food safety have now become important issues on the political agenda, particularly in Europe, but also in North America. Governments are re-evaluating their animal disease and food safety systems and are attempting to strengthen them so that confidence is maintained or enhanced.

Other forces have been at work that affect the regulatory administrations for animal disease control and the safety of products derived from

animals. Improved transportation, refrigeration, packaging and cold chain product management has meant that fresh (chilled) livestock products can be delivered anywhere in the world at a competitive price- -the manifestation of globalization in the livestock industry (Kerr, 2001a). These changes have meant that domestic protocols and procedures that previously had only limited international impacts began increasingly to act as trade barriers. Rising concern over the use of sanitary and phytosanitary (SPS) regulations as barriers to trade led to the negotiation of the Agreement on the Application of Sanitary and Phytosanitary Measures administered by the World Trade Organization (WTO) at the Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations. One of the major changes for the administration of animal diseases was the provision in the SPS Agreement to allow for sub-national *disease free zones*. There were also provisions in the Canada/U.S. Trade Agreement (CUSTA) pertaining to the removal of border inspections (Hayes and Kerr, 1997). The stronger dispute mechanisms embodied in the WTO have made it more difficult for countries to ignore their international trade obligations (Gaisford and Kerr, 2001). The high profile WTO dispute over beef produced using hormones further raised the profile of SPS issues in the international sphere (Roberts, 1998).

These changes in the international environment have also served to increase the political profile of animal disease and food safety issues because they raise questions of sovereignty. A further deepening of North America economic integration will require a greater degree of cooperation and harmonization among those charged with controlling animal diseases and ensuring the safety of food products derived from animals (Hayes and Kerr, 1997). The increasing political profile of animal disease and food safety issues raises the issue of sovereignty and the relationship between border measures and the cross-border management of animal diseases and food safety.

THE TROUBLE WITH BORDERS

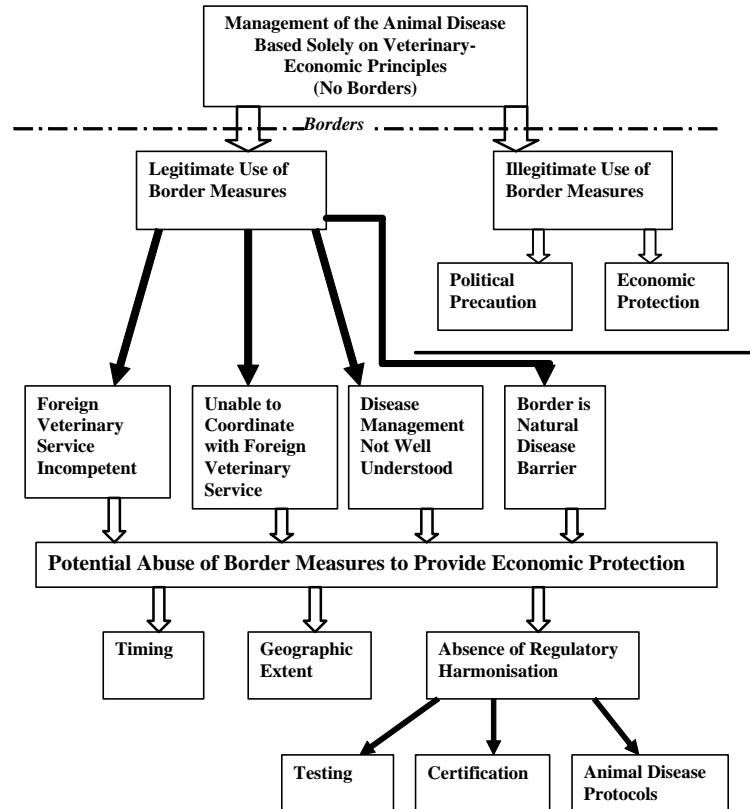
If we start from the perspective of an international trade economist rather than that of a policy maker charged with the management of an

animal disease or a threat to food safety, the use of border measures² to restrict trade suggests, first and foremost, opportunities to extend economically motivated protection to domestic vested interests. Opportunities to provide economic protection can arise from the “illegitimate” imposition of border measures or the abuse of border measures put in place for “legitimate” reasons. It has long been recognized that sanitary regulations justified on the basis of human or animal health can be used to provide economic protection. While a policy maker charged with ensuring health or safety may perceive border measures as one of the tools available to accomplish their mission, trade economists see border measures as opportunities for protectionism. Allowing those who are charged with providing health security or safety to make policy in isolation will likely mean that the trade implications of their actions will be ignored. On the other hand, those making trade policy need to understand how trade measures can be used to bolster science-based animal health and food safety regimes. If they do not, opportunities to better manage threats in these areas may be lost in the pursuit of the benefits of trade. Of course, good public policy making requires both objectives be taken into account when putting border measures in place. In general, the international regimes put in place to regulate animal health and food safety represent reasonable compromises between the two objectives. The policy environment is dynamic and the rising profile of animal health and food safety issues over the last few years, and the politicization of the issues that naturally followed, has meant change. As a result, there has been some progress and some slippage in the trade facets of the public policy regimes addressing these issues.

Figure 1 can be used to illustrate the problem of borders from the perspective of a trade economist. The example illustrated in Figure 1 is the more complex case of animal disease management although much of the discussion could be applied to border measures put in place for food safety reasons as well. To think about the question of animal disease management from the perspective of an international trade economist, let us begin

² The term “border measures” is used broadly in this paper and may include measures that are not applied directly at the border, e.g. inspection of foreign slaughter plants or requirements for veterinary certification that, while not applied at the border, hinder the cross-border movement of livestock or meat products.

Figure 1: Animal Disease Management and Border Measures.



with a world without borders- -or how the disease would be managed within a single unified state.³ In this “no borders” case, the veterinary service would manage the disease on the basis of the dynamics of the disease within the animal population alone. For example, bans on the movements of animals or animal products would be based on the requirements of scientific management. Animals in areas of low risk would not be affected by

³ The assumption of a unified state is made to abstract from the administrative borders and shared governance that arise in federated countries with state or provincial administrations.

the policy and commerce would not be disrupted in those areas. While there may be arguments among members of the veterinary profession regarding the degree of precaution necessary to ensure that a disease is managed, commerce in animals and animal products will not be artificially restricted.

In the science of animal disease control, international boundaries are artificial constructs -- mere lines on a map that have no bearing on the dynamics of a disease in an animal population. In a sense, either the lines on the map are non-binding on the scientific management of the disease or they represent an artificial constraint on scientific management.⁴ In either case, they should have no bearing on the management of the disease. Borders, however, divide government responsibilities and controlling borders is a central aspect of sovereignty. Sovereignty means that governments guard the right to impose border measures closely, which does not mean that they will not, at times, voluntarily agree to limit their control of borders by international agreement. Relaxing sovereignty in this manner is the essence of trade agreements such as the WTO and the NAFTA. However, what is voluntarily agreed to can be abrogated or re-negotiated. Even in the European Union, where countries have agreed to eliminate border measures, individual member states retain the ultimate right to leave the EU and re-assert their sovereign right to control their borders.

Border measures are policy instruments used to eliminate, to restrict or to tax the movement of goods or services into (or out of) the territory of the country imposing them. The imposition of any border measure has the potential to confer an economic benefit on some group in society.⁵ In international trade, it has typically been domestic producers of goods or services that compete with imports that benefit from protection

⁴ Of course, it may be that by chance the international boundary conforms to a natural place to initiate disease management activities on the basis of good science. This case is dealt with later.

⁵ Even export controls will help certain groups, e.g. domestic consumers of the product who benefit from the lower price that reduced exports will bring. Of course, any change in border restrictions will create both winners and losers—higher prices for producers also mean higher prices for consumers.

and, thus, have an incentive to ask for protection (Gaisford et al., 2001). In international trade theory, the imposition of border measures is generally seen as welfare decreasing.⁶ Government trade policy generally represents a balance between the desire for the benefits of free trade and the political necessity to extend protection, at times, to domestic vested interests. The ability of governments to capriciously impose trade barriers, however, significantly increases the risks for firms that wish to engage in international commerce. As a result, they will underinvest in those activities and hence, the potential benefits of trade are not realized. This unrealized potential represents the major externality of border measures and considerably raises the costs of protectionism beyond the direct welfare trade-off made in a market where the decision to extend protection has been made.

International trade agreements can be seen as attempts to reduce the level of risk arising from the imposition of trade barriers by governments for firms that wish to engage in international commerce. Risk reduction is accomplished by mutually agreeing to limits on the ability of governments to impose trade barriers and by making the circumstances under which they can be imposed transparent to those that wish to make investments in international commercial activities. In other words, trade agreements are designed to reduce the long-run negative externality associated with the imposition of trade barriers. Trade agreements recognize the need, at times, for countries to respond to domestic pressure for protection and governments are always afforded an escape clause whereby they can impose trade barriers if domestic political pressure is sufficiently great -but there may be cost associated with doing so.⁷ Hence, international trade agreements represent a political compromise between the need of firms that wish to engage in international commerce for strong rules pertaining to the imposition of trade barriers by governments and the need of governments, at times, to extend protection to domestic vested interests (Kerr and Perdakis, 1995).

⁶ Leaving aside academic arguments such as those pertaining to 'optimum tariffs.'

⁷ For example in the WTO countries are always allowed to ignore their commitments but the cost is that the Member Country injured by such an action is entitled to compensation or has the right to retaliate by imposing trade barriers on the goods of the offending country.

Governments, having voluntarily agreed to limit their ability to impose trade barriers (for example to eliminate all tariffs in NAFTA, and more importantly, never to impose them again when faced with political pressure from domestic vested interests looking for protection) will seek to find ways to provide protection without incurring the cost. As governments have, over time, agreed to limit their use of traditional border measures such as tariffs and import quotas, they have increasingly turned to non-tariff barriers to satisfy demands for protection. Non-tariff barriers tend to be much less transparent than traditional border measures and more complex because they often have a legitimate domestic policy goal as their rationale- -they come as shades of grey rather than being black or white. Border measures put in place for the purposes of animal disease management and food safety concerns fall into this category and hence, are viewed with suspicion by international trade economists.

Returning to Figure 1, once there is an animal disease problem in, for example, a livestock or meat exporting country (meaning that borders now exist in our model) opportunities are created to provide protection. In the case of an animal disease, two possibilities exist - -border measures can be imposed for illegitimate reasons or for legitimate reasons. Let us deal with illegitimate border measures first. These are found on the right side of Figure 1.

Illegitimate Use of Border Measures

Traditionally, the reason underlying the imposition of illegitimate border measures is to provide economic benefit to domestic producers that arises from protection from imports. The most obvious way to accomplish a benefit is to impose a barrier on imports when there is no or minimal risk such as a prohibition on imports into a country with a temperate climate from a country with a tropical disease that cannot survive in a temperate environment. The potential abuse of sanitary regulations has long been recognized. According to the web site of the Office International des Epizootics (OIE), the international organization that establishes the standards for trade in animals and animal products:

The ratification of the 1924 Agreement creating the OIE reflects a desire clearly expressed by the Secretary General of the League of Nations that year. He invited various governments to designate veterinary experts “to examine the health guarantees that could be provided by cattle-exporting countries, the facilities that importing countries could accord on the basis of these guarantees and, in general, to determine the most effective means of enabling statutory veterinary measures to be applied, taking into account the economic interests of exporting countries and without prejudicing the interests of countries wishing to protect themselves against animal diseases.

The Economic Committee of the League of Nations thus, in 1924, proposed to facilitate international trade in animals and animal products to try to reverse the *often highly overt tendency of numerous countries to use sanitary arguments purely for the purpose of economic protection* (emphasis added).⁸ It should be remembered that the early part of the 20th century was a period prior to governments having encumbered themselves with international trade agreements and, thus, the unilateral imposition of tariffs and import quotas was easy. Even in this era, there was considerable temptation to impose trade barriers in the name of sanitary concerns for the sole purpose of providing economic benefit.

The second illegitimate reason for the imposition of border measures in relation to animal diseases is what can be termed “political precaution.” It has come to the fore recently as a direct result of rising awareness of these issues among civil society and their subsequent politicization.⁹ Political precaution arises when politicians are being pressured to “do something, or to be seen to be doing something” in the face of strongly expressed concerns by members of civil society even when risks are very

⁸ Downloaded from www.oie.int/eng/OIE/en_histoire.htm

⁹ This statement is not to suggest that political precaution is a new phenomenon, only that it does not become an important reason for the imposition of trade barriers unless an issue is politicized.

low or largely speculative.¹⁰ A prominent example might be the EU ban on the importation of beef produced using growth hormones where the concerns relating to human health are speculative (Kerr and Hobbs, 2002).¹¹ A similar argument might be made regarding the European Union's evolving policy toward genetically modified organisms (Gaisford et al, 2001). Politicians fearing an adverse voter reaction either from "inaction" on their part or because voters do not have a sufficient "comfort level" with the existing scientific consensus, are driven to imposing border measures even in the absence of any group seeking economic protection.¹²

The restructuring of the U.S. food safety system in the 1990s was, in part, motivated by political precaution. There was rising consumer concern with food safety, a subsequent politicization of the food safety issue, the government reacting to do something and the threat to impose border measures on imports from NAFTA partners if their products did not conform to the new U.S. regulatory regime. The failure in the regulatory regime in the United States was not perceived as a failure of science, but rather a private sector failure in the meat industry (Spriggs and Isaac 2001).

¹⁰ Isaac (2002) provides the following taxonomy of risks: "Another important debate associated with the Risk Analysis framework involves the type of risk targeted where three types may be identified: recognizable risks, hypothetical risks and speculative risks. . . . Recognizable risks can be identified through experience (data) and the application of accepted analytical methods such as statistical inference and probability theory, and they include a clear causal-consequence mechanism. Hypothetical risks lack experience or data, but, with the help of assumptions and/or likelihood functions they can be assessed within an accepted analytical method. Speculative risks lack experience, data, a causal-consequence mechanism and an accepted analytical method for assessment. They are logical possibilities- -irrefutable, but untestable as well."

¹¹ North Americans tend to perceive the beef hormone ban as purely "economic protection". While the ban provides positive economic externalities for some EU interests, the primary motivation appears to be "political precaution" (Gaisford and Kerr, 2001).

¹² For example, there seems to be little pressure for economic protection from either the biotechnology industry or agricultural producers in the European Union (Gaisford et al., 2001). It is easy to see how civil society's "comfort level" with the existing scientific consensus on animal diseases can be reduced. From the perspective of a politician, the reversal of the official "scientific" position on BSE represented a clear electoral danger.

Thus, it did not lead to a decline in the public's "comfort level" with the scientific consensus as was the case in the European Union. Removing the threat of U.S. trade barriers, however, did impose considerable costs on NAFTA partners. It has also meant that the U.S. system may now diverge to some degree from the international approach to food safety (Spriggs and Isaac, 2001). According to Spriggs and Isaac for the United States:

*The major internal driver for change has been a series of well publicized food contamination crises. These [crises] have combined to rock consumer confidence in the safety of the U.S. food supply, but more importantly, they have led to a political motivation to restructure the food safety system.*¹³

They go on to discuss the Canadian situation:

*With a significant reliance upon export markets, the Canadian beef industry and the food safety system are well aware of the structural changes occurring in important export markets. These [changes] include both the legislated and market regulations adopted as part of the foreign food supply chain. For instance, recent domestic crises in the United States have motivated structural change in the U.S. food safety system which, in turn, has altered the market access rules for Canadian beef products. In order to ensure market access and industry competitiveness, the Canadian food safety system has had to restructure in a manner at least equivalent to the restructured U.S. system.*¹⁴

Politicized unilateral rule changes that affect market access are the antithesis of the surety sought in trade agreements such as NAFTA and the WTO.

The imposition of trade barriers for reasons of political precaution affects exporters in exactly the same way as barriers put in place to pro-

¹³ Spriggs and Isaac 2001, p. 29.

¹⁴ Ibid., p. 56.

vide economic benefits to domestic producers. If the ability to impose trade barriers for reasons of political precaution is unconstrained, or not transparent, then risks are created for exporters and investments in international commercial activities are reduced.

Legitimate Use of Border Measures

While sanitary arguments can be used to justify the imposition of illegitimate trade barriers, there are also legitimate reasons for a country to put border measures in place. These are found on the left side of Figure 1. The problem with the legitimate imposition of border measures from the point of view of a trade economist is that they may be open to abuse to provide economic protection either in their design or their application.

Borders divide administrative responsibilities. Public veterinary services are constituted nationally. If for example, the professional veterinarians in an importing nation consider the veterinary service and/or its co-requisite enforcement administration in an exporting country to be incompetent, then the importing country has a legitimate reason to impose border measures. Of course, the type of border measures that typically restricts commercial flows of livestock or meat products may not be effective in controlling disease. For example, in the case of “blue tongue” the vector may be wild ungulates that do not respect “official” border crossings. The optimal animal strategy would have little to do with controlling borders. In other cases, border measures, while sub-optimal from an animal management strategy, may provide the best line of defence when faced with an incompetent foreign regulatory regime.

Even if the foreign veterinary service is competent, there still may be a legitimate reason to impose border measures. If it is not possible to co-operate with the foreign veterinary service, either because of other political concerns, e.g. Taiwan and China, or a clash of professional cultures among the veterinary services, then border measures may be an appropriate way to manage a threat. If for example, an agreement cannot be reached on the exporter’s veterinary service issuing of export certificates, then border measures to require quarantine or testing upon import may be appropriate disease management measures.

If there are differences on how to effectively manage a disease, i.e. a scientific consensus does not exist, the national veterinary services in different countries may not agree on the best management strategy to protect their domestic interests. There may be legitimate disagreements based on the best available scientific information. In these circumstances, countries must have the legitimate right to protect their own interests by acting in a precautionary fashion. This “incomplete information” rationale for the imposition of trade barriers is well accepted and embodied in the SPS (Kerr, 1999).

Finally, border measures may be justified if the border, by coincidence, is where a veterinary service would choose to impose a barrier to movement for strictly animal management reasons. Probably the most obvious examples are oceans or other large bodies of water. Water is unlikely to be the barrier, however, along the arbitrarily drawn U.S./Canada or U.S./Mexican border. The efficacy of a natural boundary should never be confused with the administrative convenience of a national frontier. As national frontiers exist, they become administratively convenient places to implement disease management strategies. The problem with seeing national borders as administratively convenient is that it ignores the economic cost border measures imposes on exporters. Not “to see” national frontiers can be a major challenge for those charged with managing animal diseases.

As suggested above, once the decision to impose regulatory barriers is made, then those barriers are open to abuse both in their design and in their implementation. Returning to Figure 1, there are a number of ways that border measures may be used to provide protectionist economic benefits in excess of those that would naturally arise from the imposition of the barrier strictly for disease management purposes. The avenues for abuse pertain to timing, geographic extent and the absence of regulatory harmonization.

In one case, timing relates to when action is taken to impose border measures once an exporter has a disease problem where border measures are appropriate. For example, a decision to close the border to im-

ports may be taken before the disease in the exporting country is confirmed. More open to abuse, however, may be the timing of re-opening the border once a threat has passed. Veterinarians' primary concern is preventing the disease outbreak or limiting its extent, not the facilitation of international trade. Thus, while they may not be open to "other" influences when faced with a new threat, once the threat is passed, they have little interest in whether the trade barrier remains in place. In fact, the decision to re-open the border may lie with other officials subject to receiving a go ahead from the veterinary service. Certainly, there is considerable suspicion in Canada that this was the case in the recent closure of the U.S. border to potatoes originating in the Canadian province of Prince Edward Island. The rate at which countries receive the "all clear" in cases of foot and mouth disease has also been contentious. The UK government feels abused in this fashion by some other members of the European Union in the case of BSE.¹⁵

The geographic area from which exports are banned, or into which imports are restricted, can exceed those suggested by prudent animal disease management. Exports of products from an entire country may typically be banned even if the outbreak is localized and the veterinary service of the exporting country has the problem contained. Imports into an entire country may be restricted even when a disease cannot thrive in large areas of the importing country. The absence of regulatory harmonization can lead to abuse of border measures in aid of economic protection. This problem can manifest itself in a number of ways. For example, if testing procedures are not harmonized, requiring specific tests prior to export may prohibit exports if the tests are not available in the exporting country or may raise costs if additional, but redundant, testing is required.

The certification of export facilities, the effort required in the certification process for live animals for export, the verification of certificates and border inspections are all open to abuse (Hayes and Kerr, 1997; Kerr, 1988a; Kerr et al., 1986). Part of the problem with certification and related barriers is that the rules cannot be sufficiently well defined to limit indi-

¹⁵ This may however, be a case of "political precaution."

vidual latitude. As a result, control of abuse may require removal of the measure entirely.

If animal disease protocols are not harmonized, then countries may be able to impose barriers to trade based on differing standards or procedures. One recent example is the decision of Japan to ban imports of U.S. poultry products in early 2002 in response to an outbreak of avian influenza (AI) in Pennsylvania. According to Shane (2002):

Japan's actions are contrary to standard practice, as the strain of AI in Pennsylvania is deemed low pathogenicity. Unlike other international authorities, veterinarians in Japan make no distinction between low and high pathogenicity, despite the differences in the epidemiological and consequences of infections with the different strains. Only AI of high pathogenicity must be reported to the Office International des Epizootics in Paris.

. . . There is, however, substantial evidence that low pathogenicity strains of AI can mutate into highly pathogenic forms, as seen in Pennsylvania in 1984 and 10 years later in Mexico.

USAPEEC [United States of America Poultry and Egg Export Council] spokesman Jim Sumner said, "Japan has clearly demonstrated its protectionist policies with this action—and we must encourage our government to take all steps necessary to see that Japan reconsiders its decision."¹⁶

While the taxonomy of opportunities for abuse of legitimate border measures presented in Figure 1 may not be comprehensive, a wide range of protectionist opportunities are suggested. Non-tariff barriers to trade are only restricted by the inventiveness of the bureaucrats charged with devising them and hence, are difficult to anticipate once border measures have a legitimate *raison d'être*.

¹⁶ Shane 2002, p. 1.

LIMITING OPPORTUNITIES FOR THE MISUSE AND ABUSE OF BORDER MEASURES

It is not possible to discuss control of the misuse and abuse of border measures in NAFTA without referring to multilateral initiatives, particularly the OIE because it has been recognized as the international standards setting authority by the WTO; regional trade agreements such as NAFTA are expected to conform to the WTO disciplines. Thus, NAFTA may go further in a particular area than is required by its WTO commitments but it cannot contradict them. It appears that in many areas affecting trade in beef cattle and beef, the NAFTA partners have not been willing to exceed the OIE/WTO norms. This unwillingness suggests that there is little commitment to deepening the NAFTA relationship contrary to what was expected when the NAFTA was signed (Clement et al., 1999).

As suggested above, a primary rationale for the establishment of the OIE was to prevent the illegitimate use of border measures put in place under a sanitary justification. The method of control is simply requiring that sanitary barriers have a scientific basis and that the country wishing to impose the barrier has undertaken an analysis of the risks. The WTO dispute panels have upheld these dual requirements in the North American/European Union dispute over the import of beef produced using growth hormones (Kerr and Hobbs, 2002). These types of trade barriers have not been a major problem for trade in cattle and beef among NAFTA countries. Trade barriers imposed for reasons of political precaution have proved much more difficult to control in international forums because the requirement for a scientific rationale and a demonstrable risk are trumped by sovereignty arguments. According to Layard (1997):

Though the proponents of free trade often wish to minimize regulation, this article will argue that the BSE crisis in particular, demonstrates that whether desirable or not, national sovereignty is still vitally important to the United States both legally and politically.¹⁷

¹⁷ Laynard 1997, p. 144.

While there has been some evidence of political precaution in NAFTA countries, as yet there has been no large scale playing of the sovereignty card. However, there has been no major crisis in the area of animal health or food safety. As there are no international controls on political precaution, sovereignty is likely to be exercised in a time of crisis. In theory, the European Union has much stronger controls on the exercise of sovereignty than has yet been envisioned in NAFTA, yet sovereignty was snatched back quickly from the European Union Commission in both the case of BSE and the outbreak of foot and mouth disease in Britain in 2001.

This example suggests that it is important, particularly for Canadian and Mexican veterinary and food safety administrations, that they be diligent in preventing a crisis and in ensuring that confidence in the scientific consensus remains high. Given the heightened political profile of food safety and animal diseases, a crisis could lead to measures with serious long-term ramifications for beef exports.

Internationally, political precaution is at the heart of the debate between the European Union on one side and the United States and Canada among others on the other side, over the inclusion of the “precautionary principle” in international trade agreements and multilateral environmental agreements. This principle, stripped of its pseudo-scientific rhetoric, is nothing more than a retreat from decision making on the basis of scientific principles so that political precaution is allowed to dominate decision making (Isaac et al., 2002). While the recent experience in the EU can explain the move away from science-based decision making, and it may be good politics, it is bad trade law. Allowing political factors to dominate the ability to impose border measures for reasons of human and animal health opens the system for capture by other (economic) interests and greatly increases the risks for firms wishing to invest in international commercial activities.

Considerable progress in the control of abuse of legitimate border measures has been made in recent years, but a great deal remains to be done. The abuse of timing has as yet been little addressed. As suggested above, the abuse of timing is asymmetric. While there may be cases where trade barriers are imposed too quickly, it is unlikely that such “jumping the

gun” is motivated by economic protectionism.¹⁸ On the other hand, decisions regarding when to lift trade restriction imposed for human or animal health reasons may well be influenced by economic protectionism. The OIE puts no time limits on how fast a country must lift its trade restrictions once the embargoed country has informed the IOE that its disease status has returned to a state where trade no longer presents a risk. Ongoing debates over the status of foot and mouth disease in some Latin American regions may be an indication of timing abuse.

Over the last few years the greatest progress has been made in the area of the “geographic extent” of protection, that is allowing for sub-national zones to be cleared to engage in international trade, instead of having to wait until an entire country receives a clean bill of health. This step was a significant breakthrough, important particularly for large countries with considerable variations in their climatic regimes such as Canada, the United States and Mexico. The move to allowing sub-national disease free zones has, for example, already considerably liberalized U.S./Canadian trade in feeder cattle. For example, A Record of Understanding between the Governments of Canada and the United States regarding the Area of Agricultural Trade was signed in December 1998. That record involved a number of provisions that directly affect livestock trade. The most successful of these was the Restricted Feeder Import Program (RFIP) which facilitates the export of U.S. feeder cattle into Canada. The Record invited additional U.S. states to participate. Further, Canada initiated a review of regulations governing the import of animals with a focus on regionalization (i.e. allowing imports from some regions even though other regions of the United States do not satisfy Canada’s health regulations for imports). The Record also works toward addressing inconsistencies between U.S. state and federal brucellosis and tuberculosis requirements as well as co-operating with the Canadian Food Inspection Agency. Based on a scientific risk assessment, Canada modified its swine quarantine regulations to allow swine for slaughter to be imported from states that are pseudo-rabies free.

¹⁸ Of course, it may be a manifestation of “political precaution.”

The RFIP -- originally the Northwest Feeder Project -- has been a considerable success. It allows imports of feeder cattle from low risk areas for blue tongue and anaplasmosis in the United States. It led to a rapid rise in imports of feeder cattle into western Canada. This type of co-operation ties the Canadian and U.S. markets closer together and gives U.S. cow/calf producers a stake in an open border, and hopefully will make it more difficult for groups such as R-CALF (an upstart producer group behind the 1998 U.S. trade actions against Canada and Mexico) to obtain standing. Lynn Cornwell, then the President-Elect of the National Cattlemen's Beef Association publically stated:

*. . . I believe in trade. In fact the highest priced feeder cattle my family has ever sold went last Friday to Alberta feeders.*¹⁹

This comment does far more to ensure an open border than any formal agreement. Further, the major beef packers operating in western Canada are U.S.-owned and will not want their cattle supplies jeopardized by Canadian retaliation- -even unofficial tightening of red tape- -for future contingency protection harassment from U.S. producer groups. Moves to expand the RFIP are being made. Industry groups have been co-operating with these initiatives. As Young (2000) suggests:

Recognition of the degree of interdependence between the U.S. and Canadian industries may motivate formulation of an industry group to pursue joint interests. These actions are likely to facilitate dispute avoidance.²⁰

The process of regulatory harmonization is extremely slow both at the OIE and at the Codex Alimentarius Committee (Codex), which handles human health issues. Such a slow pace however, should not be unexpected given the large number of countries involved and their different levels of development and technical capacity. One of the reasons for having regional trade agreement such as NAFTA is to escape the "large numbers" bargaining problem so that progress can be more rapid (Yeung et al., 1999).

¹⁹ National Cattlemen's Beef Association, August 29, 2000. Downloaded from www.beef.org/newsroom/ncba/ncba00_0829a.htm.

²⁰ Young 2002, p. 33.

Unfortunately, NAFTA lacks the necessary mechanisms to force progress. There are no deadlines or closure mechanisms built into, for example, the NAFTA Committee on SPS measures. As a result, it can be a place simply to talk and raise issues rather than to resolve them. A reading of the recent minutes of the NAFTA Committee suggests that some progress is slowly being made but that a great deal of inertia exists. Given that non-trade ministries have little interest in concepts such as “deepening economic integration,” they give them only a low priority which means there are large transaction costs like “fulfilment costs” that are faced by private sector interests that wish to move the agenda forward (Hayes and Kerr, 1997). As a result, NAFTA looks very much like a “one-shot” deal rather than a mechanism for promoting further economic integration among the member countries (Kerr, 2001a).

In 1988, I wrote the following on the Canada/United States Free Trade Agreement (FTA) and the livestock sector with its second stage negotiations (Kerr, 1988b,):

*While the FTA will mean a considerable liberalization of the trade in livestock and meat products, the agreement also leaves many important points for future negotiation. In particular, . . . the harmonization of technical standards remains to be determined. The negotiations surrounding those issues will require considerable forethought and determination if effective trade liberalization is to be accomplished.*²¹

These same comments apply in 2002 and still reflect the NAFTA reality. The “Second Stage Negotiations” continue.

One other aspect of NAFTA needs to be discussed- -the dispute settlement mechanism. NAFTA countries have the choice of selecting either the NAFTA dispute mechanism or that of the WTO. The NAFTA dispute mechanism has a number of aspects that may favour the United States.

²¹ Kerr 1988b, p. 902.

As a result, Canada and Mexico are more likely to choose the WTO mechanism in the case of a dispute over sanitary issues with the United States, while the United States is more likely to choose the NAFTA mechanism (Kerr, 2001b). This dichotomy suggests that there will be less reliance on NAFTA in the future, both for negotiations on sanitary issues and for the settlement of disputes.

CONCLUSIONS

While the original NAFTA negotiations did much to promote the integration of the North American cattle and beef markets, further deepening of market integration remains illusive. While there have been no major crises in the area of sanitary risks among the NAFTA partners from an international trade perspective, market access is neither secure or predictable. Opportunities for putting what have been referred to in this paper as illegitimate border measures in place remain and “legitimate” border measures are open to abuse. From a trade perspective, having border measures available for use suggests the need for ongoing vigilance to prevent their capture by non-sanitary- -economic- -interests.

One of the more worrying trends that has arisen from recent animal disease problems, primarily in the EU (BSE in particular), is that members of civil society have rising concerns regarding animal and food related human health issues. As a result, issues that have largely been left in the domain of veterinary and human health professionals are becoming politicized. The consequence is that “political protection” issues may increasingly define the trade agenda for livestock and meat products. This new element of public decision making will increase the level of risk faced by those who wish to invest in international commercial opportunities in these products.

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