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Relative Roles of States/Provinces in Regulating Agriculture and the Resulting Impact on Cross-Border Trade: A Canadian Perspective

Michael Gifford

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Traditionally, the politics of agriculture have resulted in national governments intervening more in agriculture than any other sector of the economy. High import protection and/or treasury support have characterized most agricultural production in virtually all developed countries. Border protection and income support have normally been provided by national governments. Sub-national governments, on the other hand, have tended to focus their support on research, extension, education and health and safety programs. Most sub-national governments have preferred to leave the expensive business of farm income support programs to the central government, while the national constitutions and/or the courts have invariably indicated that the regulation of foreign trade is the responsibility of the national government and this takes precedence over sub-national measures which affect trade.

Often, sub-national agricultural programs have national counterparts, particularly in the areas of agricultural research and health and safety programs, but sub-national attempts to interfere with international trade or provide income support have been relatively rare. Nevertheless, as conventional import barriers have declined or have been eliminated by regional or multilateral trade agreements, there has been a growing awareness of the potential to use various technical regulations as thinly disguised barriers to trade, particularly in the health and safety area.

Both the Canadian and U.S. governments have a long history of intervening extensively in their respective agricultural sectors. However, there are some notable differences in the roles played by their sub-national governments.

I. THE CANADIAN SITUATION

Under the Canadian Constitution agriculture is explicitly mentioned as a “concurrent” responsibility, with the proviso that federal legislation takes precedence in the event of a conflict. The provinces have the right to regulate the production and sale of agricultural products within a province and this has led to the establishment of a number of producer marketing boards, which have received provincial powers to regulate production and marketing within the province. However, the Constitution states that the federal government has exclusive legislative authority over the “regulation of trade and commerce,” which has been interpreted to mean inter-provincial and foreign trade.

Historically, only the federal government provided significant amounts of income support, but this began to change in the late 1960s and early 1970s when many provincial governments began to introduce significantly augment their own hitherto relatively minor income support programs. Provincial input subsidies and income support became so pervasive that many people became concerned that competitive subsidization was leading to the economic balkanization of Canadian agriculture. The up-shot was the introduction of national “tripartite” income support programs, which were financed by the federal and provincial governments as well as by producer contributions.

It was not by coincidence that provincial specific income support has been largely concentrated in the richer provinces, notably Quebec, Ontario and Alberta. Less affluent provinces have, not surprisingly, been staunch supporters of national programs, financed mainly by Ottawa.

For a few commodities, i.e., the supply managed dairy and poultry sectors, the federal and provincial governments have entered into agreements with national and provincial producer marketing boards to regulate production and marketing. This has led to the establishment of provincial and national production quotas for the supply managed commodities. While these national supply management programs use delegated federal powers to regulate inter-provincial and, in some cases, export trade, the federal government has not delegated the federal commerce power to regulate imports.

The implementation of the Canada/U.S. Free Trade Agreement in 1989 and the subsequent progressive elimination of all agricultural tariffs, with the exception of the supply managed commodities, has generated surprisingly
few pressures for additional import protection against U.S. agricultural products. While there have been a few anti-dumping or countervailing duty cases initiated by the private sector, e.g., corn and sugar, the provinces have not been pressuring the federal government to limit imports from the U.S. The main Canadian concern regarding U.S. agriculture over the past decade has not been imports but the growing disparity in the level of government support provided to U.S. farmers relative to their Canadian Counterparts. In the 1980s, Canadian producers received relatively more support but since the early 1990's the situation has been reversed and has widened appreciably in the last several years.

While it is true that most provinces strongly support the supply management systems and the consequent need for ongoing import protection, there have been few provincial complaints that the federal agricultural import regime is inadequate. In fact, the only provincial representation of any consequence in recent years was the support of some provinces for the request of the dairy producers for the tariff reclassification of butter oil/sugar blends. The federal government referred the matter to the Canadian Import Tribunal, which confirmed the existing duty-free tariff classification.

In short, there have been, to-date, no unilateral attempts by the provincial governments to limit imports of agricultural products from the U.S. This stands in sharp contrast to the actions of a few U.S. states.

II. THE U.S. SITUATION

Similar to the Canadian situation, the commerce clause of the U.S. Constitution gives the federal government the power to regulate inter-state and foreign trade. By negative implication the U.S. courts have also held that the commerce clause also limits the power of the states to limit inter-state of foreign trade. Unlike Canada, however, the states have never really attempted to implement agricultural income support programs. Thus, state regulation in agriculture has been largely limited to research, extension, and health and safety programs. A few states provide input subsidies, mainly through the provision of subsidized water, but, by and large, the states have left the expense of farm income support programs to Washington.

Generally speaking, the states have respected the federal commerce power to regulate imports but there have been a number of notable exceptions where states have used state regulations to interfere on a discriminatory basis with agricultural imports from Canada.
The first time I can recall a U.S. state intervening to limit agricultural imports from Canada occurred in the early 1970's when Maine tried to use its own marketing grade regulations to inhibit imports of potatoes from Canada. However, the courts at the behest of the U.S. federal government quickly overturned this action. I cannot recall all the details of this case but what I do recall vividly was that Washington was just as eager as Ottawa to obtain a cease and desist order.

The willingness of Washington to promptly challenge in the courts state actions aimed at imports appears to have diminished sharply since the Maine potato case. For example, in 1984 South Dakota banned imports of live hogs and pork from Canada on the grounds that the U.S. Food and Drug Administration (FDA) had recently banned the use of a drug used in hog production but its use was still permitted in Canada (although under review by Canadian health authorities for the same reasons which led to the FDA decision). The South Dakota action took place at a time when bilateral trade in live hogs and pork was extremely sensitive (a countervailing duty investigation was concurrently underway). Although state officials were very clear that the action was a device for keeping Canadian product out, Washington was not inclined to pursue the issue in the courts. The state ban on imports lasted several months after the drug was banned in Canada.

Another import action took place in September 1998. Again the measures were initiated by South Dakota (in fact under the same governor) but this time they were quickly followed by similar, albeit less restrictive, actions in North Dakota and Montana. The measures ranged from certification requirements that imported animals had not been treated with certain drugs or that imported grain was free of certain diseases to state troopers stopping trucks to verify everything from plant/animal certificates to truck weight/ownership documentation.

The 1998 actions were unique to the extent that the governors involved made it very clear that they were taking unilateral action to limit/harass imports from Canada because of the alleged inability of the U.S. federal authorities to resolve a number of outstanding bilateral agricultural trade irritants with Canada. Problems cited included Canadian import health requirements for grain and live cattle, difficulties in shipping U.S. grain to Canadian country elevators, and perceptions that there were significant differences in the permitted use of veterinary drugs.
Like the 1984 situation, the state actions in 1998 occurred at a time of heightened trade tensions with imports of live cattle from Canada being blamed for the cyclical downturn in U.S. cattle prices and widespread perceptions that it was easier for Canadians to ship live cattle and grain to the U.S. than vice versa.

Although Canada urged the U.S. administration to overturn the state actions in the courts, Washington declined and instead concentrated all its efforts on negotiating a Record Of Understanding (R.O.U.) with Canada, aimed at providing a visible response to the political concerns of the states.

Since the implementation of the R.O.U. in December 1998, there has been a market improvement in the cross-border trading environment. Concrete progress has been made in resolving a number of cross border technical barrier irritants and there is now a network of ongoing bilateral consultative mechanisms at the federal, provincial/state and producer levels. In particular, the provincial/state advisory group to the two federal governments has been very useful in improving the flow of information and dispelling some of the myths at the sub-national level.

While agricultural trade tensions in the prairies have declined appreciably in recent years, Canada remains concerned that state legislators, particularly in North Dakota, continue to pass health and safety legislation which could, depending on how the implementing regulations are drafted, put the U.S. in breach of its North American Free Trade Agreement (NAFTA) and or World Trade Organization (WTO) obligations under the respective sanitary and phytosanitary provisions. This concern appears to be shared by Washington, which has conveyed its misgivings to North Dakota.

III. CONCLUDING COMMENTS

The potential for sub-national governments to limit or harass imports through the guise of health and safety concerns or other technical regulation pretenses is a worrying addition to the myriad of other problems with plague global agricultural trade. While North America, through the Canada/U.S. Free Trade Agreement and subsequently through NAFTA, can be justifiably proud of the progress made in dismantling conventional barriers to agricultural trade, the seeming ability of sub-national governments to usurp federal trade and commerce powers without challenge does not auger well for the future. To-date the number of abuses have been relatively small and, seen against the backdrop of the billions of dollars of trade which move unhin-
dered, may be regarded by some as not being of too much consequence. However, I do not believe such complacency is sustainable. Do we really want to see a standard scenario develop whereby every time there is a state or provincial election or some state or provincial politician runs for federal office and this coincides with low farm prices, the perceived way to win the farm vote is to use state or provincial technical regulations as a disguised barrier to trade? Recent experience suggests that this is not as far-fetched as one might first believe.

I am the first to agree that cross-border irritants should be quickly identified and resolved expeditiously by the two federal governments and that the longer they are allowed to fester the greater the likelihood they will become politicized and become a political football, with unpredictable results. Thus, the onus is squarely on the national governments to deal with minor trade irritants before they become major trade problems. However, I am equally convinced that illegal actions should not go unchallenged and that federal governments should not be reluctant to use the courts to force sub-national governments to cease and desist when they abuse their right to apply health and safety regulations and instead use such measures as disguised or, more often than not, blatant trade barriers.

I would like to hope that the worst is now behind us. The 1998 Canada/U.S. Record Of Understanding appears to be working well and the provinces and states are now more knowledgeable about the complexities of bilateral agricultural trade. However, the past suggests that we should not become complacent and that national and sub-national governments will need to continue to pay close attention if the rule of law is to prevail over political expediency.