Discussion Following the Speech of Mr. Brosch and Mr. McLandress

Discussion

Follow this and additional works at: https://scholarlycommons.law.case.edu/cuslj

Part of the Transnational Law Commons

Recommended Citation
Discussion, Discussion Following the Speech of Mr. Brosch and Mr. McLandress, 31 Can.-U.S. L.J. 125 (2005)
Available at: https://scholarlycommons.law.case.edu/cuslj/vol31/iss/22

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
MR. SMITH: Thank you very much, Jim. Just before we get to questions, I might make a couple of observations from my past—well, past history. I used to be involved very heavily in defending the constitutional validity of farm marketing schemes, and I just wanted to point out that in Eastern Canada, the problem is—relates to supply management.

In the dairy and poultry, turkey industries, there the supply management issue has been on the table for quite a while. And it looks to a great number of people that the defense of supply management for those industries is probably eventually going to fail, maybe sooner rather than later.

And so there is a difference from a sense between Eastern Canada and Western Canada in that respect, and it is worthwhile keeping in mind, however, that basic to both systems, I suppose, is a history of an attempt to support the farming community, which is shrinking ever more quickly as we move along, both in Canada and the United States.

Second point that I would like to make just before we get to questions is that we sit here and talk about these issues in terms of trade and economics and law. There is a human issue beyond all this, and I say this from personal experience. I went to visit my neighbor a couple nights ago, and he has taken hay off part of our land for quite a number of years. A year ago, his loan was called by the bank. He was operating a system where he purchased and raised heifers for export to the United States and, I think, Mexico eventually. He had at any one time eleven or twelve hundred head of cattle.

He had closed down his dairy operation. With the advent of BSE, he could no longer sell. He was a specialized operator in a pretty good way, but that event, in effect, caused him to first of all go into neutral.

He couldn't make any money and would eventually lose money. The bank eventually called his loan. He had to sell everything except his home, house, and a few acres around it. He had to eventually destroy his farm buildings because he couldn't—under municipal law, he couldn't sell or take—there couldn't be a severance with those buildings. And that's a very human thing. And it is occurring not just with respect to BSE, but it occurs with respect to other events, which are provoked internationally as well as nationally.

And I think we tend to forget the human element and frequently the human cost in talking about the economies of scale, if you will, or whether a certain system is better than some other system in terms of the marketing of agricultural products.

With that, I will open the floor to questions. I am going to point to you because I have been asked that each individual speaker identify themselves.
for the purposes of the record, and I am not going to start out by making mistakes with names.

So just raise your hand. I will point to you, and then give your name.

DR. KING: Henry King.

(Laughter.)

MR. SMITH: I didn't point to you, Henry.

DR. KING: I used to work for the Bunge Corporation, and I can tell you it is a nerve-wracking business. You have a few companies that trade in this area. Is there anything that can be done in terms of accommodation with these companies to try to lessen this trade friction? You know, you got Cargill, Lavelle, Bunge. What can they do? Is there anything that can be done on that end?

MR. McLANDRESS: If I might, our dispute is not with Cargill, Conagra, Bunge. Those are our competitors and the competition is fierce. They are actually also, in the U.S. some of our biggest customers on the milling side. Our disputes really come out of the farming community, primarily in North Dakota, and I wouldn't even say it is necessarily all broad-based in the farming community. It is the North Dakota Wheat Commission. It is special interest groups in North Dakota that are driving it. We don't compete with the U.S. farmers. However, I don't think we are going to get any help out of Cargill because if I were them and watching a competitor struggle, I am not sure I would throw them a life belt, but the dispute is not really with them.

MR. SMITH: Michael Robinson.

MR. ROBINSON: I had thought that Jim Peterson in Geneva virtually gave up supply management. In a statement, when he got home, he said I think it was 148 to 1, and I think when I was talking to Jim later, I said, well, they all voted block in that part of the world anyway so what the heck can they expect? But is that not accurate, that we are, in effect, committed to dump supply management, not the Wheat Board, of course, but in principle?

MR. McLANDRESS: The 147 to 1 was with respect to the provision up there relating to exporting STE's, so that's not supply management. That was related to the CWB, and my view is, it was not 147 to 1. It was 2 to 1 - the U.S. and EU vs. Canada - and the other 143 just didn't care because it is not an issue for them.

MR. BROSCH: But you are accurate about supply management. It used to be in the GATT article 11, 2(c), allowed an exception to the general rule under the GATT against quantitative restrictions. And essentially, it said you could maintain quantitative restrictions, strict quotas at your borders if you maintained supply management. Article IV, 2 of the agricultural agreement, and the footnote to that agreement essentially overrides that provision in agriculture.

So for agricultural goods under international rules with no longer - the footnote says you can't maintain quantitative restrictions of any sort. So sup-
supply management is no longer a justification for the imposition of quotas. Everybody has to be on a tariff only basis.

What Canada did was, it said okay. We will tariff it and took those couple of sectors, essentially poultry and dairy, and essentially converted those quotas into essentially tariff rate quotas with very high out-of-quota rates.

MR. ROBINSON: 314.

MR. BROSCH: Exactly. And I will say this — and Canadians don't like to hear this — but I think it was one of the biggest mistakes Canada made in the context of the relationship because it is constantly being pointed out as an example of Canada not living up to the spirit of an agreement, and it is a thorn in the side. I think it was an unfortunate situation.

MR. JENSEN: Didn't the U.S. have tariff quotas they quantified that way?

MR. BROSCH: Pardon me?

MR. JENSEN: Didn't the U.S. have its own import quotas on different things, agriculture, that they had to terminate and quantify the tariff, as did a lot of other countries?

MR. BROSCH: Yes, yes, yes. But when we entered into a Free Trade Agreement with Canada, Canada still received Free Trade Treatment on all those products, whether we have tariff rate quotas with respect to anybody else or not. That's the difference.

Identify yourself at the end if you don't mind.

MR. JENSEN: Gordon Jenson.

But NAFTA came into effect before the old agreements.

MR. BROSCH: Well, you know, here is an example of that thing we had this morning where people said the United States is obsessed with a lot of technicalities and doesn't live up to the spirit of the agreement. I think this is the feeling on the part — I am just telling you what the feeling on the part of people in agriculture is in the United States — that with respect to this issue, this is where Canada hid behind a bunch of technicalities and didn't live up to the spirit of a free trade agreement. I just tell you that that is a feeling across U.S. agriculture. Whether you agree or not, it is something that sticks in the craw of the relationship.

MR. SMITH: Larry.

MR. HERMAN: Larry Herman. The issue of supply management is a difficult one for Canada. There have been a lot of Canadian analysts saying that it is as a system essentially harmful to the Canadian economy, harmful to consumers. It affects choice; it affects price, et cetera.

The critical issue on supply management is whether there are any allies in the WTO on that issue, and apparently, Canada has very few allies, which may indicate the international acceptance or not of a supply managed system.

Now, with respect to the Wheat Board, I think you are right; the U.S. may have out-negotiated Canada on that issue. But let me just put it in context,
because I was on a conference call on July 31st, 2004, when the framework agreement was at the eleventh hour in Geneva.

The framework agreement is a long detailed agreement for continuing negotiations in Doha. And there are a lot of provisions; 150 provisions in the framework agreement. And there is one reference to STEs. In my view, it would not have been in Canadian interests to not agree to a consensus document on the basis of this one line in paragraph 18.

Now, on paragraph 18, note that it says trade distorting practices with respect to STEs. The obvious point — you have raised it in your presentation — if Canada has to negotiate on the basis of this language, the first line of defense is to show that STE, i.e., the Wheat Board doesn’t engage in trade distorting practices, and that is fundamentally a matter of economics.

So it seems to me there are a lot of arguments there that can be used in the context of the negotiations. Would you have any comment on that?

MR. McLANDRESS: I take your point. I mean, it is one line or one section out of a significant agreement. I wouldn’t have expected — I mean, I suppose I would be pleased as general counsel of the Wheat Board (though I’m not sure how I would feel as a Canadian citizen) — if Canada had simply bailed on the whole framework on the basis of that. But, that’s not Canada’s style. We are a trading nation. That’s what we will always be. So it is not surprising. It is certainly disappointing. And from where we sit, it has a particular bite. We are the one whose ox is being gored so we will do the complaining about it.

But you are right, in terms of the rest of the approach, absolutely. It is trade distorting practices, and that has been the line both of the Wheat Board and Canada all along. Show us where there is a problem and we will fix the problem. But, I think what we find — and the farmers we represent — find is that it gets so frustrating that the facts don’t seem to matter, and it is all really driven by politics. It just kind of wears thin after a while.

So that’s the difficulty we are in right now. But I appreciate all of your comments. You are right. We are just getting cynical. Logic doesn’t seem to matter and, you know, it doesn’t matter what the words of the document say and the correctness of our position and Canada’s position. That’s the problem.

MR. BROSCH: You know, the Canadian Wheat Board issue in the United States is sort of akin to the Cuban issue that we were discussing earlier in the sense that it is all being driven — I mean, there is no, you know, hue and cry across the United States about the Canadian Wheat Board. It is being driven by people in North Dakota, the Wheat Commission in North Dakota and Senator Dorgan who is the only guy I know who I don’t think even likes Shania Twain, you know. I know where she is from, but she is Canadian.

But they just have this thing, and it is sort of like the Miami-Cuban group who keep the Cuban sanctions issues alive and well. But it is not one of these
things that people have a great passion for anywhere else. Indeed, when I was in the general counsel’s office at the Department of Agriculture, we used to have this thing about barley, too, about the Canadian Wheat Board controlling barley and how unfair it was, and we had these barley guys.

Finally, the Canadian Wheat Board said at one point in time we are out of the barley business, and I was in general counsel’s office. I must have had 40 letters within the next two months from farmers saying it is unfair for the Canadian Wheat Board to get out of the barley business, all that barley.

Now that they are not going to be shipping it out, all of it is going to come across the border into the United States. It is all going to be on the Burlington, and we don’t want to be standing behind Canadian trucks as they unload old barley. You know, I have always said, if you get rid of the Canadian Wheat Board – I mean, I am not going to get involved in the merits of whether it is fair or unfair – but if you do so, where do you think that wheat is going to go?

The Canadian Wheat Board is shipping it east and west out of the lakes and Vancouver. Where do you think that wheat is going to go? All those Canadian farmers live within about 60 miles of your border.

In fact, when we did have that situation where there was a point in time where a couple years ago where suddenly it – there became an incentive for a number of people to bring their trucks across. We had a major incident in the United States as a result of that because all of a sudden farmers going to the elevators were seeing Canadian trucks.

So it really is an issue that is motivated by a very small group. Unfortunately, what you have got, you have two very, very powerful senators right now from North Dakota, who are both behind it, including the guy who is the head of the budget committee or the ranking member of the budget committee.

If the Democrats come back and take power in the Senate, he will be the chairman, Senator Conrad. And so you have got two guys who really keep beating this drum, and someone can make a lot more political noise than this issue is really worth for the rest of the people in the United States.

MR. CUNNINGHAM: I just want to add one comment to that.

MR. SMITH: Introduce yourself, Dick.

MR. CUNNINGHAM: I am Dick Cunningham.

MR. SMITH: The guy in the red sweater.

MR. CUNNINGHAM: I want to ask Kevin a question I’m sure he hadn’t thought of. The Wheat Board thing, what Kevin just said – really pay attention to what Kevin said at the end there – and think about it from the standpoint of a Senator. A Senator can do something that his constituency lusts after, that they want, and it doesn’t cost him any budgetary monies. It doesn’t cost him anything in the way of chits in the United States for other legislation.
It is a way to keep his constituency happy by going after the Wheat Board, regardless of whether that is, in fact, the cause of the problem. I always say the Wheat Board dispute is sort of like the guy who loses his coin on a dark street, and he goes over to look for it on the other side of the street because the light is better over there.

(Laughter.)

MR. CUNNINGHAM: But anyway, I wanted to ask Kevin a question he hadn't thought of.

Kevin, why don't free trade agreements work in agriculture?

MR. BROSCH: Oh, gee, Dick, I am surprised you asked that question.

Well, when — I mean, as I mentioned to you — the whole purpose of I think the Regan-based policy was to try to realign U.S. agricultural domestic policy with what we were doing internationally, and it really has three components. We are talking about export subsidies, about domestic support, and about market openings or market access. You can't deal with those first two issues, export subsidies and production subsidies, around the world unless you have got the major players in the room.

And in free trade agreements, we don't have the European Union in the room. For the United States, in order to solve those particular problems, in order to say we are not going to use export subsidies, we are going to lower our domestic support — in order for us to do that, politically, we have to do that multilaterally because we have to get the Europeans in there, too. They are the big targets. And they are not in those discussions.

When we want to talk about export subsidies, believe it or not we have got to have Canada in the room because the Wheat Board and STEs is connected to that issue and several other people. They are not all in the room in this little thing so all we are really talking about is limited market access issues with respect to a lot of these things.

For the most part, these markets are not that interesting to agriculture. I have been involved in CAFTA, have been very much for the poultry industry in the United States. We are talking about access right now, for example, for us in all the six NAFTA countries of about 25 or 26,000 tons of chicken leg quarters a year. That's what we are looking at.

We ship over a million tons to Russia alone. We ship over 3.3 million tons in export totally. So when you are saying, well, here is another 25,000 tons, that just doesn't move the needle in terms of what we really want to do. But we have been very involved in this, and we have been, in fact, out front in this. Why? Because our industry is interested in supporting trade liberalization in general.

Frankly, we don't have much to gain here, and we are using a lot of political chits. For example, we are spending a tremendous amount of effort to get Congressmen to vote for CAFTA, even though it is not going to be a very
significant economic issue for our industry. Why? Because, well, we want to be able to support the general trade agenda.

But when you go and do this with respect to Morocco where we are never going to get any product in because even if they do open it, they are going to buy it from Europe or some of these other countries who may buy it from Brazil, or wherever, or Australia who is ten thousand miles away, and we are never going to ship any.

After a while, you have to say, what are we doing this for? We are doing it more for the theory and everything. The real interest in American agriculture is not these free trade agreements, especially when you are talking about places where, you know, it is very clear, most of these agreements that have come up in the last couple of years aren’t free trade agreements.

Frankly, you know, Morocco is not a free trade agreement; it is a political trade and development. It is the hope of this Administration to get a foot hold into the Islamic world through Morocco, which is the closest and potentially the most friendly, but it doesn’t really have any real long-term economic value – certainly not for U.S. agriculture – but we are supportive of these efforts.

But the focus has been on those kinds of efforts, and there are a lot of people saying why isn’t that focus more attuned towards things where we really could have some gain, some promise, which is the multilateral process? For U.S. agriculture, that’s where it is at.

The other problem we have is that every one of these issues chips away at the open sore in American agricultural trade, which is the sugar issue. You know, we get very little gain in terms of what we are already doing down in Central America or marginal gain, but we are willing to do that. But in order to do that, we have got to open the market to some sugar, and the sugar guys have said no, we are not going to do it. And it is an easier platform for the sugar people to resist liberalization because there is just not that much interest in it at all. So who is going to go to war with the sugar guys over Honduras? Nobody.

And they are essentially doing a great job of resisting this agreement. If CAFTA doesn’t pass, they probably can get most of the credit for that. The sugar industry is basically then setting a precedent. And I am not sure it is a good precedent in terms of future trade agreements. They are basically saying we have decided not another pound of sugar, and believe me, the United States will never negotiate another trade agreement of any significance if there is no way in the world sugar access is provided and the basic sugar program.

So I can probably mention eight other reasons why free trade agreements aren’t that great for agriculture, but that’s enough, I think.

MR. McILROY: Thank you. My name is Jim McIlroy, and I have a question regarding the Canadian Wheat Board – actually a couple of questions. It
is very controversial, both domestically within Canada – I am going to have a question about the domestic controversy as well as the International controversy that Larry Herman just raised. There is no secret that the premier of Alberta is not a big fan of the Canadian Wheat Board. In the Globe and Mail, every once in a while we see these stories about renegade farmers going to court or going to jail, whatever.

My first question is: You said that a majority of Canadian farmers support it, and to me a majority is somewhere between 51 percent and 99 percent. I was wondering if you could give us a better idea of how much domestic opposition there is to the Canadian Wheat Board.

And then my second question relates to internationally, right after that framework was concluded, our trade minister and agriculture minister jointly published an article in the National Post, and, I will just quote, they said, “but despite hours of intense efforts on the most hard fought issue in the agriculture negotiations, some provisions related to exports state trade go further than Canada would have liked.”

And I guess what my question is: Which of the provisions would have gone further than Canada would have liked? Which of the provisions are the ones Canada is most worried about, particularly in light of what Larry raised? In that to me, the preface of section 18 of the Doha framework agreement where it is only trade distorting practices, if you are clean, what’s the concern? I mean, if you don’t have trade distorting practices there should be no concern. So those are my two questions.

Thank you very much.

MR. McLANDRESS: Okay. The first one, on the issue of domestic support, we just completed our latest producer survey. I haven’t seen the numbers, but they are in the neighborhood of 75 percent and climbing, supportive.

Just as a bit of background: It used to be back in – I guess, say, starting in 1947, the existence of the single desk had a five-year sunset review. So every five years the act would have to be re-passed by Parliament. What that meant is that every five years, which would basically coincide with Canadian elections, you’d have a debate in Western Canada among farmers as to whether this thing was a good idea, whether it was still working for them. And it was always resoundingly passed for years – I’m not even sure – there must have been somebody that voted against it, but not very many, so it was always passed with resounding majority. And somewhere in the 1970s some bright light thought, well, this is sort of a waste of time, and they just made it permanent.

The downside – that probably would have been the early ‘70s – the debate disappeared. People stopped talking about it, and it became an imposed institution from on high in Ottawa, which in Western Canada is never a good thing. And so the debate died out. And what people found were just more
things to complain about. And a lot of them were well-founded things to complain about in terms of it [the CWB] being stuck in its ways and things like that and losing a farmer focus.

So that’s where that governance reform came in, that came into effect January 1, ’99, to shift the company back to farmer control. So every two years there is an election of five of the elected directors. And the issues – maybe this past election was the first one where really the single desk issue wasn’t front-and-center, the biggest, basically the only issue. That usually has been the issue in every one of the elections in terms of which directors are getting elected.

It is only the last one where other issues, important issues started to come up. So with the resurgence of that debate, the support among farmers has gone up, and it is still climbing. We will never get 100 percent. It is impossible to get 100 percent on that sort of thing, but the move is that if farmers decide they have had enough of us, that’s for them to control.

Legally, it is up to the Parliament of Canada to pass the legislation that would make us disappear, but I can’t conceive of them disagreeing with the will of Western Canadian farmers.

And on your second question –

MR. BROSCH: What don’t you like about the –

MR. McLANDRESS: Oh, yeah, in terms of the agreement, I suspect it is going to be two things: basically conceding the loss of the guarantees, that’s now a given. No matter what comes out of the agreement on the other side, that would have to be one of them. That’s certainly a concern from our perspective, although that would have potentially good budgetary benefits for the Government of Canada. So we don’t like it. I am not sure how they would feel.

Really it is the second line, the last sentence, rather, the fact that future use of monopoly powers is to be discussed, is the issue which would – where Canada was concerned... Earlier drafts didn’t have that in. There were all sorts of iterations back and forth, but that’s the one. I’m sure that’s the most pointed reference in that statement.

DR. KING: You have to cut it off.

MR. SMITH: I am getting signs, and now I’ve heard from Henry.

MR. BROSCH: Can I make one point, Professor?

DR. KING: Sure.

MR. BROSCH: I think one of the things asked earlier – talk about the culture and the difference between Canada and cooperative institutions in the United States that you think has less. Actually, we don’t. We have lots of cooperative institutions. We have marketing boards. We have lots of co-ops but not in the grains area because there was a decision that when they formulated the support price program – which covers the eight major grains: cotton, corn, barley, wheat, rice, and so forth – those people who received gov-
ernment support had to give up the ability to operate cooperatively. That's by law.

So it was a decision that you either are part of the support – the government mechanism, or you can operate cooperatively but not both. And so the wheat guys and the barley guys made the decision to get into this thing years ago, and that was essentially to accommodate the other interest, which was the grain companies.

They said, you know, if you are both going to get support and you are going to be cooperatives. We can't tolerate that. So this is the problem. There are a lot of people out on the Great Plains in North Dakota who would like to be in a cooperative situation, but they can't. And so that's part of the burr under the saddle there.

MR. SMITH: Being the burr under the saddle here and having Henry on my back, I have to cut it off. I want to thank on your behalf Jim and Kevin. The only regret I have is that we had BSE this morning. We have had no BSE this afternoon, but maybe later on, I don't know. So thank you very much, and we are adjourned until – you have shut me up, Henry. So thank you very much.

(Session concluded.)