Discussion Following the Remarks of Mr. Brosch and Mr. Gifford

Discussion
 QUESTION, MR. BARRETT: Thanks to both our speakers. What has been the impact of the Canada/U.S. Trade Agreement and the North American Free Trade Agreement (NAFTA) on the actual volume and nature of agricultural trade in the area? What is the continuing effect on trade of the subsidiary programs that continue to exist at least in the two northern countries in agriculture? Is there any consensus among economists as to what should be the proper level of government support of agriculture in order to keep a viable agricultural sector, at the same time having reasonable costs and promoting free trade?

 ANSWER, MR. BROSCH: To answer your first question, NAFTA, with respect to the United States and Canada, did not change the basic rules of agriculture trade between the countries. Those had already been established earlier in the U.S./Canada Free Trade Agreement. There is a tremendous amount of trade between the United States and Canada. There has been liberalization of trade. There has been lowering of borders. But that goes back even well beyond NAFTA.

 With respect to the United States, the NAFTA is really not a single deal in agriculture, it is three, two-way deals. There is the pre-existing U.S./Canada agreement under the Virus Serum Toxin Act (VSTA). There is a particular agreement that the U.S. negotiated with Mexico during the NAFTA negotiations and there is an agreement that Canada made with Mexico.

 With respect to trade between the United States and Mexico, there has been a tremendous liberalization along the border. The U.S. has been shipping a lot more grain, meat, processed products and things like that into Mexico. Mexico has been shipping a lot more winter vegetables, tomatoes, and that kind of thing north. This has caused some problems like the one we saw in Florida a couple of years ago. There is going to be, naturally, some displacement, because, frankly, during the winter Mexicans are much more efficient tomato producers than the folks in Florida. That is the way it is.

 To answer your second question, the level of subsidies in the U.S. is increasingly becoming an issue. The level of subsidies is not just an issue with respect to our international relations; it is the big issue that is going to be facing the farm sector and members of committees in Congress for the next two years because we are going to have to rewrite the farm legislation. Subsidiary levels that have gone down significantly in the U.S. are on the
way back up, and we are now hitting some fairly record levels. That is a very, very difficult question. The last four years in a row, Congress has passed an emergency package in the middle of the summer with increasing amounts of money, and the United States is going to find itself increasingly under pressure from other countries to affect some kind of reform. I believe that there will be at least the beginnings of reform affected in this Farm Bill, because I think that farmers and members of Congress are realizing we have got to do that for our own.

To answer your third question, I think what Congress agreed on is that the lower the level of subsidiary, the better. One of the crucial issues is the form in which subsidiary money is delivered. That was an issue in the 1996 Farm Bill of the U.S. I thought the U.S. made a very good move to try to separate its current support for farmers from production. However, the U.S. has retreated from that position in the last couple years. I think there is going to be a move to say, "If we are going to support farmers then we going to support farmers incomes. However, we are not going to support particular prices. We are not going to pay farmers to grow particular things. That distorts the market too much."

ANSWER, MR. GIFFORD: To answer your first question, in terms of impact on the Free Trade Agreement on Canadian and U.S. agricultural trade, it has been phenomenally successful. Virtually every year since 1989 both countries have seen their agriculture exports increase by roughly ten percent per year.

To answer your second question, in terms of subsidies, this is seen certainly by those countries that do not have the financial wherewithal like Washington or Brussels, as being one of the major problems of agriculture trade. Although we made a big move in the Uruguay Round to try and distinguish between the so-called trade-distorting government support, compared to less trade-distorting support, the reality, unfortunately, is that, to the producer on the ground, he does not care what kind of support is being given to producers. All the producer knows is the producer across the line is receiving more money from his federal government than he is getting from his federal government and that is becoming more and more of a problem. Even though we have made a lot of progress in North American and Europe in moving toward less trade distorting forms of government support, at the end of the day there is still an impact on risk and on wealth and even these so-called decoupled programs can have an impact on long-term production.

To answer your third question, in terms of the consensus amongst economists, well, that is a contradiction in terms; there is never a consensus amongst economists. There again, it is the politics of agriculture. Governments draw a distinction between negotiating border measures. They
draw a distinction between whether import barriers and export-assistance programs. They reluctantly acknowledge that the international community has a legitimate right to try and reduce these distortions. However, when it comes to providing domestic support, which is extremely difficult to do politically, particularly if the program is characterized as less trade distorting than the old-style commodity programs. I think the consensus about support is going to be basically a domestic, political determination. Whether or not the agriculture lobbies in Europe, the U.S., Canada or Mexico get X-number of dollars will depend on its capability to influence the domestic political masters.

QUESTION, MR. MACH: I have a question about private access to the courts for preemption of state initiatives that might interfere with trade. Who has access to the courts? I am wondering if you can comment upon who might have access to the courts for that sort of recourse. Will Canadian federal governments, provincial governments; Canadian exporters or Canadian truckers have that sort of recourse? Must a U.S. private interest be affected and must this U.S. private interest take the action to court?

ANSWER, MR. BROSCH: Well, if a Canadian trucker driving across the country and somebody stopped him in South Dakota, then he is an injured party in this country and he has access to the courts in the U.S. I assume trucking associations or commercial associations that have interest in pursuing their particular injury have brought these kinds of actions. One of the things that you want to do is to be able to demonstrate to the court that you have a recognizable injury that needs a remedy and that there has been unfair interference with an active business in the U.S. Then you have access to the courts in the U.S. The appropriate role for the Canadian government is to ask for redress where its rights vis-a-vis the U.S. are concerned in NAFTA or in the World Trade Organization (WTO), if that is appropriate. That is, of course, what Canada did indicate, it made an immediate request for consultations in the case in 1998.

COMMENT, MR. MACH: In the situation in 1998, what advice Canada seemed to be getting was that Canada could attempt to take this court action, but action was dependent upon a U.S. interest being directly affected. The problem Canada had was that U.S. interests directly affected did not want to be in the situation in which they would have to take on the farm community in their state. For example, a U.S. slaughterhouse did not want to take a court action in their state and be seen as taking action against their cattle producers, but Canadian cattle producers without a presence in the United States did not seem to be able to access to court system. Canadian cattle producers are caught. Apparently, there was a domestic remedy but no way of diminishing the problem.
COMMENT, MR. BROSCH: I think you have to have some presence in the United States, some relationship to the incident. The other issue that was raised in 1998 was the issue of what remedy was available. I think what was initially on peoples' mind is they wanted to get a restraining order, to be done with the problem quickly and to go on with life. A lot of people, apparently, were advised it would be difficult in certain circumstances to meet the irreparable harm standard that you need to get that kind of relief. I cannot assess that.

What I was really trying to address was the more immediate question that came out of the Duke Law Review, the question whether or not private parties in total were precluded from making a challenge because of this particular provision of NAFTA, which seemed to me to be an odd idea for reasons I stated. That is really the particular issue. It is hard for me in the abstract to talk about these issues of particular people's standards.

QUESTION, MR. KING: I have a question concerning state health and safety standards. You mentioned these as possible trade barriers. How do you decide whether the state standard is an artificial restriction, protectionist in nature, or whether it is actually something that is justified?

ANSWER, MR. GIFFORD: Under the U.S. system you have federal regulation protecting U.S. plant and animal health. For a state to unilaterally say that they require certification, for example, that wheat coming from Canada is free from Karnal bunt, when Canada is one of the few countries in the world that is free from Karnal bunt, is, basically, a blatant attempt to use an alleged health and safety issue for trade reasons. Although the provinces and the states do have health and safety regulations and legislation, both national governments also have a system, and, basically, by in large, the states and the provinces accept that the national standard is the respective federal standard. Although you are quite right, scientists can always disagree on an issue, the onus is certainly on the state or the provinces, if they try to allege that there is a problem when their respective federal systems says there is not a problem.

ANSWER, MR. BROSCH: I think, you are going to see a lot more of this issue right now with the Foot and Mouth Disease (FMD) crisis in Europe.

Let me just explain to you shortly what the federal system in Canada. Canada has a very similar system to ensure plant health and animal health. Canada has a group of scientists who are constantly watching the movement of disease around the world. When somebody wants to bring a product into Canada and this product has never been imported before, they have to go to this agency and they have to go through what is called a pest-risk profile. They have with to establish a profile of any diseases or pests that might
affect this product, and they have to get all the data on this, and the scientists look at the study and try the analyze whether this pest is already present or the disease is already present in the United States and Canada, and whether it presents a risk. If it does present a risk scientists determine, what kind of risk is presented and whether that risk can be ameliorated or mitigated by some intervening factor to make it safe for importation.

For example, FMD is one of the most widely studied, well known diseases. FMD is on the Office International des Epizooties' (OIE) Disease A List, which contains the diseases the OIE is watching most closely. This is not an area where you are going to find, in most cases, a scientist coming in from one country, having a radically different point of view than a scientist from another. Most of the time scientists are reading the same journals and studying the same scientific material and exchanging data all the time. There is constant exchange of data between Canada and the United States, because roughly our pest-risk profile, our status in the United States and Canada are very, very similar, probably closer than just about any two countries in the world. These are very, very well known factors. I think that is why Mr. Gifford is particularly annoyed, if I can use that word, with the situation on potatoes, because I think it is Canada's view, and I have heard the Canadian representatives say this, that this is a fairly well known situation, that this is a fairly well known disease affecting potatoes, and there should not be the kind of scientific dispute that, apparently, there is at this point in time. I think that the agencies are working this out and I would expect to see within the next couple of weeks a resolution on the potato issue.

COMMENT, MR. ABRAHAMS: Just one comment for Mr. Brosch. Did you say that in the Duke Law Review article an individual under NAFTA could not sue a government? The reason I am asking is because I wanted to bring this case to your attention, Pope and Talbot. In this case an U.S. company sued the Canadian government under NAFTA, and it reads that there is a clause in NAFTA that allows companies to challenge the governments of the United States, Mexico, and Canada if export opportunities are lost for reasons that have nothing to do with normal commerce. I like that language.

COMMENT, MR. BROSCH: The section I was looking at was 102(b). This was an article about the state and provincial relationship with the federal government under NAFTA.

Basically, what this guy was saying was, "Well, pay attention to Section 102(b) because it says that no state law or application thereof can be declared invalid as to any person or circumstance on the ground that provision or application is inconsistent with NAFTA except in an action brought by the
U.S." He was saying, "Oh, my goodness, they are depriving private litigants of the ability to challenge NAFTA."

The point I was trying to make is, in most of these cases, especially in the area that we are talking about here, agriculture, if you are a smart lawyer and if you are a smart litigant, then you are not going to challenge this on the basis of NAFTA, you are going to challenge it on the basis what the state is doing is preempted by the federal regulatory scheme for all the reasons that Mr. Schaefer and a number of others have discussed today.

COMMENT, MR. ROBINSON: Pope and Talbot the special case of Chapter 11 investment protection, which does give the private party the right to sue the U.S. or Canadian government under NAFTA if export opportunities are lost for reasons that have nothing to do with normal commerce.

COMMENT, MR. MACH: One aspect of the discussion with respect to the agricultural trade irritants is the election that was occurred at these times. From a Canadian perspective, it was very unfortunate that this dispute arose and disrupted trade. A lot of commerce, a lot of beef producers, grain producers and other producers lost six or eight weeks of business and went through untold amounts of financial and other logistical headaches associated with all this, in terms of having their contracts disrupted. Canada was and essentially being told this is part of the U.S. election process. Although this has not occurred since 1998, the agricultural community has been led to believe that this is something that would normally be expected to happen and not to be surprised by it.

COMMENT, MR. BROSCH: Let me explain why I do not think this is going to be a consistent problem. Ask yourself why this did not occur again in 2000. One of the answers may be that South Dakota, North Dakota and Montana have Republican governors and you have a Republican President in the Whitehouse today. For example, do you really think there is going to be a Florida action? You know who the governor of Florida is? Do you think there is going to be a Florida action to put the Bush administration in that position anymore? I do not think that is very likely. These were not political wins. People do dumb things during elections, but, hopefully, people also learn from these experiences. I think it is good thing we did not have a repeat of this in the 2000 election. I think that one of the answers may be some of the work that was done between 1998 and 2000 between the United States and Canada. The administration did not drag people to court. I am not sure that a court case would have resolved the dispute any faster than negotiations did. Do you think if the federal government had decided to make a martyr out of these state governors and take them to court, that this
would have been resolved any quicker or any more effectively? I am not so sure.

COMMENT, MR. TENNANT: Just one other comment in terms of the management of these problems that do emanate from governors of states or other state-level people taking actions even though they may be arguably beyond their jurisdiction in managing them and dealing with them, there certainly is a role for provincial premiers and provincial governments to build relationships with their state counterparts and, in fact, apart from agriculture, I think this is an aspect to be considered in all of these situations across the Canadian/U.S. border, that by building relationships at the sub-national level, it helps in managing problems that even may, in certain respects, be beyond their jurisdiction.

Since 1998, there have been initiatives to use governors meetings to get a better level of understanding of what is going on in the two countries, which helps avoid, in some cases, future problems, of this type of dimension is certainly, as a practical matter, an area that needs to be emphasized as helpful to management.

COMMENT, MR. BARRETT: Thanks to both of our speakers, Mr. Brosch and Mr. Gifford.