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NAFTA's Underdeveloped Institutions: Did They Contribute to the BSE Crisis?



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INTRODUCTION

To receive official sanction from the World Trade Organization (WTO), regional trade agreements such as the North American Free Trade Agreement (NAFTA) are expected to lead to the removal of substantially all formal trade barriers. In NAFTA, this has meant the removal of tariffs, import quotas, and tariff rate quotas from all but a few sensitive agricultural products.² The removal of formal barriers to trade, however, means that regulatory differences that have developed in isolation, in individual countries, behind the formal barriers can become inhibitors of international transactions and trade. These unintentional barriers to trade can become sources of friction among members of regional trade agreements and, in some cases, lead to full blown international crises between trading partners that normally have good trade relations. Lowering formal trade barriers often leads to predictable consequences pertaining to regulatory disharmony that should be anticipated and dealt with by trade negotiators.

DID THE NAFTA NEGOTIATORS ANTICIPATE THE RISKS ASSOCIATED WITH INCOMPLETE INSTITUTIONS?

The negotiators of the NAFTA, and the Canada-US Trade Agreement (CUSTA) that preceded it, did anticipate the need for institutional arrangements to address regulatory disharmony. Negotiators hoped these arrangements would mitigate the trade difficulties associated

¹ The assistance of Laura J. Loppacher of the Estey Centre for Law and Economics in International Trade, Saskatoon, Canada is gratefully acknowledged.

² In agriculture, for example the US retains formal barriers to sugar and dairy imports while Canada maintains them for dairy and poultry imports.

with independent regulatory development prior to the signing of the agreement and reduce the incidence of regulatory divergence in the future. Written into the NAFTA treaty under Article 906: Compatibility and Equivalence was:

1. Recognizing the crucial role of standards-related measures in achieving legitimate objectives, the Parties shall, in accordance with this Chapter, *work jointly* to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers.
2. Without reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers, without prejudice to the rights of any Party under this Chapter, and taking into account international standardization activities, *the Parties shall, to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties.*
3. Further to Articles 902 and 905, *a Party shall, on request of another Party, seek, through appropriate measures, to promote the compatibility of a specific standard or conformity assessment procedure that is maintained in its territory with the standards or conformity assessment procedures maintained in the territory of the other Party* (emphasis added).

Further, under Article 913: Committee on Standards-Related Measures, to both assist in harmonizing existing regulations and to foster regulatory harmonization subsequent to the NAFTA coming into force:

1. The Parties hereby establish a Committee on Standards-Related Measures, comprising representatives of each Party. ...
5. Further to paragraph 4, the Committee shall establish:
 - (a) the following subcommittees
 - (i) Land Transportation Standards Subcommittee, in accordance with Annex 913.5.a-1,
 - (ii) Telecommunications Standards Subcommittee, in accordance with Annex 913.5.a-2,
 - (iii) Automotive Standards Council, in accordance with Annex 913.5.a-3, and

(iv) Subcommittee on Labeling of Textile and Apparel Goods, in accordance with Annex 913.5.a-4; ...

In agriculture, a Committee on Agricultural Trade (Article 706) was established that was, among other things, to put in place a Working Group on Agricultural Grading and Marketing Standards. Under Article 722 a Committee on Sanitary and Phytosanitary Measures was also mandated, as well as the following working groups: 1) Animal Health; 2) Dairy, Fruits, Vegetables, and Processed Foods; 3) Fish and Fisheries Product Inspection; 4) Food Additives and Contaminants; 5) Labelling, Packaging, and Standards; 6) Meat, Poultry, and Egg Inspection; 7) Technical Working Group on Pesticides; 8) Plant Health, Seeds, and Fertilizers; and 9) Veterinary Drugs and Feeds Working Group.

To promote cooperation in developing new regulations, or altering existing regulations, under Article 909: Notification, Publication, and Provision of Information:

1. Further to Articles 1802 (Publication) and 1803 (Notification and Provision of Information), each Party proposing to adopt or modify a technical regulation shall:
 - (a) at least 60 days prior to the adoption or modification of the measure, other than a law, publish a notice and notify in writing the other Parties of the proposed measure in such a manner as to enable interested persons to become acquainted with the proposed measure, except that in the case of any such measure relating to perishable goods, each Party shall, to the greatest extent practicable, publish the notice and provide the notification at least 30 days prior to the adoption or modification of the measure, but no later than when notification is provided to domestic producers;
 - (b) identify in the notice and notification the good or service to which the measure would apply, and shall provide a brief description of the objective of, and reasons for the measure; ...
 - (d) without discrimination, allow other Parties and interested persons to make comments in writing and shall, on request, discuss the comments and take the comments and the results of the discussions into account.
2. Each Party proposing to adopt or modify a standard or any conformity assessment procedure not otherwise considered to be a technical regulation

shall, where an international standard relevant to the proposed measure does not exist or such measure is not substantially the same as an international standard, and where the measure may have a significant effect on the trade of the other Parties:

- (a) at an early appropriate stage, publish a notice and provide a notification of the type required in paragraph 1(a) and (b) ; and
- (b) observe paragraph 1(c) and (d).

Thus, it is clear that those negotiating the NAFTA were aware of the potential for regulatory self-interests among the member countries to be disruptive to international trade and took considerable and detailed care to ensure that institutional arrangements were put in place to eliminate or reduce the potential for trade disrupting events.

HAVE THE NAFTA HARMONIZATION INSTITUTIONS WORKED AS INTENDED?

While institutions can be put in place with the best of foresight, they may fail to operate as intended. The Technical Working Group on Pesticides appears to have worked fairly well (Freshwater, Green *et al.*) but it appears to be the exception rather than the rule. While deficiencies in the NAFTA institutions pertaining to regulatory harmonization have not been in the forefront of the debates surrounding NAFTA's efficacy, the issue has been raised since the NAFTA came into force. The trade inhibiting effect of the absence of a harmonized beef grading system in North America was well understood prior to both the CUSTA and NAFTA (Gillis *et al.*, Kerr 1992). The Working Group on Agricultural Grading and Marketing Standards was the appropriate NAFTA institution that should have assisted in removing this impediment. Hayes and Kerr found, however, that the Working Group had little to do with attempts to harmonize grading and that the issue remained politicized and subject to protectionist interests. As of 2005, there is no mutual recognition of beef grading among the NAFTA countries. Further, Hayes and Kerr found that there was little indication that NAFTA partners informed or consulted with each other when new domestic regulations with potential trade effects were being developed. With the exception of the Technical Working Group on Pesticides, the NAFTA committees are forums to talk and talk without any mechanism to bring closure to an issue. On a more mundane level, the Committees have lead to some cooperation on day-to-day issues and, further, they appear to be taking on a new role in assisting with the management of trade crises (Green *et al.*), something that was not envisioned at the time of negotiation.

LESSONS FROM THE BSE CRISIS

The failure to make progress in the harmonization of regulations, however, was never at the heart of a trade policy crisis until the discovery of a cow with bovine spongiform encephalopathy (BSE) in Alberta, Canada on 20 May 2003. Despite more than a decade having passed since the coming into force of the CUSTA, the Animal Health Working Group had not dealt with the obvious threat of a long-term border closure. Given the rising degree of market integration in the North American beef industry, the threat was obvious (Loppacher and Kerr). While closing of the border in the immediate wake of an incident – so that the measures being taken by the country declaring a case can be assessed – is well accepted in international agreements, the rules for the reopening of a border have not been developed internationally nor within the NAFTA (Kerr 2004). As a result, they are open to both political precaution³ and capture or manipulation by protectionist interests. It is an institutional failure when a significant problem can be anticipated, an institution exists to deal with it, and nothing is done.

Even if the vulnerability of the increasingly integrated North American beef and cattle market to a border closure, based on differing sanitary and phytosanitary regulations and procedures was not well understood by members of the beef industry, the example of the British beef industry's experience with international markets in the wake of its BSE crisis should have been readily apparent. Borders were closed to British beef and live cattle and remained closed for several years. Even within the European Union (EU), where there are strong institutional structures to prevent border closures within the single market, national governments of member states of the EU were quick to snatch back their sovereignty and close their markets to British beef and cattle in spite of European Commission admonitions that keeping borders closed was in contravention of EU law. After long legal proceedings that ended up in the European Court, Germany and France finally allowed British product to move into their markets in 2000 and 2002, respectively. Ironically, Canadian and US markets still remain closed to British livestock, as well as meat and meat products. While Britain was not a large exporter of beef to North America due to lack of competitiveness,

³ See Kerr (2004) for a discussion of political precaution. Political precaution has become more prominent in trade policy with the increase in consumer awareness (but not necessarily informedness) regarding food safety problems and rising angst among some consumers regarding the risks they perceive they face. For politicians and policy-makers, one of the worst possible events would be a breakdown in the food safety system where death or widespread health impairment was the result. Thus, if there is a food safety event, decision-makers may feel the need to be seen to be dealing forcefully with the problem – such as the Japanese decision to test every cow in the wake of domestic BSE cases being discovered regardless of its efficacy as an animal health measure – or at least taking no action that might have health repercussions in the future – such as opening a closed border. Thus, political precaution can be either proactive or passive.

there was trade in breeding animals prior to Britain's problems with BSE. The North American beef industry ignored this lesson. There seemed to be a prevailing attitude that it could not happen here because regulations had been changed to protect feed supplies from contamination with risky material. Given that the scientific evidence tying outbreaks of BSE to contaminated feed is far from conclusive, that BSE can occur spontaneously, and that countries such as Japan had discovered BSE cases subsequent to the implementation of a feed ban, the North American industry's complacency was extremely naive at best. Alternatively, it may have represented a deliberate denial, much like an ostrich with its head buried in the sand, of a problem that needed attention. While the NAFTA's Animal Health Working Group may not itself have had the "border opening" issue on its agenda,⁴ there is every reason to believe that a concerted effort by the beef industries in all three countries could have put it on the Group's agenda and had a common set of rules drawn up and approved. The industry failed to avail themselves of the existing institutional structure in the NAFTA, suggesting that these institutions are flawed either because they are considered irrelevant by the trade interests they were put in place to serve or have such a low profile that they were not known by those who could benefit from their existence.

The results of this failure to deal with the border opening question *ex ante* to the discovery of BSE in North America led to an entirely predictable result. When a BSE infected cow was discovered, the NAFTA borders closed and remained closed for a considerable period. While the borders have slowly reopened to some beef products, the borders remains closed to other beef products and live animals two years later – at the time of writing in May 2005. The economic effects of the border closure have been well chronicled elsewhere (LeRoy *et al.*, Gervais and Schroeder, Sparling and Caswell) and have cost billions of dollars. While the Canadian industry has suffered the most from the discovery of BSE in North America, the industries in all three countries have suffered disruptions and economic costs. In the US, consumers have faced higher prices and some packing plants' operations have been considerably disrupted due to the absence of Canadian cattle. The costs imposed by the closure of the Japanese market to US beef has been partially mitigated by the absence of Canadian cattle in the US market to satisfy domestic demand so that US cattle producers have been, to some extent,

⁴ One of the problems from a research point of view is that it is difficult to find out exactly what is on the agendas of the various NAFTA Committees and Working Groups. Neither the NAFTA Secretariat nor the individual federal governments have web pages that provide information on the work of the Committees or Working Groups. To find out what is going on, it is this researcher's experience that one has to find the person in the government who is sitting on the Committee/Working Group and have him/her agree to share his/her meeting notes. While this is in keeping with the minimalist role envisioned for the NAFTA bureaucracy, it leads to far less transparency in the NAFTA's operation than, for example, the WTO which has excellent transparency.

cushioned from the market disruptions precipitated by the discovery of BSE. The institutional failure, however, means that the industries in all three countries are vulnerable to future human or animal health problems and they now understand the real risks that should inform their short-run operational decisions – How many heifers do I retain in the breeding herd? At what price can I afford to refill my feedlot? How many animals do I purchase for slaughter? – and long-run investment strategies. The actual risks have not changed with the BSE crisis. The event only served to fully expose them. Of course, new risks are inherently difficult to manage as normal risk management institutions such as futures markets do not exist. The NAFTA partners may have to consider the development of institutions to deal with catastrophic events such as the BSE crisis. When developing its future strategy, the beef industry has a choice, fix the institutional failure within the NAFTA to reduce the risk that they now understand or adjust their business and industry practices to accurately reflect that risk. The latter will lead to more conservative approaches to North American market integration and a reduction in the potential benefits that the NAFTA provides. The former is likely much more difficult than it would have been prior to the BSE event, if for no other reason than protectionists now also fully understand the benefits available from the institutional failure and politicians and policy-makers will be hesitant regarding change for reasons of political precaution.

The reduction of traditional barriers to trade such as tariffs and import quotas requires the corequisite of well-functioning institutions to facilitate the reduction in nontariff barriers to trade that arise from regulatory differences. This does not appear to have happened in the NAFTA. The traditional barriers are largely gone, but the regulatory environment within the North American market is uncoordinated, exhibits considerable disharmony, and is open to exploitation by protectionist influences. This NAFTA trade environment exposes firms who wish to engage in international commercial activities to considerable risks.⁵

TRADE INSTITUTIONS AND RISK IN THE NORTH AMERICAN MARKET

While traditional trade barriers such as tariffs and import quotas are put in place politically in response to requests for protection from parties with vested economic interests – and they certainly act to limit market access – they carry with them a considerable degree of predictability. They are generally difficult to remove⁶ and tend to remain in place over

⁵ In fact, it exposes all participants in their supply chains to those risks.

⁶ Of course, there are instances where countries have unilaterally removed tariffs but these instances tend to be the exception.

a considerable period. In the era since the General Agreement on Tariffs and Trade (GATT) has been in place, tariffs were “bound,”⁷ meaning they could not be raised in the future and likely would not be lowered until the conclusion of the next round of GATT tariff negotiations; and then only over a prespecified phase-in schedule. As a result, firms wishing to make investments in international commercial activities could be assured of the rules of the game, often for fifteen years or longer. Thus, even with the trade impediment in place, firms were operating in a relatively secure trading environment. Investments often could be well on their way to being completely depreciated by the time there was a change in the tariff levels.

The dismantling of traditional trade barriers in free trade agreements such as the NAFTA removes a degree of predictability from the trade environment. While it is true that firms know that tariffs and other formal barriers will not reappear, nontariff barriers tend to come to the fore. This is particularly the case when institutions are not put in place to remove nontariff barriers or they do not function as intended. There is also a certain naivety that seems to accompany the signing of free trade agreements – that the protectionist interests that have been defeated by the signing of the agreement are actually vanquished. The truth is that protectionists never go away; they may be temporarily defeated, but they are resourceful and the stakes for them are too high for them not to remain active. In the case of BSE being discovered in Canada, the US producer group, R-CALF, provides a case in point. R-CALF’s members perceive considerable economic benefits will accrue to them if Canadian beef and live animals can be kept out of the US market. R-CALF was originally formed to bring contingent protection measures (i.e., anti-dumping and countervail actions) against imports from Canada and Mexico. When R-CALF failed to win their contingent protection cases, they did not disband. They were back again in a few years demanding mandatory country of origin labeling (COOL) for beef and cattle imports (Kerr 2003). With COOL languishing in legal limbo due to a failure to fund its implementation by the US Congress, the border closure following the discovery of a Canadian cow with BSE must have seemed like a godsend to the members of R-CALF. They have been able to exploit a number of procedural and legal avenues to prevent the Canada-US border from reopening first to beef and subsequently, live cattle. The hopes of Canadian beef cattle producers have been dashed a number of times as R-CALF tenaciously pursues its protectionist mission.

Poorly developed institutions to deal with nontariff barriers in NAFTA combined with the persistence of protectionist interests means that

⁷ Sometimes the rate actually collected by a country, its applied tariff rate, is less than the bound rate. In this case, the tariff can be raised to the bound rate at any time creating a risky trading environment.

the NAFTA trade environment exhibits considerable risks for firms attempting to operate within it. These risks relate to the inability to predict market access. While technical barriers to trade, including sanitary and phytosanitary barriers, are important in agriculture (Green *et al.*), they are by no means the only aspects of the trade policy environment that create poor market access predictability. Contingent protection policies also lead to temporary restrictions on market access. In the era of traditional trade barriers, countervail and antidumping actions were seldom-used trade policy measures. Antidumping, while formally part of the international trade architecture since the inception of the GATT, was until the recent past appropriately relegated to being a trade policy anachronism. As formal trade barriers were removed both multilaterally at the GATT, and subsequently at the WTO, and in regional trade agreements, protectionists sought other means for limiting market access. As a result, the number of both antidumping and countervailing duty actions has been rising dramatically (Kerr and Loppacher 2004). Countervail and antidumping actions can lead to reductions in market access for up to five years (and sometimes longer), but in many cases their use as a risk-creating tool for short-run harassment of exporters is worth the effort of launching a case for protectionists. This is true even if there is little chance of winning the case after a full investigation. It is relatively easy, particularly in the US, to have temporary duties imposed while the competent authorities undertake a full investigation of the accused firm or sector's activities. The mechanism imposes compliance costs on firms during investigations, preparing a defense is expensive, market access is limited due to the temporary duties, and duties must be paid on remaining exports (even if they are returned if the exporter wins the case). Further, the accused firm cannot be sure of the outcome and may face ongoing duties once the full investigation is completed. Even if the case is won, there is no assurance that a new case will not be launched in relatively short order. This is a risky environment within which to attempt to make investment decisions pertaining to trade opportunities that have been identified. In the case of antidumping, the absence of a sound grounding in economic theory (Kerr and Loppacher 2004) further reduces the transparency of cases and opens the door for exploitation by protectionist interests.

The threat posed by contingent protection actions was well understood by the negotiators of the CUSTA and NAFTA. Canada attempted to strengthen the CUSTA, for example, by removing the ability to initiate antidumping and countervailing duty actions against firms exporting from the other party. The negotiators made considerable progress in this area but, ultimately, could not reach an agreement to eliminate countervail actions. Instead, the CUSTA negotiators included a provision for the two parties to reach a mutually acceptable agreement on antidumping and countervail within seven years (McLachlan, Apuzzo,

and Kerr). This deadline was removed in the NAFTA negotiations (Hayes and Kerr). Canada was, however, able to have this form of institutional strengthening included in its free trade agreement with Chile, which has no dumping provisions.

In the NAFTA, there was still an attempt to provide for institutions through cooperation on improving antidumping and countervail laws. Under NAFTA Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law:

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:
 - (a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement;
 - (b) the amending Party notifies in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute;
 - (c) following notification, the amending Party, on request of any Party to which the amendment applies, consults with that Party prior to the enactment of the amending statute; and
 - (d) such amendment, as applicable to that other Party, is not inconsistent with
 - (i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party, ...

These provisions were meant to lead to cooperation in the development of new or amended contingent protection measures. It would appear that this institutional provision has also been a failure. It did not prevent the US from strengthening its countervail and antidumping mechanism though the passage of the Byrd Amendment whereby firms launching an antidumping or countervail action receive not only the protection provided by the imposition of duties, but also receive the funds

collected through these duties. The Byrd Amendment both increases the resources available to protectionists and creates a significant incentive to launch additional contingent protection actions, thereby increasing the risks associated with engaging in international transactions for those exporting to the US. It seems unlikely that Canada or Mexico would have agreed easily to the Byrd Amendment if they had been consulted as per the provisions of NAFTA Article 1902. The Byrd Amendment has subsequently been found to be a violation of WTO commitments by a disputes panel, but the US has, as yet, failed to comply with the WTO's ruling.

In the BSE case, the risks introduced into the trade environment by the failure to deal with the issue of border opening *ex ante* to the incident in May 2003 pertain to when market access for Canadian cattle exports can be expected, and whether that access will be secure in the face of any future BSE cases. One of the major costs to the Canadian industry arises due to there being insufficient domestic slaughter capacity (LeRoy, Weerahewa, and Anderson; Sparling and Caswell). If it were known with certainty that the border would remain closed to Canadian cattle indefinitely, then sufficient surety would exist for firms to make investments in additional slaughter capacity. The possibility of an open border in the near future, however, puts any investment in additional slaughter capacity at risk. The absence of transparency in the process of opening the border affects decisions throughout the Canadian beef supply chain; breeding, cattle procurement, plant throughput, and beef marketing decisions are all affected by the uncertainty surrounding the opening of the border, and the subsequent security of market access if an open border is achieved. It is a much riskier environment than when protectionism was manifest in tariffs. While Canadian firms have borne the major brunt of the BSE border closure, firms in the US and Mexico, as well as Canada, are vulnerable as a result of the failed NAFTA institutions.

CONCLUSIONS

Unless the NAFTA partners are willing to work toward strengthening the institutions mandated to deal with contingent protection and technical barriers to trade, including sanitary and phytosanitary measures – and there is no evidence of political resolve to do so – firms operating within the NAFTA trade architecture are faced with dealing with the current level of risk. While this discussion has dealt primarily with the issue of market access restrictions pertaining to BSE, there are a wide range of products whose trade is at risk to border closures on sanitary and phytosanitary grounds (Green *et al.*, Sparling and Caswell). Other nontariff barriers such as mandatory country of origin labeling, tariff classifications and standards for biofuels (Kerr and Loppacher 2005),

and labeling of nutraceuticals litter the NAFTA trade environment and the threat of contingent protection actions is ever present.

More research is required into the reasons why the opportunity provided by the institutional provisions in the NAFTA were not acted upon by governments and why their use was not pushed by industries with interests in trade liberalization. As a result of this failure to act, institutionally the NAFTA is only a partial trade liberalizing mechanism, one that facilitated the removal of tariffs and other traditional trade barriers but fails to deal effectively with new barriers that were bound to arise in their place.

The BSE crisis should be a wake-up call for both industries engaged in international commerce within NAFTA and the three governments. The NAFTA market, for all its advances in integration, is an unpredictable market in which to do international business and decisions need to reflect the real level of risk. While there is a temptation to view the BSE crisis as special or a one off case due to the poor understanding of the disease and its transmission vectors, the reality is that any sector is vulnerable to the failure to harmonize both existing technical standards and the development of new standards. The failure of the NAFTA institutions to develop as was intended when the NAFTA was negotiated makes nontariff barriers fertile ground for protectionists' activities.

While policy-makers may be suspicious of the sovereignty implications pertaining to regulatory harmonization, particularly in the area of human, animal, and plant health and safety, industries that have invested heavily in the NAFTA market should have a strong incentive to improve the efficacy of the existing NAFTA institutions. If industries in the three countries made a coordinated effort to reduce the risks endemic to the North American market through insistence on the mandated NAFTA institutions producing results, it is likely that the governments would support their initiatives. As long as industry ignores the institutions, they can expect trade disruptions in the future.

As a first step, government and industry need to cooperate on undertaking realistic risk assessments of the North American market – to determine the potential for major trade incidents like the BSE crisis. Once such assessments are completed, then the appropriate institutional arrangements established in the NAFTA to deal with potential technical barriers to trade should be identified. It will then be up to those with a lot to lose to ensure that the institutions work in their interests.

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