Trumped up NAFTA
Will rhetoric translate into actions that harm Canadian agriculture?

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With the election of Donald Trump concerns about rising protectionism are growing exponentially. His vision is to immediately renegotiate the terms of NAFTA to “get a better deal for (US) workers,” or withdraw from NAFTA. At this point it is difficult to tell how much of this is bluster, but he has a long history of protectionist rhetoric. The overarching question is how much of this rhetoric will translate into actions that will harm Canadian agriculture. The pertinent questions that this note begins to address are: 1) Does President-elect Trump have authority to unilaterally withdraw from NAFTA without the consent of Congress? 2) If a new deal is negotiated does Trump have a free hand or is he constrained by Congress? 3) What are the major agricultural issues that may be subject to renegotiation and the implications for Canadian agriculture? and 4) Are there issues that Canada might want renegotiated?

Ability to withdraw from NAFTA

Article 2205 of NAFTA allows any member to withdraw with 6 months’ notice, and Section 125 of the US Trade Act of 1974 allows the President, at any time, to withdraw from international trade agreements (multilateral and preferential). But withdrawing from NAFTA by itself would not impact the preferential tariff rates currently in place under NAFTA. So Trump would have to address Section 201 of the NAFTA Implementation Act, which would allow him to revert to the higher WTO MFN rates following consultations with Congress. Hufbauer1 views these consultations as no more than meeting with the Senate Finance Committee and the House Ways and Means Committee and not requiring acquiescence. However, to the extent that withdrawing from NAFTA would require meaningful changes to US domestic law, changing legislation would require Congress’s legislative authority. Nonetheless, withdrawing from NAFTA appears to be within the President’s purview and the withdrawal threat is certainly a persuasive negotiating tactic.

NAFTA renegotiation – jurisdiction

The President engages in trade negotiations under “trade promotion” authority enacted by Congress so his administration would be negotiating pursuant to delegated congressional powers rather than under his own inherent constitutional powers. Abrogation or dramatic changes to NAFTA would severely impact all North American economies because supply chains are disrupted. This alone should dissuade Congress accepting and the Administration pursuing amendments to NAFTA that fundamentally distort trade. If Trump were able to successfully renegotiate NAFTA, he would require approval from Congress.

Potential agricultural issues for renegotiation

Despite strong rhetoric about renegotiating NAFTA very little is known about exactly what the Trump administration wants. The one agricultural issue identified for negotiation is mandatory Country of Origin Labelling (mCOOL). An unfortunate coincidence is that just when mCOOL was repelled US cattle prices peaked and started to decline. Correlation is often mistaken for causation, and this will be no exception where subtleties like the cattle cycle are overlooked as the root cause of declining prices and imports are blamed for a weaker market. Reintroducing mCOOL legislation into NAFTA would seem to be a strange fit since the labelling requirements originally were applied multilaterally and the requirements were challenged at the WTO under the GATT, TBT, Rules of Origin, and SPS Agreements. It is unlikely that legislation similar to the prior legislation would sustain another WTO challenge. To apply this legislation only to North America would be bizarre and be open to challenge under GATT Article XXIV. The most likely route would be to introduce a “peace clause” in NAFTA, where the US reintroduces similar legislation and Canada and Mexico commit to not appealing the new legislation to the WTO. This outcome is unlikely to happen unless a great deal of duress is applied and it seems like a strange hill for the US to die on given Trump’s motivation is to save jobs. The panel complaint was that mCOOL discriminated against imports of foreign-born animals; less imported pigs and cattle should mean less US meat packing plant jobs. From a Canadian perspective there would be not only lost export sales, but also thicker borders would lead to further erosion of a price discovery process that is increasingly opaque.

Trump won Wisconsin by a margin of just over 22,000 votes. There are almost 10,000 dairy herds in Wisconsin. Therefore, couples from these farms account for almost all of Trump’s plurality. Since the signing of CUSTA, the US dairy lobby has sought increased access to the protected Canadian dairy market. Improved market access to supply managed markets will almost certainly be an objective of any effort to renegotiate NAFTA.

Given the Trump Administration’s appetite for managed trade, it is likely that the increased access would involve a tariff-rate quota with increased preferential access. The access provisions negotiated for the TPP might suggest a best-case outcome (from a dairy and poultry producer perspective) for the renegotiations, while the US will no doubt ask for more access.

Issues Canada may want to renegotiate

There have always been a number of outstanding issues, dating back to the signing of CUSTA, that trade policy commentators would like to see addressed. From my perspective the two largest are rules of origin (ROO) and grading standards.

All free trade agreements have ROO in order to prevent non-member countries from taking advantage of the concessions made by the FTA’s members by exporting goods to the member country with the lowest tariff and then trans-shipping those products to the member countries with higher tariffs. However, restrictive ROOs increase administrative costs, complicate border inspections, decrease trade and investment, and lessen the predictability of the policy environment for cross-border economic activities. The transactions costs of establishing origin are sufficiently high so that some exporters find it preferable to pay the MFN tariffs rather than incurring these transactions costs. NAFTA’s complicated ROOs should be simplified.

NAFTA never harmonized beef grading standards between Canada and the US. The lack of equivalency means that Canadian boxed beef sold in US must be sold without a grade and not receive the associated premiums. Harmonized beef grading standards would benefit the Canadian cattle industry.

Bottom line

The future course of Canada-US trade relations is in doubt. There have certainly been cannons fired across the deck. The future depends on the Trump administration but it is constrained by Congress (and its constitutional authority with respect to trade), US court proceedings and challenges, and the willingness of Americans to accept self-inflicted damage to the US economy.