

January 1999

## Discussion Following the Remarks of Mr. Wainwright

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 Remarks of Mr. Wainwright*, 25 Can.-U.S. L.J. 89 (1999)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol25/iss/15>

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.

## DISCUSSION FOLLOWING THE REMARKS OF MR. WAINWRIGHT

QUESTION, PROFESSOR KING: I would hate to have to get a product cleared in the European Community. I hope you could do it in one lifetime. Let me play the devil's advocate on this whole clearance process and ask, what about the role of competitors in opposing the clearance process? Suppose you have, hypothetically, someone in Germany who has a good product that has been approved by the Commission. Then, somebody in France has something better, but it is competitive. Do you sense that all these procedures can be used by competitors to plant seeds of doubt in the minds of the Commission's staff? In a multi-national context, you may have some built-in economic conflicts which realize themselves in this whole clearance process. I am asking you to comment on that as an individual.

ANSWER, MR. WAINWRIGHT: That goes without saying, Henry. I think the first obvious thing to say is, of course, there may well be patents involved here. If patents are involved, then the patent will overrule those European patents, and if the first part is covered by a patent, that would be covered in the normal way. But supposing that there is no patent protection involved, then it is perfectly possible, and indeed, it has happened, that the same product developed by different manufacturers could be authorized. There may have even been the temptation for competitors to cast some doubts about the safety of the other competitor's product. If there have been such temptations, they no longer exist. The problem is not so much an inter-competitive problem within the industry as it is a problem of the industry in a sense against the world. The risk is, of course, as soon as you start to cast doubt on the health or environmental point of view of the products of one of your competitors, you throw the stone into the pond, the ripples go out and they can affect your own product as well. You have to be very careful about casting any kind of doubts on the safety of each other's products because of the ripple or ricochet effect.

QUESTION, MR. SULZENKO: I am not an expert in this, but as I understand the Canadian and U.S. approval system, applications are handled by what I would call quasi-independent agencies. Although there is some political input in the Canadian and U.S. systems, the E.U. system seems to be very political. It strikes me that there is potential for a trade clash given that we have quite different systems. Do you see that over time, as these technologies become more and more important, trade disputes will become almost inevi-

table because Canada and the United States have different approval systems than Europe?

ANSWER, MR. WAINWRIGHT: I think the answer is yes. Perhaps I should mention a related sector where the community has succeeded in handing out all the basic work to an agency, which is the area of the approval of pharmaceuticals. For high-tech, biotech, and other important new drugs, we now have a system where all the spade work is done by an agency in London, and then a relatively formal, final procedure is carried out. Then, the Commission, still with a committee of the Member States, gives their final seal of approval. I have to say that this has worked well. I do not know of any case where, at least up until now, there was any political interference.

In the case of genetic engineering, it is perfectly true that the system is more political in the sense that there is no independent agency that carries out the assessment. There is, in fact, always a scientific assessment that is carried out. It is a public document that is the basis for the final decision. To be fair, the Commission has always followed the opinions of the scientific committee in its proposals for a final decision. The difficulties have arisen because the whole process has been slowed down because of the regulatory ping-pong between the Commission and the Consulate Ministers, because the Standing Committee was not able to give a positive opinion. In a sense, it has even been more bewildered by the fact that some Member States have just not been prepared to go along, even once the final approval has been given by the Commission. Some of them, such as Austria and Luxembourg, use the safeguard mechanisms, which cause quite a bit of delay. On the question of labeling, quite frankly all the Member States are going their own way until this is taken up by the Commission.

So there is a political dimension in this, which is not necessarily built into the system, but the system gives us an opportunity to play. If we had an agency-type system, we could have avoided this. Still, I am not so sure they would have made any difference. I think we may well find it will make a bit of difference on the labeling issue. We may find ourselves before the WTO on this issue, as we have on others. That depends to some extent on you.

QUESTION, MR. WOODS: In the last generation of trade disputes in the old GATT, the European Commission had the delightful task of taking on Canada and the liquor boards in dealing with our subnationals and the delightful task of being a third party when Canada and the United States went after each other on our state and provincial deregulations.<sup>1</sup> Given that there is

---

<sup>1</sup> See *Canada – Import, Distribution, and Sale of Alcoholic Drinks by Provincial Marketing Authorities*, Mar. 22, 1988, GATT B.I.S.D. (35<sup>th</sup> Supp.), at 37 (1988); *Canada – Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, Feb. 19, 1992, GATT B.I.S.D. (39<sup>th</sup> Supp.), at 27 (1992).

the distinct possibility for disputes in the areas of technology, what are your views in terms of our ability to count on the Commission and the European Union to be able to enforce any judgment which involves these issues, which are so sensitive with the Member States? Basically, it is a European constitutional issue.

Then the second question, which is more practical for private practitioners in Canada and the United States, is for corporate counsel, people who want to be able to follow this without necessarily engaging in the government-to-government discussions. Do you have any advice about where they could go? Perhaps there are Web sites or other means by which they informally or formally could follow what is going on in Brussels?

ANSWER, MR. WAINWRIGHT: I think your first question, the question of enforcement of a possible WTO negative report, divides itself up into two parts. The first is the general question of enforcement within the Union and the international strength of E.U. law. The mechanisms are all there, and there is the possibility of using the national court procedures. The Commission has mechanisms for bringing Member States before the Court. Also, we are now just starting to use the possibilities of getting financial sanctions against Member States who refuse to obey Court orders. The mechanisms are all there, but of course, it takes a long time to enforce.

We are in an interim phase now, and we have a virtual Commission. When the new members come into power and take office in September, I have no reason to believe they will want to be any less keen on this sort of enforcement and be fair. At the governmental level, there are, of course, the enforcement mechanisms of the WTO itself. We have just had a final opinion of the WTO, which has actually ordered the European Community to pay \$191 million worth of compensation for the banana regime.<sup>2</sup> We are likely to have on the 13th of May a similar result, with similar sorts of figures in relation to hormones in beef.<sup>3</sup> Of course, these take the shape of either positive or negative trade concessions. That is at an intergovernmental level, and I do not have any reason to believe that would not work.

---

<sup>2</sup> See European Communities – Regime for the Importation, Sale, and Distribution of Bananas, Award of the Arbitrator, Jan. 7, 1998, WT/DS27/15; *World Trade Organization, Overview of the State-of-Play of WTO Disputes* (last modified July 16, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>; see also Carla Santos, *The WTO and the Banana Case: Implications for Future E.U.-A.C.P. Relations*, 36 E.U. FOCUS 3 (1999).

<sup>3</sup> See European Communities – Measures Concerning Meat and Meat Products (Hormones), Decision by the Arbitrators, July 12, 1999, WT/DS48/ARB; *World Trade Organization, Overview of the State-of-Play of WTO Disputes*, *supra* note 2; see also *U.S. Wins Round in Beef Dispute* (visited July 20, 1999) <<http://www.amarillo.globenews.com/stories/050997/wins.htm>>.

Your second question was with regard to access to information and to people. As for access to information, there is a European Commission Web site.<sup>4</sup> All the documentation of the official journal is on the Web site. Of course, there are also all the communications, all the pronouncements of the Commission, and all the debates of Parliament, which can be accessed through the Internet. As to whether that is quite enough for a lobbyist, I have had plenty of dealings with lobbyists in my job. My impression is that there is nothing like personal contact, which means knowing the people who are on the floor, not necessarily at the top level. I know a few particular U.S. law firms that are good with this, and they sometimes ring me to ask who is the girl on the phone, and I am happy to tell them.

QUESTION, MS. JEFFREY: It seems to me that you have expressed a view that is far more about cultural change than it is about technological change. I just want to make a slight case that I think we should be careful to de-legitimize the cultural aspects of what you are presenting here.

I want to put the question to you this way. We are not only talking here about consumers, but we are also clearly talking about citizens. I am a little concerned about whether the WTO was, in fact, the appropriate place to be making some of the decisions we are talking about regarding matters that, in the case you are presenting, individual citizens may wish to make for themselves or jurisdictions may wish to allow their citizens who have elected them to make. For example, in the case of labeling a genetically engineered product, I would put that on the cultural side. Where is that democratic legitimacy? Where is the counter-balance to the argument and the case you are making to us in the WTO, or in some of the other regulatory regimes that you have presented so effectively?

I am not asking you to make the case for the side of which you clearly do not seem to be in favor, and I know you are speaking in a personal capacity, but just give me some sense as to where is the cultural, democratic, and the side of the citizens in what you are presenting?

ANSWER, MR. WAINWRIGHT: First, I should say that I was not making a case. If it came out like that, it is because I am too much of a lawyer to be able to speak neutrally. Of course, this is very much a raging debate in Europe. We have seen this in other fields like television and the cinema, where there is a sense that North America is trying to overwhelm Europe. Of course, they do that to the rest of the world, too, with their culture and their values. They are doing it without even trying. There are certain Member States of the European Community, particularly France, which are much more sensitive about these issues than others.

---

<sup>4</sup> See European Commission Home Page (visited July 20, 1999) <[http://europa.eu.int/comm/index\\_en.htm](http://europa.eu.int/comm/index_en.htm)>.

To get back to specifics, I know the WTO system quite well. It is not my number one area of expertise, but I rather suspect that pure labeling requirements and nothing more would get through the WTO hoops and would not be regarded as contrary to either the agreement on technical barriers to trade or the sanitary-phytosanitary regime of the WTO.

There is, of course, a more fundamental issue, which is to what extent the WTO, which is essentially GATT, carries on most of these things. We are already in the GATT, of course, because we have more effective enforcement mechanisms, and it is now becoming more of an issue. To what extent has this gone too far, and to what extent is the risk of trade and commercial values overriding local sensibilities, whether they are cultural, environmental, or astrological? I do not think there is any one answer to that.

In the United States, you are in the midst of an interesting trade war. As I understand it, there were some conflicts with foreign countries over fishing for turtles, where the environmental sensitivities of the U.S. consumer or citizen are apparently not shared the same by the citizens of Thailand or India.<sup>5</sup> This is not just uniquely a North American/European thing. It can happen in different ways and at different levels.

There is a balance to be struck. It is gradually being struck, and as the case law of the WTO builds up, then perhaps it will be struck more and more. The beef hormones saga is a good example. The dispute settlement body, the Appellate Body, was much less hard and was more nuisanced about the Community regime, and, in fact the European Community thinks they may, with more time, be able to satisfy them.

So the story has not yet come to an end, but I take your point. There are two sides to the story, and the debate will continue.

QUESTION, MR. ABRAHAMS: I would like to know the status of the transatlantic discussions regarding mutual recognition of U.S. and E.U. product standards. Has that essentially been put on hold because of the recent upheaval at the European Commission because of the arguments about beef hormones and bananas? I refer very specifically to electric products, for example, with the U.L. label. Would that not, perhaps in the future, require CE marking because of that mutual recognition discretion?

ANSWER, MR. WAINWRIGHT: As I understand it, as a result of the WTO, there have been a series of mutual recognition agreements that are under negotiation or have already been negotiated between the European Union and the United States and Canada and other parties as well. Some of these agreements have been signed, sealed, and brought into force. I cannot give you an actual list, but this is mostly, if not exclusively, with regard to

---

<sup>5</sup> See United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, Oct. 12, 1998, WT/DS58/AB/R.

industrial products. I have not heard what has been affected particularly by the genetic engineering or the beef hormones issues. We are talking about industrial products here, and those are not affected by the fact that members of the Commission have resigned. The Commission can still carry on current business until the new Commission comes on board in September. The Commission negotiates agreements with a mandate from the Consulate Ministers. If they have a number of mandates, they can carry on the negotiations, and they can even propose to Council to conclude any agreement as part of business.