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BIOTECHNOLOGY, FOOD, AND AGRICULTURE DISPUTES OR FOOD SAFETY AND INTERNATIONAL TRADE

*Serge Frechette**

I must say that I do not have much to add to Shirley's introduction. I can only say that I agree with everything she said. I have practiced trade law for close to fifteen years. It has been difficult for me, even with all of that practice, to find everything that is necessary to be able to assess and to deal with the difficult policy and legal issues that are raised by the issues we are discussing today. Shirley has done such an excellent job at mapping out some of the difficult issues with which we are dealing; I intend to focus on the Canadian perspective on some of these issues and the utility of existing dispute settlement mechanisms, to address Canada/U.S. disputes related to food safety.

Before I do that, I will simply give a very short presentation of the structure of the Canadian system. What are the most important institutions that we have got in place? There are two federal agencies that have primary responsibility for food safety in Canada; the Canadian Food Safety Inspection Agency (CFIA), and Health Canada. These two agencies work together in the development, administration, and enforcement of Canada's food safety regime.

The CFIA reports to the Minister of Agriculture and Agro-Food. It has a broad mandate covering certain aspects of food safety, consumer protection, and market access. The agency administers and enforces eleven federal statutes related to animal and plant health, agriculture inputs, and food. It also administers and enforces the food related provisions of the Food & Drugs Act and enforces the food related provision of the Consumer Packaging and Labeling Act. The agency monitors the health safety and quality of Canadian agriculture, fish, and food products and oversees importation of those products. The CFIA is also responsible for the registration and inspection of processing plants and certifying Canadian products for export. The agency also develops general food labeling policies and regulations that are not related to health and safety. It is also responsible for protecting consumers from misinterpretation and fraud with respect to food labeling, packaging, and advertising, and for prescribing basic food labeling and advertising requirements. The agency checks labels for honesty

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and accuracy in terms of quantity, composition, nutritional information, and the grade of processed foods. In terms of biotech-derived food, or as Canada refers to them, novel foods, the agency's role is limited to the regulation of importation, environmental release, and feeds used from plants with novel trades, which includes, but is not limited to, transgenic plants. They do not have express jurisdiction over the novel foods. However, it does share responsibility for the labeling of novel foods in the sense that it ensures that labeling is understandable, fruitful, and is not misleading.

Health Canada's responsibilities include establishing policies and standards respecting any manner that may affect the safety and nutritional quality of food. Where the CFIA enforces human health and safety standards, Health Canada sets those standards, such as data requirements for the assessment of the safety of all foods. Health Canada also plays a role in inspecting, monitoring, and testing adherence to food safety standards, and it evaluates the safety of foods. It also assesses the effectiveness of the CFIA's activities that are related to food safety. Health Canada is also responsible for food labeling to the extent that it relates to health and safety issues. For example, it prescribes mandatory labeling requirements for food that may give rise to concerns over allergies.

Regarding novel foods, the department has jurisdiction over all novel foods including food products derived from transgenic plants. In October of 1999, Canada introduced a formal mechanism whereby Health Canada must be notified about these foods, and the foods must be assessed for safety prior to their sale to consumers. Genetically modified food requires a full-risk assessment. Health Canada establishes safety standards and specifies labeling requirements as they relate to the safety of these foods.

I should note that other federal departments, as well as provinces and municipalities, play a role in Canadian food safety. For purposes of this discussion, I only focus on the two main players. Now, what about Canadian policy views in respect to food safety issues? There are many Canadian officials here, and if I say something that is not right, I am sure that they will feel compelled to intervene. Canada's policy on how to approach food safety issues, including issues related to food derived from biotechnology, can be summarized as focusing on product and establishing appropriate safety levels based on the best scientific information. Safety is viewed in terms of the level of acceptable risk, which does not necessarily mean complete absence of risk, or as Shirley has mentioned, zero risk.

At the present time, there are eight acts and numerous related regulations that deal with food. However, in response to a task force review and consultation with state holders, the federal government has developed a

Canadian food safety and inspection bill.¹ If passed, the new food act will modernize and consolidate these various pieces of legislation. The new act will cover food safety and quality standards, licensing, imports, offenses and penalties, consumer protection, and intergovernmental cooperation. Although the bill maintains the current federal system in terms of the role played by the CFIA and Health Canada, there are new provisions. For example, the Minister of Health will have the authority to implement an emergency food standard that would have immediate legal affect. This authority could only be used under special circumstances, such as when the Minister of Health believes that a food poses a serious danger to public health and safety, and that the existing law and regulations are inadequate to protect the public and immediate action is required.

Two additions are noteworthy. First, there is a provision that allows for the development of health and safety standards that are suitable for regulating new technologies. Second, there is a provision that makes it clear that the Health Minister's authority to set the policies and standard is not limited to the final food products, but extends to any matters that may affect the safety of food, such as the preparation and production of food for sale. As I will touch on later, the additions to Canada's food safety regulatory regime could form the basis for measures that could give rise to Canada-U.S. trade disputes, depending on how each government reacts to certain types of pressures that could be put on them.

As to the role of quasi and non-governmental organization, over the past ten years, there has been significant coordination between the federal departments and nongovernmental interested parties. The government has consistently consulted with nongovernment groups and individuals on proposed major changes to Canada's food safety policies, legislation, and regulations. For example, in developing Canada's guidelines on labeling of novel foods derived through genetic engineering, the federal government consulted with nutritionists, academics, consumers, environmental groups, and producers. More recently, it was announced that the Canadian Council of Grocery Distributors and the Canadian General Standard Board are working on developing a Canadian standard for the voluntary labeling of food derived from biotechnology. The project is supported by Canada's Department of Agriculture and Agro-Food.

The federal government has also established non-governmental bodies to assist in the development of Canadian food safety policies. For example, again in 1999, the government established a Canadian biotechnology advisory committee. This committee is charged with providing advice to

¹ Canada Food Safety and Inspection Bill Introduced in house of Commons (visited Oct. 21, 2000) <<http://www.cfia-acia.agr.ca/english/carpaffr/newsrelease/19990422e.shtml>>

federal ministers on a broad policy basis related to the ethical, social, regulatory, economic, scientific, environmental, and health aspects of biotechnology. In respect to Canadian positions in various international fora, Canada has been involved in food safety and related issues at the international level in a number of different fora: the Cartagena Protocol on Biosafety to the Convention on Biological Diversity,² the Codex Alimentarius,³ the Food and Agriculture Organization of the United Nations (FAO), or in the context of the Free Trade Agreement of the America's negotiation, in the context of the Organization for Economic Cooperation and Development, in the context of NAFTA, as well as in the context of the World Trade Organization (WTO). Canada's general policy position in all of these fora has been consistent – governments must be able to determine what level of protection of human health and life is appropriate for their population. However, the measures used to ensure that protection must be based on science and not create unnecessary obstacles to or unjustifiable restriction on trade.

Rather than taking the amount of time that would be necessary to explain Canada's specific position in each forum, in an effort to avoid too much overlap with Mrs. Coffield's presentation, I will simply concentrate on the Cartagena Protocol and the CODEX. I must start by noting that the Cartagena Protocol does not actually govern food safety issues, per se. Instead, it focuses on the transboundary movement, transit handling and use of living genetically modified organisms (GMO) that are products of modern biotechnology and that may have adverse affects on the conservation and sustainable use of biological diversity, taking into account risks to human health. However, because these GMOs may be directly destined for food, the Protocol is relevant to food safety. For example, the Protocol requires parties to inform each other of their domestic approval of these GMOs destined for food. The advance information allows parties to decide on the applicable regulatory requirements for the import of those GMOs prior to their entering into international trade. This requirement reflects one of Canada's priority objectives, which was to ensure that GMOs destined for use as food rather than for intentional release into the environment were not subjected to the Protocol's relatively cumbersome advanced information agreement procedures.

² Cartagena Protocol on Biosafety to the Convention on Biological Diversity (visited Feb. 10, 2000) <<http://www.biodiv.org/biosafe/BIOSAFETY-PROTOCOL.htm>>.

³ UNITED NATIONS, FOOD AND AGRICULTURE ORGANIZATION, UNDERSTANDING THE CODEX ALIMENTARIUS, FAO/WHO (1999) (visited Oct. 23, 2000) <<http://www.fao.org/docrep/w9114e/w9114e00.htm>>.

Another Canadian objective, which was also the objective of the United States and the entire Miami Group, was to ensure that the trade-related provision of the Protocol could not be viewed as modifying or being inconsistent with the priorities of the WTO rights and obligations. Whether this objective was met is currently the subject of some debate.

Finally, one component of the Protocol that concerns Canada is the provision requiring documentation accompanying shipment of GMOs commodities destined for food which must state the content may contain GMOs and are not intended for introduction into the environment. The Canadian industry's concern about the practical implications of the requirement, for example, the potential negative impact on the image of non-genetically modified Canadian agricultural commodities, that may have to be labeled because they are co-mingled with GMOs. It is important to note that, although the United States is part of the Miami Group, it has not ratified the Biosafety Convention, so it cannot ratify the Protocol. Therefore, once Canada ratifies a Protocol, it will be bound to follow rules that do not bind the United States.

I referred earlier to the discretionary authority that the Health Minister will be given under the new legislation, if passed, and those two areas could lead to a potential dispute, depending on how the various powers are exercised. The CODEX Alimentarius Commission, Canada's general policy position is reflected in its comments on the proposed draft revision of the Code of Ethics for International Trade and Food. The code, which was originally adopted by CODEX in 1979, gives general recommendations for international trade and food and covers standards, hygiene additives, residue contaminants, and biotech-derived food. Canada's suggestion that the preamble states that nations have the right to establish their own appropriate level of protection based, among other things, on their own social or cultural attitudes toward risk, is interesting in that Canada is proposing express recognition of the role of social or cultural attitudes in setting an appropriate level of protection. While this view is generally accepted internationally, until recently, it has not normally been expressly recognized in text.

It is important to note that Canada's suggestion relates to the setting of an appropriate level of protection. It does not relate to establishing health and safety measures to reach such level. Canada's comments also reflect its views of the fundamental role of CODEX in setting international minimum standards for foods and the privacy of the WTO agreements to address food safety issues in the international trade context. The proposed draft also reflects a difference between the Canadian and the U.S. position on pesticide residues, another possible area of conflict between Canada and the United States, depending on how it is managed or not managed.

As I will discuss a little later, where the United States has not established a tolerance level for a particular pesticide, it imposes zero tolerance for that pesticide. However, where Canada does not establish a tolerance level, it allows for 0.1 parts per million of the pesticide in question. In its comments on the proposed draft code, the United States offered no comments on the existing text which provides generally that maximum residue limits should take into account the limits allowed by CODEX. However, Canada proposed changing the text to state expressly that, while there are no national limits for pesticides, that CODEX's limit should be taken into account.

I would tend to agree with Shirley when she mentioned that all of those potential issues that could arise between Canada and the United States have one way or another a mechanism that can be used for trying to solve those issues in order to avoid disputes. But as I have mentioned earlier, as well, it is possible, depending on the kind of pressure that may be put on governments to deal with these issues, particularly given the importance that different groups are now paying, or the attention that various groups are paying to those questions, that the governments get involved in so much politics that they feel they have to intervene in matters that could effectuate or could raise trade restrictions that private sectors feel needs to be addressed, and therefore forces the governments to address those issues through dispute settlement.

I will not go through those issues, because we are probably running short of time, but I will go into a discussion that deals with dispute settlement; how the dispute settlement mechanism, the WTO, and the NAFTA between Canada and the United States could be used, and what are the advantages and dis-advantages of using them.

When a trade dispute arises, one of the first questions for industry and government is whether there may be recourse under the trade agreement. For the purpose of discussion, I will look at the usefulness of the dispute settlement mechanism of the NAFTA and the WTO in setting food safety-related trade issues. In terms of formal dispute settlement, Canada and the United States can choose between NAFTA and the WTO. Which forum is chosen depends upon a number of factors, but depends primarily on which set of rules is likely to provide the best outcome for the challenge.

Although there are many similarities between the two fora, there are significant differences in the scope and nature of their substantive obligations. Today, however, rather than focusing on the technical similarities and differences between the two agreements and how they relate to food safety disputes, I would like to examine the broader and more fundamental issues of how well equipped these trade agreements are to deal with disputes that are inexplicably linked to the government's most basic

policy and political objectives. To do this, I propose to look at lessons learned from the WTO trade disputes, since we have not got Sanitary/Phytosanitary Agreements (SPS) or any relevant issues raised in the context of the NAFTA, *per se*, and the role of state signatories that are not direct parties to the dispute, the role of non-governmental organizations, and the investor-state dispute under NAFTA, Chapter 11.

Because there have not been any food safety disputes under NAFTA, it is instructive to look at the WTO case that had to deal with food safety issues. Let us look at the Canadian-U.S. challenge of Europe's ban on the import of beef produced with hormones, although one must be careful in drawing categorical conclusions based on one case, this decision reflects the difficulties in getting a workable decision through a formal dispute settlement process. That is true equally for the WTO as it could be under the NAFTA. In the hormone case, the E.U. was in a difficult position. A variety of food safety scares, both before and during the dispute, contributed to a general consumer mistrust of the food supply and the government's ability to protect public health. When Canada and the United States challenged the E.U. import ban on meat and meat products for cattle raised with certain growth hormones that in some circles were considered to give rise to human health problems, the E.U. had very little choice in those circumstances but to fight to the bitter end.

In practical terms, this meant maintaining the import ban and finding a range of E.U. export subjects to levy a prohibitive regulatory tariff in Canada and the United States. As a result, the beef industries in Canada and the United States did not gain improved access to the E.U. market for beef products for hormone-treated cattle. In addition, E.U., Canadian, and U.S. industries were adversely affected by the regulatory duties on E.U. exports.

The lesson from the hormones case is two-fold. First, losing countries might find it impossible for political and policy reasons to implement or comply completely with the formal dispute settlement decision. Second, the implication of not implementing a settlement may be retaliatory action by the winning country. This means that industries in both countries, which are not necessarily the industries involved in the dispute, can end up paying the price.

I will move directly to the role of non-governmental organization, as it is appropriately relevant. Over the past ten years, NGOs have become increasingly concerned about the ability or, from some NGOs perspective, inability of governments to regulate within the constraints imposed by international trade rules. The disputes involving trade restrictive measures imposed to meet environmental objectives and overstandards governing human consumption of agricultural products that some believe to be

produced in ways that are unsafe, NGOs are scrutinizing international trade dispute settlement like never before.

As a result, NGO demands for greater participation in the process has really intensified. However, right now, neither the WTO nor the NAFTA system are designed to accommodate direct and unsolicited NGO participation in the form of amicus briefs or oral representation before a panel. While both systems allow panels to seek advice and information from bodies of experts of a panel's choice, this does not meet the concern of many NGOs that want to be able to initiate and have direct control over their participation in the dispute.

This perceived lack of access, however, does not necessarily mean that the system is inadequate. NGOs in Canada and the United States can and do feed into the process through their respective governments. Although this may not seem satisfactory to some NGOs, the fact of the matter is that, in democratic nations like Canada and the United States, governments assume responsibility for weighing their interest and then determining the proper position to advance the collective interest of the nation. To allow direct NGO participation may put panels in the difficult position of having to assess a government position that may be contradicted by a position of one of that government's NGOs.

I will deal very quickly with the final point – the advantage and disadvantage of formal dispute settlement for the resolution of disputes between Canada and the United States. There are advantages and disadvantages to turning to formal dispute settlement procedures to resolve Canada and U.S. food safety related trade disputes. The primary advantage is that formal procedures provide recourses when other routes are ineffective. As I have mentioned earlier, looking at the beef hormones case, using such routes may not necessarily lead to a satisfactory solution for the industry that is particularly involved with a trade measure. Therefore, countries and industries must be very careful when they start initiating such processes. It involves major resources. It involves a long process of complicated discussion, both in front of the panel, but one also that is complicated in the context of the domestic discussions that take place before adopting a national position.

Therefore, one must look, as has been suggested earlier, for alternatives. The way to solve those alternatives is for parties that are concerned by some of those issues to use their government to enter into consultations and to try, as much as possible as Shirley was suggesting, to set rules and to set standards that are applicable and acceptable to the greatest majority of countries that are involved in this difficult issue, the interface between trade and legitimate protection of health.