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## Discussion Following the Remarks of Ms. Coffield and Mr. Frechette

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF  
MS. COFFIELD AND MR. FRECHETTE

QUESTION, PROFESSOR KING: I had a question for both of you. The real issue here is whether these health and safety measures are disguised barriers to trade, at least in the Canada/U.S. context. Do you think that some joint testing relationships are valuable?

Also, if you have some goods, you want to ship them to Canada, and you want free reign, is there any advanced warning operation that you could use? What steps do you take to avoid this type of difficulty? I think that we will see more of this in the future. We have seen it in Europe where it is sometimes a disguised trade barrier. Shirley, would you start, and then Serge, would you tackle it afterwards?

ANSWER, MS. COFFIELD: We do some joint testing already. I have had an experience, for example, with a client association that was concerned about the E.U. residue testing requirements, which involved the hormone ban. They are letting in meat that is not hormone-treated. There were some slippages in that system. The E.U. found that meat certified as non-hormone treated in fact had some hormones in it. So the E.U. was going to restrict all red meat of any kind from the United States just a few months ago. The United States did not have testing facilities that met E.U. standards. So the meat has been sent to a lab in Canada for the last for testing to meet the E.U. certification requirements. The E.U. came out and actually audited a Canadian facility in order to certify that it met their requirements for the U.S. exported meat. So we already, in certain areas, are depending upon each other in these areas of common concern.

With respect to pesticides and the United States, there are procedures for fairly rapid certifications. I have experienced a situation where a product was being sent in as a preservative for Post Cereal Company, but it also could have been used in a veterinarian application. The exporter did not know that and there was great concern. We were able to go and quickly get that regularized so it could come in. There is far more willingness between these two governments not to use these regulations as barriers to trade. The barriers to trade that come up inadvertently have to do with cumbersome procedure in the system. In the United States, there are several agencies involved: the Environmental Protection Agency (EPA), the United States Department of Agriculture (USDA), three or four agencies in the Food and Drug Administration (FDA), a Center for Disease Control, and the National Institute of Health (NIH). All of these agencies have a role in setting the

policies and implementing and enforcing what comes into the United States. Many of the problems are logistical problems. They are administrative problems that are not deliberate.

That is not the case with some other countries. In South America, for example. They are trying to get even, so to speak, for all the years we did not let anything from their country into the United States. Argentina is now off the list for foot and mouth disease, and parts of Mexico for African swine fever. There is a newfound zealotry in those governments to make sure anything coming from the United States or Canada meet certain requirements, which may seem to us to be overly protectionist. I give them the benefit of the doubt. I hope that over a period of time governments will really make a concerted effort not to use this as a trade restriction. Call it and deal with it, but do not require a certificate that is three pages long and requires veterinarians in other countries to certify to exotic diseases that the United States and Canada, who have huge administrative systems, are not able to cope with.

ANSWER, MR. FRECHETTE: On the issue of joint testing, I cannot talk with as much authority as Shirley because I have never run into any issues there. It is apparent that both the administrations in Canada and the United States are trying to work toward finding ways to ensure that there are no barriers. Joint testing is an obvious solution that could be used more than it is used. Joint testing implies an agreement on the procedures that will be used, and that will have acceptable results. Having joint testing may be a useful tool, but that very much depends on what the standards will be with respect to the particular good being tested and the tests. But I think, theoretically, I am in full agreement with Shirley.

QUESTION, MR. NORMAN: I want to raise a question that has not been addressed, or an issue that has not been raised by either of you, and that is the ownership of genetically enhanced products. The concern, as has been expressed to me by people who know a lot more about this than I do, is that we appear to be heading toward a situation where we may have four, five, or six large, multi-national corporations owning a large proportion of the world's genetic material because they developed it, and they own the technology and product rights. I would like to hear your views. This is, perhaps, an intellectual property issue, or maybe even a competition policy issue. I would be interested in whatever views you might have and ways to deal with it.

ANSWER, MS. COFFIELD: I talked earlier very briefly about bioethicists, and this is one of the real concerns about how you deal with genetically modified foods (GMOs). Many companies have agreed to release their patents and freely make them available in developing countries. For

example, for the use of genetically modified rice, particularly, where vitamin A and/or iron can be added to the rice, the results could be a huge help in eradicating certain diseases or deficiencies; such as blindness in some developing countries. Whether the companies did this because of a cleverly constructed plan to make everybody think they are good people or not, I do not really care, but it is being done. There will be more pressure for that in the future.

When you are talking about commercial products, such as Round Up resistant corn,<sup>1</sup> whether or not the competitive advantage gained by holding the patent goes into intellectual property issues or not, both countries recognize that investments should be rewarded and that investors should be able to recover their investment. I know there have been differing views between the United States and Canada for a number of years as to how long a patent can be held. The question is how you do that, for how long, and to what extent these products are going to be generally available.

I think it is an issue. I would not go to the extreme position and say that the multi-nationals will control the world in six years because they hold these patents to their chests. I do not think it is going to be allowed.

There will be mechanisms allowing them to recover their investments and make a profit. If these are as good as they say they are, they ought to be able to do that and be very happy, particularly because, in certain instances, they are going to be releasing these patents for use in developing countries.

QUESTION, MR. DELAY: Henry, will you admit that the food at this conference has been genetically engineered?

ANSWER, MS. COFFIELD: Yes, it has. I would expect eighty percent of what you eat contains products that have come from genetically modified crops.

QUESTION, MR. DELAY: In order to prevent legal problems before they become legal problems, is there an advantage to having some form of standing panel, broadly composed of geneticists, biologists, maybe even some of these Greenpeace people or physicians who would screen some of the more controversial biogenetically engineered products and run them through some discussion or analysis; maybe not as thorough as an FDA?

ANSWER, MR. FRECHETTE: There is an advantage in everything you can find to solve the problem before it hits the dispute settlement stage. Countries using the dispute settlement process could decide that before they trigger the system past the consultation stage they should consult with

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<sup>1</sup> Round-Up, manufactured by Monsanto, is the largest selling herbicide in the world. Round-Up ready crops are engineered to withstand increased applications of the herbicide. See *Round-Up ready Corn Under Attack in California* (visited Aug. 3, 2000) <[http://www.infoshop.org/news4/ca\\_corn.html](http://www.infoshop.org/news4/ca_corn.html)>.

experts to find out what the status of science is on a particular issue. They could solve the issue there if they are willing to make the policy decisions required in order to settle the matter at that point. The problem is too often that governments get put in positions where they cannot backtrack. They have no choice but to go to a panel and test to find out what the view will be from a reasonable person's point of view.

One of the reasons you end up in this situation is that you often have one part of the literature saying one thing, and another part of the literature saying pretty much the same thing, but with a nuance. The reason why you end up with a dispute is that a government, because it is pushed by an industry will give a certain meaning to that nuance which creates a dispute.

Whether you do it before or after, ultimately the practice has been, at least in the WTO context to hear from experts. Asbestos is a good example. The problem is, when you have a panel doing that you will have a decision that will try to solve the dispute, instead of having the parties trying to solve the dispute in advance.

There are obvious advantages in trying to solve the matter ahead of time. It inevitably depends on the government's willingness to agree on what the solution should be, which is not obvious.

COMMENT, MS. COFFIELD: Even before you get to that stage there needs to be better agreement on protocols for testing genetically modified organisms. That is how you determine that they are safe. There are ways of doing this and there are protocols in use in the United States and Canada, which are heavy users of GMOs. If there could be an agreement that would be a first step. What we need is an agreement on how to determine that something is safe to put out into the general environment. That is a basic question that we have not addressed here. Some people are saying it is never safe. That is not a trade issue—it is an ethical issue.

Once we get past that, it is a question of whether or not we can agree to the necessary protocols. Then perhaps we can get into panels looking at how the protocols are used. In other words, this is not a one step issue. It is going to take many steps before this is going to be able to be resolved in a way that is acceptable to the majority of entities who use GMOs. We are never going to have 100% agreement on this, as we do not have 100% on anything else.

QUESTION, MR. URLICH: The Biosafety Protocol recently negotiated in Montreal, contains provisions for the application of the precautionary principle. The question I have is two-fold. First, does the establishment of the precautionary principle and the protocol establish it as a customary principle of international law, thereby complicating future decisions in various disputes? Second, does it provide sort of a trampoline or create political

momentum for integrating the precautionary principle into codex or maybe some other agreements?

ANSWER, MS. COFFIELD: That is a very good question. The precautionary principle, you know, is an E.U. construct, and it was heavily opposed by the Miami Group, which included Canada. Actually, Canada was a surrogate for the United States in these negotiations because, as you heard, the United States is not a signatory to the Convention on Biodiversity, but it was an energetic participant, if I can put it that way.

As to the question you raised regarding whether or not this will become customary international law, I hope that there will be some discussion. My own view right now is that I would like to argue that it would not be; that it is really a subsidiary mechanism by which decisions are made, and not a substantive rule itself. But that just now came off of the top of my head, and so it is not something I have looked at. I hope I do not have to look at it.

This whole precautionary principle can be and will be a trampoline for countries to argue that, as far as they are concerned, their people do not want it. I will have to say with respect to the E.U., ten years ago they did not mind having it at all. As you may know, they did not mind having growth hormones, for example. There is a very active black market in growth hormones in the E.U. There are a lot of growth hormones being used now in the E.U. If the E.U. had not made this an issue, their public would not have created that monster. Now they have to live with the monster. There are a number of people in the E.U. in official positions who wish they had not done that. This question of whether this monster can be created many times over in GMOs is a very real concern.

QUESTION, PROFESSOR KING: Good, well, do you have any comments on the monster?

COMMENT, MR. FRECHETTE: I have just a very short comment on the question that Bill raised. Some people are actually saying that it may be the first step for the E.U.; that you will see the E.U. coming back with this idea and trying to develop it in other fora as well. Why? Because they want to build the concept that there is greater acceptance to this principle so that they can bring it back later on in the context of the SPS where it refers to international standards. So, in the context of a dispute, they could point out the existence of international standards, something that is generally accepted. Therefore, say our domestic measure is challenged and it is basically based on that standard. That is a theory that certain people say may be what is starting to happen. Whether or not it does happen depends on many legal criteria that have been developed in public international law over the past hundred years. When does something become a customary international rule?

COMMENT, PROFESSOR KING: That is a tough question.

QUESTION, MR. COTE: What do you do in the case where a country decides in one month, two, or three months to impose labeling standards, and what do you do for the countries who are hit by that? Does the SPS Agreement under the WTO deal with that or does the NAFTA? Which agreement will be used?

ANSWER, MS. COFFIELD: The question was whether a labeling requirement would be actionable under the WTO or the NAFTA.

It would be actionable under the TBT agreement in the WTO, which covers labeling, rather than under the SPS. I am expansionist in my view of what can be brought before the WTO, and I would have no compunction whatsoever in bringing a case or encouraging my government to bring a case if I could demonstrate both a method for choosing the rule and the impact of the rule, in fact, if it impaired my benefits. This sleep aid has a very long exposition on the Japanese rule on the GMO labeling, which they have now put into place. After you read that, you will see how very complicated it is. It goes through everybody right down the line through the United States and Japan.

At the end of the day, the United States and Canada will say they can live with that. Why can they live with it? Because they allow a five percent error rule; up to five percent can be not certified as free of GMO. What they are saying is they cannot meet the zero tolerance, because they cannot ever tell if there may be some odd mingling or mixing of a small percentage.

So even though it looked terrible to me, I am not the grain elevator operator. They said they can keep that paper trail so long as it is not a zero tolerance. In terms of labeling for GMOs, even though the United States is not willing to admit it they are going to accept GMO labeling so long as it is reasonable.

Once again the issue is, if it is safe to be out there then it should be out there. Once again, labeling comes down to an ethical question. If you do not want anything at all, why even allow it? If you are going to label it, let the consumer decide. If there is up to five percent, if they want to go buy something organic, let them do it. Those are the two kinds of views.

COMMENT, PROFESSOR KING: Shirley, that sleep aid is a take home from the conference. It is something to remember Shirley by, from the Canadian Food and Agriculture Department.

COMMENT, MR. NORMAN: I just wanted to make one comment on the precautionary principle, and that is to point out that it is already in the WTO Agreement on Sanitary Measures, but it is subject to constraints. There has to be some scientific evidence that there is a risk that needs to be dealt with. You can take a precautionary action against it, but you then have the obligation to undertake further scientific research to get to the bottom of the

problem and try to find the least restrictive way of dealing with it. So, the principle is already there, subject to constraints.

COMMENT, MS. COFFIELD: A diverse discussion.

COMMENT, PROFESSOR KING: She says a diverse discussion, which is very good. Thank you very much, Shirley and Serge.

