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First, the disclaimers. I am not a food safety expert. In Canada the standards for food safety are set by Health Canada, and the enforcement and inspection function is carried out by the Canadian Food Inspection Agency. I work in the trade policy shop of Agriculture Canada, where I have had the privilege of being involved in the negotiation of rules on sanitary and phytosanitary measures, both in the NAFTA and more particularly in the WTO. So, in keeping with my own area of knowledge, I would like to talk about the issues of sovereignty in the context of how countries have agreed to approach food safety regulation in the NAFTA and WTO-based trade regime.

The basic argument I want to make here today is that both the NAFTA and the WTO were carefully drafted to respect the sovereign right and responsibility of governments to make regulatory decisions that ensure the safety of the food supply of their citizens. However, both sets of rules do constrain the decision making process in some ways. As much as these constraints ensure that measures enhance food safety, they do not reduce the ability of governments to meet their objectives in this regard. More importantly, both WTO and NAFTA are parts of a much broader economic trend of globalization, which has the potential to bring considerable market-based pressure on governments to regulate food safety concerns in a coherent manner.

First, let us define some terms. I will define sovereignty as the right to decide on national objectives, and the ability to apply measures necessary to achieve these objectives. In the food safety area, this means the freedom to decide on an appropriate level of protection from food safety risks, and the right to regulate as necessary to achieve that protection. This means that I would not consider it an infringement of sovereignty if governments are constrained in their ability to apply capricious measures, or measures that are not actually related to their stated objectives. Indeed preventing this kind of behaviour was one of the key objectives of negotiating the rules on sanitary and phytosanitary measures in the NAFTA and the WTO.

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I will define food safety as the protection of consumers from toxins, contaminants, or diseases in food products. This is important because a number of current controversies that revolve around "consumer concerns with food quality and safety" are not strictly concerned with food safety issues.

There is an interesting issue of sovereignty where one government imposes mandatory government-enforced trade measures to require that products produced in another government's sovereign jurisdiction conform with certain farming practices or processing methods. And, in fact, this kind of extra-territorial regulation has traditionally been constrained under the NAFTA and the WTO. In a market economy, of course, consumers have the right to demand any products they want. Within certain limits, governments have a role to intervene as necessary to ensure that products actually have the characteristics that they claim to have. However, interventions that are designed strictly to address consumers' preferences or political choices are not about food safety. For the remainder of this discussion, I will focus on the rules surrounding food safety regulation, and their implication for national sovereignty.

The negotiation of specific international trade rules covering SPS measures is a relatively recent idea. Under the GATT 1947, the whole of human animal and plant life protection was covered in one rather cryptic exception clause,[1] which allowed countries to take measures "necessary to protect human animal or plant life or health." As a practical matter, although anecdotes from some of the older agricultural trade policy hands suggest that trade-motivated SPS barriers were fairly commonplace, agricultural trade in general was subject to so many special protective rules that the marginal impact of such standards was relatively minor.

However, in the run-up to the Uruguay Round in 1986, there was a growing realization that as traditional tools for the regulation of agricultural trade declined, there would be increasing pressure on regulators to generate new protective barriers for particularly powerful sectors. This awareness was reflected in the Punta del Este Declaration that launched the Uruguay Round

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[1] Article XX reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

a) necessary to protect public morals;
b) necessary to protect human, animal or plant life or health;
c) relating to the importations or exportations of gold or silver . . . .

of multilateral negotiations.[2] There, for the first time, Ministers directed negotiators to develop an agreement that would minimize the adverse effects of SPS barriers on trade.

While the Uruguay Round was going on, Canada and the United States were involved in the negotiation of NAFTA. Although the NAFTA text actually predated the WTO in conclusion, many of the NAFTA concepts and much of the NAFTA language was drawn from the WTO negotiating texts.

In both sets of negotiations, the basic tension was the same: it was well-understood that health and safety standards and regulations were an important potential area of abuse in the interests of economic protectionism; and everyone recognized that democratically elected governments simply could not forego the right to regulate as necessary to defend the health of their citizens.

The result is set out in Article 712 of the NAFTA, and Article 2 of the WTO agreement. Basically, governments are free to take measures necessary to achieve a level of protection which they consider appropriate, but their regulatory decisions must be based on sound science and an assessment of risks, as reflected in international standards, recommendations, guidelines, or other scientific work.

It is important to underline the distinctions made by the agreements between a level of risk protection over which countries have wide discretion, risk mitigation measures which must be scientifically related to achieving the appropriate level of risk protection, and those which must be no more onerous than necessary to achieve the goal.

In the WTO Agreement, there is a further obligation that countries must determine their level of risk protection in a particular situation in a way that avoids creating unnecessary trade barriers through arbitrary distinctions. This is evident in the WTO Article 5.5. This clause was designed to prevent countries from creating trade barriers by setting impossibly strict tolerances for products they wished to protect from international competition while accepting larger risks associated with other products. This is a relatively easy thing to say, but it gets very difficult to put into practice in different specific cases. The WTO SPS Committee has been working for some time to develop guidelines for the practical implementation of the concept of consistency in levels of protection. Progress had not been very fast, in keeping with the difficulty of the subject and the fact that this concept has been central to the first couple of dispute settlement cases under the SPS Agreement.

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[2] One of the objectives of the agriculture negotiations was set out as: "minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements."

Article 5.5 was dealt with in the recent WTO Appellate Body decision on E.U. hormones.[3] The Appellate Body decision essentially found that the standard of proof needed to find a country in violation of the consistency obligation is quite high.[4] As a result, countries will probably continue to retain very wide latitude to decide their risk tolerances on a situation-by-situation basis in the foreseeable future.

Within the general guidelines of risk mitigation measures which must be scientifically related to the risk reduction objectives they seek to achieve, both the NAFTA and the WTO essentially leave countries to make their own food safety regulatory decisions. To summarize in one phrase, the outcome is sovereignty to act as individual governments deem appropriate within a fairly large box defined by sound science.

The agreements do give some guidance about the size and shape of that box. Basically, both agreements leave it to the discretion of the importing country to decide whether the state of scientific knowledge about a risk is adequate. In the case of differing scientific opinions, the importing country retains the right to determine, within reasonable limits, which opinion to credit.

Although there is language in both agreements requiring countries to base their measures on international standards recommendations and guidelines, both leave the decision about whether a particular international standard meets its appropriate level of protection to the regulating authority. Of course, that decision is supposed to be based on a scientific judgment about the level of protection achieved by the international standard and the risks associated with a particular situation, and both agreements provide a vehicle for exporters to question a government that does not base its measures on an international standard. However, the final decision remains a sovereign power of the importing country.

In addition, both agreements make it very clear that when the science is ambiguous, governments can and should act preemptively where there is reason to believe that there is a risk to human, animal, or plant life or health. The corollary in WTO Article 5.7 and in NAFTA Article 715.4 is that if a

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[3] *See E.C - Measures Concerning Meat and Meat Products (Hormones),* WT/DS48/AB/R (Jan. 16, 1998).

[4] In the *E.U. Hormones* case, the Appellate Body developed a three-part test in relation to consistency. In order to be a violation of Article 5.5, a country would have to impose its own levels of protection in different situations, those levels of protection must exhibit arbitrary or unjustified distinctions in different situations. Those distinctions must result in discrimination or a disguised restriction on trade. In the *E.U. Hormones* case, the Appellate Body found the last of these was not proven. Future cases will no doubt elaborate on what proof is actually required to show violation of Article 5.5.

government is acting in the absence of science, it should do so on a temporary basis while the scientific uncertainty is being resolved, and then it should act in a way consistent with the science.

Finally, and this is important to the next subject I want to mention, governments are required under both agreements to recognize the "equivalence" of foreign measures which demonstrably achieve the health protection objectives which the importing country has established. Here, too, there is a substantial deference to sovereign decision making by the importing country. In WTO Article 4, equivalence is to be recognized where "the exporting Member objectively demonstrates to the importing Member" that its risk mitigation measures achieve the importer's level of protection. A similar provision is found in NAFTA Article 714 2(b). In both cases, the importer ultimately retains considerable discretion in deciding when the demonstration has been made convincingly. It is not clear how a WTO panel would rule on whether a measure had been objectively shown to work if an exporter ever challenged a failure by an importer to recognize a measure as equivalent.

The principle of equivalence is becoming increasingly important because, aside from the legal plane on which governments retain considerable sovereignty over food safety decisions, there is a more practical reality of how food safety regulation is actually done in an increasingly globalized economy.

Particularly in Canada and the United States after NAFTA, there has been a significant trend in larger and fewer food processing establishments making specialized products for a global or at least a North American market. With the removal of tariffs on processed food, companies with operations on both sides of the Canada/U.S. border have increasingly rationalized production by assigning North American product mandates to plants situated in one country or the other. Contrary to the predictions of some Canadian nationalists at the time of the Free Trade Agreement, a sizeable number of these plants are in Canada, so rationalization has been accompanied by a huge increase in two-way trade in agri-food products.[5] As a practical matter, neither Canada nor the United States is in any position to inspect the high volume of products crossing the border. In any case, to do so is not the most effective way of ensuring the food safety status of products. In the past several years, efforts have focused on more efficient ways to deal with these volumes of trade, and assure the safety of the food supply. The main innovation has been a focus on processed-based food safety systems, whereby standards concentrate on how

[5] According to Agri-Food Canada, Canadian agri-food exports to the United States were $3.6 billion in 1989 and $10.3 billion in 1996. Imports for the same years were $4.3 billion and $7.9 billion, respectively. Similar growth has occurred in Canadian trade with other countries over the same time frame.

the product is processed, rather than on assessing the safety of the final product at the end of the production line. Of course, if regulations are to focus on what happens in a processing plant and the processing plant is in another country's jurisdiction, some level of coordination between national inspection authorities is required. In general, this takes the form of mutual recognition of the equivalence of the systems in the two countries.

This situation continues to accord full sovereignty to the importing party, which ultimately must be convinced that the system under which a product is produced is adequate and reliably implemented. However, it puts a significant market pressure on regulatory systems in both countries to evolve in ways that are compatible. Essentially, food businesses that have been established on one side of the international border or the other with a view to serving both markets need to be able to secure the necessary food safety approvals in both markets without fail, or the investment that has gone into making North American scale plants in each country will be lost.

Fortunately, both Canada and the United States have long histories of fairly compatible approaches to food safety regulation, and both are moving in similar directions with more focus on Hazard Analysis Critical Control Point (HACCP) plans at the plant level, and in the horticulture area, back to the farm level. Both have been using their government resources in more of a monitoring and audit role to ensure that the necessary process controls are actually observed. This is both more resource-efficient and more effective in terms of reliable food safety results than the old end-point product inspection model. In order to allow plants to effectively meet standards in both countries, the specific requirements for HACCP programs in the countries need to be broadly consistent, and the regulatory authorities in both countries must be willing to recognize equivalence in situations where differences in some of the details of manufacturing and control procedures do not have significant food safety implications.

International trade rules leave governments free to act with full sovereignty within a very wide scope to pursue their national interests in assuring food safety for their consumers. At the same time, international trade and investment patterns are increasingly making it in the interests of both governments and consumers to have food safety systems that work in ways that are mutually consistent.

The bottom line is that governments do in fact retain sovereign control over the level of food safety protection to which they aspire, and the ability to regulate as necessary to achieve that level of protection. In fact, I would argue that the increased focus on objective scientific assessment and control of risks, which is implied by the new international rules, actually provide consumers with greater certainty that their food is safe, compared to the

situation prior to the WTO and NAFTA agreements when one could never be certain that regulations were actually based on an objective assessment of food safety needs.