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DISCUSSION AFTER THE SPEECHES OF PAUL MARTIN AND MATTHEW SCHAEFER

COMMENT, PROFESSOR PICKER: I want to thank you both. And you both claim that you are not experts. We are open for questions.

QUESTION, MS. COFFIELD: I have a question and a comment about the problems with dispute resolution regarding the solving of real-life problems of the people who are trying to trade in the world.

First, I will make reference, not to the hormones problem but to the specified risk material and the BSE problem. As I am sure you know, the European Union, at least, has had such internal conflict on this issue that it has not been implemented. It has, once again, been postponed for a year. On the other hand, the United States has implemented its ban, which is much less widely known. As of last December, all meat and meat products of ruminant were banned from all of Europe, not just the European Union, based upon a rather cursory determination by the TSE Committee and the United States that European countries do not have enough controls with respect to the monitoring and enforcement and cross/border trade of animals that might be contaminated or infected with BSE.

By the time dispute resolutions were able to get to this issue, there had already been vast enterprises wiped out in terms of their ability to trade, possibly forever, on certain lesser products that might not be meat, or might not be de-boned meat, but might be a byproduct that they are not able to recover because of actions that have been taken, possibly in Europe, but, certainly, in the United States, that each side can say is based upon scientific evidence. And the problem of having to prove the negative with respect to many of these exotic diseases becomes virtually impossible for governments.

What is risk and what is risk assessment? If you are saying that the Panels are giving that deference in an almost unlimited way to national governments, then I do not see that this agreement has, in a practical sense, solved our biggest problems in terms of trade in this type of food product; and that is the incompatibility and uncertainty and the potential that one will be hit by a totally unexpected, out-of-the-blue restriction. This is not to say that the BSE is not important. I think it certainly is. I think twelve people in the world have died from it on the basis of potential cross species jumping of this. I would say that the hormones probably have affected more people, and, yet, there are political issues and emotional issues that come up in countries with respect to certain problems. I certainly appreciate that consumers have to be concerned about what they eat.

But I have a fundamental problem with dispute resolution that takes a year or more and that can be triggered by actions that are put into effect, and the effect that can have on our industries in Canada and the United States, major consequences based upon what I personally believe would be suspect science, but which I recognize under the agreement is probably defensible.

I wonder if you would just comment on whether there is another way, if we could put aside dispute resolution and find another way to resolve these differences so that we can have, certainly, a recognition of certain standards, and we can set some area or some line above which countries really should not be operating, recognizing there will always be the peculiar case where that will happen.

ANSWER, MR. MARTIN: Let me say a couple of things. On dispute settlement, you are right, it is a really clumsy system; and, it is worse if you work in one of the governments that has to assemble reports on hormones — it was not me, thank God — but, some of my colleagues wound up putting together thousand-page submissions to deal with this hormone issue over a two-year period. It is a very clumsy system. Unfortunately, it is probably the best system to which you can agree. Given the balance that if you had a system with more automaticity, you would basically be legitimately open to the accusation that some faceless bureaucrat in Geneva is deciding whether stuff is safe enough for Canadians to eat. I can tell you that there is just absolutely no way you can get my minister to sign off on that.

However, I think there are some things about the agreement, just having the rules in place, that have given people the framework to discuss new and proposed rules, and I think it has avoided a lot of disputes when measures are being contemplated. People do think about their obligations. It is not entirely a question of being forced to do so through dispute settlement. The fact that rules are there and that you have signed up for them does have some chilling effect on the creativity of bureaucrats in creating barriers.

The other thing about the agreement is that it has notification provisions. For example, I was unaware that the Americans had actually implemented this BSE thing, because it seems to me when I was in Geneva at the SPS Committee meeting in mid-March, there was discussion between the Europeans and Americans about it. At that time, I thought it had been notified as a comment period measure.

COMMENT, MS. COFFIELD: It is a comment, but they put it into effect retroactively.

COMMENT, MR. MARTIN: Okay. I guess the point is that, by requiring people to notify their measures and have these discussions and be open for comments from others, you can actually get measures adjusted in ways that work better. That has had some salutary effect on some measures that we

have been concerned about. I do think there is some benefit, but you are right, dispute settlement is an extremely difficult instrument to use.

COMMENT, MS. COFFIELD: I would just like to comment on the notification. In the United States, the FSIS shoots first, and then they notify in these issues. I do not think that this is understood, that that prohibition actually went into effect in December, but this is exactly what the United States does in all disease cases. It is effective the day they decide, and they may publish it the next week and give a comment period, but it is always effective the day they decide. That is a problem with respect to notification.

COMMENT, PROFESSOR SCHAEFER: I think you are making the argument that you can almost argue the other way for Nader and Buchanan, that the agreement got the balance wrong, that it still allows too many trade restrictions and measures that inhibit trade. I think part of that is the dispute settlement process; although it is much stronger under the WTO, it does take eighteen to twenty-four months to get through the process. You generally have fifteen months to implement it, and, in fact, in the *Hormones* case, the E.U. is hoping that they can have up to four years. Clearly, short-term solutions are not in order, even through the WTO dispute settlement system.

It is an improvement from the prior GATT system. The other thing I might mention is that I know the U.S. government has a policy where they want certain reforms to be undertaken in Codex. If Codex has its legitimacy, i.e., the United States wants to be much more science-based, wants it to take on issues horizontally, wants not to be product-specific, and wants to improve its management process in the participation of MGOs so that Codex standards will be more legitimate, so some of these international standards might be more legitimate, more countries, if they are science-based or horizontal, may be willing to consider them. It would not create such a problem in terms of domestic politics if some of these Codex reforms go through.

COMMENT, MR. WOODS: Professor Schaefer's comments about various animal parts reminds me — I wish I could remember who it was, I cannot remember, but somebody once compared the process of making sausage to the process of making laws. They said that they were very similar, and they remarked it was a good thing the end consumer was not aware or privy to the process in both cases. Perhaps the same thing could be said for some of the ways we work out international law and some of these standards.

The question is, with respect to the *Hormones* Panel, am I right in my thinking that the Appellate Body has backed off a bit from the original Panel decision, and does that mean that this might put the brakes on what I consider to be the potential for a bottomless pit of litigation, if you want to call it that, or deciding what the rules are through several large complicated Panel deci-

sions, or are we going to see a bit of a hiatus on that prediction in the future in terms of litigation?

The second thing, picking up on Professor Schaefer's comments about the states and referendums, I am not quite sure I understand. In the U.S. constitutional setup, what powers and rules do the states have in terms of setting the standards which would ultimately have effect in the context that we are speaking about today?

ANSWER, MR. MARTIN: Well, I will try to predict the future, and Matthew will explain the states. A bottomless pit of litigation is quite likely, actually. The Appellate Body in the *Hormones* case did back off from where the Panel was, but I do not think that necessarily stops people from wanting to clarify some of these things in the SPS Agreement.

As we mentioned, there is another case ongoing now, and there are certainly others out there on the horizon in terms of SPS measures. I guess the thing about the Appellate Body decision, is that it adjusted that balance somehow between deference to national sovereign decision making and the international rules. Certainly, one side in the hormones decision was very happy with the Appellate Body and will be a lot more inclined to use the dispute settlement provisions now that they think that balance is in a certain place.

ANSWER, PROFESSOR SCHAEFER: On the states and localities, the federal government, under its commerce clause power, which is, again, much broader in the United States than in Canada, has the ability to preempt the states in a lot of these areas to the extent the feds have not preempted or do not have Constitutional authority to go into these areas, the latter being a much smaller possibility. States maintain the leeway to set their own levels of protection and their own standards, and one of the ways by which they do that is by referendum.

There was some concern that a referendum is not like a regulatory process; a state regulator would have a risk assessment before it before creating the measure. But to accept the referendum is setting a level of protection. That is a public policy choice that can be decided in a variety of ways, by the state legislature or by the citizens through referendum. And, in fact, if the referendum went further and actually created a standard rather than just a level of protection, it may still be okay under the agreement, provided there is some rational relationship among that standard, the level of risk assessment, and the level of protection that the state wants to achieve.

QUESTION, MR. WOODS: Is that standard reflected in legislation or just in the referendum result?

ANSWER, PROFESSOR SCHAEFER: Well, it would become law. Certain states' constitutions allow for laws to be enacted via referendum.

QUESTION, MR. WOODS: What about the commerce clause? Would that not demolish anybody trying to prevent certain kinds of bottles or cans coming into the state?

ANSWER, PROFESSOR SCHAEFER: The other issue is, even if the federal government has not preempted the states under its positive powers, under the commerce clause, we do have something called a dormant commerce clause that prevents undue burdens on interstate commerce, even where Congress has not acted. That is a limit on state authority even where Congress has not affirmatively acted to preempt the states. True enough, a law passed by referendum or by any other measure would have to survive scrutiny under the dormant commerce clause.

If it is facially discriminatory, is it virtually, *per se*, ruled that it is illegal? Not necessarily, but you would have to have a strong justification for it, and if its origin is neutral, some people believe that courts are still going through a balancing analysis between effects on interstate and foreign commerce and the legitimate objectives achieved by the state.

COMMENT, MR. WOODS: Another potential pit of litigation.

COMMENT, PROFESSOR SCHAEFER: I think eventually what will happen is, once several cases have gone through and there is some clarification of what the provisions mean, litigation will subside because parties are able to predict better the results of the litigation. Sometimes for domestic political reasons, they need to go through the process, so that they have a Panel report, but in other cases they are willing to settle.

COMMENT, MR. CHANCEY: I would just like to add my voice to the growing consensus that Mr. Nader and company's concerns were hollow, and just point to the fact that, for those of us who were hoping that the SPS Agreement or that the WTO level or the NAFTA level were going to, in the long run, contribute to improved trade flows or less abuse in the implication of sanitary and phytosanitary measures, there are some practical implications that, in fact, these agreements could lead to the opposite effect. I am really essentially referring to the process of international harmonization from the point of view of trade flows. I think both speakers have pointed to the importance of equivalency agreements, with the national scientific and regulatory authorities in the countries that trade arriving at a consensus about what constitutes the right science, and what are appropriate risks and mitigation measures, etc.

We have in the WTO or the WTO/SPS text reference to standards-setting bodies. There was a dynamic that existed prior to the creation or the codification of rules and framework for applying measures that in itself contributed to trade flows, the Codex Alimentarius, the OIE in the case of animal products, and the IPPC, the International Plant Protection Convention.

In the case of the NAFTA/SPS Agreement, there is only one referenced body, and that is the North American Plant Protection Organization. I have been involved in dispute resolution or trade management involving SPS issues with Mexico in particular, where the consensus that was reached within the North American Plant Protection Organization, for example, contributed largely to the resolution of a number of issues.

The dynamic that led to the consensus in those organizations was one that essentially resulted from the fellowship of like-minded scientists and regulators on both sides, on three sides of the issue in the case of NAFTA. Interestingly enough, we made some gains in a number of American access issues based on the fact that a consensus was developed without a great deal of political interference or pressure. We are now seeing new types of problems that really relate to the fact that the North American Plant Protection Organization has become increasingly politicized, at least on some points. In other words, we lose the stability to operate in a scientifically sound environment as we compromise.

I would suggest that over time, the same shift of pressures from the backs of the trade negotiators to the scientists could occur at the international level. I think the *Hormones* Panel result, at the very least, weakened the significance of international standard setting and created a "my science is better than your science" situation. I think, in the short term, clearly those countries such as Canada and the United States, which have established traditions have an advantage. The accepted science in many cases was generated by Canada and the United States and the European Union. Over time, I think that will change, and that may have unintended effects.

COMMENT, MR. MARTIN: I agree that there is a danger of the scientific world becoming politicized. I think that people who go to the Codex can certainly see that there is a tendency in that direction. But I am a little bit at a loss as to what you can do about that because, obviously, states will try to retain their sovereignty as much as possible.

Basically, what we have here are some norms which are guiding sovereignty, and the thing to do if you are in the sovereignty maintaining business is to go out and screw around with the norms if you can.

COMMENT, PROFESSOR PICKER: I am a little concerned that the Appellate Body for beef hormones may simply be giving licenses to countries to continue to maintain bogus SPS measures because the Panel has reversed the onus and has put the burden of proof on the countries making the complaint. I always read the SPS Agreement to be an exception to the obligations in the WTO. As Paul pointed out, there is no national trade and obligation, nor is there an MFN obligation. The preamble to the agreement says that if you do everything in the agreement, all you have done is hit Article

20B of GATT, which was the exception allowing you to take measures to protect human, animal, or plant life or health. Once you did that or tried to justify measures under Article 20B, you had the obligation to demonstrate that it was a measure which was necessary and there was no other less trade-restrictive measure available.

This is in the preamble to the agreement. There is also a provision that indicates that the onus is on the country maintaining the measure to demonstrate that it is necessary. I am concerned that by reversing the onus and putting the onus on that country that is challenging, that is putting them in a position of having to go out and demonstrate that all of the proofs you have taken to establish your measure are wrong. So that now, for example, if Canada is going to stop the importation of some American product on the basis that it is disease-ridden, the onus is not going to be on Canada to demonstrate that we hit an appropriate level of scientific justification, but on the United States to go through the process of demonstrating that our measure either does not meet that, or is an unnecessary or disguised restriction on international trade. I think that is going to be very difficult, and I would like to have your comments on that.

ANSWER, PROFESSOR SCHAEFER: I think the Appellate Body makes clear that a challenger bears the burden of proving a *prima facie* case, and then it shifts to the defending party. It is not enough just to show that there is an international standard and that you have not based your standard on that international standard. You must go further and show that it was not based on science and a risk assessment, and your question is really, how much do you need to go ahead and show? I do not think it is clear from this one Panel report, but if you have science on the other side, a *prima facie* case is just enough that if the other party does not come up with any rebuttal, then a Panel, as a matter of law, would rule in the challenger's favor. To the extent you have some science and a risk assessment out there showing that their standard does not make sense in terms of the level of protection they have chosen, that is going to shift the burden of proof. It is hard to tell just from one case, but I do not think we have set the burden too high on the challenger. I do not see it as being as drastic as you do.

COMMENT, MR. MARTIN: No, it is not true that the SPS Agreement is an exception. The Europeans actually tried to draft it that way, because, as Matthew mentioned, a lot of stuff in the SPS Agreement is about nailing the hormones. The European argument on hormones was always that it was consistent with Article 3, and, therefore, they did not need to appeal to an exception, so when the SPS Agreement was being drafted, they tried to draft it as an interpretation of Article 20B, so that they would never have to deal with the obligations in the SPS Agreement in order to deal with hormones. We

saw that one coming, and it is drafted so that this agreement applies to all sanitary and phytosanitary measures which may directly or indirectly affect international trade. Such measures shall be developed and applied in accordance with the provisions of this agreement. It is a positive obligation that you have to do your SPS measures in accordance with the agreement; it is not an exception.

QUESTION, PROFESSOR KING: I had one point that is an outgrowth of what Shirley said. That is the fact that, in terms of time, the producer, for instance from the United States, has lost the market during the period of arbitration. What I am wondering about is the speed of these procedures, so you just cannot harass a producer with standards that are later rejected. In other words, he or she has lost the business and has financial reverses. Meanwhile, this Panel is taking its time coming to its conclusion. Is there any move to try to expedite these cases so they get settled?

ANSWER, MR. MARTIN: The dispute settlement provisions of the WTO Agreement actually have timelines in them, which is a big step up from the old GATT system, but I think people are generally thinking they move along relatively quickly for international arbitrations. I do not know how you could go about making it any faster, given the complexity of the cases that people are putting to them. I have my doubts that you can make them faster and actually deliver the reports when the deadline came up. As a matter of fact, in the hormones case, it was extended due to the complexity of the case.

COMMENT, MS. COFFIELD: If I could comment, that really confirms my concern about using dispute resolution for everything that comes down the pike. I have been asked privately by some clients, please do not take this up with the secretary; please do not take it up to the political appointee because, if you do, it will not be resolved. It will become an issue of dispute between the two countries.

As you say, maybe there is nothing you can do about the politicization of what ought to be a common approach to common objectives around the world with respect to food safety, but I would hope that governments could get to the point where they do not jump on everything as a reason to go into a long, lengthy dispute settlement process and would rather pay more attention to those professionals who built up a relationship with their colleagues around the world and can approach this on a professional level, rather than on a political level. I am sorry to say the two do not possess the same degree of objectivity, which is what ought to be used in the food safety area.

COMMENT, PROFESSOR SCHAEFER: I will just add quickly that the strict timetables in the WTO Agreement are an improvement over the old GATT. They may not resolve disputes necessarily quickly relative to what

might be happening out in the marketplace. But, the other point to keep in mind is that, if countries were to be strategic about their violations realize it takes twenty-four months for an Appellate Body Report to come out, and another fifteen months to comply, they could start doing wholesale violations during these three-year periods in response to protectionist pressures. The system would break down.

I think some things do get worked out on mutually agreeable basis, on the basis of professionals, but this was a highly politicized matter that was going to require a dispute settlement Panel report to achieve any change in Europe, and we will see if even that was enough. But, clearly, countries have to comply if there are wholesale violations.

COMMENT, PROFESSOR KING: I looked at it from the standpoint of, if they agreed, they might be out of business.

