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## **HEALTH, PLANT AND ANIMAL PROTECTION, AND FOOD SAFETY: WTO AND NAFTA**

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### **INTRODUCTION**

The number of issues that this presentation was designed to cover is broad ranging, from the role of science, politics, institutions, to who makes decisions and how they are made. The paper will cover as much as possible in the time available, but in a fairly broad sense. We will not examine any particular disputes, but we will try to provide a sense of the structure that exists, how it is working, how it is changing, and illustrate some of the challenges we are facing today and into the future.

The trade rules component is probably the part that people are most familiar with. There is the WTO Sanitary and Phyto-Sanitary (WTO/SPS) Agreement, the basic WTO Agreement, as well as the NAFTA. There is today ongoing discussion toward creating a free trade agreement within the hemisphere, the Free Trade of the Americas Agreement (FTAA) but that one is not here yet. Also increasingly important, something Bill Kerr will discuss later in his paper, is the role of international standard setting bodies: CODEX for food safety; the OIE for veterinary issues and the IPPC for plant health issues; and NAPA was the regional component of the IPPC network.

These three international standard setting bodies are explicitly referenced in the WTO and the work that they do has huge implications for trade in the sense that *if they succeed in setting a technical standard then that is automatically deemed to be WTO consistent*. This will be discussed later. Back in the pre-1995 era, before the present WTO Agreement, these standard setting bodies were very scientific and very technical. Increasingly, people are recognizing the significance of their work and we are increasingly seeing trade policy types showing up at these meetings internationally.

The third group is international environmental agreements. Some might say -- what does that have to do with SPS issues? The answer is found in the bio safety protocol which is developing an international regulatory system for shipments of genetically modified organisms (GMOs). There are also certain rules for deliberate release of living organisms such as seed, seedlings or fish stocks. There are also rules for trade in GMOs which are for food, feed and processing. So this is a very contentious agreement but it is a sign that the SPS world is broadening out. It is not just the WTO which is relevant today, a whole range of international agreements is covered.

## THE WTO AND ITS RELATION TO NAFTA

The WTO Agreement is about 600 pages thick but its principles can be summarized in three propositions:

- *countries should not discriminate between foreign goods and their own goods;*
- *importing countries should not discriminate between foreign goods from one country and the foreign goods from another country; and*
- *the only instrument available for protection of domestic industry is a tariff.*

These principles occupy a page and a half in the WTO document. The other almost six hundred pages provide elaboration, exceptions and detail. Services and intellectual properties are part of the coverage. But for goods,

these are the three fundamental disciplines. In the NAFTA context, we are not supposed to have any tariffs, so perhaps it could be argued that the WTO agreement boils down to two disciplines vis-a-vis the NAFTA countries.

### **SPS Rules**

There are many exceptions identified in WTO, among them subsidies, product code, Article 11, and so on. For discussion here the critical ones relate to SPS measures. Before the WTO was put in place, there were disciplines on SPS, called Article 20, which essentially said that you can break your WTO obligations for special circumstances providing you do it in certain ways. One of those special circumstances is to protect human, plant, animal health or life according to Article 20 (b). This provision has been around since 1947 and was actually invoked in a few panel cases over the years. But in the 1995 agreement the SPS agreement became an elaboration of Article 20 (b), and says that if you are going to invoke Article 20 (b) you have to do it in the following ways, and the SPS Agreement essentially describes rights and obligations that all countries have in invoking any exception related to human, animal, plant health or life.

We are going to touch on NAFTA throughout the paper because that is a primary focus of this group. In the SPS area, NAFTA SPS negotiations were going on at the same time as the WTO negotiations which produced provisions in the separate agreements that are very similar. There are some significant differences but for all intents and purposes, *the two agreements are remarkably similar.*

The scope of the SPS Agreements deal with measures to protect human, animal and plant health or life, from food or feed borne risks, and from pests or disease related risks. For example, anti-smoking legislation has to do with human health but it does not fall under the SPS because it does not deal with these particular types of risks. The important thing to remember about the *SPS Agreement is that it is risk-based not product-based.* The scope of the Agreement is not the same as the scope of the agricultural agreement which is product specific.

In Canada, United States, and Mexico, measures are taken in pursuit of animal, plant, human health on a range of products. For example, Canada impounded a ship load of British tanks during the foot and mouth crisis in 2001 because of concern that the tanks had potentially dangerous dirt on their tracks. So it doesn't matter what the product is, it could even be a human being for that matter so it is not a HSF tariff line- based agreement. *It is a risk- based agreement.*

Characterizing the SPS Agreements is fairly simple. It is clear that every country has the right to regulate in these areas. This situation goes back to Article 20 (b) conditions from 1947 but it was elaborated in the WTO SPS Agreement to include that each country has the right to choose its own level of protection. *So on any particular plant health, animal health, or human health issue, Canada, Mexico and the United States do not have to have the same level of protection.* Individual countries can be fussier than another country. There is nothing wrong with that in principle. However, accompanying these rights are a series of obligations. While any country can choose its own appropriate level of protection, their application must be consistent. It is not allowable to be really fussy about a particular risk from imported products, but not really fussy about a similar risk that happens to occur domestically. So countries are supposed to be consistent. Perhaps we can talk about the European Union (EU) in that regard later on.

In addition, *countries are supposed to be fundamentally transparent*, and are supposed to notify trading partners if a measure is being put in place. Other countries are supposed to have the opportunity to comment. *Regulation is supposed to be based on science*, and the chosen *measure is supposed to be that which achieves the required level of protection with the least disruption of trade.* The action is not supposed to unnecessarily disrupt trade although trade will usually be disrupted.

Before discussing these points, let's return to the fundamental disciplines of the WTO which include no discrimination between domestic goods and imported goods and no discrimination among sources of imported goods, and use of only tariffs for protection. The reason for the

exception to this in an SPS world is because, obviously, if a good is coming in from one country that has a different risk profile than your own domestic production you can distinguish against that good in a sense that its importation can be banned because of the risks. You can distinguish between one country and another country in terms of imports if they do not have the same risk profile. So the whole point of the SPS Agreement might be said to be discriminatory. It is a rule upon which you are allowed to discriminate; and in terms of using the tariff as the only measure of protection obviously in a SPS context, if you have a good that is coming into a country and there are risks associated with that good, it does not make any sense only to put a tariff on that good. It has to be banned. So it is in that sense that the SPS Agreement breaches the three fundamental obligations within the WTO system.

Some of the other aspects of the SPS Agreement are on temporary measures. Essentially it says less than 100 percent certainty by scientific means is allowed when there are circumstances in which countries have to act. That is recognized in the WTO and in NAFTA except that the country that is putting, say, *a temporary measure in place pending finding all the science, they have an obligation in the WTO to seek out that additional information*. It is not allowable within this framework to put a measure in place and then ignore the file. Temporary measures can be used but there is the obligation to seek out missing data, and an obligation to review the basis for that measure. If and when the information is available, if the measure does not make sense, there is an obligation to review, revise or remove it.

The whole point about this is that in a situation, say, between Canada and Mexico, Canada has a certain appropriate level of protection and we regulate in a certain manner with certain measures to achieve that appropriate particular level of protection. Let us also say that Mexico wants to export to Canada, but they do not regulate in exactly the same way that we do. Mexico may claim that it can achieve Canada's appropriate level of protection but in a different way. In this instance, Canada has a obligation to respond. If it can be established that the way Mexico regulates, even though it is different, is able to achieve the appropriate level of protection

at the end of the day, then the WTO Agreement encourages Canada to recognize that there is “more than one way to cook a steak” that is, there is more than one way to regulate in a particular area.

The third area which is encouraged in the WTO is the whole idea of regionalizing measures. If there is a problem, say in the United States with a particular disease, that does not exist in Canada, but disease only occurs in a few states, then if Canada is putting a measure in place, it should only put that measure in place on those states which have the disease. It should not put on a blanket measure against all imports from the United States. Of course in order to apply that principle, there must be a level of confidence that the product or the disease from the infected states is not deflecting into other states. But if it can be established that there is a region within which that disease is prevalent and the disease does not get out of that region, then *countries are supposed to apply their measures on a basis of a region instead of on the basis of a whole country.*

### **International Standards**

Turning now to international standards, you will recall that one of the fundamental obligations in the SPS Agreement now is to base measures on science. There are two ways to demonstrate a scientific basis of a measure:

- *through a risk assessment; and*
- *through using an international standard.*

There is an assumption within the WTO system derived from the WTO Agreement that any standard that comes out of CODEX, the OIE, or IPPC for certain classes of subject areas may be applied. It is not just any standard that comes out of CODEX, but a standard on CODEX that deals with positive list of risks or issues. That standard is presumed to be scientific. If a country puts a measure in place and says that the measure is based on this CODEX standard, then that is the end of the debate. It is deemed to be scientific and it is also deemed to be consistent with the rest of the SPS Agreement. As mentioned above, these are the relevant standard-setting bodies.

The TBT Agreement is very different, and consequently very interesting. It says that any standard from any international organization including those that are under development is deemed to be consistent with the TBT Agreement. That concept presents a huge open universe. The SPS Agreement is very specific, as is CODEX- alimentarius. If for some reason or other, a country decides to come up with a standard for plant health that does not count, it is only those three bodies for those three subject areas and they have to line up very clearly. So if the United Nations Environment Program (UNEP), for example, comes up with a standard on tolerances for environmental impacts of something, that does not count. But it would in the TBT context because the SPS Agreement was negotiated as an elaboration of an exception. The negotiators were very careful when they negotiated the SPS Agreement and it is very tight, whereas on TBT which has to do with labeling and other issues, it was more of a bottom up agreement. People said we need rules on standards, what should they look like? They were not as fussy when they negotiated.

Earlier it was mentioned that with the coming into force of the SPS Agreement, an intersection was established between what these previously very technical bodies were doing and the world of WTO rules and international trade. This has been a bit of a mixed blessing for these organizations. On the one hand what they do now is becoming really important and so the stakes are really high. The government officials who used to try to explain to their colleagues what they doing at some CODEX meeting on import/export inspection systems or some similar issue, they would just get glazed looks. Now the work that these people do is really important.

As mentioned before, delegations are changing. However, on the down side because of this enhanced importance of these first technical bodies, there is a temptation to use these bodies to undermine the SPS through the back door. So if you could come up with an unscientific CODEX standard for food safety and that standard is automatically sanctioned through the SPS Agreement, because it is a CODEX standard you have diminished the whole scientific basis of the system. There is a real threat to the WTO system if people start misusing these scientific bodies for non-scientific objectives. This is a problem that the Mexican, U.S. and



Canadian governments are all facing. The NAFTA partners are cooperating to address this problem.

### **NAFTA Rules**

As indicated, NAFTA came into being about the same time as the WTO negotiations occurred but there are some little differences here and there in the two agreements. On provisional measures, NAFTA is the same as the WTO. But on the WTO and provisional measures, when all of the science is not available, there is an obligation as the country putting the measure in place to seek out the information that you need so you have to actively collect it. Under NAFTA, the only requirement is to receive the information. It is not required to look for it but if someone shows up with new information, you have to take it into account. So the NAFTA obligations are actually less onerous than the WTO in that area.

*On the principle of equivalence, NAFTA is much more ambitious.* The NAFTA Agreement makes equivalence look like the future. It implies that equivalence will be easy to achieve, that there will be whole universe of equivalence agreements, and that the world will be much friendlier place with equivalence. As it turns out, equivalence has not been the silver bullet that people thought in 1992, 1993 and 1994. Canada and the United States, given all the billion of dollars of trade that goes back and forth in agri-food products, equivalence is lacking although some would say on meat that we have something like an equivalence agreement. In my view it would be stretching the definition to call that an equivalence agreement.

We have been negotiating with FDA and USDA on fish inspection and fluid milk and dairy products for about seven years. We are still not there, and it is not because there is any kind of hidden agendas and any animosity. The reason is that the problem is really complicated, and regulatory authorities are very reticent to say that there is “another way to cook a steak” than their way. That is just life in the regulatory business. This whole equivalence thing that was so promising in the early 1990s has caused people to come to realize that it is a lot more complicated and a lot less fruitful than people thought. But maybe in the future things will be

simplified. Scientific expert groups and science has got no where under the WTO.

### **The Role of Committees**

In the WTO when a problem arises, a country can go to the committee, raise the issue, and try to get agreement from the rest of the membership. The good offices of the chair may be used to try to facilitate some solution between two countries. But, at the end of the day, the only thing that is *not achievable by international persuasion must be pursued by a legal panel. Legal panels are expensive, time consuming, and increasingly legalistic.* Every time there is a win from a panel, the other side appeals; that appeal will be appealed, and the dispute is dragged out. Usually by the end of the day after the dispute has been won, the industry has moved on to another market and the outcome really does not matter.

This is a cumbersome and expensive process. Within NAFTA there are several options on these disputes. NAFTA countries can either go through committees, to the Commission, or set up a group of technical experts who will provide a scientific opinion. This is a unique feature of NAFTA, one that we could perhaps use a more effectively in other agreements. There an amusing provision in NAFTA resulting from NAFTA being negotiated at the time of the trade and environment debate reaching its peak. A lot of non-governmental organizations were very suspicious of the trade agreements and they were particularly suspicious of the WTO. There is a provision in the NAFTA Chapter that if, say, Canada wants to take a dispute against the United States on some SPS issue to the WTO, the *United States has the right to insist that the dispute be handled within the NAFTA. This provision relates to any SPS measure or any environmental measure.*

Also on the environment, there is a list of environmental agreements at the beginning of the NAFTA which was meant at the time to make the agreement environmentally friendly. There were three from the Brazil Convention Montreal Protocol and citations for endangered species. If a NAFTA country introduces a measure pursuant to one of those agreements, it's deemed to be almost sufficient reason to be consistent with NAFTA.

There are certain checks and balances included but a lot of credence is given to measures taken pursuant to those agreements. That does not exist in the WTO.

### **BioSafety Protocols**

There is also the Cardahan Protocol which is a odd agreement coming out of UNEP, and it covered trans-boundary movements of genetically modified organisms. At the same time in the IPPC context there were people negotiating an agreement on the basis of species. The two approaches are not quite the same thing but you would have thought that if the whole GM issue had been given to IPPC rather than UNEP, we would have had a very different agreement today. And part of the problem there was that the IPPC people did not talk to the UNEP people and vice versa. A lot of what is going on today is that people are making connections between international agreements which they had not even thought of five years ago.

We could have had a much better Biosafety Protocol under IPPC than under UNEP. But life does go on, we did not do it that way, and we are stuck with what we have. Canada signed the Biosafety Protocol; the United States has not signed it; Mexico did sign. However Canada has not yet ratified the protocol. We are going through domestic consultations to look at ratification. The United States is not likely to ratify the protocol since it has not ratified the convention on bio security or diversity which came out of the Rio Conference in 1992/93.

In terms of the United States and Canada, we are a huge exporter of GM commodities and products. We have an significant interest in this Agreement. This Agreement imposes all the obligations on the exporters and none on importers. In the WTO system, most of the obligations are on importers, so this agreement a complete flip of how we are used to thinking the problem.

### **Dispute Resolution/ Panels**

The salmon dispute with Australia a few years ago is an interesting case of why panels are not necessarily a good idea. They cost a lot of money, they consume a lot of time, involve a lot of lawyers and a lot of

trips to Geneva. In this situation we won the first round action, we won the appeal and then we went to receive the congratulations from the Canadian salmon industry. They said we do not want to bother with Australia anymore; we have moved on to another country. Not much return to a hard fought battle.

I think it is fair to say that the panel system, in terms of supporting the science rule-based transparent system, there has produced good results. However, one of my messages today is *that panels should be avoided if the issue is resolving disputes*. In the SPS committee, at every meeting countries show up and pound the table about some country, say Australia, has this measure and it does not make any sense. Mexico will take a run at the United States about avocados or some thing else. Someone will take run at Canada about Karnal bunt. We all take a run at the EU for everything that they do. The Australians are being hammered all the time and so this happens at every meeting. There are twenty issues out there that get bounced back and forth. People seek the views and seek the support of other countries around the table. They seek to put pressure on the importing country to review the measure. Through that cut and thrust, over the last five or six years, almost one hundred issues have been resolved where the parties come back to the committee and say we have sat down and sorted it out. The number of panels is not a good indicator of how many disputes have been resolved because a lot goes on before you get to the panel stage. In our mind, *the SPS committee has been quite helpful, useful, and effective in resolving disputes*.

### **NAFTA Panels**

One could say that there has not been a panel under NAFTA which may lead one to say that there have not been any disputes. That is an incomplete picture, with an incorrect conclusion. Despite the fact that there is a provision in NAFTA that it rather than WTO can be used if parties have a problem. It should be mentioned that there have not been any panels in the WTO concerning the three NAFTA countries in the last five years on SPS issues. Most recently though, the disputes settlement committee provisions were invoked for the Canada/ U.S. potato wart issue as discussed by Robert MacDonald elsewhere in this publication. Essentially Canada

requested consultations on an expedited basis. The United States responded on an expedited basis because of the perishability of the product. But that simply served to raise the issue to a sufficiently high political profile that it was made a priority; the scientists got together and sorted it out. So the dispute settlement provisions were invoked to simply underscore the importance of the issue to the parties concerned. Then it was resolved outside the context of NAFTA.

### **Committee and Working Groups On SPS Measures**

When NAFTA was created, there was a committee created which has met every year since. It is a mechanism whereby issues can be addressed and resolved before going through the formal dispute settlement provision within NAFTA. *Within the committee structure, there are seven or eight technical working groups that report to the committee on a wide variety of issues in the SPS area.*

A new committee on food packaging labeling has just been created. This is something that reports to both the SPS committee and the committee on standards and related measures, TBT. Both committees have to agree at the same time to create this new committee. I think that the letters may have got lost in the mail but both committees have agreed to establish this working group. One of the first things that it is going to have to deal with is the whole question of GM food labeling. It is a kind of an issue that having a NAFTA type policy framework would be very useful. It does not make sense to have labeling standards in Mexico, Canada and the United States which are different given the amount of trade which goes back and forth. So the idea would be to set up some kind of common standard, or at least some kind of harmonized approach to that question. There are all kinds of mechanisms within NAFTA to deal with disputes and avoid them.

There is another unique aspect to NAFTA in the dispute settlement area, *the dispute resolution corporation*. It is a NAFTA instrument but it is run totally by the private sector. It is related to *ensuring that the provision of contracts are met*. There are about 750 or so companies, mostly Canadian and American to date that have joined this corporation. They use this

corporation to resolve contractual problems, more of a quality nature rather than a food safety nature. This is just another instrument that we have within the NAFTA context that other folks do not have. As mentioned before, the whole idea of expert groups, the SPS Committee can refer something to experts. *The Commission itself is a unique instrument. It is a committee of three ministers, and they can sort of resolve issues without going to a panel.* That process does not exist in the WTO system. So NAFTA has this political mechanism for resolving disputes.

I have mentioned the *NAFTA, TWGs (technical working groups)*. Some of them have worked well, some have not. The animal health group is not very good and the plant health group, NAPO, has been very good. The veterinary drugs group, feed and the fruits, vegetables, dairy and processed food groups have not got off the ground well. Perhaps in the case of the latter, dairy, fruit and processed food, the area may be too big, the expertise may not have been tapped. We are looking within the NAFTA committee about whether these are the right groups, should they be changed, should some be deleted, others created or split some in two or three. This process is going on in Ottawa and other capitals now. But where they work, these groups have been very useful. They are really very helpful in, not necessarily resolving disputes, but in avoiding them. Again, it is not appropriate to look at official reports of NAFTA committees, panels, commissions to get a true picture of what is going on within the Free Trade Agreement.

Within our three countries, regulators are on the phone directly, or through our embassies, on a daily basis and hundreds of issues get resolved routinely at the technical level. Ministers never see them. NAFTA committees never see them. It is obvious that Canada has always worked closely with the United States but what the NAFTA has brought is that we are working increasingly closer with Mexico. It has certainly strengthened whatever was there before between Canada and, the United States has simply been strengthened by this initiative. For example, on foot and mouth disease we ran simulations of an outbreak, three countries together. Good results, good cooperation. We also cooperated on BSE in terms of doing risk assessments for each other so that the three of us do not have to do the

same risk assessments. So we share the risk assessment work. As another example, recently with Brazil, there was the U.S. government, the Mexican government and, the Canadian government all agreed on a line of action, based on a risk assessment which was done in Canada but which was approved in the other countries in terms of methodology. And so, the bottom line is looking at formal dispute settlement reports does not give you any indication at all as to how many disputes there are and how they have been resolved.

## THE FUTURE

On the multilateral front, we have new diseases, new technologies and other change that will be a challenge. For example, recall that CODEX looks at food safety, the OIE looks at animal health issues, then something like BSE shows up. It is an animal health issue *and* a food safety issue. So CODEX and the OIE have reason to start to work together, but they represent two totally different cultures. CODEX is very transparent, OIE is not. The officials all meet in Paris once a year but no one on the other committee knows when they are in town. The OIE is becoming more transparent. They are having to deal with more topical issues, not necessarily a bad thing.

There are some threats out there in terms of weakening the scientific basis of the regulatory system, in the form of animal welfare and process-based labeling. For example, how far apart were the chickens when they laid the eggs? Soon those data may have to be placed on the product. That kind of issue, which is coming out of Europe, is troubling in the sense that it is very difficult to deal with. And the whole issue of precaution in the context of Article 57. You can take a measure as long as you get the new science. Europe is saying that is not enough. They want to invoke something else that is even more loose and opaque, and not clear, but undisciplined. They are being very tenacious on these issues, and they are trying to slip it in through on CODEX so that they can get a standard on precautions which they could then use to slide into the WTO Agreement. So this sort of games that are going on.

Biotechnology is a new challenge which cuts across about ten different international agreements. How do we make sure we respond to it in an efficient way? Another issue which is not really a concern within NAFTA but it is the whole issue of- -can developing countries implement the SPS Agreement? If the SPS Agreement is not going to be implement by three quarters of the members of the WTO, is this a good thing? We are trying to wrestle with getting technical assistance to countries so that they can support and implement a science-based regulatory system.

Within the hemisphere, there are some other challenges. Earlier discussion indicated that we may want to fine tune the technical working groups. Within the hemisphere to which NAFTA applies, the whole idea of trying to come up with some kind of consultative mechanism for SPS issues before 2005 and 2006 when the FTAA agreement is supposed to come into legal effect is upon us. There are many problems within the hemisphere of an SPS nature and the only place we can talk about them is in Geneva. A lot of the countries in the hemisphere cannot afford to go to Geneva, so where do we talk? Consideration is being given to this within the FTAA negotiations that are now ongoing.

That is it: a snap shot of the framework, all the components, how it works, the last five years and some of the challenges we see coming down the road.