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QUESTION, MR. CHODOSH: Mr. Schafer, in talking about the different doctrinal alternatives, facts on the one hand versus motive and purpose, one of the underlying questions is how you define foreign affairs. You seem to imply a more public conception of foreign affairs, the change to advance or frustrate a foreign government's policy, especially in the commercial area. What we have seen is a lot of law and legal activity that is meant to frustrate private activity or has a devastating effect on private activity. I would be interested in what your working conception is of foreign affairs, since that seems to be one of the predicates of whatever kind of doctrinal solution we come up with.

ANSWER, MR. SCHAEFER: I agree that the motive or purposes review is not without problems. I just find it more satisfying than the alternative, the threshold effects analysis. However, one definition maybe we can start with is the primary purpose of the state law to change or advance a policy of a foreign government. I think this captures a lot of what you want to capture and leaves aside what might be more problematic.

QUESTION, MR. CHODOSH: Just as an example, suppose California opens its courts to claims against large foreign companies for charges of slave labor based on state law conceptions of international human rights norms. What is that? From one point of view, that is a policy that opens its courts and compensates victims. You have all kinds of things in the legislative record that will have nothing to do with influencing existing government. On the other hand, people will see that as a deterrent for future human rights violations as sending a signal. How do you then categorize that kind of legislative activity? Where does that fall in your view, even according to a motive doctrine?

ANSWER, MR. SCHAEFER: There are always tough hypotheticals. For example, the Swiss banks situation, with the Holocaust gold. Are you trying to change the Swiss government's policy, or are you really just trying to compensate the victims? I am not suggesting that the lines are going to be easy to draw and I am a little bit hesitant to start taking positions on each individual case. I would say that I think a strong case is made that there has to be a Dormant Foreign Affairs Doctrine. The real question then becomes what standard or review to use? It is a tough question. There are problems with motive or purpose. I think the complications are a lot less significant and a lot friendlier to federalism if we use purpose or motive.

QUESTION, MR. CHODOSH: Mr. Anderson, I wanted to ask one question. You talked a lot about the relationships and negotiations between provincial governments, state governments, foreign governments and national governments. What about the state-to-state activity of the sub-federal unit to the sub-federal unit? It seems to me there is a lot of this activity that is going on, almost beneath the rug of federalist concerns. What is your view of this?

ANSWER, MR. ANDERSON: There is a fair bit of interaction between the provinces of Canada and the U.S. states. For example, there are regular meetings of the Atlantic Premiers with New England Governors. There are meetings between the provinces and states on the prairies as well. The Great Lakes area is little less coherent. We just had an announcement that the Premier of Ontario is going to have an important meeting with the Governor from New York.

When you actually get into the substance of these interactions, they tend to spend most of their time talking about general issues as opposed to specifics. They are not negotiations. There may be an issue that the state government wants to address with the provincial government. Sometimes the federal government will get involved. These interactions do not get into what I would call foreign policy.

QUESTION, MR. HERMAN: I would like to ask a question about is the increasing power of the Congress and a sense that since Watergate and the Viet Nam war there has been a diminution of presidential power in foreign affairs. Is this a long-term trend, whereby the Congress and the committees of the Congress will increasingly act in foreign affairs, or is this a short-term phenomenon? Will we see a resurgence of Executive power in the U.S.?

ANSWER, MR. SCHAEFER: I think there are domestic political forces behind this trend. More and more citizens are starting to realize international affairs are starting to affect their everyday lives and they are going to their Congressman for particular issues. I think you are going to continue to find the President being put in tough situations where it is his veto threat that will protect the U.S. from going against its international obligations. Those are going to be politically difficult and lonely decisions to make at times. On the state level you may find Governors in the same positions with state legislators.

QUESTION, MR. BROSCH: Over the last fifty years, the tendency in international trade agreements has been to move from treaties to Congressional Executive Agreements. The necessity of Fast Track legislation arose out of initial defeat of the General Agreement on Tariffs and Trade (GATT) by the Senate in the early 1950's. Because the Executive

Agreement has no particular status in the U.S. law, does this tendency allow for more conflict to arise over these kinds of agreements?

ANSWER, MR. SCHAEFER: Trade agreements are non-self executing. Congress approves the agreement and the rest of the bill is changing U.S. law to come into compliance with the agreement. Subsequently, no one can bring a claim against the federal government for violating the international agreement. On the state level there has not really been a conflict yet because the states have fulfilled the stand still obligation. Conflict may arise when Canada and the U.S. liberalize or roll back existing levels of state protectionism. How is the U.S. going to liberalize or roll back existing levels of state protectionism? Is the U.S. going to use the full extent of its constitutional power or is the U.S. going to look for some form of consent, political sign offs from the states? How are the Canadians going to do it? Are Canadians going to get provincial consent, or are they going to test their legal powers? Current trade agreements allow the federal government to sue the state to come into compliance. Nobody else can sue a state. The federal government ultimately maintains authority to sue a state to come into compliance.

QUESTION, MR. BROSCH: In that suit, what status does the agreement itself have?

ANSWER, MR. SCHAEFER: It would be for conflict of the agreement. It would not be self-executing. There are a few different ways to conceptualize it. The statute gives the Executive Branch the right to sue a state to come into compliance with an agreement. You could say the implemented act incorporates the agreements into law only for purposes of that particular type of action. So you can still say it is still non-self executing. It is just that we incorporated in the U.S. law for that limited purpose.

QUESTION, MR. JOHNSON: Canada found itself in the circumstance described this morning. Under a Canada/U.S. agreement, Canada assumed positive obligations relating to provincial practices. To implement those obligations, those practices had to change. Canada's implementing legislation had a section dealing with what would happen if the provinces did not fall into line. Constitutional challenges were threatened. The provinces ultimately fell in line on by themselves, so it was not an issue. Had the challenges been made, the Labor Conventions Case suggests that the federal government would lose.

Suppose we had that situation in the U.S. with trade agreements, Congressional Executive agreements assuming positive obligations requiring specific changes to state law. The state says, "No, we are not going to change our law." How would that problem be solved?

ANSWER, MR. SCHAEFER: I think the key difference is that in Canada, this problem may be a Constitutional issue depending on the status of the Labor Conventions Case. In the U.S., it is not a constitutional matter. The federal government has the constitutional powers to bring the state into compliance. Realize that even here these new Federalism limits do apply to Federal Executive Agreements, which is the method that the U.S. uses for international trade agreements. I am saying those new limits that Mr. Farber described in the Lopez case and the commandeering cases will not prohibit federal governments from binding states to obligations on international trade agreements on subsidies, services, investments, etc.

QUESTION, MR. MACH: Mr. Anderson, the U.S. history on these sort of international discussions tends to be legalistic, to be legislative and to use the courts to resolve issues. In Canada we have had a much longer tradition of trying to use federal provincial agreements to develop consensus on areas and develop procedures to deal with issues that affect everybody. Canada has hundreds of various types of federal provincial agreements; minute ones, ordinary ones, ones covering very substantial areas of Canada, ones on internal trade and the social framework that provide an overall umbrella for governmental interaction and social policy. Given the areas you have identified as probably being most challenging in the future, international environmental and international trade, where there will be the need for greater federal provincial involvement? Do you think it is time for federal provincial agreements on how the provinces will be involved in international and environmental trade discussions?

ANSWER, MR. ANDERSON: There is an important difference between Canadian and U.S. federalism. Canada has what we call Executive Federalism. Canada has the ability at the federal level and the provincial level to engage one another to enter into agreements and do a lot of things that are at different levels of formality in terms of the nature of understanding as well to carry on dialogue. Within the United States, the way the states relate to Washington is very different. The U.S. tends to work much more through a very diffuse political system. Canadian provinces tend to be more structured and formal in their approach to these issues. Whether Canada would benefit as we move forward on these issues of environment and trade and having a more formal understanding, I do not know. I think the federal government explained quite clearly to the provinces our approach on the issue of how we manage trade. The procedures are well known. There are a few little areas where there are some questions about how we actually manage this type of dispute. There have been one or two inconsistencies. There are clearly some areas where the provinces have a different view from the federal government. Is there a basis for an agreement? I think that is a

fair question. There certainly was no basis for an agreement in the 1980's when the provinces wanted to have negotiators take their instruction from the federal government and the provinces. I cannot imagine the federal government conceding on that core issue. The same issues are quite similar in the area of environment. The environment is a much less settled area of law. There are more ways to skin the environmental cat than a trade cat. Some of the things that will be interesting to watch over the years are the instruments that become the key instruments to deal with international environmental issues.

QUESTION, MR. ABRAHAMS: Mr. Schaefer, in reference to an earlier question posed to you about the diminution of presidential powers since Watergate and Viet Nam through the Congress, do you see an early timetable or do you see any timetable at all for resurrection of Fast Track Authority for the President to negotiate trade treaties?

ANSWER, MR. SCHAEFER: The same problems remain. The debate over environment and labor and how to treat them in trade agreements have basically ended Fast Track since 1995. The President has been without it for six years. That same controversy, that same dispute, remains to be solved and eventually people of good will are going to have to come to some reasonable resolution.

Here is the problem. The U.S, since the North American Free Trade Agreement (NAFTA), has not entered into any regional agreement, with the exception of Jordan recently, that has not been subject to approval.

Meanwhile, the European Union, Canada and other nations have been cutting fair trade deals. The result is that U.S. companies are falling behind in market access, vis' a vis' access in all these markets. The other problem is that when you do not have a somewhat active or credible regional policy and other countries are using it to gain ground, it doesn't give an incentive for the World Trade Organization (WTO) processes to move forward either. Eventually, one would think the economics of it are going to suggest that we are going to have to come to some reasonable resolution of these issues.

COMMENT, MR. CHODOSH: With that, I want to thank you both very much.