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Discussion

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**Discussion After the Speeches of Edith Brown Weiss,
Michael Hart and Aureliano Gonzalez-Baz***

QUESTION, *Professor King*: We talked about the relationship between the trading partners, the environment and the new trade agreement. I am concerned about implementation. Are there several alternatives as to how it might be implemented from the standpoint of environmental concerns?

ANSWER, *Professor Brown Weiss*: When we talk about environmental issues and combining them with a free trade agreement, we are talking about the issue of standards or whether standards may constitute non-tariff burdens to trade, and, hence, the discussion about Article XX in the GATT or the comparable provisions in the Canada Free Trade Agreement where the environment is mentioned. I think we are also concerned, and these are my personal views, about environmental aspects of dispute resolution. The minute you begin to get into environmental trade, as I indicated, you are going to get those kinds of issues, and you are going to need environmental expertise woven into that process. To the extent that disputes settled by the provisions aren't involved with the NAFTA, and deal with environmental regulations, then, in my view, there is a question of the relationship between those provisions and any dispute resolution provisions that will be available in the GATT.

Now, there are things that can be done outside of the NAFTA itself, and we talked about the Border Plan being one. We could discuss, for example, regular meetings on environmental laws, regulations and standards, and cooperation on compliance and enforcement, and that could be done in the Border Plan arena or even more procedurally.

I might just add one comment. I think, Mexico or any country will find, as they embark on economic development, that it is much cheaper to embark on environmentally sound economic development, as we in the United States have found, than offer to clean up the environment later. The long-term costs in terms of ecological and health damage are potentially very serious, and it is, in fact, in a country's own interest to address those issues. Sometimes, an outside interest can serve as a helpful catalyst to globalize what seems to be in that country's own self interest.

QUESTION, *Professor King*: Can you comment on the criticism that although Mexico has good law on the books with respect to the environment, it is not always enforced as well as it might be?

* The questions, answers and comments presented herein have been edited by the *Canada-United States Law Journal* for the purpose of clarity, and have not been edited or reviewed by the respective speakers.

ANSWER, *Mr. Gonzalez-Baz*: The government is doing things like working with EPA in training and technology. It is working very actively in Austin and San Diego with respect to that, but the Mexican Government, because of U.S. pressures, has been compelled to act upon concerns that are openly in violation of Mexican law. We don't have the resources or the manpower to do more than what we're doing. If we are to compare the enforcement of our laws with our capacity to enforce, I would say that we would get an "A". There's no question. Is it sufficient? No. Will it ever get to be sufficient? It's doubtful. What we are recognizing is that we have to move very fast to be able to comply. If one expects to see rapid, overnight enforcement, we're never going to comply, but can we say that there are thousands of companies every year complying more and more with the statutes? I believe that we could truthfully say that they are.

QUESTION, *Professor King*: Where do we stand on the relationship between the environment and trade in terms of the GATT negotiations?

ANSWER, *Mr. Hart*: The only place where the environment issue is a major part of the GATT negotiations is standards negotiations, where there are efforts to begin the development of a much stronger consensus on the issue of standards, but it's a very time consuming process.

In the Canada-U.S. Free Trade Agreement, for example, there is a provision to encourage scientists and others in the health area to work together towards either accepting each other's standards or harmonizing, and that has proven extremely difficult to do. Once you have a standard in place, it's very difficult to move away from it and explain to your population why you must have a different standard.

The GATT is trying to achieve a stronger consensus, but, at the same time, not prevent countries from deciding that they will have a tougher standard within their own jurisdiction, as long as it can be justified as not being a disguised barrier to trade and can be justified on scientific grounds. That is the only area where there is a concerted effort to deal with environmental issues. I think it will be the next round or phase of GATT negotiations which will have to deal with environmental issues in much greater depth.

COMMENT, *Professor Brown Weiss*: There's one forum that we haven't mentioned if we are discussing the relationship of environment and trade issues, and that's the OECD. Both the trade working groups and the environment working groups have been meeting together since September of 1991, with the purpose of identifying the key issues, which they have done, in the hope of developing some guidelines. Of course, that is a limited forum, in the sense that it doesn't have developing countries as part of it. Nevertheless, it is a forum in which that dialogue is conceiving the most important trade with partners.

COMMENT, *Mr. Hart*: It's a very healthy dialogue. There is use-

ful work to be done in building the ground work for contractual negotiations for the future.

QUESTION, *Mr. Brand*: How can we seem so optimistic about the interface between trade and environmental issues when significant environmental groups, like the Sierra Club, are not so convinced?

ANSWER, *Mr. Hart*: The GATT remains a mystery to 99.9 percent of the people in the United States, Canada and, I assume, Mexico. It was not a well known instrument until the free trade negotiations in the United States. Most people didn't know about it, but all of a sudden those who were opposed to the FTA decided to find refuge in the GATT — not that they knew anything about it.

The fact is that many people are confused about what the GATT means. The only time they read about it is when the GATT is used as a bogeyman: when the headlines say "GATT says you can't do this", or "GATT declines that", or "GATT rules so-and-so". They see this negative dimension of the GATT. The focus on the *Tuna* case, I think, has increased that perception in the eyes of environmentalists, although it's not unique to environmentalists. It's very bad law — badly drafted. It has made it clear that these are issues that must be addressed in order to avoid bad cases in the future.

Rather than saying GATT is bad, say, "How can we make sure that we continue to maintain an open, transparent, liberal zone and trading system, while also meeting trading goals?" That's the real challenge, not saying "Throw out the GATT."

COMMENT, *Professor Brown Weiss*: We've been discussing a narrow set of issues, particularly the trade effects of environmental issues. What we have not discussed are the environmental effects of trade policy; that is the other half, and both must be looked at together. There's much that we haven't discussed, and my basic response would be that I don't feel so sanguine on the broadfront that everything has been resolved and that everything is very cozy.

Environment and trade have not been on an equal level. The references this evening have been on the trading system and how it gets incorporated into environmental concerns. Rather, the issue is how do you get the environmental system and the trading system to work together, putting them on equal footing. I think that we can have a cooperative relationship if we decide to work together and say, "Yes, the goal is sustainable economic development, and that has to be environmentally sustainable." Trade is the tool that seems to provide a framework in which the two must be treated equally.

QUESTION, *Mr. Moore*: There seems to be in the OECD joint session work a lot more comfort with product standards than there is with process standards. For many environmental groups, process standards are very key. What do you see as the outlook for their incorporation?

ANSWER, *Professor Brown Weiss*: I think this whole question of

whether a process is "out of bounds" needs to be reexamined. It has not always been out of bounds. For example, even in the GATT itself, there is an exception for things made by prison labor. So, the question of whether there are certain processes that might be relevant, as opposed to other processes that aren't, seems to me to be a question that does have to be addressed.

COMMENT, *Mr. Hart*: The process standard is not something that the GATT fails to deal with. There are a number of process standards that have been accepted. The point here is not whether GATT allows them or not; the point is whether a country can unilaterally impose its standards on other countries, or are we going to put in place a process whereby countries can cooperatively determine the appropriate process standards and then use the appropriate trade measures in order to enforce them?

I think if we want to have unilateralism — if we are going to have one country deciding what the process will be, and then use its power to impose it — we'll have difficulties, and we will have many pressures on the trading system. If we use cooperative means to reach a consensus on what is an appropriate process and how to enforce it, we will not have those difficulties.