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Discussion after the Speeches of M. Jean Anderson and Jonathan T. Fried

Discussion

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Discussion after the Speeches of M. Jean Anderson and Jonathan T. Fried

QUESTION, *Mr. Miller*: In what new ways can we think about sovereignty and jurisdiction so that we permit more flexibility and a greater participation of a wider range of interests?

ANSWER, *Mr. Fried*: The government has certain sovereign prerogatives that go beyond the particular industry or sector involved, and the government must preserve and protect these prerogatives.

At one point during the negotiations of the FTA, some industry groups proposed self resolution of dumping cases. The problem with such a proposal is that competition laws give rise to the concern that there will be collusion in the resolution of industry-to-industry disputes. Two combatant industries may easily raise their prices so that they both make money and the consumer suffers. The government, however, will not accept this kind of private sector participation unless every affected group is allowed to participate in the dispute, at which point, the dispute resolution becomes unmanageable. Governments are involved to represent the range of private sector interests.

A second observation is that sovereignty may be somewhat elastic. Sovereignty under traditional international definitions is plenary and exhaustive. Government only surrenders sovereignty voluntarily. Governments have surrendered some of their authority to the GATT. In other words, they have agreed to discipline themselves in accordance with the agreed upon international rules. The two governments have also agreed to further discipline under the FTA.

I tried to emphasize that under Chapter 18, the necessary flexibility in terms of rules, already exists for the governments to gain input as sponsors of creative solutions.

QUESTION, *Mr. Coombe*: Ms. Anderson, I would like to know the process by which a Chapter 19 binational panel is permitted or obligated to review a complaint of an "interested party," assuming that it is a party from the private sector in the United States.

ANSWER, *Ms. Anderson*: In the United States, any party to the underlying administrative proceeding has the right to request a panel. If a private party to a case requests a panel, they must formally notify the U.S. government. There is an absolute requirement by law in the United States that the government must forward that request instantaneously with no discretion to decide whether or not a panel should be created.

QUESTION, *Mr. Morrison*: The description of an Article 19 proceeding was extremely interesting because it is so unique. During the period in

which Congress enacted the article, there was considerable discussion about the constitutionality of the provision. This debate arose because the judicial review provisions in the United States were changed. In my opinion, there are two separate sets of issues, one of which the House Committee dealt with very well; the other of which they neglected entirely.

The first issue is whether a party has a right to judicial review of a decision by an administrative agency under these circumstances? The answer to that question seems to be no. Second, is there anything inherently wrong with arbitration, particularly on the international level? The answer also seems to be no.

I have no doubt that the agreement could have either provided for no judicial review or could have provided for an elimination of the administrative agency and provided for an arbitration by the five member panel. What we have is a hybrid in which a governmental entity, the U.S. Trade Commission, in the case of Pork International, makes an administrative decision as the arm of the United States government. Then private parties overrule this government entity - a situation which in my view is unheard of. It is in essence, a surrender of sovereignty by private parties. This surrender of sovereignty is not at the substantive level but after an administrative process has gone forward.

Under the United States Constitution, it seems that Congress had two choices. They could send the matter to judicial review, or they could have put the matter into arbitration. Congress cannot provide for judicial review by people who are not judges or members of the Executive Branch. The specific clause in the United States Constitution which was not mentioned, is the Appointments Clause. This clause requires the President to appoint people who are officers of the United States.

There is also a provision in U.S. law providing for judicial review. I wonder whether any parties who are dissatisfied with the panel result, such as in the Pork controversy or in any of these other controversies, are considering a constitutional challenge to these provisions.

ANSWER, Ms. Anderson: I have no way of knowing whether they are considering a constitutional challenge. But I will say a couple of things in response to your comments. First, the Appointments Clause issue was not exhaustively considered, but it was considered at great length. There was a lot of work and effort put into analyzing the applicability of the Appointments Clause and any difficulties that might arise under it in the context of first negotiating the agreement and then in the legislative process of passing the implementing statute for the FTA. The conclusion was that it was a fairly neglected part of the Constitution, in terms of court decisions, for some years. Only recently have a couple of major cases raised this issue. We did, therefore, look at the clause.

There were some people in the office of legal counsel in the justice department who took exception to the notion that a binational panel

could be created. This was so not only because the panel members came from the private sector, but also because some of them are not even Americans and are given the authority to make a decision that would then be absolutely binding on agencies of the U.S. government. The first job of the office of legal counsel and the justice department is to protect the flexibility, discretion, and authority of the President. Consequently a lot of analysis of this issue took place. The conclusion of a lot of constitutional scholars was that the *Buckley* and *Synar* cases were cases in which Congress was trying to usurp power from the presidency by denying the President his appointments power. Whereas in this case, almost by definition under the Constitution, trade agreements are done jointly by the President and the foreign affairs power with the negotiating authority. Congress, which has the constitutional power over trade, had delegated to the President the authority to negotiate this agreement. Therefore, there was not a separation of powers issue in creating the binational panel.

You will also notice that in the FTA implementing statute, it states that the decisions by the binational panel shall be binding on the administrative agencies of the United States, the Commerce Department, and the International Trade Commission. If this provision is declared unconstitutional, the “fallback” option should be used. The “fallback” is that the President has a scintilla of discretion to accept the decision of the panel and then can instruct the agencies to impose it. The President issued an executive order saying that he automatically accepted all the panels decisions and was imposing them on the agencies. This assured that if the first alternative under the statute, the preferred one, was declared unconstitutional, the “fallback” would automatically come into play.

All this leads me to think that if anybody files a constitutional challenge on this issue, they are probably wasting their time and money.

COMMENT, *Mr. Fried*: I just want to add one word from a foreign prospective, and that is the lesson of the Uranium Claims Tribunal in the Supreme Court decision in *Dames & Moore v. Reagan*. It may look like judicial review, but starting from your premise, which is that there is no inherent right to review, all that has been done is that remedies have been set out in an international agreement, which the President is free to do, according to *Dames & Moore*, and certainly, when there is a joint congressional and administration agreement to do so.

As a result, what we have is a decision of an international tribunal, which is made part of U.S. law by the statute and the implementing rules. As a result of these rules, the President has undertaken in effect to say, “Yes, I agree in advance to abide by my international legal obligations.”

QUESTION, *Mr. B. Smith*: You have shifted judicial review under domestic law from a domestic court to a binational panel. To what extent,

in your knowledge of the Chapter 19 decisions, would the result have been different if those decisions had gone to a domestic court?

ANSWER, *Ms. Anderson*: There is really no way to answer that question, but I will say that if those cases had gone to the Court of International Trade, they would have been heard by a single judge. The decision received in a particular case may depend on the judge who heard the case. The court is overworked and has less time to devote than does a panel. Once the decision is rendered, it would probably be appealed to the Court of Appeals for the Federal Circuit where I think you get fifteen minutes to argue your case.

The process of five panelists, willing to give it all the time in the world, seems to assure that it will be a reasoned decision rendered in a shorter time frame than a court decision.

QUESTION, *Mr. Robinson*: This question concerns the alternative system that we are supposedly working on and the relationship to what is going on at GATT, assuming the Uruguay Round gets back on its feet. I think it is generally regarded that Canada shot itself in the foot in financial services under the FTA by deregulating at the same time it was trying to negotiate concessions in financial services in the United States. I have heard respectable academics say that under the draft subsidy code, under which I assume Canada has had significant input, our regional subsidies and our provincial industrial research and other grants are defined as countervailable subsidies.

What were we doing at the Uruguay Round skewering all of our regional and other policies that we desperately want to retain in Canada?

ANSWER, *Mr. Fried*: I think both of these premises are wrong. Regarding financial services, while there were some articulate spokesmen suggesting that we should hold back on rearranging our pillars of the financial system in order to concede it as a negotiating chip to the United States. I think the government's decision was that independent of any free trade negotiation with the United States, it was in our own national self interest to proceed with that deregulation regardless.

Concerning the subsidies code, it is my understanding that it is quite the opposite. If anything, Canada is as vigorous as ever in seeking to insure that appropriate protection and recognition is given to the role of regional development in government domestic regulation.

There is no single text ready to be signed by the Uruguay Round negotiators of any country. There is a suggestion that some sort of system should be used, like the traffic light system in which certain subsidies are clearly identified as absolutely prohibited, such as direct export subsidies, and some are labeled as purely domestic, such as unemployment, health, and other areas like that. The middle ground are those which, until they have a distorting impact on trade, are placed in a yellow light category. This says in effect that, if it has an impact on trade, then it is

not illegal. As to where each kind of regional development program falls, green or yellow, it is yet to be determined.

Binationally, we are already two years into the five-year time table of the subsidies working group. Have we been sitting on our hands? No. Both countries have been procuring and obtaining exhaustive information regarding their own programs federally and provincially and regarding programs of each country. Each side will be well armed in any binational discussion to have an honest discussion as to who is really doing what. Both sides have decided, while they continue to compile the information, to hold any negotiations pending the results of the Uruguay Round. It may well be that improved definitions coming out of the round as well as tighter dispute settlements and consequent amendments to the codes, may well influence both governments to say, "Gee, that is really all we set out to do and that gives us some greater security in any event. Let's adopt that." Or they might say, "Let's build upon that model and add a few extra bells and whistles ourselves." Or, the Uruguay Round might collapse and then we will have to do it bilaterally as best we can.

But in the meantime, we are devoting most of our energy to two things: compiling information bilaterally and working diligently multilaterally.

