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Discussion following the Remarks of Mr. Schaefer Proceedings of the Canada-United States Law Institute Conference on Multiple Actors in Canada-U.S. Relations: The Role of NGOs in Canada-U.S. Relations

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF MR. SCHAEFER

MR. KING: Very good, Matt. One of the things is in terms of these non-governments; should there be an abiding rule that people who have a stake in the cross-border relationship have the right to appear in all hearings involving that?

I think that this came up in the environmental area. Should they have guaranteed standing in these situations?

The other thing, is there any further regulation of their activities that you think is necessary? You mentioned one, but those are my two questions.

MR. SCHAEFER: In terms of standing, I think if we look, flip this chart of mine back over, we achieved this to a large extent in the NAFTA context. Of course, we do not know whether amicus briefs would be allowed in Chapter 20 government-to-government trade disputes. They are allowed in the WTO, although with much controversy. Chapter 19 allows all interested parties to appear that would have the right to appear in the domestic court proceedings because it is replacing domestic court review of antidumping and countervailing duty determinations. Therefore, I think standing is met there as well.

MR. KING: How about regulating NGOs?

MR. SCHAEFER: What do you have in mind?

MR. KING: In terms of their behavior, corruption and all that?

MR. SCHAEFER: That is another significant point to consider. There is an article by Peter Spiro that looks at some of the regulations of NGOs, and he is the one that's pointed out a lot of NGO leaders are not democratically elected.

Additionally, many NGOs are not subject to the same ethics rules as corporations and corporate codes of conducts. It is certainly something that can be explored. Part of that, of course, can be overcome by what you require in terms of information when NGOs make a submission or access the international processes. And I should say this U.S.-Canada-Mexico statement on amicus briefs does layout some requirements in terms of information they have to submit. Whether that is enough to cure these gaps in regulation of NGOs within domestic law, I am not sure. It is something worth exploring for sure.

MR. KING: Other questions?

MR. BANKES: Nigel Bankes, the University of Calgary. It seems to me, we got off this morning with Gordon Giffin making a plea for simplicity and Bob Rae responded by saying that's completely unrealistic; and your comments really illustrate why that it is, or one of the reasons why it is. I think as individuals, we are complex individuals owing complex allegiances.

We think of this in federalism terms when we say, "Am I principally a citizen of Newfoundland or Canada," principally, "Am I Texan or American." I think what we are seeing here is people thinking of themselves as environmentalists or as unionists and that being an important part of their identity and that is being expressed in the sort of forum you're referring to.

I think one of things we need to think about, going back to Gordon this morning, how can we reach the next step in NAFTA and continentalism? And one of ways to do that, of course, is to think about how we can encourage ideas of multiple allegiances rather than minimizing their significance.

Certainly, for Canada, the Charter was considered an important means for creating Charter communities and Charter federalism, rather than traditional conception of federalism. However, I think what's interesting about the CDC, is one thing that is encouraging us as to accept multiple allegiances, because, as you point out, these petitions are now being applied from NGOs from all three American -- all three parties to the NAFTA arrangement.

MR. SCHAEFER: Two points here. One is going to be a reiteration, or maybe both are, that really struck me in looking at this issue. First, even though there's no requirement for an NGO submission to be from a transnational network of NGOs, if you look at the recent submissions, you will see that the three countries have created an avenue, have created the incentive for these NGOs to come together in the three countries.

The other key point is on institutional development that came out in Ambassador Giffin's remarks. The only country thinking about new institutions, thinking broadly about new institutions, is Mexico.

The U.S. and Canada really were not thinking new institutions when NAFTA was coming up, either. It was just that Mexico was going to be included and there were NGOs that had many concerns about what is going on in Mexico in terms of both democracy and environmental and labor enforcement. That is why the new NAFTA institutions and processes were created. They are not there due to broad thinking on behalf of Canada and United States. Maybe we should have had something like a side environmental agreement 40 years ago.

The side agreements may well make sense independently of any trade agreement. That's sort of what strikes you when you look at the issue, not only that Mexico is the only one thinking in those terms today, but that the inclusion of Mexico in the free trade regime is the only reason we have a lot of these subsidiary NAFTA bodies now implicating Canada and U.S. relations.

MR. KING: Jim Phillips.

MR. PHILLIPS: Under the International Joint Agreement, the commission created under that agreement the Boundary Waters Treaty, the Commission which has been operating since 1911 has had a practice from its beginnings of allowing the public to be heard on matters before it where the deci-

sion's significance will affect the public in the particular region or area. For example, if the Commission is given a formal reference by the governments to look into a matter like bulk water matter removal of water from the Great Lakes and convenes a fact-finding board, when the report of the board is made public, it has hearings and consultations. Therefore, we have been using that approach for almost 100 years, not me personally, of course.

MR. SCHAEFER: Yes, thank you for the comment. It reemphasizes another key point that there really is nothing new with NGO involvement. One of the things I would say, the submissions that have been made to International Joint Commission, I am no expert on this, one of the reasons Henry in a conference – I am loosing track of dates -- but in the last couple of years, one of your conferences asked the question can the International Joint Commissions serve as a model, or should more broad disputes between Canada be referred to the International Joint Commission because it does have such independent fact finding?

MR. KING: I also believe that the answer is yes.

MR. PHILLIPS: Jim Phillips, again. To give credit where credit is due. I was in Ottawa three or four weeks ago. I was briefed by Prime Minister Martin's advisors, mainly Jonathon Fried and Scott Price and Rob Wright, etc.

They brought forth an idea that I was very excited about, they have deduced in talking with the U.S. that the smart border declaration approach by Manley Ridge has been extremely successful. The reality behind the scenes, it is successful. They are interested in broadening out to have, if you will, a smart regulatory group, a smart labeling group and a smart environmental group, essentially to bring together a binational new approach to having U.S. and Canadian governments and U.S. and Canadian NGO agencies sit down and focusing on regulations.

And I thought that was very honest and exciting potential new initiative on behalf of the Prime Minister.

MR. KING: Yeah.

A CONFERENCE PARTICIPANT: You talked about opening up the proceedings, I was wondering if there was movement towards the first step of publishing the proceedings.

MR. SCHAEFER: Yes. First, everybody should know about the Web site www.NAFTAclaims.com. If you are looking for any documents regarding Chapter 11 cases, most of them have found their way onto that Web site. It's run by Todd Wieler of the University of Windsor. He is doing a great public service by putting all these documents on the Web site.

Second, the three parties have issued a formal interpretation regarding confidentiality in the arbitration. The statement basically says the parties are not prohibited from releasing submissions or final results, less any confidential business information.

MR. KING: One more.

MR. PHILLIPS: Peter Phillips University of Saskatchewan. I sit on one of NAFTA's CEC, which was precipitated by, I think, 40 or 50 different NGOs challenging the Mexican Administration of corn and maize corn in Mexico.

And the precipitating part role for NGOs I fully appreciate and understand its role and its power. I guess where I find it a bit of a challenge that as we begin to open the deliberations of these panels to advice from of reference and their reference point for making assertions about what outcome should be are different than what the panels are empowered to do.

In many cases, they are empowered to deal with technical issues that have certain standards of evidence in decision-making. They are bringing in very motive humanist approaches that are often a very hard fit. And, as our panel is deliberating, we have this challenge that people are saying this is a massive social problem and yet, much of the terms of reference relate to scientific and technical matters where emotion is deliberately withdrawn from the process.

I have seen this happen on environmental panels in Canada and the U.S. where we open it up and then we create frustrations by this expectation that actually, NGOs will influence the outcome, yet the outcome may be pre-determined partly by the structure of reference itself.

MR. SCHAEFER: That sense you have about the side environmental agreement is true in Chapter 11, too. That is one of problems. One of the reasons why Mexico opposed an amicus brief, they're worried about enlarging the scope of arbitration, bringing in issues that aren't relevant to the arbitration, adding costs to the parties and then, also, potentially distracting the arbitrators from their job, namely to determine whether any one of these substantive obligations within the investment chapter been violated.

Therefore, I think it is a problem in the other agreements or chapters we mentioned as well.

A CONFERENCE PARTICIPANT: Democracy is messy.

MR. SCHAEFER: Particularly messy in our country.

MR. KING: Very good session.

Thank you very much.

(Session concluded)