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Discussion

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## DISCUSSION FOLLOWING THE REMARKS OF MS. FERRETTI

QUESTION, MR. KING: If you had to reconstruct the North American Environmental Commission today, in light of your experience, are there any changes that you would make? In other words, you have had five years of experience operating under the Commission for Environmental Cooperation (CEC) as it functions now. Would you give it more teeth? Does it need more bite? How would you change it if you could, or do you even think it should be changed?

ANSWER, MS. FERRETTI: Well, I do not think it needs more teeth or more bite. Again, having had this experience with the citizens' submission process under Articles 14 and 15,<sup>1</sup> I can tell you that governments take that very seriously. They are very concerned about those submissions, so that in itself indicates, at least to me and to those of us who are involved, that these governments actually do feel the "sunshine" effect and want to make sure that they put their best foot forward. So I think that is very important, and I think the process has been successful so far, even though it is still a little too early to tell.

Where I think, Professor King, we have the greatest challenge, what I would – I am not so sure I would say "change" – need to really think twice about is the issue of resources. On the environmental cooperation and trade front, this entire effort was really a way to help Mexico bootstrap itself up to – we do not say it aloud – our "North-American" environmental standards. Mexico, even though is a member of the Organization for Economic Cooperation and Development (OECD), is still very much a developing country trying to address issues of poverty, sanitation and basic education. Mexico has a tremendous amount of competing interests and objectives, and its budget cannot cover them all.

My concern is this: on the tenth anniversary of the Commission, when people can look over our record, what are they going to find? Are they going to find massive improvements over ten years ago? My guess is *no*. Those problems take a long time to fix, especially when many of them were 40 years in the making. It is going to take more than ten years to clean them up. But I do know right now that the biggest obstacle in Mexico – and this my personal opinion – is resources. We have a government in Mexico that is very committed to the environment. Secretary Lichtinger, my predecessor, is the Minister of Environment in Mexico. I know he is personally committed

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<sup>1</sup> North American Agreement for Environmental Cooperation, Can.-U.S.-Mex., Sept. 14, 1993, arts. 14-15, 32 I.L.M. 1480, 1488-89.

to the cause. So it is really an issue of resources, and if I had to do it all over again, I would try to look at that issue.

QUESTION, MR. GELFAND: What I wanted to ask you relates to a question I asked earlier and that Secretary Loy was talking about with the secret arbitral panels. Any kind of openness is welcome; if we do not have openness, there is no democracy. We have three democratic countries. Our domestic courts are open, so what is blocking the openness in these arbitral panels?

ANSWER, MS. FERRETTI: I am afraid I cannot answer that. The CEC does not have anything to do with the arbitral panels. I really would defer to somebody else as to why that is, the history behind it, and a rationale for it. I cannot respond to that.

QUESTION, MR. CHARNOVITZ: One of the lessons of the Rio Conference<sup>2</sup> was the importance of linking in not only environmental but trade and other ministries in order to develop an integrated, sustainable development policy. I am wondering what the experience has been of the CEC with respect to dealing with other ministers in North America. I know you report to the Council of the Environment Ministers, but to what extent have the trade ministers taken an interest in the CEC and tried to cooperate with you or the finance or commerce ministers of the free countries, or do they see you as a function that does not at all relate to their own ministry functions?

ANSWER, MS. FERRETTI: At the ministerial level, the environment ministers have at least indicated their interest, and there have been several efforts made, to meet with their trade counterparts. So far – it has been seven years – there has not been a meeting; most recently, just last year, there was an effort by the environment ministers to re-establish that desire. I know there are discussions taking place right now between the officials from the environmental and trade departments to develop an agenda for that meeting. I do not think it has been as successful as, perhaps, people might have expected, but that is in part because it is believed that the onus is on the North American Environmental Council Commission to cooperate with the Free Trade Commission, but there is no inverse expectation that the Free Trade Commission ought to meet with the Commission. That, perhaps, might explain why there is a little bit of an imbalance in terms of interest to meet. Certainly, on the environmental side, the interest is there, and they are prepared to raise a number of issues with the trade ministers.

QUESTION, MR. FITZ-JAMES: One of the things about the Commission: it has not exactly had a spectacular record in terms of case throughput. I think maybe you guys have had maybe 30 or 40 cases going

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<sup>2</sup> That is, the United Nations Conference on Environment and Development, held in June 1992 in Rio de Janeiro, Brazil.

through in the ten-year history; that works out to be about three or four per year. Governments may take you seriously, but not that often. Are you taking any steps to get yourself known, because very few people out there in the “great unwashed” public actually know about CEC and what it does. There does not seem to be a huge throughput of matters going to the Commission.

ANSWER, MS. FERRETTI: It is an interesting question, because I recall when the side agreement was being negotiated and they decided to establish this mechanism, there was a popular view that we would be overrun as soon as we opened up the doors and that there would be hundreds of cases at our door step.

Well, that has not been the case; we have gotten only a few. I am not sure that people do not necessarily realize we are here, because the environmental community *does* know that we exist. I think it was, perhaps, partly a judgment on the part of our environmental community to test the process to see if it worth going through the process. We have received about 30 cases, because a number of the submissions – almost two-thirds – did not meet the criteria.<sup>3</sup> It has also been a learning experience wherein the environmental organizations had to learn to use the process and make it work for them.

QUESTION, MR. FITZ-JAMES: Are you doing anything to fix that?

ANSWER, MS. FERRETTI: Certainly, we are not out there doing commercials about ourselves. Part of the problem is that we have limited resources. Right now, we are developing three factual records for cases; in addition to actually looking at new complaints, and other new submissions, that is about all we can handle. If we were to get more, we would have to ask for more resources, and I am not so sure they will be forthcoming right away. Therefore, there is a little bit of interest on our part not to get *too* popular. We have enough work as it is. We want to make sure we do a good job. People are highly critical from all sides. We want to get all bases covered and do the job right.

QUESTION, MS. DOBSON: Thanks for a very interesting talk. I noted that early in your talk, you mentioned the fact that there were some decisions that had gone against national environmental laws and that, in effect, the trade rules were dominant. You were optimistic about how things were going, and it seems to me that those disparate views are in conflict. I was wondering if you could say more on that, as the issue of trade rules that

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<sup>3</sup> The CEC has received 34 submissions since 1995. See *CEC: Citizen Submissions on Enforcement Matters*, at <http://www.cec.org/citizen/status/index.cfm?varlan=english> (last visited July 1, 2002). See also *Citizen Submissions on Enforcement Matters: Guidelines Submissions*, at [http://www.cec.org/citizen/guide\\_submit/index.cfm?varlan=english](http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english) (last visited July 1, 2002).

trump important national environmental laws is what many of us are concerned about.

ANSWER, MS. FERRETTI: I do not know how to respond to that question. Clearly, it is an issue that has to be worked out. My sense is that the only way this will be worked out is by citizens and organizations voicing and clarifying their concerns. I think there is a lot of misunderstanding about NAFTA Chapter 11<sup>4</sup> in terms of what is and what is not going on, on both sides – on the trade side as well as on the environmental side.

The reason why I am optimistic is because we have this thing called democracy wherein we have public voices and we can be heard by the decision-makers. There has already been some movement to that regard, as a letter of understanding was drafted by three countries to help clarify the interpretation of those provisions.<sup>5</sup> I understand that not everybody is happy with content of that letter; there is a view that the letter does not go far enough.<sup>6</sup> Nonetheless, it just shows you that governments do listen and will move when pressured. That is why I am optimistic, because I think we are headed in the right direction.

QUESTION, MS. GRANZER: I just want to ask whether you find, when looking back at the issues that you are identifying today, that an issue should have been addressed earlier on, perhaps during the NAFTA negotiations? What type of impact could that have had?

ANSWER, MS. FERRETTI: I guess (getting back to the question about going back in time) there are only two areas that I think we have issues today that could have been fixed early on, but we did not have the necessary experience. Chapter 11 is one of them. I do not think anybody, when they negotiated Chapter 11, realized it would be implemented in the way it has been *vis-à-vis* some of the domestic laws, especially in regards to the environmental laws. Perhaps that is an area where it would have been good to go back in time and to fix it.

Another area I would fix: NAFTA's environmental language was negotiated before the existence of a side agreement and the CEC. If we could go back and change that, I think that the alteration would have laid the groundwork for a more active collaboration between the environmental and the economic-and-trade-policy communities in terms of looking at some of

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<sup>4</sup> That is, North American Free Trade Agreement, Can.-U.S.-Mex., Dec. 17, 1992, Ch. 11, 32 I.L.M. 640.

<sup>5</sup> See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpre.asp>.

<sup>6</sup> See Frank Loy, *On A Collision Course? Two Potential Environmental Conflicts Between the U.S. and Canada*, 28 CAN.-U.S. L.J. 11, 22 (2002).

the integration issues. This may have resulted in the convergence of policies on the environmental side as well as the economic side of the equation.

QUESTION, DR. SCHAEFER: Two quick questions, one in terms of the NAFTA side environment agreement. Many people would say, even without the NAFTA trade agreement, we should have had something like a NAFTA side environmental agreement all along. We share borders and ecosystems, *et cetera*. So, some people would say that adding it onto NAFTA was not such a big deal. Do you think it makes sense in the Free Trade Agreement of the Americas to have a side environmental agreement that looks like the one we have with NAFTA, or how would you adjust it to a broader hemispheric situation?

My second question relates to environmental group concerns, and that they really missed the boat in terms of input into drafting the agreement. Everybody was concerned about enforcement in Mexico. Mexico had pretty good laws. The key concern was enforcement. So, in fact, factual records can be prepared if a country failed to effectively enforce its own environmental laws. However, as some environmental groups found out in early cases, a change in law no longer means failure to effectively enforce, so even though the agreement encourages keeping high standards, it does not require it. That is not subject to the investigative processes. How much of a gap do you really think there is? Did they really miss the boat? Is it a significant omission that we only focus on enforcement and not on the lowering of standards for purposes of these factual records?

ANSWER, MS. FERRETTI: That is a very good question. Certainly, I have heard that one of the basic criticisms of the assumption on the side agreement was that as long as everybody enforces their own laws, everything will be fine; we know that is not the case, especially where there are major differences in standards where it matters.

I want to say I am not in favor of having equal environmental standards across the board in North America, but only where it matters. The Agreement does make some sort of allusion to this, saying that countries will work hard to enhance their own environmental standards and levels of protection.<sup>7</sup>

At this point, I have not really seen a situation that has been a glaring example of “boy, have we missed the mark.” We are looking at effective enforcement, and we really should be looking at these outrageous differences in standards. Some of the differences are not in the areas you would expect. In fact, Mexico has really made efforts in recent years to improve, enhance and strengthen its environmental standards.

I am sorry, your first question was?

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<sup>7</sup> See North American Agreement for Environmental Cooperation, Can.-U.S.-Mex., Sept. 14, 1993, at Preamble, 32 I.L.M. 1480, 1482.

QUESTION, DR. SCHAEFER: Extension to the Free Trade Agreement of the Americas, and whether it makes sense to have a side agreement.

ANSWER, MS. FERRETTI: I cannot answer in terms of yes or no. I do know that North America is different in the sense that we share these borders so closely. At the same time, I recognize that the value of the cooperation on the environmental front could extend to a hemispheric side-agreement. I think that you would make the choice of whether the instrument will include provisions for a Commission or some other structure based on the issues you are trying to address. Certainly, in the case of migratory species, there are some birds that migrate from South America. Clearly, there is some value in collaborating on issues affecting those kinds of migratory species, yet the instrument that addresses that issue is not in a trade agreement.<sup>8</sup>

Clearly, there are some significant environmental issues related to trade, movement of products and so forth where collaboration on standards might make sense.

QUESTION, MR. URAM: You said that the citizens' submissions process was going to be the tool that would allow citizens to hold governments accountable to what is needed, yet you said there are only 30 cases that have been brought forward and that two-thirds of all submissions failed to meet the criteria for even being heard.

What is being done in order to try to increase that level of what is been submitted as to what is going to be heard; and, if you could elaborate on the one third of those cases that have been heard, what has been the results of those cases?

ANSWER, MS. FERRETTI: What we found was that, in terms of meeting the criteria for consideration, most of the "misses" were submissions from Mexico. So, we worked with a number of organizations to develop a workshop, along with writing some brochures, to explain in clearer language and to better educate the ordinary person as to our requirements. I think that has made a difference in what we have seen in terms of the quality. The submissions we are getting today are much better than they were six or seven years ago.

In terms of the actual impact, as I mentioned, I think it is a little early to proclaim total victory in terms of meeting the objectives, but I can tell you from antidotal evidence. For example, I heard back from some submitters that were involved in the first case that went through the CEC, regarding a pier that was built in Cozumel, who alleged that Mexico did not follow its own environmental impact laws.<sup>9</sup> Even though the pier was built and

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<sup>8</sup> Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-G.B (for Canada), 39 Stat. 1702.

<sup>9</sup> See *Citizen Submissions on Enforcement Matters: Cozumel*, at <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=32> (last visited July 2, 2002).

nothing “earth shattering” happened, one of the submitters informed me that there has been a noticeable change in the administration of the environmental impact assessment law. They now have evidence to show that the law is now taken more seriously and is actually being applied to construction of new facilities.

I also heard from Canadian submitters alleging the lack of effective enforcement regarding their Fisheries Act,<sup>10</sup> which prohibits the impacting or changing the fish habitat in some areas in regards to hydro operations in British Columbia.<sup>11</sup> We compiled a factual record, looking at the British Columbia program, and drawing heavily from experts in the fishery communities, hydrology, and so on. Because of that analysis, there is now a better understanding of the process of the Government of British Columbia’s programs, and the government is taking steps to address some of the weaknesses of their program that were suggested by some of the reports and assessments made by our panel. While the panel did not come out and say that there was a lack of effective enforcement, it did identify some areas for improvement in terms of fisheries management and the impacts of hydroelectric facilities. Those were the only two cases where we compiled factual records, and both of them were positive experiences. I think an interesting research initiative for some of you would be to look at what the impact has been on the ground.

COMMENT, MR. KING: Last question.

QUESTION, MR. ROBINSON: I feel I have to give a short defense of Chapter 11, which is being badly beaten up here this morning. Three cases have been mentioned in which trade laws supposedly trumped environmental laws; that is factually just plain wrong. The *Ethyl* case was settled<sup>12</sup> because Canada realized it had a very poor case. I think the *Methanex* case has not finally been decided, and in the *Metalclad* case,<sup>13</sup> the B.C. Court effectively took away most of the trade law aspects of the decision, notwithstanding the decision finding was, yes, the Mexicans had cooked the revocation of the permit in order to block an investment.<sup>14</sup>

There are only three cases. In my view, if you examine the cases, you will find that the bases for the invocation of these laws were poor research and poor science. In fact, all three of those cases used environmental

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Official submissions available on the site are in Spanish.

<sup>10</sup> Fisheries Act, R.S.C. 1985, c. F-14 (Can.). See *Citizen Submission on Enforcement Matters: BC Hydro*, at <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=46> (last visited July 2, 2002).

<sup>11</sup> *Id.*, s.35(1).

<sup>12</sup> *Ethyl Corporation v. Canada*, 38 I.L.M. 708 (NAFTA Arb. Trib. 1998).

<sup>13</sup> *Metalclad Corp. v. Mexico*, 40 I.L.M. 36 (NAFTA Arb. Trib. 2000); *Mexico v. Metalclad*, [2001] B.C.S.C. 664 (Can.).

<sup>14</sup> See, e.g., *id.*, ¶¶ 50-76.



protection laws as thinly-veiled anti-free trade laws. I, in fact, was involved, and Simon Potter – he can give the other side – has not arrived yet.

COMMENT, MR. POTTER: Simon Potter has well arrived.

COMMENT, MR. MICHAEL ROBINSON: I thought Simon was still trying to save our wood.<sup>15</sup> He gave up.

COMMENT, MR. POTTER: I have given up for the time being.

COMMENT, MR. MICHAEL ROBINSON: I think a better example you might look at, and I appreciate your comments on this, was the famous “plain-packaging” issue, in which Canada decided, based on what turned out to be absolutely appallingly poor science and research, that if all cigarette packages were turned into something very unattractive and the trademarks were stuck way down in the corner, kids would not buy cigarettes. The health committee was prepared to introduce legislation requiring all the tobacco companies to do this.<sup>16</sup>

Simon appeared for the tobacco companies, and, even though I was then a smoker, appeared on behalf of the anti-tobacco health lobby. It was quite clear to all of us, I think, that GATT health and environmental exemptions are quite strong enough to protect us from having legitimate environmental laws applied legitimately struck down, but in the plain-packaging case, the government backed down because their research was junk. They had no scientific basis for taking away the trademarks of their U.S. owners. So they backed away.<sup>17</sup> What did they do? More research. When they did, they were better able to defend the legitimacy of the health exemption and now you see incredibly horrible things on Canadian cigarette packages, like cancerous mouths.<sup>18</sup> And Simon has not yet attacked that.

COMMENT, MR. POTTER: Yes, I have.

COMMENT, MR. KING: We will wind this up. Simon has the opportunity to rebut.

COMMENT, MR. POTTER: Just a quick one, the warnings on the cigarette packages are being attacked because of their size, not because they are ugly. I have nothing to add except to say – I agree with my friend, Robinson – that good valid laws enacted to protect the environment with some scientific justification benefit from the health exemption. Chapter 11 is *not* forcing countries to strike down good valid environmental laws; rather, they are backing down and settling when they have rotten cases.

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<sup>15</sup> That is, softwood lumber.

<sup>16</sup> See Gary M Sutherland Mark O'Neill & Gordon Ple, *Taking on Tobacco*, GLOBE & MAIL, July 29, 1996, at A15.

<sup>17</sup> See Silvia Ostry & Julie Soloway, *The MMT Case Ended Too Soon: Taking it to Arbitration Would Have Helped Settle Some Crucial Questions*, GLOBE & MAIL, July 24, 1998, at A15.

<sup>18</sup> See Brian Laghi, *Rock Urged to Expand Crackdown on Tobacco*, GLOBE & MAIL, Nov. 1, 2001, at A1.

COMMENT, MR. KING: Thank you very much. Our next panel will begin very shortly. We have a five-minute break.

