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QUESTION, MR. CARMODY: I would like to thank both of our panelists for their very wholesome and thorough treatment of the subject this afternoon and perhaps begin the question period with a question of my own about third party participation. It is something that we have heard quite a bit about in the aftermath of the Seattle ministerial; the participation of third parties, Non-governmental Organizations (NGO), in dispute settlement.

We have had, since October of 1998, the World Trade Organization (WTO) Shrimp decision, which allows the submission of non-governmental briefs in WTO proceedings.[1] And we also have similar moves, although not quite the same, but similar moves, in other institutions of international economic law. We have, for example, the World Bank Inspection Panel. We have movement towards the inclusion of NGOs in certain facets of the International Monetary Fund (IMF) proceedings. I would like to hear from both panelists regarding what they would think of integrating more third party participation in Chapter 11 proceedings.

ANSWER, MR. HAIGH: In my view, the presence of outside parties is not something to be welcomed into the arbitral process. My concern is this – I think the non-governmental organizations that seek this kind of standing in these proceedings are often those who have a particular agenda that they want to advance. Their argument in favor of being included in proceedings is that the public policy of their own government is under attack in the Chapter 11 case, whatever it might happen to be. And that is true as far as it goes.

But it seems to me that the proper place for the debate on public policy issues is in the political fora that are available to all of us—whether that is through the press or in Parliament in Canada or in Congress in the United States—and not to allow the process of dispute resolution, which is quite specific to the parties, that is between the investor and the state, to get hijacked by those who have another agenda to advance.

COMMENT, MR. CARMODY: Daniel has just indicated to me that he has no immediate response to that, so we will take questions from the floor.

QUESTION, MR. WOODS: You know, one of the problems with Frankenstein was that he was an incomplete product. He was big, scary

[1] United States – Import Prohibition of Certain Shrimp and Shrimp Products, (visited Aug. 1, 2000) <http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.>

looking, and he moved slowly. If there had been a Frankenstein 2, the project might have been a little bit more successful.

I have two questions. With respect to the long-term viability of investor-state dispute mechanisms within trade agreements such as North American Free Trade Agreement (NAFTA), from the government point of view, when that money gets paid out, it is taxpayers' money. And, if there are fourteen cases now, and they grow and double or triple, there are going to be a lot of places in government where there is not going to be much oxygen left in the room because people are going to be really focussed on those issues.

That is a fact, and it makes the idea less attractive in terms of policy makers wanting to include them in future agreements. Whether that is right or wrong, that is something that I think one has to consider in looking at a Frankenstein 2, if you like.

My second comment is that I heard early in the remarks that perhaps counsel should take a longer-term view of using the mechanism because of some of these reasons. But on the other hand, it seems to me that it is the reverse. Domestic counsel should be more and more aware of the rights of their clients and should be pursuing their rights as aggressively as they can. And there you have a bit of a conflict between counsel sitting there advising clients and the interests of the bar, if you like, to keep this mechanism in place in the present and future agreements.

ANSWER, MR. PRICE: I would like to respond to the second comment or question first. When I was counseling caution in bringing claims I was not suggesting that you should not zealously represent your client. If your client has a meritorious claim, bring it forward. All I was suggesting is that the words "fair and equitable" or "full protection and security" or "expropriation" do have a meaning. There are precedents. And that, in advancing claims, counsel should not just assume that those words can mean anything they would like them to mean.

If I could respond to your first comment, I do not think it is a Frankenstein, so I do not think we need a Frankenstein 2. If that ends up being the case that there are a series of enormous damage awards against governments for their treatment of investors, I suggest the remedy for that is not to alter Chapter 11, but to alter the treatment of investors.

QUESTION, MR. SCHAEFER: I have a question on payment of damage awards. Assume the United States loses the *Loewen* case.[2] Would the federal government have existing statutory authority as well as funds to pay out such an award, or would there have to be separate legislation? Would it create any

[2] Lowen Group, Inc. v. United States, Notice of Claim, Oct. 31, 1998; *see also* Harmonization Project, Briefing Paper, Loewen Group, Inc. v. United States (visited July 28, 2000) <http://www.harmonizationalert.org/NAFTA/loewen.htm>.

problems, not necessarily legally, but politically, to have the United States paying out an award of money for the bad acts of one state? In other words, would the other forty-nine states be upset that one state's actions has led to the payment out of money in that respect?

The second question is just, should we really be discouraging companies from bringing claims against proposed legislation? In other words, aren't the governments, be they federal or state, better off knowing about potential liabilities in advance rather than having the company wait until they have actually passed legislation? I would suggest the conscientious legislator should already be worried about international obligations prior to a private party bringing it to their attention in a claim. But if the private parties can assist in bringing that to their attention, why not?

ANSWER, MR. PRICE: With respect to the question about whether legislation will be needed, I think the answer is no. The judgment fund would be the source of payment of claims against the United States. Will the United States government be upset if it loses? Yes, extremely.

QUESTION, MR. TUTTLE: What about the Mississippi issue? Do you think that there will be a problem with the other states in terms of a dynamic created where a bad act by a state leads to the outflow of money, potentially harming other states?

ANSWER, MR. PRICE: It is well settled under international law that the acts of a political subdivision are attributable to the central government. That is the principle underlying all of our treaties and the principle underlying the doctrine of federal supremacy in foreign affairs. States should not be doing things for which the nation, as a whole, must pay. Will other states be concerned or disturbed by this? I would hope so.

With respect to proposed measures, I will turn that over to David. But the fact is, putting my former government hat back on, when the Congress is considering legislation that is inconsistent with our international obligations, the first thing we, in this case we is the United States Trade Representative (USTR), or the legal advisor's office, do is trot up to the Hill and tell them, if you do this, a claim will be asserted against us either in the WTO or by a private party under agreement and there will be a claim for damages. It is one of the most powerful arguments against passing a measure inconsistent with international obligations. I think it is quite a separate question as to whether proposed measures should, in fact, ground a NAFTA claim.

ANSWER, MR. HAIGH: That would be my point especially. In this case you would be interested to know that in the notice of intention to bring this claim, *Ethyl* quoted from governmental papers advising the Canadian authorities that they would be breaching their international trade obligations

if they were to proceed with this bill.[3] So *Ethyl* not only had the opportunity, through its lobbyists, to meet, and they did meet several times, and to appear in front of the Senate subcommittee, but also to have the satisfaction of seeing some of their viewpoint reflected in the advice that the governmental authorities were receiving in the course of the process. But, as Daniel says, that is different from starting an action in the middle of the process as a way of weighing into that debate.

COMMENT, MR. MURPHY: Yes, just two quick points. I think the gentleman's comment about federal supremacy is highly current. Is it not like in the Supreme Court where each of us has a brief pending "Amicus Curiae" in the Massachusetts Burma sanctions case.[4] That is the bottom line. Who runs the foreign policy of the United States? We will find out the answer, I guess, when the decision comes down in June.

But I would like to support the gentleman's earlier comment . I do not litigate cases any more, but I used to litigate a lot of them. And I will say flatly in front of all the eminent litigators here, when a case goes off the rails, it is always the Judge's fault. It is always the Judge's fault. The lawyers are only doing what they can do subject to the baseless filing rules. And summary judgments and motions to dismiss take care of that. So I do not see how you can ask a creative counsel with a client's problem in their pocket or hands to say, "Well, I think I am going to take the statesman-like approach." That is what the government is there for. Government should govern. Judges should judge.

COMMENT, PROFESSOR KING: I might add, next year's conference will deal with the first part of your question.

COMMENT, MR. MURPHY: This is not an original thought, of course.

COMMENT, MR. ROBINSON: Henry, I have got the mike in my hand, so I preempted you. Michael Robinson is my name, and I am from Toronto. Just a comment on the federal-state issue in which some of my American colleagues might be interested.

It is entirely different in Canada. In fact, the first time the Chapter 11 award is going to go against Canada because of the actions of a province – and I have had a couple in my office that have not gone forward, but may still go forward. I am sure you are going to find a revisiting of what we call in Canada the *Labor Conventions* case.[5] That case, an old privy counsel case

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[3] Ethyl Corporation v. Government of Canada, 38 I.L.M. 708 (1998).

[4] *See* David Ivanovich, *States' Trade Sanctions Ruled Illegal: High Court Slaps Down Massachusetts' Burma Act*, HOUSTON CHRONICLE, June 20, 2000, at A4.

[5] Attorney Gen. Can. v. Attorney Gen. Ont. [1937] 1 D.L.R. 673 (Labour Conventions case).

from the 1930s, says that the federal government cannot make treaties that affect areas of provincial jurisdiction unless the provinces also go along with it. Our current Supreme Court of Canada will probably reverse the *Labor Conventions* case and say "yes they can." And then what will happen is that the government of Canada will immediately debit the account of that province with every penny, which they had to pay out. Under the Canadian taxing authority, the Feds grab all the money and hand it out to the provinces when they feel like it. And, of course, when the Feds want to reduce the deficit to show what good guys they are, the way they do it is by reducing the amount of money they give to the provinces. So it is very different in Canada.

QUESTION, MR. WILDHABER: My question has to do with market access, as well. During the NAFTA negotiations, Mr. Price, was there any thought given to the not-so-theoretical possibility of a company initiating a Chapter 11 challenge and going for what I call a full court press, so initiating a NAFTA environmental side agreement request for factual record and the officials of a company lobbying the government to take a Chapter 20 case at the same time? Were there any fears expressed of that possibility arising? Was there any thought given during the negotiations to a company initiating Chapter 11 proceedings and, at the same time, asking its government to initiate a state-to-state litigation under Chapter 20?

ANSWER, MR. PRICE: Yes. I think, in fact, that is just not going to happen. It was the view of the people around the table that, if an investor has asserted a claim, it is unlikely, more than unlikely, that the host government is going to assert a claim under Chapter 20.

I suppose the other point I should mention is, there is a provision in Chapter 11 for the three parties to disagree on the interpretation of a provision. And that interpretation is then binding on a tribunal.

COMMENT, PROFESSOR KING: I had one point. I have watched people preparing for these cases. This has generated a tremendous amount of interest in international law. What you have done is created a flurry of activity on the part of people who are litigators who never had any interest whatsoever in international law. Now they are preparing claims, and they have been educated in this whole area. So I think in that sense this whole thing has been quite good. I do not know if that was your foresight, but I think this is something that I am watching happen now.

COMMENT, MR. CARMODY: Thank you very much, Professor King, and I think that brings an end to this investigation. Thanks to both of our panelists, and thank you for attending.