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QUESTION, MS. VERNON: I want to ask Professor Schaefer first if you had any comments you would like to make regarding Mr. Grenier's presentation before we open it up to the floor.

COMMENT, MR. SCHAEFER: I have just one on the language you used regarding the cooperation on disputes; you mentioned there is some wiggle room. There is wiggle room even in the U.S. statutory provisions in the NAFTA implementing act and Uruguay Round implementing act in terms of state involvement. That just reemphasized the need for there to be a cultural change, an attitudinal change, that includes full participation. We are seeing it in the United States as I mentioned going through the disputes. So I do not know if there is that cultural or attitudinal change in Canada, but we are seeing it in the United States

COMMENT, MR. GRENIER: I agree. I think it is the same in Canada.

QUESTION, PROFESSOR KING: I wanted to ask Matt, what has threatened the impact on environmental legislation in Chapter 11? There has been some concern on the part of environmentalists that this would have some adverse affects on existing environmental legislation. Do you see this as a potentially explosive issue, Matt?

ANSWER, PROFESSOR SCHAEFER: It is potentially explosive. But we have to remember one of the things that happened after NAFTA and the WTO agreements were concluded. We did have some environmental non-governmental organizations (NGOs) trying to enlist states' opposition to trade agreements. They came up with these laundry lists of state laws, many of which in the environmental sector could be subject to challenge such as the Delaney Clause, or the California Proposition. I have the right number. There were sixty-five on carcinogens. It has not come to pass. There has not been, in the fifty-three years and counting, one case against state measures successfully pleaded in the GATT. In fact, states largely have not complied with it. A lot of the measures not involved in the *Beer II* case are commercially insignificant. This is why Canada has not re-upped the case in the WTO, in part. But there has only been one case. So these laundry lists fail to take into account, again, of a lot of what the obligations and agreements actually require.

Now, on the Chapter 11, specifically though, measures tantamount to expropriation, there is a lot of concern that that is going to be used to go after environmental regulation.

COMMENT, PROFESSOR KING: That is what I am talking about.

COMMENT, PROFESSOR SCHAEFER: I will have to agree with what Dan Price said yesterday. Regulatory takings are recognized in U.S. constitutional jurisprudence. They are recognized, to a certain degree, in international arbitral jurisprudence. We ought to wait and see what results come about under the cases before we jump into it.

I have no doubt, though, if the United States loses *Loewen* or the California MTBE cases, there is going to be an outcry and an outrage. But we ought to look at the specifics of those measures in the justification form. For instance, in the MTBE case, no studies have shown adverse health effects of MTBE in groundwater. It does create an odor. It does create a smell. But nobody knows for sure what the effects are. There has been a ton of resources spent by environmental organizations attacking international trade agreements over the past ten years. What we have seen is that some of the focus was lost on domestic issues; clean water, clean air, and MTBE, was lost at the expense of things that are easier to collect monies for, like attacking international trade agreements and foreign institutions. It probably has not been a wise use of resources by environmental organizations.

Yes, there are legitimate concerns within the trade agreements, but we ought to realize that these are not enemies. We ought to be concerned as much about our own domestic laws and making sure the science is done on those, as well.

QUESTION, MR. MURPHY: This is a question for Professor Schaefer. I am Terry Murphy, a proud graduate of the University of Michigan Law School.

COMMENT, PROFESSOR SCHAEFER: Ditto.

QUESTION, MR. MURPHY: Go Blue. Would you please put your White House hat back on for this? We have a brief in the Supreme Court in the *Burma* case in effect supporting the federal government's powers over foreign affairs. You did mention your view that it is important to maintain a central authority over foreign affairs in some way. I would hope that is shared around this room.

But I wonder whether you could speculate or even if you know why the United States did not choose to enter the *Burma* case until the absolute last possible minute? It had a rebuke from the First Circuit Court of Appeals for failing to protect the foreign affairs powers of the United States central government, and it did not come into that case until the last hour of the last day of the 14th of February of the year 2000. We did not know until they were filing whether they would file at all.

ANSWER, PROFESSOR SCHAEFER: I am not at liberty, obviously, to reveal any internal discussions that occurred. It is clear, though, the stakes at

the Supreme Court level are different than at the First Circuit Court level. I am not trying to sell these things. I am hoping they do not collect dust on the shelves. I did hold up a couple law review articles I have done in connection with this conference earlier. I had one on the shelf, ironically, before I went to the White House. I agree completely with the First Circuit analysis, that it should be struck down on all three grounds. The unpublished article I have would conclude the same thing.

The predictions are going to be potentially a five-four case, very close. I do hope the measure is struck down, at least on one of the grounds. These cases do not make it to the Supreme Court very often. They have taken certiorari, and it may set precedent for the next fifty to one-hundred years. You can see the problems that may be created if a halt is not put to this type of activity.

COMMENT, MR. MURPHY: I would have thought it would be a no-brainer for the United States government to advocate in that area.

COMMENT, PROFESSOR SCHAEFER: The First Circuit struck it down on all three grounds. So the failure of the Executive Branch to file an amicus brief before the First Circuit did not affect the result in any way, shape, or form.

COMMENT, MR. MURPHY: The First Circuit rebuked the United States government in a footnote.

COMMENT, MS. VALENTINE: I am speaking as an ex-member of the Department of Justice. I am now the general counsel for the Federal Trade Commission. I do not know anything about the facts of this case, but as a general matter, the U.S. government does not get involved in cases at the appellate level. Had the Court wanted, the Court could have asked the Attorney General, in fact, to file an amicus brief. Even at the Supreme Court level, we will generally avoid getting involved at the petition for certiorari stage and only come in on this important issue affecting the U.S. government once the petition seeking certiorari is granted.

Now, whether this case, because of its being so central to federal power, the federal-state issue as opposed to your usual dispute with private parties, it should have been subject to different rules. It is not that unusual at all for the government to do that.

COMMENT, MR. MURPHY: I can tell you that a senior member of the White House Legal Affairs Office told me personally in the Supreme Court on the day that case was argued that they were very worried that the Solicitor General of the United States of America would have been rebuked by the Justices of the Supreme Court that morning for failure to defend the interest of the United States in that case. They were worried about a public rebuke to the Solicitor General in open court.

COMMENT, MR. DAVIS ROBINSON: I might add something. As I spoke with you yesterday, the turf wars that go on between the State Department and the Justice Department in almost every government are absolutely incredible, and this is a very good example. In the case of the United States, the Department of Justice and the Solicitor General's Office are in charge of filing all the briefs filed in U.S. courts. However, when it comes to international law, the Department of State is fundamentally responsible for input in those briefs, however it is with great resistance from the Justice Department. But they have the final say.

As I said yesterday, in the case of international tribunals, it is exactly the reverse. Whereas the Department of State has been extremely willing over the years to help the Justice Department in the U.S. cases, I am sorry to say such has not been the case in the reverse. This is an intensely political area. I would argue that, frankly, the Justice Department is much more subjected to internal political forces, especially in certain administrations. This case has been out of the ordinary in that area. So I do not know the answer to this. It is absolutely shocking, after my time in office, the West Side Highway in New York, which has been a disgrace for forty years now, was held up for years because American-South African policy was being run by the mayors of our cities rather than by the Secretary of State. If you think you could get the Justice Department to do anything about it, you better think twice.

COMMENT, MR. Von FINCKENSTEIN: As a former trade negotiator and a federal civil servant, I cannot help but take issue with Carl. Carl, you went through a long description of how the internal coronation process works between the federal governments and provinces and the steps being taken to make sure that there is an adequate hold for the provinces so that they can be heard; the various committees, the sea trade committees, the best practices document, and how you are in the next room or at the table depending on the issues.

Then you went through lessons you have learned. You made two statements. First you said that private parties define the national interests, not the national government. And then you said that no one is at the helm. I do not understand. You are saying the whole process does not work, or you are saying there is a fear of leadership by the government. Or when the process works, it does not work in terms of *Softwood Lumber*. Needless to say, I disagree with all three conclusions.

COMMENT, MR. GRENIER: I think it is a bit of both. The process seems to have worked overall. But when very, very large interests are at stake, as they are in the *Softwood Lumber* case, and because this case has been going on for so many years, then it is quite evident for anyone dealing with the case now that the federal government is extremely reluctant to offer

leadership on the question. They are waiting for the industry. I am not blaming them for that, by the way. They were burned badly by the industry the last time around, and so they have told us in so many words that they are waiting for the industry to make up its mind. That means that the industry, if it does make up its mind, will be very, very heavily involved in the policy setting for the next phase of this long standing dispute.

So I think it is true and that private interests will make policy. I am not saying they will be the only ones, but certainly they will be very important, if they make up their minds. If they do not, then it will be up to the federal government to decide. Normally, in a case like this, when it is really an exception to a general rule that we are talking about – if we are talking, for instance, of renewing or prolonging the Softwood Lumber Agreement, then I would say that, if there is no consensus within the industry, obviously we should refer back to the general rule.

It was not my intention to suggest that the federal government and the provinces have not worked hard at setting a process under which, in the absence of the constitutional regulations, as they have in the United States, to allow the provinces to participate in the process.

COMMENT, MR. HAIGH: I just wanted to add a short comment to Carl's summary of the relations between the provinces and the federal government with respect to trade by reminding you, again, of the agreement on internal trade and the role that it has come to play. Not only does it get used in trying to resolve disputes among the provinces themselves with respect to procurement issues and other issues having to do with creating fair ground rules in terms of investment or trade between the provinces, but it has also been used, as I mentioned yesterday in the *Ethyl* case, where a group of three provinces brought a complaint against the federal government that its MMT Act had breached the terms of the agreement on internal trade. And they were successful.

I will still think that was the mechanism that forced the federal government to turn around and settle its Chapter 11 case with Ethyl. It is an interesting model, because it was based on virtually the same undertakings as exist in the NAFTA. National treatment, most favored nation treatments, and standards of fairness, these are all in the provisions of the agreement on internal trade. It is intriguing to see this sort of extra constitutional agreement in play under the various entities. I just mention that as a comment.

COMMENT, MR. GRENIER: There are a couple of reasons why I did not mention the Internal Trade Agreement. First, I was involved in the discussions prior to the negotiation of that agreement. I believe I did make the suggestion at the time, in the early 1980s, that we use the international model of agreements to deal with internal trade barriers. This was largely

done, I think. Unfortunately, in the agreement itself, there is more exception to it than rules. It may have been used successfully in the *Ethyl* case, and I am glad of that. But to me, the years that I was involved in the discussions and negotiations on internal trade are not the best souvenirs I have in my dealing with the federal government and the provinces. This is the reason I did not mention it. But indeed, some good may come out of this agreement at some point.

QUESTION, MR. WOODS: I would just like to go back to *Beer II* for a minute and ask a question. In *Beer II*, a fascinating thing happened. The GATT panel back in 1992 took a look at U.S. Supreme Court rulings and opinions of people like John Jackson, and they decided that the U.S. states, which are sub-nationals, were bound in terms of the market access issues. By the way, Canada also went after the U.S. federal government on a very significant commercial tax issue, as well. So it was not all frivolous and facetious.

The best thing that happened out of *Beer II* was, if you took this seminar twenty years ago, or if you went to international settings in the last fifteen years or so, the only country that was nailed on subnational issues was Canada. This session fifteen years ago would have featured a big discussion with our U.S. friends about what the hell the federal and the state governments were doing. So it adds some balance to the perspective.

With respect to Chapter 11, investor-state, and the issues of expropriation, if the GATT panel was looking at those kinds of issues, would the GATT panel be able to make those same rulings? Is the Supreme Court looking at these cases so that the precedents would not be the same ten years later?

ANSWER, PROFESSOR SCHAEFER: I will answer the first one. I am not sure I understood the second. But on the first, could a GATT panel look at these same types of issues? The answer is no, because the WTO does not really have investment obligations outside of the TRIMS[1] Agreement, which is actually not much of an investment agreement. It is really reiterating what Article 3 and Article 11, the national treatment obligation, and the quota prohibition obligation in the GATT, already required. So it is a useful clarification of Article 3 and 11, but it in itself is not very useful. So you will not see expropriation claims brought before a WTO panel.

QUESTION, MR. WOODS: Some eight years ago, the cases were pretty clear. They appeared pretty clear in terms of the power of the U.S. government to bind their states. When you take the issue away from trading goods to investment or expropriation or even just going back to market

[1] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, at Annex 1A.

access, have there been rulings in the last eight years or so that would cloud the issue more?

ANSWER, PROFESSOR SCHAEFER: In fact, I addressed this issue specifically looking at the recent Supreme Court jurisprudence in the 1999 article in the *Journal of International Economic Law.*

I do not think any of these recent rulings, *Lopez* or *New York*, inhibit the ability of the federal government to bind the states, even in new areas like services or investment, or in areas like government procurement or areas like subsidies. It is not a constitutional, legal question in the United States. It is simply about political constraints. It is not easy – even though the federal government has the power to preempt the states in these areas, politically exercising that power is not easy. There are complications, but it is clear that they are political complications and not legal complications.

The other thing of note that has occurred in the last year, there was a constitutional challenge to NAFTA over its approval method. We had our trade agreements in the United States as congressional executive agreements requiring simple majority of both houses of Congress to approve the agreement rather than two-thirds of the Senate. NAFT Only sixty-one senators vote for NAFTA. So there was a challenge to NAFTA in U.S. courts arguing that NAFTA was required to be approved as a treaty by two-thirds of the Senate. It could not be a congressional executive agreement. That claim has failed at the lower court level. I believe there is an appeal in the works on that. But even that argument, I think, has been properly disposed of by the lower court.

QUESTION, PROFESSOR KING: I just have one comment. Matt, you mentioned a five-four decision in the Supreme Court. Which way?

ANSWER, PROFESSOR SCHAEFER: That is a good question. I actually think, if I had to put my money on it, that the Supreme Court is going to invalidate the law. But you do hear a lot of predictions that it will be a very close call, five-four one way or another, so we will see.

ANSWER, MR. GRENIER: Yes. I realized when I answered Konrad Von Finckenstein's question, I only addressed the national interest question. The "no one at the helm" remark in my presentation really was aimed at the United States. For instance, I remember, for instance, meeting with some very senior persons from the Department of Commerce with the Minister in tow. He was arguing that some trade case was actually going against the national interest of the United States. The U.S. official said "Absolutely. But he said, you know we are prohibited by law from taking the national interest into account in these cases."

COMMENT, MR. POTTER: Carl, I would just like to give you the opportunity to expand a bit on the line on one of your last slides which says,

"do not negotiate, litigate wherever possible." I am a litigation lawyer. I am in favor of that. However, it would only be fair to the crowd to point out that there have been statements from the British Columbia wood industry that they are not entirely closed to the idea of negotiation. Everybody wants free trade, but not everyone thinks that litigation is the necessarily the way to get there.

COMMENT, MR. GRENIER: Absolutely. And I did mention that we are still far from a consensus within the Canadian softwood lumber industry on this matter. I certainly hope that we will get a consensus. I do not think anyone can say right now if we will. We are certainly working hard to do that. You should not rejoice too quickly on the litigation aspect, because of course, most of the money will go to U.S. lawyers.

COMMENT, MR. POTTER: They always need help.

COMMENT, MR. DAVIS ROBINSON: Yes, if I could make one more comment on the issue of the five to four vote. One thing that is not really appreciated is that most U.S. federal judges do not know very much about international law. The reason for this is that they do not face very many cases involving international law issues. That was one of the reasons that the state department, in my day, fought so hard over the American Law Institute (ALI) Restatement of Foreign Relations Law, because most federal judges, if they face an issue that is of any transnational significance, are going to refer first, very likely, to the ALI restatement. They may have very, very limited personal experience.

I would recommend, because of the U.S.-Canada relationship, and it is a model, that more efforts be made in the federal judicial conference to educate U.S. federal judges. They do not know very much, and that includes the Supreme Court. A lot of them may not have been involved in that many cases. So if it is five to four the wrong way, to some extent it is going to be because of lack of experience and little realization of how important these issues are. To me it was absolutely ludicrous that over a fifteen year period, American policy over South Africa was not run in Washington. It was run in Los Angeles and in New York City.

COMMENT, PROFESSOR SCHAEFER: One of the ironies that comes up in the Massachusetts *Burma* case is that you still read press reports saying the law was struck down because of the WTO agreements. This is an indication that international trade agreements are a threat to our sovereignty.

If you read the First Circuit opinion, there is little to no mention of the WTO at all. It is a domestic constitutional matter where the First Circuit has said the states are not allowed to operate in this area.

The other thing, on the Restatement and the Supreme Court, the State Department worried that the Courts would turn to the Restatement too

quickly. In fact, what you find in some cases, is that they ignore the Restatement. If you look at the *Hartford Fire Insurance* case in 1993 and look at the analysis done by the majority, they ignored the Restatement as well as everything else that there might have been in terms of international law.

COMMENT, MS. VERNON: It sounds like he just threw you an idea for a judicial conference in Nebraska.

COMMENT, PROFESSOR SCHAEFER: I definitely agree with that, that there is a need for further steps.

COMMENT, MS. VERNON: I am sorry, we have other questions and comments, but time has arrived. I would like to thank all of you for joining us. I would particularly like to thank our two speakers. Please join me in another round of applause for them.