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Discussion Following the Remarks of Mr. Smith

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF MR. SMITH

QUESTION, PROFESSOR KING: I have one observation. As long as Jesse Helms is Chairman of the Foreign Relations Committee of the United States Senate, maybe our leeway in structural changes is limited. However, there are many things we can do without additional legislation. One of the initiatives that I think is good, but does not seem to be on the surface because it requires changes, is the extension of the International Joint Commission's (IJC) jurisdiction. I wanted to get your observations on that. You condone the work of the International Joint Commission. Do you have any thoughts on other areas where it could be extended?

ANSWER, MR. SMITH: I would not worry if the International Joint Commission got into the position of having to go to Congress and Senator Helms for amendments to the Boundary Waters Treaty.¹ But I should have thought that there could be impressed on the Boundary Waters Treaty and on the duties of the International Joint Commission, by way of an exchange of notes, if you will, or by way of simply agreement between the parties, that the Commission could extend its operations geographically. Because of course, it is limited to boundary waters and waters flowing into boundary waters. There is that aspect. In terms of its other duties as concerns its substance, I throw this out. I have not examined the issue.

Allow me to digress for a minute. I do not think we should make Senator Helms out to be a demon. I got a different impression of Senator Helms in the last little while. I have been involved for many years in an exercise whereby we negotiated a convention on intercountry adoption. I was down in Washington just before I came here at the National Council for Adoption where they were good enough to give me a little award. The legislation to implement the High Convention on Intercountry Adoption is going through the Congress now. Senator Helms has been very helpful. Senator Helms is the father of a handicapped child. I think that we have to look at that, notwithstanding the power that this gentleman has and the things that he has done. I think we have to balance these things off. We all have to be very grateful to Senator Helms, because the issue of intercountry adoption is terribly important. In Canada and the United States alone, we are dealing with nearly 20,000 adoptees from abroad every year. Those are individuals

¹ Treaty Relating to Boundary Waters between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2449.

for whom we have gotten some help from Senator Helms down in Washington. I am sorry for the digression, but it is good to put a positive note on things.

COMMENT, PROFESSOR KING: I am very objective, but we should keep in mind Brad's recommendations after Senator Helms moves into eternity. So I want to throw this thing open to discussion. Any suggestions? You have given us a great panorama and you have given us a blueprint for what has to be done. It is very important. The magic of the International Joint Commission is the fact that it is shared. It is two countries working together, and it has got a history of solid accomplishments. So we have to build on that.

Now, maybe you solved all our problems, Brad, but I wanted to ask if anybody else has any questions.

COMMENT, MR. GRENIER: I really do not want to come back on *Softwood Lumber*,² of course, but I want to come back on muddling through. This is a fine expression, and in French we have a similar expression that means to get by without a formal system for resolving situations. But I prefer muddling through, because for me, and this is probably because of my incomplete grasp of the English language, it evokes an image of two very young boys playing in the mud. Now, the only problem with this image, of course, is that one of the boys is already the size of Jesse Ventura. It does not take a long time to figure out who is going to be the muddler and who is going to be the muddle. My point here is that when we have rules and we decide to set them aside for some reasons, then obviously, as we have done in *Softwood Lumber*, this undermines the rules for other cases.

We have been fortunate since 1995-1996, that other cases have not used *Softwood Lumber* as a precedent. But if we do muddle through because we do not have any other choices, because there are no rules on some of these instances, then that is fine. But if we do have rules, then we should use them. That is my point.

COMMENT, MR. TENNANT: Your list of personal suggestions would, by and large, be widely endorsed. Indeed, if there were the time and the people, would offer a great deal of assurance that, in many of those areas, that is exactly their own list of what is being done. Picking, for example, the fact that the IJC, even though people have not yet extended its grasp as far as to that which you just referred, it certainly has been greatly re-invigorated in terms of the number of references it has been given. Dispute anticipation is exactly what everybody is focused on, and finding mechanisms, new mechanisms included, to try to manage them. So it is a very useful list that

² In the Matter of Certain Softwood Lumber Products from Canada, ECC-94-1904-01 USA; Memorandum Opinions and Order, 3 Aug. 1994.

you have put forward for discussion today. Because it would meet wide endorsement on most of its points, it would be a good basis for further discussion.

The second point I wanted to make is that as someone who is serving in the United States, the last two and a half days have been absolutely marvelous. All of the discussion has been very, very focussed on the bilateral Canada-U.S. relationship. Whereas the reality, which I and my fellow Counsels General and Ambassador Raymond Gretchen, feel we face on an on-going basis is that our intermestic relationship, in the eyes of Americans, has become very NAFTA-ized, and that, within the United States, Canada is thought of in the NAFTA context. The level of general awareness when Canada is mentioned, is “oh, our NAFTA partner, Canada.” But it also is a circumstance that invites Americans to think about whether problems are solved on a trilateral basis, or whether there still remains a possibility of working on them bilaterally.

The discussion here was very different than the kind of environment that we often feel we are working. Therefore, it was refreshing. But I do think that it is also important to realize that the wider environment is a bit different than this marvelous one that Henry creates for us.

COMMENT, PROFESSOR KING: I have one observation. One of the glues in the Canada-U.S. relationship can be the importance of the cross-border diplomats. One of the observations I have, since I come from a very political family is the fact that our opening speaker, Jim Blanchard, had access to the President of the United States. He had a political base, which was tremendous in Michigan. He had been the Governor of Michigan as well as having been in Congress. He had both the executive and the legislative branch behind him. Open Skies is attributed to Jim Blanchard and his Canadian counterpart. This was a very important development so that you can fly across these borders.³

The choice of the American leadership for an ambassador to a country such as this ought to be made with great consideration of the relationship and what can be done. Because it is that glue – that personal glue that seems to have made quite a difference during Jim Blanchard’s tenure. Jim McIlroy told me how much he is thought of in Canada. But it is the ability to call the White House, the President’s office, and get something done. Any other comments?

QUESTION, MS. VALENTINE: I will just come to a quick defense for a moment, with respect to *Softwood Lumber*, just because I do think the

³ See Open Skies Treaty, 28 U.S.C. § 1502 (1994). For more information about the Open Skies Treaty, see *Open Skies Treaty*, (visited Aug. 31, 2000) <<http://www.nawcwpns.navy.mil/~treaty/OS.html>>.

principle was important. The principle that I was hearing is that not all issues between the United States and Canada are legal ones nor can they be isolated as legal issues. Sometimes there are political aspects. It is very important to remember. We ran into this with Boeing and McDonald Douglas in the competition area. There, in fact, were legal aspects to that merger that we and the European Commission handled in a very straightforward way. There were also political aspects to that merger that simply could not be handled by the legal system.

Everyone started saying, "Gee, the legal system has fallen apart." In fact, the legal system worked really very, very well on its issues. Although we ended up with different solutions in terms of what should be done about that merger, they were perfectly compatible, and the company went on and lived with each of them. The political issues are not going to be solved by the legal system. The legal system is going to be destroyed if you try to put too many political issues onto it.

But now my real question is, given all these beautiful legal principles, if you could take everyone in this room for the next three years and just have them work for you to solve the one most concrete, pressing, productive thing that we could do to improve legal relations -- or to improve relations between the United States and Canada, what would you have us do? Maybe each of you should answer that.

ANSWER, MR. SMITH: Henry and I, as he has indicated, have been working for twenty-five years on dispute settlement. We agree completely on some of the basics. I do not know whether Henry will agree with this or not. It would be very valuable if somebody, some wise person in the next three years, forgot about the politics for a minute, sat down and figured out whether it would be feasible to have a North American Tribunal made up of Americans and Canadians with jurisdiction to hear disputes about the existence and interpretation of treaty commitments. They would do no more, just that. I do not suggest to you that the tribunal would have a lot of work, but I suggest to you that its very existence and the possibility of having to resort to it, either for a whole problem or for a bit of a problem, would be extremely valuable. That would be my suggestion.

COMMENT, PROFESSOR KING: I am absolutely in agreement. I would go further, as Brad knows. I would broaden it. But one of the advantages of doing treaty disputes is, when the countries signed the treaty, they already gave up some sovereignty, if the treaty means anything. This was what we did to sell this to the American Bar Association. Treaty law is very clear. It is set forth in the Vienna Convention on the Law of the

Treaties.⁴ It is very clear. Historically many of the previous disputes between Canada and the United States have been treaty disputes. These are legal disputes, and this is very important.

So does a treaty mean something? It gives the treaties life. This is very, very important, segregating the legal questions away from disputes. It would develop its own institutional memory. That is one of the problems with the *ad hocs*. What happens at one time to one group of people may not be applicable to another. Here you have got a point of reference. That is what we need, a point of reference on our dispute resolutions. When you have a problem, you go here, you go there, or you go there. That is the toolbox concept, which was originated by the working group. Brad certainly participated very importantly in that. We need a toolbox that you look at and examine when you get a dispute between our two wonderful countries. I think that is what has got to come in time.

QUESTION, PROFESSOR PICKER: Having participated in the NAFTA dispute resolution process under Chapter 20, I had written on the suggestion that we would benefit from being transformed into an international permanent tribunal, as well. Now that would involve a third country, and possibly a fourth, as members are added. Do you feel that such an institution would benefit from NAFTA, that is the eventual adoption of the replacement of the panel process, either Chapter 20 or Chapter 19 or both, with permanent, on-going tribunals?

ANSWER, MR. SMITH: I have served as a Chapter 19 panelist, and there are problems in terms of constituting panels, getting people. I am not altogether sure that a permanent Chapter 19 panel would necessarily be a good idea. After all, Chapter 19 was supposed to be temporary. It was supposed to be gone by now, but it lives on. That is point one.

Point two is, as I have indicated, I am not a great believer in importing somebody from the outside. Between our two countries we have enough common legal traditions and we have, among our legal community, enough independence, that we can do it ourselves. We do not need to import a third party. That is, in a sense, a theory, but I have seen it work in Chapter 19 cases. I am not sure at all that a third party from a different legal system is necessarily going to assist.

Let me divert for a moment, if I may, because Henry has allowed me to be up here, and he has almost finished his CLE. This is very important to me personally. It ought to be important to those of you who are lawyers out there talking about different legal systems. As Henry indicated at the beginning, I have been in the middle for the last three years, of an effort to develop a

⁴ The Vienna Convention on the Law of the Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

convention on jurisdiction, recognition, and enforcement of judgments worldwide, and we are in trouble. We are in real trouble. We have done a lot of good work. It has been very slow. What has happened is the Europeans, who have a different concept of law, have been, I should not say negative, but they have been resistant to doing something different than what they have in their own European conventions in Brussels and New Guinea. The United States, which was the promoter of this back in 1992, has been increasingly hesitant about involving itself in this project because the concepts as they evolved were not concepts with which they were familiar.

The Haigh Conference is there to try to bring these things together. People in that exercise tend to look at it from a legal system point of view. I am trying to pick up on your point, really, about the third party. It is very important in an exercise like that, or in any exercise where you are trying to apply the law, to attempt to come to common agreement; to look at the other systems and to try and coordinate. That has been floating around, but certainly it is important to find middle grounds.

I think, to come back to your point, when you import somebody from a different legal tradition, a different continent, there is an element of potential misunderstanding simply by way of background. That is the only point I would make.

QUESTION, PROFESSOR PICKER: Let me put Chapter 19 aside, and focus on Chapter 20, the treaty focus, the country-to-country focus. Would you recommend, or would you think there would be a benefit to a permanent or on-going tribunal consisting only of nationals of the three participant countries so that there would be no outsider, except to the extent we would have a greater input of the civil law system through the Mexicans, but to have an on-going or permanent institution-building entity, which would create the memory to which Henry has been referring, and which is clearly absent in the panel process that Chapter 20 has created? Chapter 20 indeed does allow for outsiders, whereas a permanent tribunal would not. Do you think that would be a benefit, if such a thing were created or were substituted for the Chapter 20 process?

ANSWER, MR. SMITH: The short answer is yes.

COMMENT, PROFESSOR PICKER: Thank you.

QUESTION, MR. BAILEY: A rules-based system is a real touchstone for Canadians, in particular as a middle power, middle-sized economy right next to the world's one and only superpower. It is very important for us to try to resolve disputes based on rules rather than relative powers. The flip side, though, from the U.S. perspective, is what is the motive for going along with that rules-based system when, in fact, part of what it does is it takes some of the tools out of the toolbox for the United States? I mean, the United States

does not have to worry about going up against anyone bigger than they are in the world now and for the foreseeable future. So why should the United States give up that leverage for rules-based solutions?

ANSWER, MR. SMITH: Well, one answer might be that they are good guys and good ladies. I would say to you that there is, in the United States, a respect, and indeed a reverence for law. We sometimes complain because the United States is so pre-occupied with law and with lawyers. I am not sure that that is a bad thing, but there is this zest for law. You can build on that. The United States wants to be seen as adhering to the rule of law. When its national interests get in the way, of course, we have problems. The uplifted knife is not very nice for the rest of us. The United States recognizes that in certain circumstances. Getting along with its closest neighbor with a similar legal system and with similar concerns might be persuasive enough to have them go along.

But you are quite right. If you have got the power, why would you give it up? You can only go at it with the skills of advocacy, I would suggest, and maybe you can be persuasive.

COMMENT, PROFESSOR KING: It is the ultimate question of law versus sovereignty, as someone mentioned the other day. The big thing is that there is a tremendous amount of security in giving up sovereignty in the globalized world. Our two countries do not have basic differences of a major stature, but it is these little skirmishes that cause all the trouble. What we are trying to do is eliminate the skirmishes.

QUESTION, MR. KERESTER: When the executive branches of each of our two governments are in agreement on a particular objective, to what extent could an aggressive use of the executive agreement be used? I have never been quite certain where the boundary line is between what requires a treaty and what can be accomplished by an executive agreement. The executive agreement avoids the necessity of seeking the legislative approval.

ANSWER, MR. SMITH: I do not know the answer to that, and I would not presume, if I did think I knew it, to try to answer it. But I would say this, in my experience in the law, there are usually ways around these things. You do not always have to follow a particular course. There are options. Whether it is an executive agreement or whether the bureaucracies agree informally to do certain things, it seems to me that you can accomplish a lot of your ends, maybe not all of them. So I would not like to suggest that an executive agreement might be a way of doing a number of these things. Far be it from me to suggest to you, our American colleagues, that that is the way to go.

But one thing, if I may just continue, Henry, in looking at analogous matter with respect to Mexico in our little joint working group, it did occur to me that you can encourage certain things by the executives agreeing on a set

of principles. You have it in many areas. You look at competition areas. You have exchanges of letters. Here is what we will do. We will do this, and you can do that. It is not necessarily enforceable in an international law sense, but you decide that this is the way to go, and the two parties work it out in perhaps a more informal way.

COMMENT, PROFESSOR KING: It is a case by case, Chuck. I worked for the state, and I agree with Brad's answer.

QUESTION, PROFESSOR SHANKER: I am a lawyer, and I like rules of law, but it may be that you made a wonderful argument for muddling through. It makes a lot of sense in almost every case. If by muddling through you say, even when there is a rule of law, unless the parties are quite willing to accept that rule of law in a particular case, adjudication is questionable. And you are never sure the adjudication is right. You just hope it is right.

So it strikes me, there is a lot to be said, even when you have rules of law, to let the parties agree to work out things that they think are okay. You may call that muddling through. I think that could be a very, very useful exercise and may be the way to solve a lot of problems, not putting people to the wall, even when you have the right to put them to the wall because of the uncertainty that, if you put them to the wall, you get the right decision.

Perhaps more important because, in some cases, unless the parties are quite willing to accept gladly the adjudication, then you have problems in trying to do it. Let them work things out so long as they both agree to this muddling through. It is the way the world has worked for a long time. Is that rule really that bad?

ANSWER, MR. SMITH: Well, I agree it is not a bad rule, and as I have indicated, there are a lot of circumstances where it makes sense. I have just pleaded for more rules and for an apparatus to apply them so that it backstops your negotiations. It is like cases. We all know we do not go to court every time somebody comes in the door. We look at the law, and we say, here is your position. First, let us see if we can settle it. Nine times out of ten, you settle it. Then the tenth time you have to go to court. That is eventually what makes the law.

So I do not disagree with you that muddling through is an essential way of approaching certain problems. It is a good way of approaching problems. But I say that you ought to have, in our relationship, an increasing amount of rule-based circumstances so that your negotiations will be tighter; your negotiations will be circumscribed; and hopefully your negotiations will be more successful.

COMMENT, PROFESSOR SHANKER: I do not disagree, but I like settlements better than adjudications.

COMMENT, PROFESSOR KING: Sure. The whole purpose in our initiative, Brad, of the joint working group, was to get a set of rules and to give the negotiations some bite that would force the resolution of disputes. So we also gave plenty of opportunity in our recommendations to try to negotiate the settlement. But there had to be something there, some bite, to make sure that things got resolved.

Well, any other questions? I want to thank Brad for a tremendous session this morning. I cannot thank him enough. He has done a lot of thinking. We want to go back to our homes and think about what his plan is. I think you deserve a round of applause.

