SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 27 | Issue

Article 15

January 2001

Discussion Following the Remarks of Mr. Smit

Discussion

DISCUSSION FOLLOWING THE REMARKS OF MR. SMIT

QUESTION, MR. KING: I have a question. In treaty disputes, would you say that the Rome Treaty is subject to European Union (EU) jurisdiction?

ANSWER, MR. SMIT: Yes. All the implementing measures also.

QUESTION, MR. KING: Is trade law is pretty well defined?

ANSWER, MR. SMIT: Not too defined. The court writes the rules as it goes along. These are sensible rules, so it is okay.

QUESTION, MR. BROSCH: In the dealings we have had with the Europeans over the last few years, one of the problems we have had has been this issue of shared competence. For example, you go to Brussels to negotiate an agreement on an issue and you are dealing with the people in Brussels who are supposedly writing the rules. However, there are fifteen different member states enforcing rules in fifteen different ways. You do not have any relationship with those fifteen other folks. It is hard to have any confidence in what is really going on over there. How do you think this concept of shared competence is going to evolve over time?

ANSWER, MR. SMIT: Under the treaty, there was just no doubt that there is the power in the community institutions to do what they want to do. However, as a political matter, the member states see that they are losing the power. The term sovereignty is meaningless, but it has a lot of emotional appeal. The member states are saying, "We are losing our sovereignty." They cooked up something called the subsidiary principle; that the community should not act unless the states cannot act. My colleague, George Widland, has written a whole article about this issue. It is all poppycock. Who decides whether the community should act? Who decides that the states cannot act? The community decides. If you go to court, the court going to say, "Do not get us involved. That is a political question." The states see that their power is slipping, that the bureaucrats in Brussels are taking it and that the bureaucrats are not that closely supervised. That is the political reality of the situation. That is why I think that if we give more power to the Parliament and if we have more direct control over the Commission, then things are likely to change. However, it will be very hard to change in Europe where you have fifteen countries. They are not like the provinces in Canada. They are not like the states in the United States. They are independent countries. To get them into the mode of cooperative consolidation will be hard, but it will happen. Why will it happen? Because

of the perception of the people at large is that working together they are better off than they would be if they go it alone.

COMMENT, MR. HERMAN: The idea of institutionalizing the North American Free Trade Agreement (NAFTA) has an appeal, but it is not going to happen because the U.S. Congress would never agree to it. One of the things you did touch on, which I think is in the realm of possibility, would be to institutionalize the NAFTA panel process. In other words, instead of having ad hoc bodies, which are not working satisfactorily for a number of reasons, you could institutionalize the dispute settlement process. It seems to me that is a relatively easy thing to do. An institutionalized panel system could also deal with the investment dispute. I think that is within the realm of possibility. It is a long shot, but it's within the realm of possibility. It is at least worth discussing. Other kinds of institutions within the NAFTA are not realistic. I would offer one caveat though. Major disputes between Canada and the U.S. are not going to be dealt with under the NAFTA. The World Trade Organization (WTO), for a variety of reasons, would handle major disputes. I think the United States feels that it gets a better hearing and a better outcome if it takes a bilateral dispute out of the NAFTA context and into the WTO. That being said, I think the idea of somehow bringing a core institution into the picture, into the NAFTA picture on the dispute settlement side, makes sense. It is within the realm of possibility.

COMMENT, MR. SMIT: Experience has shown that if you do that the institution will significantly define and enhance its role in a matter that is acceptable because it is perceived not to be political, but dispassionate. In my estimation, if that is possible, the rest may fall into place.

COMMENT, MR. HERMAN: Provided you do not have the problem of national judges or judges from one of the three NAFTA countries feeling they have to support the cause.

MR. SMIT: This is the real problem, how are you going to compose the tribunal and divorce them from nationalistic influences? I think that maybe we should devise some way of indirect selection that does not give the powers to the political orders.

COMMENT, MR. BROSCH: I do not believe that all the major disputes between Canada and the U.S. are going to be dissolved in the WTO for two reasons. First, many of the rights that countries are going to assert are rights that are created only under the NAFTA and do not exist under the WTO. Second, in a number of the agreements under NAFTA, there is choice of forum provision that says those kinds of cases, even if they could arise under both agreements have to be litigated under the NAFTA.

COMMENT, MR. SMIT: If you create an institution that builds its own reputation for dispassionate resolution, then people want to go there.

COMMENT, MR. HERMAN: I would disagree on the basis of history. First, there has not been a NAFTA Chapter 20 dispute for years. Second, let us take for an example the softwood lumber case, if there is a dispute on the state-to-state basis emerging out of softwood lumber, then it is not going to go to NAFTA. It is going to the WTO. The Canadian Government will take it to the WTO. I think a lot of this depends on the particular context of the dispute, but history tends to show that both the United States and Canada prefer to have a matter dealt with in the WTO context then in the NAFTA context. I am talking in the bilateral state-to-state disputes, not Chapter 19 disputes.

QUESTION, MR. KING: I have a question. Does the fact that there are a tremendous number of states that want to enter the EU affect your thinking on the structure? In other words, as you add a lot of the developing worlds as well as the developed world, does that give you cause for thought on any of your approaches?

ANSWER, MR. SMIT: It aggravates the problem of keeping the supranational structure working intact. Is not it significant that all these states want to join? In Canada, they want to go their different directions. In Europe, they created a structure and people want to join. Maybe you should take that as an example. Create that structure and people will want to join. Why do they want to join? I think a lot of countries want to join because they want to have the benefit of the open market. Their people can move in the open market, work anywhere and benefit. The Europeans have implementing regulations that provide significant measures of social security, which they would get out of the common fund. This is something. There are some pies they get a piece of. However, they will have to relinquish at a given moment that each state is represented in Council. Council could still be, but a Court cannot be.

COMMENT, MR. HOLLOWAY: Is not the perspective growth of the EU giving rise to a profound challenge? Surely, it is not just thinking you are better off. It is thinking enough alike, that is one of the problems. As I see it, getting all these countries to think alike is a problem. For example, one of the sources of the problems between the United Kingdom and the EU is that because of their common law heritage the British and Welsh have profoundly different view of the nature of rights and responsibilities then people in the Continent do. So a Romanian or Bulgarian may think they are better off, but when it comes to actually behaving like a European, it may not be so easy.

COMMENT, MR. SMIT: But over time, you adjust, right? In England, there never was a constitutional right to civil liberties. They slipped it in the back door by ratifying human rights conventions and the Courts picking it

up. Oh, that is now part of our law and this way we get enforcement of civil liberties. I think, in time, if you are a member of the same club, you tend to conform to the standards of the club if you find that to be profitable and attractive. And do not forget, for these small countries, it is very nice to go to the European Community. When you join the EU you go to Brussels, you expand, you participate in decisions that are much more momentous and you will be part of the mega power of the world.

COMMENT, MR. KING: On that note I would like to thank Mr. Smit for being with us today. Thank you very much.