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DISCUSSION AFTER THE SPEECHES OF GARY HORLICK AND SARAH RICHARDSON

QUESTION, PROFESSOR KING: Gary, I have a question on Fast Track. Do you think that the environmental provisions in the NAFTA, or any future trade agreements, will be strengthened? Do you think that will make a difference in getting Fast Track through? Is the support of the environmental people critical, and if so, what changes would you have to make to push it over?

ANSWER, MR. HORLICK: If I had to guess, there were negotiations for three years within the Congress about what environmental and labor provisions should be put in Fast Track. So, in some sort of public choice sense, you have to assume that the bargain was closely struck, so that anything you did to strengthen the environmental provisions might get you votes on one side, but would lose you votes on the other side. This was rather fully bargained out. So, I would not think that there is anything you can do that actually increases your number of votes. It is going to be a trade-off. Probably, the best prospect for Fast Track, maybe not for other things, would be if the Republicans won a very large majority this fall and thus would not need Democratic votes. Otherwise, I do not expect anything until the year 2001.

QUESTION, MR. BENT: We have seen the roles of NGOs and environmental negotiations and the public faith surrounding environmental issues, and I would be interested in your view as to the changing roles of NGOs in the environmental debate, and also whether you see that affecting the way NGOs organize themselves in other international negotiations, particularly trade and investment.

ANSWER, MR. HORLICK: We should probably share the answer. Business is an NGO also. So, what you are seeing is a perfection of special interest lobbying all over the world, and it is overrunning governments.

My personal view is that governments are ceding their proper role to undemocratic elected bodies, which includes not only environmental NGOs, but also business. Clearly, they have. And so we have invented this term "civil society," but no one elected any of these people.

I look at it perhaps in a rather old-fashioned way. But it is happening. What you then worry about is the democratic legitimacy of the United States and Canada telling Mexicans that they should have a coral reef rather than jobs. I am not knocking coral reefs. But who has a right to tell the Mexicans what to do? And, you will note, the constant thread through this is the richer countries telling either poorer countries or poorer sectors in other rich coun-

tries that they lose. That is not a pretty picture. I can assure you that is how the rest of the world looks at it as we talk about the environment, but this is a reflection of hegemony.

ANSWER, MS. RICHARDSON: I think the environmental NGOs are becoming very sophisticated, but predominately only in the United States. When you compare the United States and Europe, there still is not much of an environmental voice. I think we are seeing this now in the Summit of the Americas and in the FTAA. NAFTA is distinguishable for a couple of reasons. One, the United States so wholly dominates the North American region that the U.S. NGOs have a disproportionate voice in the debate. As you move south and you try now to incorporate Central America and South America with big countries like Brazil, you will find that the U.S. NGOs have less and less influence, although certainly not less interest. They are all still there, and they all go to the meetings.

They are mostly the same NGOs that participated in the NAFTA debate, but a few have dropped out. A few cannot maintain the pace anymore. They are just not interested. They feel like they have been talking about the same issues for five years and nothing has been done. They are cynical and they are quitting. They are working on other issues, but the big ones are still there.

I think that, outside the OECD and NAFTA, they are going to continue to be frustrated for a long time because they are not going to get the same kind of airplay they got here four years ago.

COMMENT, MR. HORLICK: If I could just add one thing. At least some people will continue to be interested, particularly in the WTO, where I am an NGO. I get invited to their trade environment symposium as an NGO, which is sort of odd, but they have to treat everyone the same. They will maintain an interest to the extent that the WTO dispute resolution system works and it is working well.

So, I agree with what Sarah was saying. Trade sanctions are about looking for a big stick. Most of the environmental fights are not directly a result of trade. It is, to the extent that trade causes economic growth, a result of that economic growth. But the backup at the border is not caused by trade. It is caused by customs bureaucracies. There is no backup at the French/Dutch border because there is no one there. Most of the environmental effects advocates are trying to use trade sanctions that have nothing to do with trade. They are just using the most effective instrument they can find.

As the WTO becomes an effective instrument, NGOs will want to use trade. They will be continually frustrated because, if you go to an organization whose mission it is to increase trade and ask them to use a sanction which decreases trade, you will not get very far. So, I do not predict a very happy relationship for the next five years or so.

QUESTION, MR. TUTTLE: Some of what I have heard is encouraging and some is not, in terms of my question. I come from a generation of trade negotiators, trade lawyers who used to have GATT-zilla up on their doors. There was a political cartoon of GATT-zilla destroying the environment put out by the environmentalists leading up to the end of the Uruguay Round.

At the same time, I guess there were the two solitudes between the people fighting for the environmental issues and the people fighting for trade issues. To what extent, since the Uruguay Round, and since the progress in NAFTA, have we been able to bridge that gap? And, actually, as Canadian lawyers and American lawyers, what sort of obligation should there be for us to help as engineers to bridge what I still think is a gap between those who see themselves on the environmental side and those who see themselves on the trade side?

ANSWER, MS. RICHARDSON: Let me take a crack at that, just from some of the experiences we have had at the Commission. One of the things we are doing this year that we have not done before is to create a working group of trade and environment officials. We are doing this, in part because, after two years of working on the trade environment program at the Commission, all of a sudden trade officials started coming to our meetings, and they started realizing that we were working on projects where we were discussing trade issues. They wanted to be involved in those discussions.

This sort of informal involvement is now formalizing itself in this group. One of the mandates of this group is going to be to find areas of common interest to work on among these officials. Now, it has not been particularly easy, and I do not expect it to be particularly easy, to find these areas of common interest.

But, one thing that we do find now is that the trade and environment officials are actually talking to each other, not just within the national governments. Say, for example, in Canada, the United States, and Mexico, you have officials from the environmental departments calling up their trade counterparts saying, look, this what is we are doing, what do you think? Just beginning that dialogue at the governmental level is something that is new to a lot of these people, particularly in environmental departments.

In Mexico, this divide was much more pronounced and much more serious than it was in Canada or the United States. Then, what you have are two representatives from each government coming to the table, so you have six representatives. You have the three national governments with the three representatives from each of the two sides. And that debate is completely different as well.

We have a long way to go before we find the consensus that we need to find on issues that will move this debate forward. But actually, despite the

frustration involved in getting these dialogs going, I think that communication is incredibly useful. That is just from a governmental perspective.

ANSWER, MR. HORLICK: One way you can bridge the gap is to utilize a number of trade rules which would have beneficial environmental impacts if enforced. One obvious area where there is considerable discussion in the WTO now is on subsidies in areas like fishing, agriculture, and coal, which is usually considered the most polluting of the conventional fuels. It is also the most subsidized. The problem lies in getting any WTO member government to make a complaint against any other WTO member government. But, there is a reason why there are no fish off Canada. They are paying huge amounts of money to buy the best technology in the pond to catch all the fish. This is documented, the amount of subsidies for fishing. It is the same with agriculture in Europe, the overuse of agricultural chemicals is part of the common agricultural policy. So, there is some thinking about how you can use trade rules in environmentally beneficial ways.

The other comment regards my observation of NGOs in the United States. You asked if that gap would be bridged. I am on the advisory board of an environmental NGO. What I see is that you will never satisfy some of the NGOs because all they are interested in is using trade for leverage. They are not particularly interested in the fact that trade increases wealth. Some of them, to be blunt, think wealth is bad, especially for poor people. I found this hard to explain in an international forum. But other NGOs have tried to learn how the trade system works, and you are seeing some of the results. They are working with it in productive ways. I think there is room for movement there. Basically, though, if people are just looking for trade to use as a stick, they are going to be disappointed.

COMMENT, MR. DUDLEY: When I looked at the CEC website a couple weeks ago,¹ I noticed that, of the twelve or thirteen complaints which you have got sitting on there right now, six of them were from Canadian NGOs which were basically using the whole process to take a political bash at the Canadian government. It is an observation, maybe a question.

COMMENT, MS. RICHARDSON: We cannot actually stop people from submitting petitions to the commission. When we have a properly filed submission, we deal with it. If the way we deal with it is by saying, sorry, we are not going to deal with it any further, then it still goes on the website, stating same.

I guess, in a sense, that is one of the good things. The bad thing about this open agreement is that it gives people that kick. Sometimes it is a political kick, and sometimes it will mean something. I think the point I would add to

¹ See <<http://www.cec.org>> (last visited Oct. 1, 1998).

what Gary just said is that all of this is so political so often that you end up looking for that common ground and looking for the right petition. You have got to expect that NGOs will support trade in some instances, and they may not support trade in other instances. It all depends on what else they care about at the time.

QUESTION, MR. DUDLEY: Should it not be a mechanism for the frivolous and vexatious?

ANSWER, MS. RICHARDSON: Well, we could put next to it a mechanism for the frivolous and vexatious, but it would still be there. Right?

QUESTION, MS. DALLMEYER: Yes, I have a question. I guess I will direct it more toward Gary. I was trained first as a scientist and then as a lawyer. So, it amuses me to hear the trade lawyers talk about how the environmental NGOs are finally learning something about trade law, and that fact may be improving their ability to talk with you. I was wondering to what extent you would evaluate the ability of trade lawyers to absorb issues of ecosystem concepts, population biology, and things of that sort which may have a direct effect on how you set up trade regulations?

ANSWER, MR. HORLICK: Very low. That is why we are trade lawyers. We cannot do numbers. You will be encouraged to know that, at least within USTR, for example, the environmental shop is basically run from the EPA. The EPA sends all their people over. So, certainly, there is progress on that front. But, more to the point, you actually raised an issue which I consider quite interesting and useful, which would be for trade negotiators to have a better sense of the environmental consequences of the things they are negotiating. The problem is that the negotiations start sounding like environmental impact statements and everyone runs the other way for fear it would mean just litigation rather than negotiation.

To give you a good example, the mess along the U.S./Mexico border was not a result of free trade, but of Murphy's Law. When the *maquiladora* system was set up, Mexico required that the plants be near the border. So, you had all the plants dumped in the same spot with no infrastructure. One hopes, though one cannot guarantee, that if the negotiators had been aware in advance that these rules they were setting up would have caused an environmental disaster, they would have thought them through.

So, you cannot count on the trade lawyers or trade negotiators to anticipate these effects, and Murphy's Law is the one constant with which they must deal. So what is needed is a system that generates that information without it being used as a road block for the actual negotiations. And it is not going to come. I do not have an answer for how to do that. But you raise a good point of what is missing.

QUESTION, PROFESSOR KING: Gary, you said in the case of the sea turtles and in the *Tuna-Dolphin* case, the WTO found that we could not use trade to accomplish environmental objectives. Would another solution be to try to talk trading partners into changing their environmental laws so you would not get that type of conflict? In other words, is that trying to persuade them to accomplish environmental objectives through environmental legislation, rather than destroying trade relationships?

ANSWER, MR. HORLICK: I think that would be ideal because you would actually get instruments better suited to the purpose you seek, and you would have people negotiating when they knew what they were talking about. Certainly, I think a lot of people will remember, the first real burst of international environmental law was in the late 1960s and early 1970s. The perception was that it did not have teeth, so people did not do anything with it. There has been a constant search for teeth ever since. One form of teeth is trade sanctions, the other is negative publicity, as Sarah explained. One of the things you definitely hear from the environmental groups is the lack of what they call a GEO, a global environment organization. So they wind up dealing with the WTO by default, and as I mentioned, they will always be frustrated.

Now, of course, a lot of people do not want them to have a GEO either, for fear it would be too effective. I was just at the WTO's Trade and Environment Symposium, and there was one at IUCN (the World Conservation Union) the day before. The IUCN proposed an informal global environmental forum, because there is nothing like it anywhere. But, on the flip side, things like CITES (the Convention on International Trade in Endangered Species) have worked, not perfectly, but if you look at it, the glass is more full than empty. The Montreal Protocol has worked. So my personal view is that environmental groups have been, to some extent, dedicating a disproportionate amount of their resources to this very exciting trade and environment fight when they ought to be going after pure environmental agreements like the Kyoto Agreement. I am not saying Kyoto is good or bad, but, it goes straight for the solution rather than pushing for trade sanctions, which will always get you into a fight with other people. Again, they could legitimately claim that they tried it the direct way and it did not work.

COMMENT, MS. RICHARDSON: There are a lot of environmental groups that will tell you that the only way they can get people's attention is when they attach an environmental issue to a trade issue because, without that, the environment tends to be marginalized in setting priorities.