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Discussion

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## DISCUSSION AFTER THE SPEECHES OF EWELL MURPHY, LAWRENCE HERMAN, AND BEATRICE PRATI

QUESTION, PROFESSOR KING: Mexico is a civil law system, and the United States and Canada are common law systems. In terms of dealing with these different systems, do you find any problems with how they work from an American lawyer's understanding?

ANSWER, MS. PRATI: It really varies. I think in the last few years, there has been a lot of exchange of information. And I think there are a lot of good professionals who understand that they can contribute quite a bit with their knowledge. For example, in the case of dumping we have good legislation, but we are behind as far as implementing that legislation. I think there is a lot of good input and good cooperation. But I have to say that sometimes the overwhelming arrogance, and I do not know if it is inherent of a lawyer or of a special country, sometimes that takes over, leading to our problems. Cultural differences show up at tables or in discussing deals. But I would say that, in general, the lack of understanding is a gap that is closing very fast.

QUESTION, PROFESSOR KING: Pat has been our optometrist today on various lenses. On the cultural lens, do you see signs of optimism over a period of time? What are the implications for extending NAFTA to other areas of Latin America? Are Americans going to have to think differently to appreciate things? How do we change the context to avoid the complications of that cultural problem that we see through that lens?

ANSWER, MR. MURPHY: I think the trouble is that there really is a serious impediment to expanding NAFTA. I think the American public's view of Mexico is an impediment. It is a form of not seeing things very clearly. We believe that Mexico is going through a serious crisis, and the United States does not really appreciate that the situation in Chile or Argentina or Brazil is very different from the situation in Mexico.

In talking about lenses again, to a great extent, the American public and, therefore, the American politicians see Latin America through the lens of Mexico. It is not rational, nor is it a very good perspective, but that is the way the United States looks at it. There is a good chance

that NAFTA will not be extended to Chile because Congress will not pass the Fast Track again because we will all see Chile the same way we view Mexico. It is very sad.

QUESTION, PROFESSOR KING: I have one question on the recommended changes in dumping. Here is what troubled me on your dumping recommendations. It was on the question of intent. Do people set out to dump? That is a pretty hard hurdle to pass. If I wanted to recommend a change in the Herman amendment to the international anti-dumping regime, I would say that the question of intent to dump is a pretty hard standard. I wondered whether you might consider eliminating that from your proposed changes in the dumping law.

ANSWER, MR. HERMAN: What I did was suggest a list of factors that could be addressed, and I recognize the difficulties there. The idea was to try to short-circuit the debate about replacing dumping with competition-type remedies, which I do not think is getting anywhere. But, I looked at it in a way in which some of the competition-type elements can be brought to bear in an assessment of the market at a point in the dumping process that allows the process either to be off-ramped or to continue without any deficit to the complainant. I only suggest that one element that could be looked at is intent, and it is one thing that is controversial for sure.

COMMENT, PROFESSOR KING: It is controversial with me, too.

QUESTION, MR. HUFBAUER: I have a comment and a question on one very interesting proposal that Larry Herman put forward. My comment is this. He talked about the absence of a core in NAFTA by way of any kind of bureaucracy. I would say that the only reason you would deplore the absence of a core at this point is you think that the core would have been a lightning rod that would attract most of the hostility which has come about. Also Congress could cut the funding for the core, as it did for the U.N. It might serve that purpose, but it would serve no other useful purpose at this point.

Would you accept the concept that there could be a national interest declaration by the very top person, the president, the prime minister, that certain cases will not go forward? I mean, that is Helms-Burton and *Softwood Lumber*. You cannot put everything in a legal track. You can put eighty percent on that track, but you have to have some exceptions. If you cannot accept a national interest exclusion, I do not think this is going to go anyplace. But if you could, I think it has a lot of potential. I think that you have to allow, for starters, this declaration of certain issues.

ANSWER, MR. HERMAN: Well, that is for negotiation. If a concept is accepted that we might look at a little further, then we will

negotiate it. What you are suggesting is institutionalizing the GATT Chapter 20 exception, and having a short list of institutionalized exceptions that have an issue that are not tracked to a permanent core. I do not have a problem with that in principle. It is a question of how wide the wedge is.

COMMENT, MR. DATTU: I would like to address a comment made about being able to keep certain things out of the NAFTA process. The promise made to Canadians when the FTA was being negotiated was that there would be an institutional framework to deal with all disputes, and certainly at the core of the support that was received from the FTA was a concept of being able to resolve all those issues. I think that certainly in Canada that type of concept would not be met with a favorable response.

COMMENT, PROFESSOR KING: I wanted to mention as a U.S. Chairman of the Joint Working Group, ABA, CBA, Bar Mexicana, that we recommended a court, but the negotiators did not pay attention.

COMMENT, MR. HERMAN: Gary Hufbauer raised a great point, and I do not want to let it go. I am not proposing institutionalization of a bureaucracy like the Commission in Brussels. I am only addressing a permanently appointed panel system, which would not have investigatory powers or anything like that, but would be a restrained bureaucracy. Indeed, right now we have three secretariats operating in three capitals. I think it would be a savings in terms of expenditure to have just one.

QUESTION, MR. O'GRADY: I just want to ask Mr. Murphy if he would comment on something I read a month or so ago in *Atlantic Monthly* or *Harper's Magazine*. It was an analysis of Mexico, and it was really very glum. The thesis was that Mexico was being pulled into three separate nations: a new economic zone along the U.S. border, an essentially independent area in the south, and sort of a middle area around Mexico City, all surmounted by a drug trade that is so extensive that it becomes a threat to the world in that it has its own military.

In that sense, it seemed that NAFTA was a definite negative factor in promoting the separation, in effect, of this trade zone around the U.S. border. Do you think what this article is saying makes any sense?

ANSWER, MR. MURPHY: I really think that that is pretty off-the-track. I think that Mexico is going through a bad time. It has been damaged very much by the drug market in the United States. Perhaps the whole idea of opening up Mexico, as Alejandro suggested, happened too soon, without qualifications.

But I think that the good thing about NAFTA is that it really is an attempt to coordinate the economies of these three countries. And I think history is going to look back on NAFTA, not as something that

created the coordination, but something that found the economies interrelating and started dealing with it. At least we are meeting with each other and talking with each other, and we have the secretariats in place. Goodness knows, that is better than what we had before. We were just staring at each other across the border, not communicating very well. I think that we need to keep NAFTA in place. Maybe we need to adjust some aspects of these relationships. Maybe some of these things are too open. Who knows? But I think that it is not relevant to say that Mexico is falling apart. The fact is that these three economies are interrelated, and we are going to have to find effective ways to deal with each other.

COMMENT, MR. ABRAHAMS: I have a comment and a question. I think there is a real problem in this country, perhaps with the exception of states that have large Latino populations like California and New Mexico, but there is a thought process that abounds which views Mexicans as banditos with sombreros and bandoleros.

COMMENT, MR. MURPHY: A lot of people feel that way about Texans.

QUESTION, MR. ABRAHAMS: I want to address this to Beatrice and ask her to amplify on my question. You mentioned that, under NAFTA, there has been an ease of customs clearance. I understand about national treatment in the three countries under the NAFTA. But, I wondered whether you could amplify on the issue of non-certifications and the locking and labeling rules, which, frankly, are outside of NAFTA. I did not want people to draw the wrong inference on that; that is a Mexican rule. And as long as there is national treatment, that is fine. But there is nothing prescribed in NAFTA about the non-certifications or the new locking and labeling rules.

ANSWER, MS. PRATI: At the beginning there was nothing. There were some rules or regulations that really were not addressing the problem. I guess that is just our answer to a necessity of having standards for everything for quality control. Maybe it is being overdone. I do not think it is so, however. I think the problem is that the enforcement is not clear.

The things come out a year ahead of time, and instead of being serious about the enforcement, it is postponed. At that point, it is not being taken seriously anymore. Then suddenly it hits and suddenly it is being enforced. I think we are not used to legislating and implementing and having a course of action that is coherent. I think they are justifiable. I think they are good ideas and they address the concerns of the Mexican government and the reflection of Mexican industry. Some of it is a protection measure. Maybe the overall challenge should be that we should all sit down and agree on one measure instead of having to do

three, but I think we are way ahead of the game by proposing that.

COMMENT, MR. ABRAHAMS: On the labeling rules it is not just American exporters who are complaining. Even Mexican importers are complaining.

COMMENT, MS. PRATI: I am sure. In fact, everybody is confused, and the problem is going to hit even harder. People who will be reviewing that information will start complaining, too, on a comma not being in place. And that is going back and forth with our formalities. For you to protect yourself, you know this is what is going to happen. You get a ruling ahead of time that your label is okay. Then you can fight it through tooth and nail at the border.

QUESTION, MR. DATTU: I know Larry has done a great deal of thinking about this issue, and it is in connection, again, with the issue of dumping and the attempts by Canada to eliminate anti-dumping laws within NAFTA. We are seeing very little progress on that and a reluctance on the part of U.S. industry to enter into negotiations on these issues, and certainly Larry's suggestions are ones that ought to be given some thought, too. I am wondering whether there is also room for looking at some substantive changes within the NAFTA context on the application of anti-dumping laws. What I am thinking of is more in the nature of a public interest provision that might look to public interest in the NAFTA context. It may also look to the territorial aspect to public interest where after an investigation and a finding of injury that a body would be set up to look at an issue of public interest, consumers, and downstream industries that might be affected by a dumping finding.

In Canada, and I am not just saying that Canada has solved this issue, but certainly we have a public interest provision, and to that extent, the Canadian administration and enforcement of dumping rules is more consumer-friendly than is the case in the United States. There seems to be reluctance in the United States to look at that. Is that something that should be progressed?

ANSWER, MR. HERMAN: These are, like everything that has to do with legal remedies, highly controversial subjects. It certainly is something that merits looking at. Whether you can ever reach a consensus in the North American setting with something like that is another matter. I do not know. What I was trying to do was find something that would not be immediately rejected in congressional committees in Washington and maybe open the door just a little bit. So it is a modest attempt to see whether we can deal with not a broad issue like public interest, which extends beyond the NAFTA context, but look at something within the NAFTA context only. But I think your idea has merit, I certainly do.

