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QUESTION: *Professor King*: I appreciate the importance of institutionalization, the difference being based on an enforcement which is based on other considerations. We noted that the European Community had institutional tribunals for hammering out controversies.

In the NAFTA, the group which I was U.S. head of, the ABA-CBA-Bar Mexicana group, recommended a North American free trade tribunal. We recommended this for consistency sake, so that the decisions were not isolated. We also looked to the future and felt that perhaps as other countries adhered to the concept of NAFTA, that there would be an even greater need for consistencies in ruling so that each proceeding would not be one, in and of itself.

I would like to have Jon comment on that concept, and also perhaps elaborate on his feeling that there is not as much a need for institutionalization in the settlement of disputes, as perhaps others, including myself, would often feel.

ANSWER: *Mr. Fried*: I would like to answer in a couple of ways. First, I certainly did not mean to suggest any denigration of the importance of institutions, but rather that to look solely at a community-based model of supranational, centralized decision-making which need not be the only avenue to success. Stand back from the agreement, and look at what it is supposed to do. It is not merely a dispute settlement agreement. No free trade agreement is merely an agreement to settle fights. It is in effect a road map for maintaining and managing an ongoing economic relationship. It is not project specific; it is not case specific.

How will we continue our rule-making on the basis of a shared objective, a liberalized market? Against that backdrop, the institutions of the agreement that are probably most important are those of the politicians and bureaucrats, not those of the panels. And indeed NAFTA takes the FTA a little further towards harmonized regulatory affairs by setting up and sustaining several groups in several areas of a highly specialized nature. We have groups of veterinarians sitting together, agronomists and so on. And what do they do? They are doing the same thing that Gary described in regard to airline or aircraft safety.

In a couple of areas in the NAFTA itself, we specifically mandate them to do that. For example, again, in the customs area we tell our rules of origin people, that if they are faced with a conflicting ruling from one customs administration versus another, the group shall meet and redraft the regulation to bring it back to a uniform basis. In the

sanitary and phytosanitary (SPS) area, with regard to standards, we say, "All right, you are free to regulate domestically, but use the international standard where you can, and the burden of proof in effect shifts if you do not. If you are not using an agreed basis, the presumption is that the regulation may be trade-restrictive unless you show why it is necessary to protect your population."

So really I have two points. First, yes, support for institutions is important, but not necessarily for any particular kind. Secondly, look at the on-going management of the relationship and not just the disputes.

The other thing I note in regard to a permanent tribunal, is that as far as we have been able to discern — and we have only had five government to government disputes that have gone to a panel proceeding under Chapter 18 of the FTA, the inherently reasoned nature of judicial or quasi-judicial decision making has not deprived *ad hoc* panels of the ability to be consistent in their jurisprudence. The nature of reaching decisions based on arguments, briefs and so on, in an adversarial context is such that if you are going to base your decision on a prior decision of an equal court, you must to come up with a good reason, rather than with whim or capriciousness to do so. So I am not sure that the panel or roster system is that much poorer a cousin to a permanent tribunal as your question seems to suggest.

Having said all of that, I am not sure the NAFTA parties will wait until the fifth country to reexamine the panel system, assuming Chile is the next country to apply for succession. As Gary described the roster process, an element of the reverse selection from the roster is that the other countries who are allegedly ganging up are each able to point to someone on the panel from their country. And in a three country dispute, where Canada and Mexico target the United States, for example, the Americans must choose one Canadian and one Mexican. So we can always say "Oh, there was a Canadian there, it was not a bunch of foreigners making the decisions."

If you try to maintain that principle that one of your own will be there, and Chile joins as a co-complainant, you either go to a seven person roster, which becomes administratively unreasonable, or maybe you do have to look at a more permanent tribunal at that stage.

COMMENT: *Mr. Horlick*: In fact, you have not heard the last of it. A permanent tribunal was not possible in the U.S.-Canada FTA or NAFTA because the governments, particularly the U.S., will not agree to it, but some change becomes inevitable if NAFTA adds members. The EC Court of Justice is permanent. You could not possibly have 13 free-standing, *ad hoc* panels in the EU; it does not work. We are having enough trouble filling the panels in the U.S./Canada FTA and now NAFTA.

Let me differ somewhat with Jon. I think the institutions do mat-

ter. I personally think the European Court of Justice is God's gift to international law professors. Both Jon and I teach occasionally, and obviously people here teach more. As all of you know, international law professors are always teased by their students that there is no Hague jail, or there is no GATT jail, or they do not have an army to enforce rulings. The European Court of Justice does not have a jail, and it does not have ECJ marshals, but people have to follow its decisions, and they do, and it is enforced through the member states, but you rarely even get to that point. So, the ECJ finally gives us an institution which we can point out to our students and say, "See, international [i.e., EU law] law works."

I do not view NAFTA panels the same way. Although I co-authored an article about them, the fact is no one knows what they will do. I do not think we have even organized one yet. So let us look at U.S./Canada: the track record is, to be polite, a mixed bag. Chapter 19 has worked surprisingly well. At the risk of going back a bit, when Clayton Yeutter took over as U.S. Trade Representative in 1985, he was the one who really pushed the U.S. view on dispute resolution. Because of his agricultural background, he was very offended by the EC ability to block GHT panels. So he was much more interested in dispute resolution than his predecessors had been. He set up a task force under Jules Katz. I was the trade lawyer on it, and one of the most interesting aspects was that he brought in some labor people — not to argue about labor standards or any of that, but just to tell us how labor contract dispute resolution mechanisms worked. The point they made was to segregate the small cases, where neither the company nor the union really cared what the outcome was; what mattered was that everyone perceived that there was a fair process. In the end of most labor arbitrations it is not that big a deal whether the worker wants to stand 7 inches from the machine, but insurance company requires a distance of 6 inches.

The whole point is not to make every dispute a constitutional issue. The problem with GATT disputes is that everything is taken to the level of a big fight, no matter how small it is. What Chapter 19 has been successful at, for the most part, is that small cases get resolved, and no one much cares as long as it is perceived as fair. The small cases involve raspberries, replacement parts for paving machines, things like that. Where Chapter 19 falls apart is the big case, such as *Lumber*, where the losing party will never accept the result. So, Chapter 19, I think, reinforces Jon's point.

I do not view Chapter 18 as reinforcing his point though. The *Salmon* compliance record is spotty at best. On *Lobster*, Canada lost, a wrong decision, done on a national-line vote, so Canada complied for sound political reasons. On *UHT* Canada lost, if you care to characterize it that way. Was Puerto Rico ordered to do much? Not much, but

let us chalk that up as a success. *CAMI* is sort of a success, and *Durum Wheat* was a success but the loser will not accept the result.

The more panels you have, the less consistency you will get compared with what you would have with a permanent tribunal. This is no more inconsistent than is the U.S. Court of International Trade, which has nine judges who inevitably rule sometimes in opposite directions. So, it is not worse than the institution it is replacing, but that is not an argument for using *ad hoc* panels as the preferred form of dispute resolution among governments.

COMMENT: *Mr. Fried*: What is interesting to note in regard to these panel decisions is that they do a little bit more than what courts do, because by the terms of both the FTA and now NAFTA, these panels are invited not only to make their ruling, to make a determination, but to recommend to the parties proposed solutions.

If you look at *Salmon and Herring*, for example, although it took a few more months, there was an agreed codified Memorandum of Understanding between the two governments that flowed from the decision.

The governments agreed to revisit how the salmon are doing and how we are doing in five years. Similarly on wheat, in the *Wheat Board* case, the question was wheat board pricing. And the end result of that was that the two governments negotiated an audit process and both defined a process for auditing acquisition price in a Memorandum of Understanding. Now mind you, that has not stifled certain politicians, but nonetheless the matter in dispute in that case, regarding Canadian compliance with a particular article of the NAFTA, was settled.

One last point. Let us look at NAFTA. First, it is a consensus roster. Somebody only gets onto a roster in Chapter 20 if he or she is acceptable to all three countries. Second, if you try to nominate somebody from off the roster, there is a peremptory veto. Third, you can use third and fourth country persons as chairs. And finally, the roster is limited in total to 30 persons. I think that what you will see in future disputes is an increasingly frequent recourse to the same people. In effect, thereby, the likelihood is that panels will resemble a fairly permanent tribunal.

COMMENT: *Mr. Horlick*: *Wheat* truly is an elevation of form over substance; it does not involve just a few politicians. You have the Secretary of Agriculture saying "I do not care what the panel says, we are going to impose quotas." I do not chalk that up as a "successful" panel report.

COMMENT: *Mr. Fried*: I am not sure he would have responded better to a permanent tribunal.

COMMENT: *Mr. Horlick*: Possibly, but it is also contradictory to say you are going to keep using the same people because it is limited to 30, but note that you can go outside the roster. The history of the

Chapter 19 roster certainly has shown the need to go outside the rosters more often than not on the U.S. side. And so it really becomes purely a matter of how many panels there are. If there are a significant number of panels, they will have to go outside the roster, because all of these people have full-time jobs. But going back to the fundamental point, one cannot see the kind of political basis in NAFTA that you have in the ECJ. I do not view them as even close.

Now I do share Jon's view, just to end on a harmonious note, that if what he says happens, it does provide the basis when you add the fourth or the fifth NAFTA country, to start doing something permanent. At some point, however, even the U.S. will have to give up on the *ad hoc* panels, because they will not work.

QUESTION: *Mr. Doh*: I am going to ask two questions. One is a follow-up from Henry's question and Jon's point about institutions, and that is, I would concede the point that the rules perhaps need to be perceived and are more important for the institution from a purely legal framework, as far as changing the procedure of the government. But it seems to me that we in the U.S. — and I am speaking out here as a sovereignist, not a U.S. government official — may have dug ourselves into a bind here with a side agreement. That is, we have conceded that we will be creating permanent secretariats. Secretariats are simply looking at the questions of enforcement of domestic law. But Gary's point is right on mark. When you create a bureaucracy, and in the case of the Environmental Commission, Canada I think has designs for a fairly significant bureaucracy, you start snapping back; you start giving it resources, publicity, media, etc. . . . While you may not be fundamentally changing the legal relationships, in a practical matter, you are. You already are crossing that line, if you will, of commenting on the overall standard, perhaps promoting harmonization, etc. . . .

Now a fun fact which some of you may know is that in addition to the environment and labor secretaries, we now have a trade secretary which we have conceded to have for Mexico. Basically, it is a price for agreeing to the labor and environmental secretaries. Under the FTA we have the national secretary, which we like just fine, but we are starting to talk about obsession and we are starting to talk about permanent institutions such as the trade secretary. It seems that we are heading down the line of the institutions starting to drive the policy as posted. I would like to hear from Jon, whether he agrees or disagrees.

The second question relates to the real problems that Gary has pointed out in terms of our sub-central relations. Again we set ours up for some real conflicts. I thought Gary described the conflict and the problem very lucidly, but I am interested in solutions. Now that we have dug ourselves into this bind, what might we do about it? What might we learn from the Canadian experience in dealing with the sub-central obligations?

ANSWER: *Mr. Fried*: Just as a matter of historical fact, it is really at the strong insistence of the United States EPA that the other countries were cajoled into going along with the secretariat of a different kind and size that we talked about. The Canadian interest was simply to assure that the resources were appropriate for the mandate that the agreement gave them. I think really that is the point of the secretariat. What is important to note in the side agreements — and this is not unique to these two agreements — which Professor Bilder mentioned, is what you have asked them to do; dispute settlement is an add-on chapter.

Five years from now, my prediction is that the most significant consequences of the labor and environment side agreements will be expanded cooperation, technical assistance, joint work in the kind of standard setting and regulation that Gary talked about, and maybe more openness in terms of what standards might be adopted according to regional or international norms.

So in terms of cooperation, in terms of having a technical resource available, the environment and labor secretariats are not terribly distinctive, except in a regional context. The Food and Agricultural Organization in Rome, for example, just to pick one at random, has a similar technical mandate. Secondly, again not dissimilar to other international secretariats and bureaucracies, what we built into the side agreements is a certain degree of so-called sunshine. And we already pervasively have sunshine in a human rights context of course, with or without having signed any particular agreement.

As we know, the Human Rights Commission of the U.N., or various treaties in the OAS and European context will call on countries to account for human rights performance, either in specific cases or on an on-going basis of performance.

The GATT and the WTO have adopted this system through something called the Trade Policy Review Mechanism. Once every few years, countries will be called on to report comprehensively on how their domestic system is doing *vis-a-vis* their international obligations. And to the extent public discussion and reporting will enhance respect for the things in which we believe, which is compliance with environmental and labor norms, I do not see that as a quantum leap from what governments are already doing with international secretariats in several other areas.

Regarding the trade secretariat, again, just a point of clarification: the central secretariat, which will be headquartered in Mexico, does not replace the national sections, because they are complementary. In effect our secretariats, unlike the GATT secretariats, are limited to administrative and court registry functions. They will assist panels, they will keep records, they will keep proceedings going, and they will pay out those huge sums to the panelists for their dedicated service.

It is perfectly appropriate to maintain a court registrar in each capital, which is where cases will be undertaken. This central secretariat, which will be small, will simply add a more archival institutional memory, more than anything else, rather than overtaking what the national sections do.

So to that extent certainly, I think, Canadian, American, and to my knowledge Mexican, negotiators are fully agreed on the limited role the central secretariat should initially undertake.

ANSWER: *Mr. Horlick*: I should disclose bias, because most of my clients are large U.S. or Canadian businesses, and I think their perspective is worth bearing in mind.

In terms of dispute resolution, I have been involved in a number of the U.S./Canada FTA panels, and I am reasonably happy with them, not perfectly. As I said, I think in the end we will have to go to something more permanent to get more consistency than multiple panels (or multiple judges can offer). Look at this in terms of how NAFTA developed. U.S. business certainly is very interested in NAFTA, very supportive of the basic NAFTA agreement, wanting a NAFTA agreement. They then get told, "but you have to swallow the labor and environmental agreements."

Now I have yet to encounter a client corporation that wanted an international negotiation of labor standards; quite the contrary. And if it were a serious prospect that these secretariats are going to start doing what they are likely to start doing, that is a scary prospect for some businesses. Simply put, the work force in the United States is about 14% unionized. It is more than double that in Canada and Mexico, so you can immediately see some splits.

On the environmental side, a number of businesses — I think Dow Chemical organized a coalition for the Rio Summit — are interested in international environmental standards, since they are applying the same standards worldwide. But I doubt that is a unanimous view. And certainly one where the point Jon makes is a very good one. The thought that you have the EPAs of the three countries sitting down and doing this is almost as scary to some businesses as the thought of ten central bankers sitting in Basel, deciding on interest rates. So all perspectives, including business *and* labor *and* environmental groups, must be considered.

COMMENT: *Mr. Thomas*: I would like to just make a comment, which I think is an important part of Gary's point in that both labor and environmental agreements provide for a four year review by the respective counsel. I cannot believe that the day will not arrive very soon when there will be members of Congress who will say that the coverage of labor rights under the labor agreement, for example, is insufficient. It has to be broadened.

I agree with much of what Jon has said, but categorically disagree

with him that the function of these secretariats is going to be mainly in promoting corroborative activity between states. With the public complaints project, which allows any citizen in North America on the environmental issue to complain about a failure to effectively enforce law, I think we are going to see a plethora of complaints. As organization states test out the agreement, we are going to see whether or not it helps them in focusing their lobbying activities connected with interaction with policy. I think it is going to turn out to be a very interesting process, and the government may not have known what they were getting themselves into.