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Sovereignty and the Regulation of International Business in the Environmental Area: A Canadian Viewpoint

*J. Christopher Thomas**

I propose to divide my presentation into three parts. I wish to begin by making a few general observations about the prospects for "collisions of sovereignty." Then I will discuss the GATT *Dolphin/Tuna Case*, because I want to add to the points which have already been made, and then I will discuss the North American Agreement on Environmental Cooperation, because it illustrates how the Parties wove together some of the strands of thought that this conference has been addressing over the last day and a half.

Let me turn first to this question of sovereign collisions. As I prepared for this presentation, I assumed that what Professor King meant was the clash of differing or even contradictory sovereign conceptions in respect of environmental matters. The potential for conflict is an important topic.

It is equally important to keep in mind that in focusing on collisions, we can also lose sight of a larger reality, namely, the reality of cooperation and collaboration between sovereigns. Particularly as between Canada and the United States, we have a number of international bodies and agreements such as the International Joint Commission and the Pacific Salmon Treaty, which deal with transboundary or shared resources, and seek to promote collaboration with the objective of enhancing the environment and resource management generally. We have a long and quite admirable record of transborder collaboration.

At the same time, when one considers the subject of "collisions of sovereignty," I cannot think of two countries better suited to be represented in this Institute proceeding than Canada and the United States, because our modern history is replete with sovereign regulatory collisions. Although Lawson Hunter's discussion of antitrust issues did not pursue the issue with as much fervor as perhaps I would have, antitrust regulation has generated many conflicts. The United States has taken a generous view of its jurisdiction; Canada has sometimes felt the need to take a reactive "jurisdictional-thwarting" approach to international enforcement of U.S. antitrust law (although that response has changed somewhat in recent years). I believe the reasons why the United States has acted as the protagonist and Canada as the antagonist in these

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kinds of issues stem from the very different nature of the countries and from the distribution of power between them.

The United States necessarily has a global view of its interests; it is a view which is quite different than that which faces Canadian policy makers and politicians. This complex global view of the United States has laid the foundation for a more expansive view of jurisdiction. The political, military, and economic interests of the United States which span the globe have laid the foundation for expansive notions of jurisdiction. Couple that with the separation of powers and the jurisdiction that is vested in the Congress. Add to the mix Congress' responsiveness to political action groups, lobbying activity, and local interests and an American political culture which considers that 'problems are there to be fixed,' and one has the recipe for a much more assertive view of how problems are to be addressed in the international context than one finds in Canada.

There are volumes of writings on the question of conflicts of jurisdiction. There is a converse to that, exemplified, for example, in the annual debate over the extension of most-favored nation treatment to imports from China and in the GATT *Dolphin/Tuna Case*, where the Congress has enacted laws which have territorial effect, but which are activated by some kind of activity which occurs abroad. That is what the GATT *Dolphin/Tuna Case* was all about.

In order to understand why the GATT *Dolphin/Tuna Case* arose in the first place, it is important to understand one other fundamental distinction between Canada and the United States. The United States Congress, rightly so, views the U.S. market as an asset in inducing changes in foreign behavior. It sees the threat of withdrawing or conditioning access to that market something which can be very effective in persuading foreign governments and persons to change their behavior. To some extent history has proven it right.

Canada views any threat of withdrawal of market access as a threat to its export interests. That is why during the negotiation of the North American Agreement on Environmental Cooperation, Canada vigorously opposed and ultimately succeeded in preventing the use of trade sanctions against its exports where a panel favored a persistent pattern of non-enforcement of environmental law and the problem was not cured. Canada regarded this as one more opportunity for competitors in the United States to attempt to use environmentally-based import restrictions in order to block Canadian exports.

The idea of conditioning access to the United States market in order to induce changes in behavior is very dear to the hearts of those people who occupy the U.S. Congress. I recall that then-Congressman Gore during the course of the uranium cartel hearings considered this to be, in his words, "ruffling a few foreign feathers." From the foreign perspective, a "ruffling of feathers" is often a euphemism for trivial-

izing the interests of the foreign sovereign.

When a country of the size and power of the United States decides to use its market as an attempt to induce changes in foreign behavior, it is essentially prescribing unilaterally a standard of behavior. That was Mexico's concern in the *Dolphin/Tuna Case*. Mexico's imports of tuna were blocked not because it had failed to meet a U.S. harvest rate applicable to dolphin kills in U.S. waters, but rather because the United States had prescribed a standard for dolphin kill rates in waters outside U.S. territorial jurisdiction that were based on the U.S. standard. The concern, therefore, was that the United States was prescribing a standard in respect to fishing activity in areas over which it had no jurisdiction. This was the "production process" concern to which my colleague referred.

The GATT 1947 is concerned primarily with governmental measures affecting trade in products. The United States imposed a restriction on tuna imports on the basis of something which occurred in the process of producing tuna, namely, the level of dolphin mortality. Mexico challenged the production process standard as being GATT-inconsistent.

From the point of view of settled GATT doctrine, the GATT Panel Report (which remains unadopted) is quite defensible. However, it was strongly criticized in some quarters in the United States as an "unwarranted assertion of jurisdiction by a nameless panel of international bureaucrats into a matter of U.S. sovereignty." On the contrary, it was a collision between U.S. environmental law requirements and U.S. GATT obligations.

Thus, the collision was not only a sovereign collision between the United States and Mexico in political terms. It was a collision between the law-making power of the Congress in respect to the environmental law and obligations which the United States had entered into in respect to international trade.

That being said, when one looks at the GATT and at environmental regulation very carefully, the surprising finding is that there is a significant *lack* of overlap between the systems of environmental regulation and the systems of trade regulation. Where GATT does have something to say about environmental law is when a contracting party decides to use import restrictions as a means of changing foreign behavior. One of the fundamental rules of the GATT to which the United States subscribed (in fact, it was language proposed by the U.S. in 1946-'47), was that states should not use import restrictions except in narrowly defined circumstances. The problem with the ban on the importation of tuna was that it did not fall within any of the negotiated exceptions to the general rule of no quantitative restrictions.

The GATT panel was very concerned about the notion of unilateral prescription of standards. It said, "The Panel considered that if the

broad interpretation of the relevant article suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties, but would provide legal security only in respect to trade between a limited number of contracting parties with identical internal regulations." What the GATT Panel was concerned about, therefore, was unilateralism, whereby the U.S. created standards which other countries were obliged to meet in order to gain access to the United States market, which market access was supposed to be protected by certain guarantees entered into freely by the United States.

I propose to turn now to discuss the North American Agreement on Environmental Cooperation which was entered into after the NAFTA was concluded, when the Clinton Administration came into power. I must say that as I listened over the last day or so, I silently congratulated Henry King's prescience in assembling a cluster of different subject areas because they illustrate the fundamental problems which were confronted by the parties in constructing the environmental agreement.

What did we see? We saw that each of the parties wanted to retain its sovereign ability to determine the substantive content of its environmental laws. At the same time, each recognized that it had an interest in harmonization in certain areas; that was to be achieved through collaborative efforts. Each also had an interest in restricting its sovereignty in order to further the parties' shared interests, and each state's individual national interest.

When one reviews the environmental agreement, one sees the interplay between these different interests. For example, there is an article which deals with the enforcement principle. This is a classic example of a public international law that I think Professor Pharand would quickly recognize as a principle of law; it says that nothing in the agreement shall be construed to empower a party's authority to undertake environmental law enforcement activities in the territory of another party.

Then, however, there is a recognition of the need of cooperation and collaboration. The agreement establishes a Council, comprised of the environmental ministers of each of the parties. The Council operates by consensus. The use of a consensus rule means that the decisions on, for example, formulating new recommendations to each of the three governments must be unanimous. In other parts of the agreement a two-thirds voting rule is employed. I will not bother to list them. The important point to note is that insofar as the law-making or the recommendatory nature of council decisions is concerned, they result from a

consensus rule which, of course, is a "sovereignty-enhancing" rule, in that no party can have a recommendation made against it without its consent.

The United States Administration recently published a draft Executive Order on how it intends to deal with the Environmental Agreement. It has stated that the top priority for the council, as far as the U.S. is concerned, is to look at the environmental effects of process and production methods. In my submission, this is the preferable way to go when compared to the *Dolphin/ Tuna Case*, where the legislature of one party has prescribed conduct which the other party must meet. In contrast, under the Environmental Agreement, the Council, by consensus, addresses an array of different issues, and by consensus will develop recommendations to each of the parties, specifically in the area of production process methods. This is unwieldy and may take longer than the domestic legislative process, but it is a sovereignty-enhancing process from the perspective of the parties.

The parties also recognize that there are certain aspects to environmental law which require transboundary mechanisms. Accordingly, they agreed to work within three years to arrive at a mechanism which would deal with the environmental assessment of projects which could have adverse transboundary effects, and which would deal with the mitigation of potential adverse effects.

You will recall that the political debate in the United States often focused on the question of Mexico becoming a pollution haven as a result of the greater investment opportunities which would be afforded by the NAFTA. The question of how to deal with that situation arose. The parties ended up with a commitment to the effective enforcement of their respective environmental laws. They left the substantive content of the law in general terms to the discretion of each of the three countries. That appears to me to be an attempt to balance two competing interests: on the one hand, the interest of each of the parties in being able to have the flexibility to determine what its environmental priorities would be, what mechanisms or procedures would be used to enforce that law, whether damages would be used, whether it would be an administrative process, etc. and, on the other, their desire to ensure that there would be effective enforcement of that law.

The relevant provision of the Agreement states: "Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations." This is an important statement. The parties have said that the content of the law is to be largely left to the party itself, but they collectively commit to enforce their laws in

order to achieve high levels of environmental protection.

There is another dimension to this whole question of sovereignty which was expressly addressed by Charles Levy in his discussion of private parties' access to government-to-government dispute settlement. This is a different dimension of the sovereignty question, because it relates to the willingness of governments to cede control over the incidence and timing of international disputes. I believe that there has been a very significant development in the Environmental Agreement, because in addition to the party-to-party dispute settlement mechanism (derived from the GATT, ironically, through Chapter 18 of the FTA, Chapter 20 of the NAFTA, and then inserted into the Agreement), the Agreement has a "public submissions" provision. In essence, any non-governmental organization or person in North America can submit to an international independent secretariat, established under the Agreement, a complaint that a Party is failing to effectively enforce its environmental laws.

While a public complaints process may not be particularly noteworthy in domestic environmental law, on the international scale, the idea of any one of us being able to complain about the lack of effective enforcement of either a state or federal law in the United States and Mexico, and assuming the Provinces of Canada opt in, a provincial or federal law of Canada, is a remarkable step forward in international dispute settlement.

I must point out that this process does not directly lead to the imposition of sanctions. If the Secretariat considers that a complaint warrants consideration and further study, it transmits it to the government concerned and the government has generally 30 days (60 days at the most) to respond. Then if the Secretariat considers that the matter should be studied further, it must obtain two-thirds approval of the Council.

Now, my personal view as to how this process will operate is the following: First, I believe that the Secretariat will be inclined to accept a properly documented complaint. Secondly, the U.S. has already said in its Draft Executive Order that it will normally endorse having a factual record prepared by the Secretariat if such a recommendation is made to the Council. Properly documented complaints will be very difficult for governments to respond to in such a short a period of time. Therefore, I think that we are going to see the Secretariat receiving what it considers to be meritorious complaints and creating factual records. The factual records will be based on information which, among other things, the Secretariat can solicit from the public. If a company or industry may be potentially adversely affected by the outcome of a factual record, it will almost certainly want to participate in the compilation of the evidence that the Secretariat puts together.

What is the ultimate sanction? There is no sanction there, except

that the report is normally to be published. (It cannot be published if two-thirds of the parties vote against it.) Once published, a factual report could be the object of considerable media attention and pressure for remedial action of law enforcement problems.

I believe that in international dispute settlement processes, it is the fact of the finding, as much as the potential for sanctions, which makes a difference. It is the focusing of media and public attention on a party's enforcement practices, even without the imposition of sanctions, which is going to drive this Agreement. Environmental organizations and private citizens will be able to say, "We have tried. We have exhausted our local remedies, or we have tried to deal with our local enforcement offices. We have not been able to succeed. We are now going to the Secretariat." I do not believe that a Secretariat report that finds that one of the parties is not effectively enforcing its environmental laws is going to be buried in the last section of the *New York Times* or the *Washington Post*.

Moreover, a factual record could form the basis for a party-to-party dispute (although the threshold for party-to-party disputes is different. There must be a *persistent pattern* of non-enforcement in order to take a matter to a party-to-party dispute settlement mechanism.)

My conclusion is that in international environmental law, and specifically the North American Agreement, we have embarked on an organic process. It is a process of development. I see it both having political dimensions and legal dimensions.

On the political side, there is no question that having created these agreements and organizations, the United States Congress and the political bodies of the other two parties will scrutinize their performance. I expect that in four or five years, perhaps even sooner, certain members of the Congress will say, "We do not think that the agreement is working the way it should. We should be trying to expand coverage. We should be trying to do this, that, and the other thing." Perhaps the Administration and the Executive of the other two countries will be saying the same thing. The result may be an extension of the Agreement's scope and coverage.

The legal importance of this is that from perspective of international law, the parties have wrestled with the questions of sovereignty. They have attempted to protect sovereignty by, for example, saying that they do not want to have enforcement activities of another party in their territory. They have said that they wish to retain the ability to formulate their environmental laws, but they want to ensure that there are high levels of enforcement, and have agreed to subject that to dispute settlement.

They have also begun - and this is very significant to my way of thinking - to fragment the traditional monopoly that governments have held over dispute settlement by allowing a public complaints process.

This is a significant act, one which will have great implications, not just for NAFTA, but for the multilateral treaty system as a whole. I believe that the day will come when affected industries and other interests may not have standing, but will have rights of intervention to appear before international dispute settlement panels. In fact, that debate has already started in the United States, and as a result other states are going to have to face some important policy decisions in that area in the not-too-distant future.