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Discussion

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Discussion After the Speeches of Stanley M. Spracker and J. Christopher Thomas

QUESTION: *Professor King*: Chris, I note the disparity in the economy between the United States and Mexico.

One of the problems that people were concerned about was that Mexico had taken the U.S. environmental laws and put them in statutory form on their books. The problem before NAFTA was entered into, was the staffing of the Mexican environmental laws — the monies that had to be appropriated to enforce them.

NAFTA came about in the process. Mexico is a country with financial limitations, presumably limitations on the people who are qualified to enforce the laws. What is going to happen in terms of Mexico's response when the U.S. says it needs negotiations that are going to implement the Agreement and that Mexico must enforce its environmental laws? What will happen when Mexico responds, "Well, we are limited." What is the sequence of events that is going to take place?

ANSWER: *Mr. Thomas*: I am going to respond to your question in oblique fashion, if you do not mind, by focusing on the issue of devoting sufficient resources to environmental law enforcement. This issue was initially focused on Mexico, but as the negotiations proceeded, it became a more widely shared concern of the three countries. The concern is shown by the fact that there is language in the Agreement which provides for two defenses where there is an allegation that a party has failed to effectively enforce its environmental laws.

The first is that a Party has a defense where there has been a *bona fide* reasonable exercise of discretion in respect to investigation, prosecution or penalizing an offender. This makes sense. The *bona fide* decisions of the Environmental Protection Agency, Environment Canada, or SEDOSOL, as the case may be, should not be second-guessed.

Secondly, there is also language which deals with a situation where a government has to establish priorities with respect to environmental law enforcement. And again, if there is a *bona fide* attempt to allocate scarce resources by the party with respect to environmental issues which are deemed by that party to have greater priorities than others, then that can be evidence that the party is still effectively enforcing its environmental law.

On a practical note, there is no question that entering into the NAFTA negotiations has led Mexico to make significant funding commitments with respect to stepping up its environmental law enforcement, particularly in the border area.

I might also add that — this is something which always intrigues me — the United States has a tendency to overstate its position when it

starts off a negotiation. This, I am convinced, results from the interplay between the Administration and the Congress.

In trade, for example, all Congress hears about is how those miserable Japanese, Canadians, or other countries are restricting U.S. exports, and how all their imports are causing pain in the United States market. Rarely does a Congressional hearing examine what a good deal the U.S. has in the Canadian market, or about American investment successes in Europe and Japan. It just does not happen. As a result, this affects the way in which U.S. politicians and the negotiators they instruct initially look at the world.

A good example in the environmental area was the testimony of William K. Reilly when he was EPA Administrator.

He went to Congress to testify on NAFTA and the environment. He was asked, "how can we make sure that the Canadians and the Mexicans enforce their laws properly?" He responded that that was a good question, noting that he had a stack of letters from members of Congress all asking him not to enforce EPA regulations with respect to leaking gas storage tanks. There were approximately 300 letters, all asking him to relax EPA enforcement policy in order to relieve constituents of financial hardship.

Mr. Reilly pointed out that if the U.S. was going to ask the Mexicans and the Canadians to enforce their laws to the highest standard, it would have to be prepared to meet those standards that it prescribed. Thus, when the politicians began to think about these subjects, they began to recognize that this was a bit more complicated than they had originally thought, and there tended to be a softening of their original positions.

ANSWER: *Mr. Spracker*: Another practical way in which this has shown itself, is that before the Clinton Administration took office and there was the negotiation of the Environmental Corps., there was an effort by the Bush Administration to demonstrate environmental improvement with respect to boundary activity hazardous waste, particularly along the U.S./Mexico boundary. The Bush Administration also made the effort to demonstrate environmental improvement in terms of questions of staffing and the development of qualified inspectors.

So the EPA has made a significant commitment to working cooperatively towards training inspectors, really trying to address enforcement within Mexico to acquaint them with our experience.

In addition, with respect to the U.S./Mexico boundary, there is now major activity under way in terms of clean up: enhanced regulatory inspection and enforcement that is conducted jointly. The EPA region on the West Coast and in San Francisco has been very aggressive in filing enforcement proceedings against companies that do business on the border or on the other side of the border that are U.S. subsidiaries, where they at least have a claim to jurisdiction.

So this is an example of where it is not a legal or regulatory requirement, but there is some effort by the Executive Branches to develop the type of infrastructure environmentally that can demonstrate improvements in environmental management. The Executive Branch has also attempted to allocate some U.S. priorities to areas that were the focus of the concerns expressed during the course of the NAFTA debate.

QUESTION: *Mr. Doh:* With respect to what is going on at the border, there are also a couple of new institutions that were created primarily because the U.S. was considered to have had a particular stake in environmental reform, particularly dealing with environmental problems that had transborder implications. For example, we have the North American Development Bank that borderlines on a cooperation commission.

I would like to also say that a lot of these kinds of waste water crimes are funded through tax premium municipal bonds in the United States. Mexico does not really have such a facility. Now, we have the possibility of the state of Texas, for example, issuing bonds for development of projects that are on both sides of the border. I think that a lot of legal cooperation and many economic innovations will arise from this.

My question has to do with the distinction between the production process and the actual product. And the *Dolphin/Tuna* strikes me as something that is quite clear cut. The *Corporate Average Fuel Economy (CAFE)* case, however, strikes me as something that is less clear cut, although I am not very familiar with it. I am wondering if our speakers could speak to this issue of what is a better remedy for accomplishing a conservation goal, in this case a lower corporate fuel economy with the idea of improving the air climate? In other words, is it better to have a remedy that applies to a product or to have a remedy that applies to the production process?

ANSWER: *Mr. Spracker:* Well, I think this is another example of a middle ground between the tuna example, and the example I mentioned earlier about the labeling requirements, and the other more typical health and safety standards that can be applied to a product and can be judged upon entry. It is less intrusive on the sovereignty in other countries. But it is certainly true that not only the *CAFE* requirements, but the new requirements of the *Clean Air Act* to phase out gas guzzlers has already received a cry from foreign car manufacturers, many of whom manufacture cars that would not even come close to the mileage fuel efficiency standards that we are posing and which, with respect to the U.S. domestic automotive industry, are measured on a fleet-wide basis. So they can offset the luxury car against the economy model and come up with an average. If you manufacture only luxury cars, you are not going to have the benefit of that system.

And yes, one can surely make the point that it is only a product restriction because the test is in the product (i.e. does the product meet the test, or does it not?) But fundamentally, I see that as closer to the process side. It is certainly among the type of ambiguous areas that I would expect to see tested out in a subsequent round of challenges.

QUESTION: *Ms. Dallmeyer*: I do not mean to get too deeply into some of the various aspects of the enforcements, but some of the standard requirements were pretty straight forward. However, some odd things come up in that the request for submission seems to be aimed at promoting enforcement rather than perhaps at the industry. A question that the Secretariat should determine is whether the parties meet the submission or the requirements. And one of these aspects to consider in order to be guided towards submission is drawn exclusively from mass media reports. I was just wondering if you could elaborate on the knowledge of the agreement?

ANSWER: *Mr. Thomas*: The "mass media" provision was inserted because the parties were concerned about the international equivalent to "frivolous and vexatious suits." They wanted to make sure that a complainant had a genuine interest. They did not want to make it easy for somebody to send a letter with five or six newspaper clippings attached to it saying, "You should be investigating this."

To answer your question on what the request for submission was aimed at promoting, I would say that it is a concern that shows up in the party-to-party dispute settlement provisions as well. The United States initially pushed very hard for trade sanctions as the remedy for a finding of a persistent pattern of non-enforcement. It seemed to the other parties that if one is really concerned about the integrity of environmental law enforcement, the first thing that ought to be done is to fashion a remedy which aims at improving environmental law enforcement. Rather than immediately jumping to trade sanctions should we not give the respondent party, if it has been found to be failing effectively to enforce its law, the opportunity to remedy the situation? That was inserted then and that is why you see references to action plans. Only then is there a possibility of trade sanctions. It is the same kind of thinking that goes back to the public complaints process, about which there was a concern in that competitors could be using it to harass competitors rather than out of a genuine concern about enforcement of environmental law. So that is why that language is in there. It requires a qualitative judgement by the secretariat.

QUESTION: *Ms. Dallmeyer*: Am I correct in assuming that this requires full exhaustion of remedies within the State?

ANSWER: *Mr. Thomas*: I would not say a full exhaustion. I do not have it in front of me, but the implication of the language is to refer the Secretariat to look at whether or not exhaustion has taken place. Certainly there has to be notice given to the party that there was

a concern on the part of public complainant.

COMMENT: *Mr. Levy*: I want to raise the issue of harassment of companies. U.S. companies were making a very important distinction. They felt the Agreement should not focus on compliance by companies, but rather it should focus on whether or not the Party enforced its own laws. This is as a reason the provision was put in there. The Agreement has nothing to do with compliance in the sense of what the companies are doing, but rather what the governments are doing. That was a very important distinction, both in terms of sovereignty and also in a practical sense of how, at least U.S. companies, were viewing the Agreement and why they ultimately accepted it.

There was a point where the U.S. companies were basically prepared to throw the NAFTA out after they saw the first U.S. draft. It was totally unacceptable. And if the U.S. Government persisted on trying to use trade sanctions to force companies' compliance, U.S. industries would have opposed the NAFTA.

QUESTION: *Professor King*: One of the unique aspects of the side agreement is the role of the Secretariat now that the FTA has de-emphasized its role. They perform administrative functions, but their role was never successfully enlarged beyond that. They were a repository of information and cases.

Please comment on the role of this new institution, because I think institutions are very important for purposes of accommodating the conflicts of sovereignty.

ANSWER: *Mr. Thomas*: I agree with you; I am a big believer in institutions. I think this in part reflects a difference in philosophy between the Bush and Clinton Administrations and perhaps being early on in the Clinton Administration, a little bit more idealism than one might have found say three years into the administration.

I sat as a GATT panelist, and I have worked on FTA panels, so I had a chance to take a look at the respective contributions of secretariats. I, contrary to many people in the United States, believe that the GATT Secretariat plays a very important role in supporting the work of dispute settlement panels.

It provides a whole other dimension in terms of giving the panelist an understanding of what the tensions are within the organization, what the state of relations are as between contracting parties. The Secretariat is a repository of GATT lore. It knows about previous decisions where the issues that are under dispute were addressed before. All of this is valuable. Significantly, it evolved from two rather tense articles of the GATT.

In the case of the NAFTA Agreements, the Environmental Secretariat in particular, and the Labor Secretariat, have been given a much greater advantage from the beginning to evolve in support of the institutions and the respective Councils. The parties have agreed that the

secretariats are to be independent. The parties are under an obligation not to attempt to influence the Secretariat in the way in which it discharges its obligation.

So I think the foundation has been laid for institutional growth. In addition, after the fact, there has been an effort to supplement NAFTA's institutions with some kind of international coordinating secretariat. You are correct that in the NAFTA the institutional mechanism is sparse. There will be a North American Trade Secretariat in Mexico City which is to assist the three parties. But whether it is given sufficient support to evolve over time as the parties become more comfortable with the institutional apparatus of the NAFTA, I am not sure.

ANSWER: *Mr. Spracker*: I also think it is a very important development. A major concern is about using a trade agreement to address environmental concerns, even with a side agreement or separate protocol, because the environmental credibility of the system is in the process that is setup. There is a skepticism on certainly the U.S. side about whether or not trade agreements are the right vehicle to emphasize the type of health and safety concerns that drive environmental policy making.

My hope is that the Secretariat will add that environmental credibility to the process, and will bring a level of environmental awareness to this process that will make the dispute regulation process work successfully; not just in terms of adjudicating it, but giving those decisions credibility, so that the health and safety concerns here are being addressed and resolved appropriately. So I view it has a hopeful development.

COMMENT: *Professor King*: I want to add one point there. I think in the case of the environment you have a big constituency. This is an area that is not beyond public scrutiny, and I think what they do will add a lot to the functioning agreement, or if they are not doing their job, then perhaps it will decrease some of the impact of the agreement.

COMMENT: *Mr. Levy*: Stanley and Chris have made two important points. From an academic as well as a practitioner's point of view, it is very interesting to go back to the original U.S. proposals, which raise questions about U.S. sovereignty. Originally, U.S. proposals were on their face in many instances unconstitutional.

It was clear the Justice Department had not been involved. Most of the U.S. negotiating positions were ultimately influenced by the Canadian and Mexican negotiators, and also by the U.S. private sector. Ultimately, looking at the U.S. proposals and their constitutionality, shifted a lot of the U.S. negotiating positions in terms of what the power of the Secretariat would be, particularly with subpoena power and related powers.

I am not an environmental lawyer, but having worked on the envi-

ronmental side agreement, I constantly was told by people to watch how the NGO pushes the envelope on procedure through litigation. My guess is that they would try to push the envelope with the Secretariat, and it is going to be fascinating to watch the responses of the Secretariat, two parliaments, and a Congress. It will be interesting to watch how the NGO and all the other interested parties will try to push the power of the Secretariat, and how that would run up against not only the question of sovereignty in the international context, but the U.S. constitution.

