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Discussion

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## Discussion After the Speech of Joel P. Trachtman

QUESTION: *Professor King*: You spoke of the European Union as a model, and you seem to feel that it is an example of a working relationship that is in practice.

To what extent is the EU a model in other areas? In the European Union the countries are relatively geographically integrated; there have been relationships over a long period of time, some of them unfriendly, and there have been small countries, and large countries, but a degree of economic dependency among them. Are there difference in the European Union that perhaps would make it different from other groupings that you are talking about? For example, you talk of other groupings such as NAFTA. I would like to have you look at the different systems and discuss to what extent they provide a model for us.

ANSWER: *Mr. Trachtman*: I think it is a very difficult and interesting question. And I would argue that you need a tremendous array of economic, social, and political data to really compare these institutions.

I think you are absolutely right that the European Union is different from anything else. It is unique because of its historical circumstances, because of the concerns about war between Germany and France that motivated the European Union, and because of its relative economic and social homogeneity. There are lots of things that are unique about it, but one of the things that I should have said is that we are dealing in a circumstance of great particularity.

All of the states that exist in the world today are different from one another in the way they allocate internal authority, and in the way they exercise authority externally. Similarly, all of the institutions that we have created for economic integration, like the European Union and NAFTA and MERCOSUR and GATT and so on, are unique, and they respond to a unique set of social concerns. It is through the response to those practical and particular problems that they develop. I would say that the European Union is a model in the sense that it has developed in a very sophisticated way, and it has developed a very high level of institutions. Institutions in terms of its secretariat at the Commission, in terms of its legislative ability, in terms of its judiciary, and in terms of the legal rules, both the common law type legal rules, the constitutionalization that it has undergone, and the *acquis communautaire* that it has developed. I think that the EU model is very important, because it represents the results of a lot of very strong minds trying to work together on those problems.

I think as NAFTA develops, if NAFTA develops, if people want to have greater integration in the institutional sense, or want to deal

with additional issues, the first thing that they will do, naturally, is to ask what did they do in the European Community? That is what happened when the European Union developed; the first thing they did then was to look into what they did in the United States? I do not know whether they also asked what they did in Canada. But in many instances as the EU developed, they looked at the United States as a model for integration.

**QUESTION:** *Mr. Doh:* In your working definition of subsidiarity you talked about the investigation of the government, and you used the words both "effective" and "efficient" as a determinant of whether or not that particular service would be provided at a lower level of government or a higher level of government, and *vice versa*. Moreover, is there not a difference in terms of the ideal level of government for setting policy, or establishing regulation, as opposed to the ideal level of government for the actual provision or enforcement of that level of government?

**ANSWER:** *Mr. Trachtman:* With regard to your first question, I think I would just look at social welfare, at effectiveness in implementing social welfare, which might be broader than mere allocational efficiency in its economy, depending on to which economist you are talking.

Economics being in its own view the queen of the social sciences, has a way of spreading out and trying to address lots of issues that might not be considered economic. And to the extent it does address everything in social policy, then allocational efficiency in the economic sense is efficient. But what I as a layman would argue we ought to consider in determining subsidiarity is where do we get the most welfare.

As I said, the problem with that is each of us, individually, in each state, has a different conception of welfare, and has a different view of the good life. We need to integrate that view as we engage in this subsidiarity negotiation.

With respect to your second question about legislation possibly happening at a different level than implementation, I think it all depends. I for one am completely open minded on the issue of how we design our institutions. We may decide to legislate at a high level, and implement or enforce at a more local level, or *vice versa*. There is the possibility for that as well.

So, again, we want to have as efficient a system as we can, and the design of institutions should relate to efficiency. The only point I would like to make is that it should not relate solely to a pre-defined definition of sovereignty. It should not be constrained by that pre-defined idea of sovereignty.

**QUESTION:** *Mr. Fry:* Would you comment on potential national, sub-national governmental tensions?

A couple of years ago we had a conference on what sub-national governments are doing. What do you see as major tension points, and how do you accommodate some of the aspirations and demands of sub-national government while still trying to maintain the notion of speaking with one voice on foreign affairs at the national level?

ANSWER: *Mr. Trachtman:* Well, this is an area in which you are the expert, but let me see if I can speak to it. The problem is one again of transaction cost economizing. I would suggest that the one voice principle should only be retained to the extent that it is the best way to engage in relations.

So, to me, it is perfectly appropriate to have the German laender represented in Brussels, to have the U.S. states represented in GATT, or in Tokyo, in terms of trade, to the extent that it does not make our transaction costs too high, and to the extent that that is the efficient way to transmit individuals' preferences.

Here perhaps we can talk about the idea of how individuals' preferences are best transmitted. We have this idea of a democratic deficit in the European Union. We also have this idea of direct effect that people have been talking about this weekend; the idea that individuals can actually sue, based on a legal rule that may exist in international law. All of that tends to enfranchise the individual.

The question to me is to what extent do we wish to be enfranchised, or is it more efficient for us to operate through state governments, or country governments, or through something else? And it is a question of institutional design. Do we want to have direct participation through judicial or legislative means, or do we want to filter our democracy somehow, either because we like filters, we like to restrain our democracy in some way, or because it makes it more efficient to transmit our interest?

So, just relating to Professor King's question, the German laender said that they wanted to have a voice in Brussels, and they really argued for this idea of subsidiarity in the European Union. And that was a way in which this sub-national unit had a tremendous effect on this transnational entity, and kind of hopped over the national unit to have that effect.

So, I may not have answered your question in very practical terms, but in theoretical terms I think it is a question of what works best.

QUESTION: *Mr. Brand:* I would like to suggest one additional term to your collection, and get your reaction on the suggestion. You deal with sovereignty and talk about extra-territoriality as the horizontal division, subsidiarity as the vertical division, for analysis, and then you use the effects test in terms of extra-territoriality while basically using an effectiveness test in terms of subsidiarity. It seems to me there is still something missing, and I would suggest that what is missing is found in the term legitimacy.

I think in your response to the last question you began to move toward that area, because in international relations and in national relations currently, certainly you have a greater emphasis than possibly at any time in history on democracy.

And if you define everything in terms of effectiveness and efficiency, it seems to me you would lose something, at times, or risk losing aspects of legitimacy. This has caused a good deal of the debate through the 1970's and 1980's in the international arena on the concepts of balancing equity and efficiency.

Certainly for the developing states there has been great concern on that issue, but it seems to me that there is an overlay of the need for consideration of concerns of legitimacy, along with your concern of extra-territoriality and subsidiarity.

ANSWER: *Mr. Trachtman*: I could not agree with you more that legitimacy is important and democracy is important. I would like to see it in the model I have already described, and maybe I did not describe it fully in the sense that what we are trying to do in the model is have people have the authority to address effects on them in the horizontal axis, and have people have the authority to get effectiveness in accomplishing what they want to accomplish on the vertical axis.

Then, assumed in that — and maybe I should not have assumed it — is that you need a mechanism for people to express their desires, and that mechanism is democracy of some kind. And I guess just to answer the question that was implicit in what you were saying, I do not see much more in terms of legitimacy, than the question of, "Are you getting people what they want?"

The structure that I have outlined is a very utilitarian structure; it involves a cost-benefit analysis. What could happen in that structure is that one person's good might be sacrificed for the good of others. Maybe what we need in this type of structure is a vision of some minimal rights. But I would actually argue that that could be included in welfare. My set of rights is valuable to me, and I would give something up for it. So it is not simply economic efficiency, but efficiency in getting the full scope of what I want, which includes a certain set of guarantees of rights. The idea of legitimacy would be in this framework for determining what sovereignty is. I would argue that any government that is illegitimate, in the sense that it did not respond to what its people wanted, would have no authoritative claims to speak, in this model, because the only way you can get a claim to speak is if you are transmitting people's concerns regarding effects on them.

QUESTION: *Mr. Brand*: I guess I am concerned with how do you define what they want? It seems to me there are two extremes. It could be proposed: "I want some kind of fixed economic theory imposed from above," and then answered: "well, we know through this set of factors that they are better off if they were here at X than at Y." The other

extreme would be what often happens in some democratic societies; it takes a poll everyday, and then changes its mind as the poll reflects differences.

But I think it becomes quite difficult — and in some of the areas that we have been discussing, for instance export controls and economic sanctions — to obtain what we think are not just economic purposes, but political purposes or human rights purposes.

We often hear discussions where people say, “Aren’t we harming the group that we are most trying to help, because it is out of power; who are going to be hurt first by these sanctions?”

The best response I ever heard to that kind of question was from a young minister in what was then Rhodesia, when the sanctions were imposed on Rhodesia. His response to that question was, “Well, it is a little bit like a woman being pregnant; there is some pain that goes along with that, but you seek goals beyond that.”

There are assumptions made in any kind of discussion of sovereignty, that somebody knows best how to decide what is right for others. In our model, at least in Canada and the United States, we have decided that a representative democracy is the best way to do that. But then when we use that in the context of discussing sovereignty, it seems to me we always have to come back to the question, not just who is “us,” but who is “it” that is sovereign. Over history the answer to that question has changed dramatically.

I think that your discussion here is useful, for me particularly, in thinking about whether we should integrate the concept of democracy. The concept of “King is sovereign,” is tied to the monarchies, and I think it carries with it a lot of baggage that is just very difficult to throw out. But as we draw towards that, how do we work through this transition, consistent with what, in the U.S. and Canada, are very important democratic ideals.

ANSWER: *Mr. Trachtman:* I have discarded the word “sovereignty,” and what I would like to convey is that the authority comes from the individuals. So there is a premium in this model on institutions that can reflect the individual’s desires, and that is what you are talking about in terms of legitimacy.

Now, one of the problems that I think occurs is where you have an interest in influencing what others do. Let us take the example of the United States, wanting to influence environmental protection in Brazil. Let us assume it is for completely altruistic reasons; it is not for spillover, rather, it is because we are concerned about biodiversity.

We want to get everybody to follow the same level, similar to what Michael Hart said last night about getting everybody to follow the same social policy, because we think this is the right level. I guess I am troubled by that kind of imperialism, telling Brazil or India the level of environmental protection or social policy they must have. The reason I

am troubled is, not because I would like to deny these benefits to these people, but because I think it is appropriate to let them define their vision of what they want.

If they feel that sacrificing some social policy issues or some environmental issues for development is the right tradeoff, I do not feel that it is appropriate for the United States to get involved.

This is a very difficult idea I think, because it raises the question of when you should have humanitarian intervention, and I think that the one answer is, "if this is an expression of what fully informed people want, it is appropriate."

That raises this question of relativism: everybody has different visions, and everyone has different resources. If Brazil could hold us up for a side payment and get similar resources to ours, they might be willing to protect the rain forest, to engage in better environmental protection, and that seems to me an appropriate position on the Brazilian side, to say, "Look, we want to develop, we have cut our domestic tradeoffs a particular way, and they involve destroying the rain forest. If you in the north like the idea of the rain forest, or if you want our carbon dioxide absorption services to continue, you have got to give us something to really compensate us for the loss in development."

I defined this model to talk about economic issues, and I have not thought through some of the political issues that you raised, in terms of humanitarian intervention for example. When does it become appropriate to invade a society in order to protect people? I have some views about that, but I do not think they fit into the model, or I have not figured out how they fit into the model that I have described.

COMMENT: *Mr. O'Grady*: I think that it is very important to have a conceptual model in which to make these decisions; on the other hand, it is very hard to find one that has much practical value. I suppose that is the nature of conceptual values. One thought that is occurring to me is that when you extend the boundaries of sovereignty horizontally, as you put it, in effect you are bringing another partner into your democratic processes.

On the question of trade with Cuba, to take an example, people in the United States feel strongly, about whether there should be an embargo. Let us say people in Canada feel strongly that there should be trade, how do you resolve this?

I think one concept you have to perhaps consider is the fact that now the democratic process is extended. You made permeable the boundaries of your sovereignty, and as part of that, you have to start from the proposition that there are more of us than there are of them, and on any Radonic calculus that you want to employ here, we have a bigger multiple. Tocqueville said that the Americans would have to solve this internally or they would not be able to run their own democracy.

If you take an example within Canada, at the moment, Quebec is very keen on the idea of manpower resources training, and I think in resolving that issue and another issue with Quebec, the English speaking part of the country has to be careful to avoid the simplistic idea there are more of us than there are of them. And that gives our idea more legitimacy.

I do not know where you go with this, except that it must be true that if you recognize that the other side has some basic legitimacy, then you are cast back on basic principles. One thing that is wrong with sovereignty, is that, in a way, it is a formula for cutting off all thought.

At some point you have to make a rational decision. I mean you cannot be too rational, but you have to do something sometime.

COMMENT: *Mr. Trachtman*: The example of the United States export controls relating to Cuba is an interesting one, demonstrating this approach to horizontal problems. The example of the relationship between the United States and Canada is also interesting.

There are two kinds of things I would like my model to say. One is, if Canada defends against that, and says "Sovereignty — you Americans get lost," the Americans should refuse to accept that; they should refuse to cut off debate, as you said on that basis.

But when Canada says "Look, this affects us much more directly than it affects you; it affects you indirectly. Let us figure out a way that we in Canada can have the authority to continue to do what we want to do, and you leave us alone." That is politics, and it is a negotiation.

Now, one of the things you are saying, which I would agree with is you cannot have politics all the time. It is too much; you want to freeze politics. And what I would say is that discussions, jurisdictional rules and institution do freeze politics.

I did not really get a chance to give you the full picture, but my model does not exclude negotiating jurisdictional rules based on this framework. When do we in the United States need to be able to say something about sales to Cuba? How do we negotiate those rules with you? We need to constrain the politics and these rules.

In the *Cuban Democracy Act*, there is a jurisdictional basis on which the United States asserts jurisdiction. One question is how valid are those bases? Are they the real bases? Is the fact of relationship to the United States corporation or licensing of intellectual property sufficient? Is that really the basis, or is the basis really the effects within the United States, rather than these arcane connections?

So, I am not purporting to solve any problems, and I am also not purporting to have something that would be a limitless negotiation or a limitless debate. What I think this does is perhaps say that the debate or the negotiation should refer to effects, not to some of these artificial ideas of nationality or sovereignty, but to the real effects that we are

concerned about.

You might say, "Well, the United States should not have these concerns." I might agree with you, but the fact is the United States does, and the other fact is that — and this is the more difficult part of your question — the United States has more power than Canada. At least in some measures.

That power is going to be exercised in the *Cuban Democracy Act*, in Section 301, in negotiations in GATT, and I do not think that one can do anything to remove that power. That is a fact of life. The question is, how can you negotiate ways of constraining that power with the United States?

And the recent Uruguay Round of GATT is an example of attempts to offer things, to make deals to constrain the exercise of that power in trade terms.

QUESTION: *Mr. Lawpher*: My area has to do with the concept of revenue generation via mandate, using sovereignty as a club. I am a CPA. In the areas that I work it seems more and more that the organizations that govern various things, like sewer districts and this and that, on a smaller level, seem to have lost some of the flexibility that they had in dealing with people. Where we used to say "Well, it is okay, we understand your circumstances; everything is okay," we have to now say, "We understand your circumstances, but there is really nothing you can do, you have to pay."

Now, as a comment, since I am dealing in a smaller environment, do you see that there is a trend in the United States and other countries that seems to be that governments are getting in the revenue generation themselves, and that they agree with this concept of mandates?

It seems that everything now is being mandated. It seems that we are talking about nothing but mandate now: "My hands are tied, therefore you have to pay."

ANSWER: *Mr. Trachtman*: I know so little about this matter, that I hesitate to comment on it. You are referring to the idea that sometimes mandates are substituted for taxation, when taxation is politically unavailable. It is a way in which perhaps the government tries to do things that are hidden from people. This seems to be a question about the openness of government, and how it operates. I am not sure that anything I have said really could answer that, except to the extent that if one of the things that we are trying to refer to is efficiency in doing things, we would evaluate taxation versus mandates in terms of efficiency.

QUESTION: *Ms. Dallmeyer*: Where, in your vertical or horizontal axis, do you include the activities of non-governmental organizations?

ANSWER: *Mr. Trachtman*: In the vertical axis, although maybe you would say that they do not fit at all. I think that they are a type of

organization, which you might compare to states. They can be compared with sub-state and super-state units, in that they tend to be more functional.

For example, we might think of this organization as a functional non-governmental organization, and it is bound geographically, but it is not related to a specific country's border or a specific municipality's border, however, I think NGO's are one of the reasons why the concept of sovereignty does not work any longer. NGOs, GATT, and NAFTA and other things have a tremendous voice, and people are listening to them more in legislation and in adjudication.

In my model, I tend to think of them as being in the vertical axis, although they do not necessarily relate in the same way as some of the things I mentioned.

COMMENT: *Ms. Dallmeyer*: They may not even follow an axis at all.

QUESTION: *Mr. Trachtman*: Why do you say that?

ANSWER: *Ms. Dallmeyer*: Well, in many instances they are transboundary, and they operate generally at the bottom end, really from the bottom up, in the activities that they generate. They may be an end around this entire hierarchy of levels of government.

COMMENT: *Mr. Trachtman*: I agree with your point, and think it is useful to reflect on it. By my vertical axis I did not mean to commit myself to things that are territorially bound. A family, which is not necessarily territorially bound, and a club, an NGO and a religion are societies, and they need to be reflected in this type of axis.

The origins of subsidiarity are in the Roman Catholic church. It was an idea that was invented by the Roman Catholic church to countervail the power of the state in Europe.

So I see all of these NGOs, all of these different types of associations we form as having a role, and as having a claim to authority, in particular ways.

QUESTION: *Mr. Picker*: Would it be correct to say that in this vertical process, the focus is the nation-state? Part of the concern is to have the state focus on issues which it must address, such as the NGO, the individual or any another entity, and to have society articulate the policies which the states must address in working out the vertical representations.

ANSWER: *Mr. Trachtman*: It is probably true in society today that the default position, in most respects, is the state itself.

If you are looking at the European union, you might argue that the balance is shifted to some extent and the default position is more centralized. I think that the NGO is something that does make claims on both the state, and very importantly, as at the Rio Conference on the Environment. In the Uruguay Round, to a lesser extent, NGO's were tremendous players, making claims not just on the state itself, but

on the international organization. I think that that has become a very effective way of asserting a voice.

NGO's today do not have a particular basket of authority. They can elect their own president, they can set their rules, they can adopt their agenda. Like the National Association of Manufacturers, they can make a point and people will listen, based on the authority that they command.

COMMENT: *Mr. Picker*: In that respect, then, they are articulating policies which states in their debate must address. They cannot simply ignore the policies raised by these NGO.

ANSWER: *Mr. Trachtman*: I think they do what they are able to do. Sometimes they find that there are other NGOs in contending lobbies that balance them out.

Sometimes in the environmental area we have seen that NGOs have played a tremendous role in raising these issues, in a way that has political ramifications. People that are running for office have to pay attention to what the different environmental NGOs say about them. So, it is part of the political process, and maybe this relates to the question of how people get a voice. They get a voice sometimes directly through elections, sometimes less directly through NGOs, and sometimes they do not have a voice at all.

QUESTION: *Professor King*: How does this reflect on the war and peace issue? Do you have any comment on that, in terms of optimism, or no effect?

ANSWER: *Mr. Trachtman*: It is I think not an unimplicated question. The former Yugoslavia shows that no matter what you do in terms of integration, you can still have disintegration, and it can be violent. What integration does, just looking at that, is make it harder; it raises the cost of war, raises the cost of breaking up. I think to that extent, integration may incrementally promote peace. This was certainly one of the ideas of the European Union.

I think the other thing I would say is that to the extent we can promote some idea of international justice, to the extent we can promote some platonic idea of international justice, as each state or each society getting what is his, they will not have a good reason for war.

If we think about some of the trade disputes as potentially being a basis for wars, and if we can find a way to articulate peoples' views, in a way that they find legitimate, in a way that really is responsive to their concerns and that they could agree responded, they would have less of a basis for war. So, in a very incremental way, to the extent that we can have something that is less artificial, something that is more substantive in its responsiveness to real concerns, perhaps it reduces the possibility for war. Obviously, this does not deal with political concerns, with nationality, with irredentism, with this idea that we are the Serbs, and we want a homeland of our own. These things do promote war, and

I think that this model does not do much for them. One thing it does — and it is the same thing that federalism does — is it allows the possibility for living together apart. It allows for not having to necessarily succeed, and not having to necessarily succeed violently, to have some level of local authority, some ability to determine and to chart one's own course. And to the extent you can do that; to the extent you can satisfy people with some solution, or even to the extent you can accept secession and then re-integration and some broader economic grouping, that might be a basis for reducing peoples' perceived needs for war. I recognize that this is an airy theoretical approach to something that is very emotional, but I do not have anything more that I can offer.

