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COMMENT, Professor King: You covered a lot of ground in a very short time. I wanted to throw the session open to questions or comments; and if any of the commentators have any questions for the panelists, I would be happy to hear them.

QUESTION, Mr. Graham: Mr. Horlick, from what I am reading about the U.S. literature and other literature about the GATT, much of what you say about the lack of substantive rules and which mechanisms apply are equally true of the GATT. Do you really think that we can come up with something in these negotiations that would produce a model that could then be translated into the Uruguay Round without the Europeans and others totally blocking it?

ANSWER, Mr. Horlick: To be honest, we probably will not produce such a model on contingency protection. What I had in mind, in saying that the United States and Canada share principles, was a reference to an attempt in 1982-83 to negotiate definitions of subsidy in the GATT. We actually got an agreement among the experts from the United States, Canada, the EEC, and Japan on what a subsidy is. But there is no political will, and there are great differences on how, to value a subsidy. In practical terms those really do not matter. The problem then was getting politicians to agree to any of that. My reference really was to the entire agreement. I think there are a number of things—services, investment, intellectual property—the agreements on which will form an aspirational model, but not necessarily a model to be followed.

QUESTION, Mr. Graham: I have a follow-up question on dispute resolution mechanism in particular. I was very struck by Jon Fried's point that, because of the retaliation nature of the solution, the GATT system creates more problems in restrictive trade and, therefore, destroys the whole fundamental nature of what the agreement was supposed to do, which was to free up trade. Do you see any way in which that can be addressed?

ANSWER, Mr. Horlick: Actually, I'm mildly optimistic about dispute resolution, probably because the end of the Uruguay Round is so far away. As you know, this is a major priority for the United States, and one of the aspects of GATT dispute resolution which to me is most striking is that most of the disputes statistically aren't a big deal. I think a U.S./Canadian tribunal can provide precedence for the fairly routine handling of disputes. I'm not saying that we are going to have a GATT

dispute resolution mechanism that will take on the big issues as the U.S./Canada mechanism will have to. But it will provide a model with which most lawyers are familiar. Labor disputes range from the tiny shop floor dispute to the threat of a strike. The GATT treats everything as a threat of strike issue, even though most of these disputes are "where do you stand on the shop floor?" type issues. A U.S./Canadian tribunal, properly negotiated, can provide some guidance for the shop floor-type disputes.

QUESTION, Professor King: Do you have any feel for the United States Trade Representative's position on this?

ANSWER, Mr. Horlick: Officially, of course, it is all a secret. However, my own view from talking to the negotiators is that the U.S. negotiators are willing to discuss these things. What is missing is the political push from the business constituency to say that the United States is willing to do these things. Everyone who opposes it on very narrow grounds is out there lobbying very vigorously against the proposal. Basically, U.S. businesses favor the proposal but aren't pushing hard enough yet. If they push hard, the United States is willing to make these deals because there is a benefit for us on services and investment. The same is true in Canada. Overall, the USTR is not opposed but is scared for the lack of a business constituency.

COMMENT, Professor King: That's my sense, too. I don't know whether it is something about the USTR communication with business or whether it's just an omission—from being too busy with the negotiations—but there hasn't been the business constituency thus far.

COMMENT, Mr. Horlick: There's not been the mobilization that occurred in the Tokyo Round.

QUESTION, Mr. Magnus: I am enjoying this metaphor of the stadium. We have got our two teams on the field. We have also got some teams that are neither Canadian nor American and they come in with their trade practices, dumping, subsidies. From a Canadian prospective, do you see that the measure of injury vis-á-vis other trade practices outside the stadium, but coming into Canada, would be measured against a market which has Canada as a denominator or has North America as a denominator?

ANSWER, Mr. Fried: I think you can't answer that question without being able to analyze in detail the rule of origin provision. Let me move back a step before taking that point further. It's not unfamiliar, at least to the ITC, to administer two different standards depending on origin of goods. It's not unfamiliar to Canada, at least in tariff matters respecting GSP and, for evaluation purposes, code and noncode members. In principle, one can envisage, and should properly envisage, a different discipline applying to those prepared to take on the obligations in the Free Trade Area than those from outside.

In terms of how best to assess the impact of incoming goods into

Canada which may be distorting trade by virtue of the unfair practice, it seems to me there are two aspects. One is the question that you raised in which, if there is an import displacement effect, you may want to consider not only which standard to apply, but also the standing to be given to American producers. The second is how to control the onward dealing with the goods in the North American marketplace. Maybe that's the way to divide it; that the first crossing of the border can properly be on a Canadian market standard, as long as you are satisfied that your rule of origin provisions and your customs administration is effective enough to accurately and adequately control the onward shipment of the goods into the other country's market.

What I'm trying to suggest is, in a North American free trade area, if you combine this with Mr. Horlick's suggestion and give an American industry standing in Canada to complain about this third country good coming into the Canadian market by virtue of its import displacing effect, then you have begged the question of whether it is a Canadian industry, or an American industry, or a North American industry.

It is almost an analogy to merger standards. What is the relevant market for this import? It may be Canada. It may be North America. It may be New England, or Quebec. I think you want that flexibility in the standard depending on the market at which it is aimed.

QUESTION, Mr. Herman: I'm interested in the interrelationship that is envisioned between private-type remedies and public-type remedies in dispute settlement. I can see the possibility of having a bilateral dispute settlement body that would deal with such things as unfair trade practices; section 301 actions in the United States and the question of subsidies.

How does that relate to private remedies? For example, in a section 201 case, the decision has to be based upon a consideration of national priorities, because that's the essence of the section 201, or safeguard action. It's hard for me to visualize a bilateral body that would deal with those kinds of actions which are so inherently political and national, not binational in scope, in terms of the relief that might be ordered.

Also, what happens in the case of a dispute over whether a particular type of action is or is not a justifiable subsidy under the bilateral agreement and the determination is that the action is not justifiable? Do the private remedies then take effect or is the relief ordered to the private party by the bilateral body? That is, how do you relate the private line remedy to the public dispute settlement mechanism?

ANSWER, Mr. Bertrand: The interesting point you raise is the issue of making the link between what I call public and private enforcement. What may be contemplated is whether the trade agreement can embody mechanisms or simulate the private remedies and adjustment.

The negotiators need to have imagination to give the market forces the push that the forces might need in order to have their own self-polic-

ing system. For example, in an anti-dumping case where another company is dumping in Canada, we can simply try to devise a system that would allow the injured party some form of redress or market redress.

Assume that you are dumping in Canada at a certain price and that I can establish it. Perhaps I should be able to obtain the price difference as a remedy, or I should be allowed to buy the goods at your place at the same price and dump in your market. Self-discipline would work out the problem. Self-discipline would make sure that any dumping would not last any length of time. I think I would put my faith in adjustment by the business community, so long as they have the proper tools to do it.

QUESTION, Mr. Herman: I have no problem with the dumping situation, because, quite frankly, I don't think that's a real problem in the North American context. A lot of attention does not need to be devoted to dumping because statistics show that dumping affects a very small portion of Canada/U.S. trade. But what about the subsidy situation?

ANSWER, Mr. Bertrand: I'm assuming that you have to start first with the national treatment and with the same opportunity for every firm in the market to obtain the subsidy; so if you don't have those, the situation wouldn't work. The only things to be concerned about are the corrective measures of subsidy that have been in place and have allowed the structure to endure. A good scientific and economic agreement would probably lead you to letting out two aspects of the subsidies. One is cost benefit, looking at the cost of what our subsidy is intended to do. The other aspect is a question of what subsidies are obtained in the other country.

QUESTION, Mr. Bilder: I wonder if it is worrisome that both the commentators as well as Mr. Legault have all seemed to state that some kind of autonomous third party or autonomous binding dispute settlement mechanism is almost a sine qua non to the agreement. That can be very worrisome because it might be difficult to get an agreement on this kind of a third party dispute settlement. As desirable as it might be, it is troublesome to say we have got to have this when we only might be able to get it.

Why is this of such concern? Obviously it is desirable, but private parties, countries, the United States and Canada certainly have lived a long time and have managed to deal with their problems without binding dispute settlement. What is so very special about the Free Trade Agreement that makes this so essential? Couldn't we live with something less than an autonomous third party dispute settlement?

ANSWER, Mr. Horlick: I'll give you a brief response for now. Businesses can live with it because the GATT, for example, works without one and 90% of things go on just fine. My personal view is that the reason that you need it is the lack of trust between the two countries. Distrust has reached a high level in the wake of recent decisions that

Canada won't accept the concessions the United States wants on services and investment without a concession on contingency protection.

COMMENT, Professor King: We will get more into that later tonight.

QUESTION, Mr. Hudec: The panel seems to be in agreement that net subsidy is a good idea and I wouldn't want to let that idea go in the record unchallenged. It seems to me that this net subsidy concept is just one step away from scientific tariffs. If you are going to talk about compensating subsidies, I can't see how you, politically, could avoid talking about consideration of other burdens which may also effect the position of the two parties—your environmental regulations versus mine, your labor laws versus mine, and so forth. You can get very quickly into a process which would require you politically, in any event, to take account of all of the differences and conditions which weren't there when Hobbes wrote. So I think that it is a very bad idea.

Second, on the dispute resolution tribunal question, both Mr. Horlick and Mr. Fried stated their cases in the context of time. Whatever you can do with a dispute settlement tribunal in the context of time, you can also do with the internal decision-making machinery of each country.

What do you think about the relative benefits of an international tribunal or binational tribunal versus simply speeding up the decision-making process of the two countries?

ANSWER, Mr. Fried: Let me try a ten-second response to that. First, in regard to your comment, I said nothing about net subsidy. It is important to comment on what kind of discipline might occur in the Free Trade Agreement other than to say that Canada and the United States have the unique opportunity to take multilaterally agreed disciplines one step further at greater refinement, greater discipline, and more clarity to the substantive rules involved based on the trade distorting effect in a free trade area.

I did not premise my case for binational procedures on timing. I think the timetables in the United States and in Canada under our procedures are considered by businessmen to be effective timetables. I think you can achieve a result in just as short a timetable with more certainty, more objective administration, more fairness, in a more balanced procedure as between petitioner and respondent than you can in our domestic procedures as currently administered in each of our systems.

ANSWER, Mr. Horlick: Let me just briefly reply on net subsidies. I recognize the slippery slope. One can work within the context of the specific programs alleged to be subsidies without having to take into account all of the other effects you mentioned. Just for an example, say you are looking for an incentive to a business to do something. If it is paying tax on a grant, that payment effects the way the business responds

to the incentive and you can measure that. You can look at its tax return, so it is measurable within limits without sliding down the slope.

COMMENT, Mr. Fried: Let me add one other point, if I may. That is, I did try to emphasize an intermediate stage of consultation of dispute avoidance, in which both sides would take a more comprehensive view of the problem than simply trying to find the handle; such as, is this injurious, is this subsidy to deal with what is properly a market or adjustment problem in the North American environment?

That's a fundamental difference between domestically-administered law and the kind of two-step binational procedure that would require comprehensive oversight by the governments on the market conditions first and dispute settlement as a last resort.

QUESTION, Mr. O'Grady: I was wondering about the halfway measures that are more identifiable cost factors such as manufacturing standards, packaging labeling, maybe even food and drug regulations. Is that kind of problem going to come up, and if it does, is the binational committee, if it exists, going to deal with it? Is it going to try to consult a harmonization of the two sets of rules or is it possible that it might occasionally direct the legislatures to harmonize it?

ANSWER, Mr. Fried: I tried to state at the outset that the answer depends on what is put into the Agreement. If there is a provision in the Agreement for harmonized rules, they have to be administered. Most problems, be it the individual rule of origin determination or the technical standard inspection, are not going to engage the political attention of either or both governments. They are going to be handled by day-to-day management and administration of the Agreement.

When an agricultural officer imposes a medical or health or sanitary standard, domestic law will, in effect, be applied. It's not a question of treaty interpretation or treaty application between the two governments at that point. It is a matter of whether the domestic standards have been properly applied. The affected business or private party or importer or exporter at that stage would ordinarily have recourse, as available today, to the administrative procedures in that department or to the quasi judicial or judicial review procedures.

Only when the problem becomes so pervasive, so profound, or so serious as to cause either government to believe it may have an impact on the relationship should there be an opportunity for the governments to either lift it out or to say to each other, "wait a minute. We really better clarify what our previous administration said fifteen years ago in terms of their overall intent."

ANSWER, Mr. Horlick: Things like standards and labelling are going to be matters where the businesses on both sides will be able to use the Agreement to harmonize. This is something they will want to do to so save money. I think it will be one of the successes.