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Discussion after the Speech of Louis Sohn and the Comments of Robert Hudec and T. Bradbrooke Smith

Discussion

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Discussion After the Speech of Louis Sohn and the Comments of Robert Hudec and T. Bradbrooke Smith

QUESTION, Professor King: I have one question to begin. I think that one of the arguments we have heard about this whole discussion of dispute resolution at this time has been the fact that there is no trade agreement in place. We don't know what the scope of the trade agreement is going to be and yet we have gone ahead.

I'm confident that the American Bar Association is going to be receiving recommendations from the joint working group, provided the mails or special delivery service is working, but I would like to get a comment on this question that you can't have a dispute settlement procedure until you get the agreement. Does anybody want to comment on that? Professor Sohn, do you want to?

ANSWER, Professor Sohn: I mentioned before that you cannot have dispute settlement of really high quality unless you have the rules first, because you are not going to give a blunt, *carte blanche* to a group of lawyers to tell you what the rules are. You have to have the rules first and they have to be quite detailed. That doesn't mean that you cannot say in advance that it will be necessary, in order for those rules to work, to have a definite way of settling disputes on it. We have developed those things over a few hundred years and they generally work, if they are used. They are very often not used. If they are used, they usually work.

In addition, over the last twenty or so years, a new science of alternative methods of dispute resolution has developed and it has been suggested that some of these procedures should be built into this new machinery, but the point that relates to the substance is really another one; that is, you can't provide in advance for all general matters which apply in principle to the whole business. But you might want to give your institutions additional powers to deal with special things like subsidies which you build really, in part, into the substantive provisions.

As far as the power to determine X or Y or Z in a particular case is concerned, the commission or the tribunal would have specified additional powers. In fact, if you look at the various treaties which relate to trade areas, in particular the Australian one with New Zealand, that's exactly what they are doing. The same is true to some extent, a small extent, with respect to the treaty with Israel, because it is a rather limited treaty. Even there, in addition to the general clauses of dispute settlement, you have throughout the treaty additional clauses scattered, with respect to Article 3, providing that the joint commission under the treaty should do certain things.

Then there is in another place a provision that says the joint commission should do X; if the joint commission does not succeed, it should go to the conciliation commission. You use the mechanism that you establish in your dispute settlement. You use it to deal also with special problems that arise when you draft the treaty. Very often you get to a point where you can't solve an issue and you have to delegate it to somebody to take it one step further. That is what you build into the treaty itself, but that does not mean that you cannot already start to think about the basic provision that has to be in any treaty for it to make any sense.

COMMENT, Professor King: Thank you. I would add, also, in connection with the dispute settlement procedure, that unsolved disputes under an agreement can undermine the workings of the agreement. We have seen a number of cases where the relationship has become aggravated because of unsolved disputes. We feel and have felt that having a dispute settlement procedure in place frequently forces the parties to settle disputes. The existence of such a procedure is an incentive to settle disputes. These are some of the thoughts that have gone into our thinking over the past twelve years. It is an issue that requires an awful lot of thought.

QUESTION, Mr. Fisher: I think Professor Hudec touched upon this problem; we have talked about a series of clearly identifiable disputes, including a number of existing disputes between Canada and the United States that may well be appropriate for some form of arbitral mechanism. Professor Sohn mentioned specifically, countervailing. We may end up with some form of definitive rules, like a stoplight system where some forms of subsidization are clearly agreed to be acceptable and others are clearly agreed to be unacceptable and in the middle there will be a need for some form of joint determination. Perhaps the rules may be laid out in those regards.

If the agreement only ends up in the most difficult areas of negotiation, for example, trade in services, only with some statements of principle under which either further negotiations will take place or there will be further developments, how do you perceive that the arbitral mechanism will function?

ANSWER, Professor Sohn: There are various ways of doing that. You can, of course, provide immediately that you realize that this treaty is not going to solve everything and, in particular, that new problems are going to arise all of the time. The interesting characteristic of international law today is that it develops awfully quickly.

In the area of trade, there will also be rapid changes. A possible solution might involve the formation of a joint commission. One of the commission's functions might be to watch over new developments that are necessary. Another function might be to suggest to the two governments that a group be established to prepare some additional regulations that would be added to the treaty. Perhaps those regulations could then be put into effect by some easier method.

We have seen such a process, for instance, in international aviation. In Chicago in 1944, a basic Convention on International Civil Aviation was concluded. It had some general principles on quite a number of areas. They were rather general, but then a provision was added that the Council of ICAO, with expert advice, should prepare additional regulations and put them in as annexes to the convention; this process has been going on all of the time. I happen to be on the receiving line of new regulations, because I was interested at one time and I wrote some comments about this procedure; so they are sending them to me and practically every week comes a package of something new being done. Then I inquired as to what the governments are doing about it. The reply was that they send the new regulations to all the governments. In the United States, a notification is put in the Federal Register. It says that unless people object, the following regulations are going to go into effect in six months, and if people object, hearings will be held to determine whether or not to put those regulations into effect.

Very seldom does anybody object, though there were some objections about the structure of new airplanes, as a few companies didn't like some new restrictions. However, normally people don't object. Those regulations go into effect on a specified day and that is the end of it. Nobody has to worry about it. Congress, in fact, doesn't want to worry about all those complicated technical regulations and I think the same is going to happen here.

In general, as far as the trade treaty power is concerned, Congress has already delegated quite a lot of power to the President. I think once they agree to the trade treaty, they will be willing to say that, with the President's approval, the Department of Commerce or the International Trade Commission would be entitled to put additional regulations into force. If the additional regulations have been agreed to with Canada by this special procedure, they would come into effect as supplements to the treaty; so if people decide that they need additional rules concerning services, there would be a new annex on services. If we should need additional rules on investment, there might be a new annex on investment. This process would be going on until this treaty would mushroom, bringing into being not a small trade treaty, but a book full of regulations. I think that is going to happen because that is the nature of the beast.

You cannot simply solidify the law at particular point of time and say that these rules are going to last forever or at least for twenty years. It's not going to last for even three years.

QUESTION, Mr. Stone: The need for an International Trade Commission of some kind was proposed by Donald Macdonald three or four years ago and by Senator Mitchell of Maine before any current discussion of a free trade agreement took place. One might conceive of the need for a trade commission of some kind, even if the present negotiations by some accident were to not materialize.

On the other hand, one could conceive of a joint trade commission of some kind that would be assigned specific tasks or responsibilities by reason of the trade agreement, but would have a life of its own; that is, it might be established by the trade agreement, but would have a life that was, in fact, separate from the agreement itself.

Professor Sohn, would you comment on the need of a commission of this kind even in the absence of the kind of bilateral agreement about which we are talking?

ANSWER, Professor Sohn: I agree with the suggestion made by Professor Stone that an international trade commission between the two countries is necessary even if there is no agreement. The necessity is due to the tremendous volume of trade and the kind of problems that arise everyday right now.

No agreement exists right now, but problems do and we need something to deal with them. I think perhaps the time has arrived now that within the next few months we can do both things. It would be best; but as Professor Stone has pointed out, if by some reason those things don't go through, it doesn't mean that we should do nothing. As suggested, we can do certainly something. At least it would make our lives a little easier.