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QUESTION AND COMMENTS BY MEMBERS OF THE INSTITUTE

DR. ROGELIO RAMIREZ DE LA O AND DR. GUSTAVO VEGA CANOVAS

ULICE PAYNE: I'm a partner in the law firm of Reinhart, Boerner, Van Deuren, Norris & Riselback, SC based in Milwaukee, Wisconsin. Regarding Chapter 11 of NAFTA, which basically gives a private right of action to certain aggrieved parties, what is the standard and scope of review of those arbitration tribunal awards? In other words, it seems that they refer to the ability to appeal these decisions, but there doesn't seem to be any clear procedure for doing that. What was the intent of the negotiators with regard to Chapter 11 on this matter? Is there somewhere you could refer me to, specifically, what do you do if you chose an arbitration tribunal, and you don't like the award you are given? Chapter 11 seems to indicate that there's a right to appeal that but there's really not much direction.

VEGA CANOVAS: Well, I agree with you. I think part of the discussion about what's going on in Chapter 11 is that panels don't seem to have followed sort of a standard in review. There is not a set standard of review like it happened in Chapter 19. In Chapter 19 you have it set in the agreement, clearly stated. In Chapter 20, it is also stated in some sort of way. You negotiate the kind of rules of procedure you want to follow in Chapter 11 as far as I understand. I understand that there have been problems in terms of the kind of decisions that certain panels have adopted. Apparently, you can appeal on the basis of international law if you can prove that the panel exceeded its powers or its standard. What happened is they went to a Canadian tribunal, Vancouver, and Vancouver reconsidered the award of the panel and modified it in certain areas but confirmed the decision of the panel in others. Is this what the negotiators had in mind? I have asked that question to some people who participated in negotiations, and the answer I've been given is that they never expected that there would be awards like the awards that have been taking place so far. They believe that probably they were not very clear. And as far as I understand, Canada is asking for some kind of modification or clarification of what does "equivalent to expropriation" mean, because that has created a lot of problems in some of the awards.

The Canadians are proposing that NAFTA allows them to add some clauses that eliminate the possibility that policies that are adopted by the governments with their social goal or environmental goal cannot be considered equivalent to expropriation. I can give you the references later if you want. But just to summarize, it's not clear-cut exactly what is the standard of review. The Zona, along with other cases have created very clear standard. The panel was very clearly specified how we construe what is expropriation, equivalent to expropriation, what kind of rights could be protected, etc. In that case the standards were very clearly stated, but as far as I understand, Chapter 11 as well as Chapter 19 cannot establish precedence. We would need to find ways in which panels would be allowed to set standards, to set precedence. But that was resisted as far as I understand. In Chapter 19, an award is issued and it solves the dispute, but it cannot create a precedence for another panel. It does in a way, but you cannot use it, it is not binding. I mean, you can have an entirely different decision and that is not the idea. If you want to have jurisprudence, you have to have precedence. I think that's an area where we would need some kind of strengthening of the institutions of NAFTA. And that is what

Canadians would like to do in Chapter 11, and I would guess that with the decision of the Guadalcazar case, Mexico might want revisit its position, because they were resisting the Canadian position.

JIMMIE REYNA: I wanted to point out, and this goes back to this issue of renegotiating of NAFTA, that the big problem with Chapter 11 is what constitutes a taking. The views that were established in the negotiations were not consistent with international law as to what constitutes an illegal taking. The parties recently got back together again and many would say that they renegotiated what a taking is under Chapter 11. They came out with a decision. It's only been out about two-and-a-half, three weeks, but they have a decision now and what they say is that we, the NAFTA parties, have clarified what a taking is for purposes of Chapter 11. Now the belief is that the definition is so narrow that it is going to be exceedingly difficult to obtain an award under Chapter 11. So you may want to take a look at that recent clarification/renegotiation of a provision of NAFTA.

MARCO HERNANDEZ. I'm an associate for Strasburger & Price S.C., in Mexico City. As we say in Mexico, I think regarding this big difference between liberalization and integration, I would say, "*Pusieron el dedo in la laga*". You have put the thumb in the wound. I have been finding out that what is happening between Mexico, U.S., and Canada and Latin America is that if we let time lapse, we are going to be suffering from this trade effluxion affect. That is, trade effluxion made, as integration and liberalization happens, the flows of trade move in such a way that basically changes occur such that now we are looking at China now as a big challenge. So I believe that if we take more and more time for this liberalization effect not to come into integration between us, bankruptcy trade effluxion, the trade effluxion affect will actually eat us up and we'll find that the European Union is more and more advanced, we will find that the China Affect and the Tiger Affect will be very much advanced. So I believe that we have to look at this, we have to look at the institutions that are responsible for fostering or helping us with that change, and the World Trade Organization, the UN. I think that the affect of the trade effluxion is that if we do not review it, if we do not study how far it is going to get in the next 20 to 40 years that you are actually proposing a change, what will happen? That is my question.

DE LA O. I am skeptical of the state intervening in trade flow, so my answer is going to be biased. And I think that Mexico has enjoyed an undue monopoly on NAFTA for quite a lofty period of time. Not only that, but it has been extremely lucky in having NAFTA inaugurated right at the time when the U.S. was going to go through one of the most extraordinary periods of growth, not necessarily to be replicated. So for all of that, what we have created in Mexico with this competitive advantage, artificially and institutionalized advantage, is a very large export sector which, as you have pointed out several times, it makes Mexico the second partner to the U.S., surpassing other partners that were much larger partners than Mexico was when NAFTA started. So I guess when artificial situations come to an end or approach an end, things tend to go back to their place, and I cannot regard this monopoly of Mexico to be permanent.

The Canadian situation is a different case, but admittedly the U.S. president has sold fast-track agreement to negotiate and widen NAFTA, and then provide NAFTA treatment to other countries, but I think it has started now to diversify and Central American countries now have preferences that only Mexico had before. China has

too large a size, and it is also too large a priority for the U.S. That cannot just be put on the back seat. So therefore, I would rather think this way. If we have in Mexico the right economic conditions as we did in the early '90s, and then, as we did during the adjustment to the peso crisis in 1994, we have a flexible exchange rate, and if we receive the inflows of foreign and direct investment, then we're going to be playing with or without the states taking specific measures. And I think what Mexico has to do, and what the U.S. has to think about is reinforcing NAFTA on those sectors that did not work. So let me just say something about what Gustavo mentioned at the end of his presentation. I am less sceptical that NAFTA can be negotiated or reopened. I do not think it is a matter of reopening NAFTA and then opening a can of worms. But I think the excuses are perfect because the U.S. has not fulfilled its obligations in the trucking sector in the U.S., so Mexico should say, "do not worry, this is just fine, we understand the political dimension of trade, we're not going to push you to the wall. Let us just add to this table this sector and this other sector, and we are going to sweeten it. We are opening banking and gas, and then we take it up from there." But I think it's very difficult when governments see themselves as the promoters of something, because then the whole market mechanism may be lost in the process.

