

A POLICY LEADERSHIP COMMISSION FOR NAFTA?

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Following are some comments on the proposal by Knutson and Loyns for a “Policy Leadership Commission” (PLC). Rethinking the role and/or mandate of the Secretariat as described early in this publication is one thing, and the three governments may want to look into this. Intervening to change the way trade disputes are handled is something else.

The first difficulty is that trade remedy laws (TRL) are domestic laws that differ from one country to the next. During each dispute, the pane’s mandate is to look at whether or not the law of the country whose final determination is under review, has been applied properly *and nothing else*; it cannot judge *de novo*. Then, if a change is introduced, for example that the PLC could make “dispute settlement recommendations,” the basic sovereignty of TRLs would be compromised, not to mention the basic integrity of the dispute settlement process agreed upon in the NAFTA. So, each country would have to accept the intervention of the PLC *prior* to the proverbial long arm of the law. To me, this looks like a non-starter to any discussion among the three governments.

There is a second difficulty. The PLC would have to have its own legal department to handle such things as:

- disclosure of confidential information has to be handled in a secure fashion when mediators attached to the PLC, instead of lawyers, are reviewing the issues raised during a trade dispute;
- antitrust issues would have to be dealt with. At the end of the day, a mediation requires finding a compromise between two disputing parties *in the same industry*. It would take no time at all for antitrust authorities to raise serious questions about the process and its outcome.

The issue is that legal content would have to be involved in the PLC even though that is what is sought to be avoided. The legal department within the PLC would also be called upon to react if, as Knutson and Loynes wrote, “there should be safeguards and penalties to protect against groundless interest group actions”. The question here is, other than lawyers (representing at least two sides), who could arbitrate whether a complaint is “groundless” or not?