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Discussion Following the Remarks of Mr. Loy and Mr. Nymark

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF MR. LOY AND MR. NYMARK

QUESTION, MR. KING: Thank you for your optimism, Alan, and also observing my self-imposed time limit. I think the reason I stick to these time limits is I want to get in some discussion.

One question, Frank. When you want to improve the environment, one of the questions you always get is about losing jobs. In other words, thousands of jobs are going to be lost if you protect the environment. And you felt concern over the figures that have been advanced. Is there anyway of getting a better estimate, or is this just pure armchair speculation? In other words, we are talking jobs at a time when jobs are at a premium. As a person who is sympathetic with people who do not have jobs, I am concerned. I am wondering if there is any way we can get more accurate estimates of the environmental consequences of moving ahead on these issues?

ANSWER, MR. LOY: The trouble with the figures is several-fold. One of them is that they tend to focus on a certain segments that probably may be hurt. They then exaggerate those numbers, but leaving that aside, they focus on one particular segment. They do not focus on the segments that will be helped, and they do not focus on the costs, jobs and lives that are saved by action.

Let me just say that in almost all of those cases, there are always a variety of figures bantered about. It is the same thing that you have when there is a trade dispute. In the United States, the steel industry will try to show you that there are X million jobs and X hundred thousand jobs at stake. There is no reference to the benefit of a trade regime that provides other jobs for those displaced workers. The answer, therefore, is not so much in the figures, I think, but in the careful reading of those figures and recognizing that there are just so many of them.

QUESTION, MR. KING: Do you want to comment on that, Alan?

ANSWER, MR. NYMARK: We are close to paralyzed at the moment on the issue of climate change over the numbers.

COMMENT, MR. KING: Right. Maybe that was an inappropriate question.

ANSWER, MR. NYMARK: The numbers are generated out of pretty classical economic models. I think the environmental movement has failed miserably to show leadership in quantifying the value of natural capital. Until we quantify the value of natural capital, it will always be a footnote to economic models; so you are always going to get the cost side of these larger issues being put up front and the benefits, or avoided costs, being almost totally ignored.

QUESTION, MR. CHARNOVITZ: Thank you. I thought those were two excellent presentations. I have a brief question for each speaker. Mister Loy, you talk about the secrecy of NAFTA Chapter 11 arbitrations. It seems also there is a lot of secrecy in NAFTA Chapter 20 or Chapter 19 arbitrations as well as in the WTO panels. I am wondering what your prescription might be for all these international processes that try to supervise national compliance. For Minister Nymark, I am wondering whether you feel chilled by NAFTA Chapter 11; and whether the Environment Ministers of the three countries have talked about that, and whether they think there is a problem that needs some attention.

ANSWER, MR. LOY: Well, I think the thing about Chapter 20 is that states can waive their own rules.¹ I think that Canada and the United States have been especially good, in various forums, including the WTO forum, in saying that we want the most open possible processes and that we want documents distributed and we want *amicus curiae* briefs and the like.

The problems with Chapter 11 are that, one, the parties can refuse to waive their own rules, and, two, the tribunals do not have the same support as they would in Chapter 20. And, therefore, my thought is that the interpretation that was issued in July of last year, which sought to open those processes, should minimize the exceptions they have, which basically says that if the tribunal says you cannot do it, you *cannot* do it. I think you have to find a way that is more open to make it possible for tribunals to open the processes.

QUESTION, MR. KING: Alan, do you have a comment?

ANSWER, MR. NYMARK: No.

COMMENT, MR. GELFAND: Thank you, Professor. Excuse me if I do not share your optimism about their two speeches. Minister Nymark on the one hand points out that Canadian industry is going to have a hard time being environmentally protective with President Bush's very weak emissions goals. Yet Secretary Loy has indicated that we are entering in a new *Lochner* era with respect to these secret arbitral tribunals.

And, as far as the optimism is concerned, more negotiations, all well and good – but opponents are being locked out. They are moving a lot of these conferences from places like Seattle and Quebec, where opponents can

¹ See, e.g., North American Free Trade Agreement, Can.-U.S.-Mex., Dec. 17, 1992, ch. 20, art. 2013, 32 I.L.M. 693, 696:

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to its Section of the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties.

The parties may also agree to use differing rules of procedure in the proceedings. See *id.*, art. 2012, §2, 32 I.L.M. at 696.

gather, to places like Dubai, where they cannot. And I am not sure where the optimism is.

COMMENT, MR. KING: We will note that comment. Marty works for Congressman Dennis Kucinich. Mister Page?

QUESTION, MR. PAGE: Thank you very much, Mister Chairman. I would like to come back to this question of costs because, needless to say, I might have a few new ones that are slightly different than those of my honored colleague, the Deputy Minister of Environment for Canada. I think part of the difficulty in estimating the costs within Canada, Alan (and I would be interested in your comments on this), is that in the absence of any rules or any implementation plan, some of those cost estimates (what I would call worst case cost estimates) are quite legitimate when it is very difficult to determine how Canada will implement the Kyoto protocol, what the implementation will be.

The second point I would make just in connection with this is when you begin to look at the very nature of the Canadian economy, it makes it probably the most vulnerable to Kyoto of all the industrial nations that are proposing to ratify this in the immediate future. It is very much in the same nature as Australia. Some of the comments that have come from the speakers suggest that those costs are exaggerated and are in the context that there is no of effective means of estimating those costs.

COMMENT, MR. KING: That is the same point I was trying to make. Michael Robinson will be our last questioner.

COMMENT, MR. ROBINSON: Along the lines for the cost problems for Canada, this is sort of a Swiftian “modest proposal” for Alan; and I would like his comments. What we do is we nationalize Ballard Power, which has all the fuel cell technology and patents, all of the leading ones in the world.² And that is not a problem, of course, because in Canada, Parliament is supreme, and the Charter does not protect property rights,³ so we can take it and give them nothing. We say to them, okay, we will pay you out over time.

The second step is that we pour billions into Ballard Power so they can create huge fuel cells that create electric power, as well as those little ones that are going into buses and cars and then we license the U.S. electricity industry and maybe other foreigners, too, to use these wonderful cells to create electricity. With all the extra money we are going to make from doing that we can make equalization payments to Alberta because we will have

² See *About Ballard*, at <http://www.ballard.com/tC.asp?pgid=5&dbid=0> (last visited June 8, 2002).

³ See Canada Act, 1982, ch. 11, annex B (Canadian Charter of Rights and Freedoms) (Gr. Brit.).

destroyed their oil and gas industry by doing this, so we give them their money back because we can get repaid by the Americans.

QUESTION, MR. KING: Do you have any comments on that?

ANSWER, MR. NYMARK: I am going to come back to Bob, because I think he thought maybe his statement was a question, so maybe I will try to answer that. Climate change is a very large issue; therefore, no one should underestimate the importance of the economic implications of the issue. But, as Frank said on science, there are few issues of this magnitude where I have seen such a convergence of professional opinion on the science side, and few large issues of this magnitude where I have seen such a convergence on the economic side. The range of potential costs here for climate change is far narrower than the range of potential costs and benefits as was debated in the Canada-U.S. Free Trade Agreement. The range is still unacceptably large from the point of individual businesses; and whether it turns out to be acceptable or not will depend on whether we can design a plan to remove the peaks of vulnerability on a regional and sector-by-sector basis in Canada; and that is our objective.

QUESTION, MR. KING: Do you have any comment on that, Frank?

ANSWER, MR. LOY: Just God Bless.

COMMENT, MR. KING: I think we got off to a wonderful start. We will reconvene in five minutes.