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## Discussion Following the Remarks of Dr. Hickey and Mr. Luff

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF DR. HICKEY  
AND MR. LUFF

COMMENT MR. MCILROY: It is question and answer time. I would just ask that you make sure you have a microphone, and that you identify yourself so we have an accurate transcript; that would be much appreciated. I notice there are more hands up than there are microphones.

QUESTION, MS. ODENBACH-SUTTON: I have a question for Mr. Hickey. I am wondering about states' rights in terms of having any rights beyond their boundaries, and I am thinking in particular of the situation in Alaska, where I believe the state has specifically passed a law saying the pipeline route must go through the State of Alaska as opposed to across the northern border.<sup>1</sup> I am just wondering what your views are with respect to the rights of a state to tell you to go beyond its own boundary and say how its resources will be transported?

ANSWER, DR. HICKEY: I think that question raises a very serious international law question. Of course, I suppose the position of the U.S. would be that since we have sovereignty over our production of energy, the concept would not have much meaning without the ability to deliver it to where it can be used. An energy source produced that is unusable because it cannot get to market is no energy resource at all.

However, as soon as it enters into transboundary areas and has an impact on another state, that other state has a right to raise the question. Now, under the traditional model, of course, if that transportation does not cause actual injury, then the basis for Canada to complain would have been undercut; however, to the extent that the precautionary principle applies to potential injury is relevant, the Canadian claim to oppose that sort of transportation would be enhanced.

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<sup>1</sup> At the time of the Conference, the U.S. Senate had not approved such a bill. In the time since the Conference, the Alaska Natural Gas Pipeline Act of 2002, H.R. 4, 107th Cong. §§ 701-715 (2002) was passed by the Senate. Note § 704(d) of the bill:

No license, permit, lease, right-of-way, authorization or other approval required under Federal law for the construction of any pipeline to transport natural gas from lands within the Prudhoe Bay oil and gas lease area may be granted for any pipeline that follows a route that traverses—

- (1) the submerged lands . . . beneath, or the adjacent shoreline of, the Beaufort Sea; and
- (2) enters Canada at any point north of 68 degrees North latitude. [emphasis added]

Canada is not at all pleased with this proposition. See Michael Kergin, *Trust the Market (and Canada)*, WALL ST. J., May 15, 2002, at A18.

QUESTION, MR. CHARNOVITZ: I have a question for Professor Hickey. You talked about the traditional model of permanent sovereignty over natural resources. We also had a traditional model of sovereignty over humans, but that has been changed to a large extent by human rights treaties between countries. There are many treaties on the environment that protect diversity, endangered species, or migratory species, and those treaties reduce state sovereignty for some of those resources. We have treaties on transported pollution, but not much in the way of any enforced obligations to the world community or on the development of one's own energy sources, nor any obligations not to waste them. I wonder, do you think that international law might develop over the next 25 years, in the interest of the world community, to pull back some of that permanent sovereignty by way of treaties?

ANSWER, DR. HICKEY: Yes, I do. I think much of the push will be due to environmental groups and human rights NGOs, who have developed a very effective way to move from soft-law principles and articulations of saving the planet to hard law. So, I would expect that if people felt it was necessary to address this traditional model of permanent sovereignty in a way to limit it, either for human rights or environmental purposes, there is a way to do it.

First, it would be necessary to get some sort of principle articulated, and I suppose it would be a declaration that the permanent sovereignty over natural resources cannot be exercised in a way that causes environmental harm to the community or harms human rights held by all peoples. The next stage in law-making is that you would wait for people to react to that proclamation. Then, you would convince a state to agree to non-binding declarations that have no legal effect; after this point, the principle would enter into the lexicon, much in the manner as did the "precautionary principle." If the principle is then reiterated in treaties that *will* have binding effect but the principle is vague enough that states do not feel bound by it, then the debate will shift not to the existence of the that principle but as to what it means; through this process, the principle hardens. If enough treaties articulate the principle, and enough states are parties to that treaty, the next step for international law will be to then answer the question of whether those treaties have ripened into a customary international law that would be binding on all nations, regardless as to whether or not they are parties to the treaty. With the notable exception of states that are persistent objectors to custom, you would then have a newly-created customary international law principle that would not be dependent on treaties for its international law effect.

This is a pathway as to how those ideas that you expressed might become law in the next 20-25 years; it is definitely possible.

QUESTION, MR. ROBBINS: I have two questions, one for Mr. Hickey and a different question for Mr. Luff. Mr. Hickey, you brought up acid rain

as an example. I would like you to expand on that more because it seems to me that with the most current knowledge, there is much stronger evidence of the sources and transport of acid rain and the damage it causes. If the United States refuses to be bound where the data is so good, what hope is there?

For Mr. Luff: first, I would like to say it is absolutely wonderful to hear the many things that Canadian oil producers are doing to reduce their impact on the environment. However, you mentioned the concept of an “ecological footprint,” that being a concept that came from Canadians. My question is: should you not also start considering what your footprint is on climate change? In other words, the oil you use in Canada and export to the United States, when it is used, has a very deleterious impact. I understand what you are saying about transitional fuel sources. For instance, BP is heavily investing in solar power as it looks ahead to future markets. Is not it something that *all* oil producers should be thinking about at this time?

ANSWER, DR. HICKEY: As to your question about the U.S.-Canada acid rain, I may have to ask for some help from the audience, as I am not really a U.S.-Canada specialist. I am aware, however, that the initial agreement between the U.S. and Canada on acid rain during the Reagan administration was to do more study because the U.S. believed that Canada had not shown by clear and convincing evidence that extraterritorial pollution harm had been caused by the coal-burning Midwest power plants.<sup>2</sup> I believe that this issue has been resolved and that harder agreements are in place, but if someone else can help out with that, I would greatly appreciate it. As the science has hardened, I think the U.S. acceptance of the obligation is greater, but I do not know about the present status of the agreement obligations between the U.S. and Canada on acid rain. I am sorry that I do not.

QUESTION, MR. MCILROY: Can anybody help out on that before we proceed to David’s question.

COMMENT, MR. LOWE: There is a Canada-U.S. Clean Air Agreement;<sup>3</sup> it tends to get referred to as the Acid Rain Accord. It spells out general obligations or agreements to do good things together and has more specific obligations related to specific emissions. There is an annex related to acid gas emissions,<sup>4</sup> and an ozone annex was later added was added as recently as last year.<sup>5</sup> So, this issue has moved well beyond the study and onto the treaty stage.

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<sup>2</sup> See *The \$94 Billion Report*, WALL ST. J., Sept. 23, 1987, available at 1987 WL-WSJ 303335.

<sup>3</sup> That is, the Agreement on Air Quality, Mar. 13, 1991, U.S.-Can., 30 I.L.M. 676 [hereinafter AAQ].

<sup>4</sup> See AAQ, *supra* note 3, 30 I.L.M. at 685.

<sup>5</sup> Protocol Amending the Agreement on Air Quality, Dec. 7, 2000, U.S.-Can., available at [http://www.ec.gc.ca/air/pdfs/can\\_usa\\_e.pdf](http://www.ec.gc.ca/air/pdfs/can_usa_e.pdf).

COMMENT, MR. MCILROY: Thank you very much. We will knock off the second question and we will proceed.

ANSWER, MR. LUFF: I think the point is very well taken that, as an industry, we do need to be demonstrating performance when it comes to the use of the products and the resources that we generate for the consumers. We are attempting to do that by leading by example, by demonstrating and showing the public how we can produce oil and natural gas as efficiently as possible using the latest technologies and reducing our emissions through capital stock turnover projects and so on.

From a total emissions perspective: when it comes to greenhouse gas emissions, the largest percentage of emissions is on the consumption end. The producers generate only about 18 to 19 percent of the CO<sub>2</sub> emissions associated with the resource.

We can demonstrate leadership in what we are doing. Individual companies are moving from not only being explorers of oil and gas but also to being true energy companies, moving into and investing in renewable energy; others, unfortunately, are not. There is a broad spectrum within the industry and the companies that are members of CAPP, from those who are true energy companies in the broadest sense and are involved in the generation of electricity as well as the production of oil and gas, and those who only produce one type of fuel. We have been working with the provincial and federal governments to help Canadians and North Americans understand the issues that surround climate change. What are we trying to accomplish? How can we get there? Are the targets that have been set in front of us realistic? Can we achieve those targets? If we move toward those targets, what are the implications? Before we can say yes, what do we need to accomplish? We feel that we need to have all of the information on the table before we act.

COMMENT, MR. MCILROY: Do we have any questions?

QUESTION, MR. QUINN: I heard yesterday about Canada being the "Saudi Arabia of the Western world." Eventually, you are going to have fossil fuel depletion in Canada. Will it be in this century? I understand that there have been some estimates that natural gas reserves will peak about 2020, and then they will decline toward exhaustion. When will you peak in fossil fuel production or in natural gas reserves? I heard that Alberta was going to peak about 2003, and that seems to be close.

Second, regarding the concept of oil sands: is this not energy that is harder to get, and thus the energy return on energy invested is lower? When will it not be worthwhile to go after it because you will have to use more energy than you will get?

Third, with the inevitable decline in fossil fuels, will there be a bidding war between countries that want it, driving up prices and causing resource wars?

ANSWER, MR. LUFF: I cannot give you a specific answer on the peaks as it relates to oil and natural gas. For many years, people have tried to predict when the peak production for natural gas and oil might be in Canada. There are people working very diligently in the western basin who would say that once they unlock coal-bed methane, the peak is a long way out in the future.

The matter of substitution from one resource of choice to meet our energy requirements to another will continue to evolve as it has been over the past hundred years. Back then, the resources of choice to meet North America's energy requirements were certainly not oil and natural gas, nor will they be 100 years from now, either. So it is a matter of what those technologies will be and from where they will come. As it relates to the peaks, it is not so much about where the "peak" is, but rather about the future of North America's energy requirements. In the future, we believe that our energy requirements will be higher than what they are today. The real question is: what will be the resources or the technologies that we will be using to meet those requirements? We believe that, as a society, we will find technologies that will be environmentally responsible to meet our needs.

When it comes to the oil sands, yes, they are more energy-intensive to produce, no question about that. However, there is a balance between the cost of producing the resource and the ability of the market to pay for what it costs to produce it, so there is an equilibrium in there that will be reached at some point. Our operators are doing everything possible to use the latest technologies to reduce their emissions and to be as efficient as possible in producing fuel from oil sands. There are many fuels still left in the ground, but to produce them will take a few key technological breakthroughs. I apologize; I forgot the third question.

QUESTION, MR. QUINN: Will there be bidding wars between countries to obtain the dwindling supplies of fossil fuels, or perhaps even resource wars, as some people say is already happening in the Middle East and in the Caspian Sea area?<sup>6</sup>

ANSWER, MR. LUFF: I really cannot say. When I look at it from a personal perspective, who really knows what resources we will need to generate our future energy demands? In that light, I think bidding wars over the last molecule of natural gas does not seem that plausible to me.

COMMENT, DR. HICKEY: I would like to offer a comment. If you look at the predictions that have been made over the last few decades concerning the availability and finiteness of fossil fuel supplies, they have almost all been 100 percent wrong. If the price is high enough, we will be awash in oil and gas; if the price is low enough, we will have a shortage.

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<sup>6</sup> See, e.g., Josh Martin, *Pipeline to Profits: Petroleum Companies Developing Oil Fields in the Caspian Sea Region*, MGMT. REV., Apr. 1, 1999, available at 1999 WL 19829623.

I just saw a recent study that said that oil wells that were thought to be long depleted are replenishing themselves from deep-pocket oil resources that are percolating up through the fault lines and filling up capped oil wells. So, I think the price of oil will affect whether we will ever run out. Of course, there are economists who say that we will never run out because eventually the price will be so high that people will stop using it and find a substitute.<sup>7</sup>

COMMENT, MR. LUFF: When the price gets high enough, we will shift to other technologies and other resources to meet our energy requirements.

QUESTION, MR. CLELAND: I have a question for David Luff. David, at the end of your presentation, you talked about how CAPP and the oil industry is moving toward environmental certification. I am just wondering if you could expand a bit on that. It is something the electricity industry in Canada is in fact working on with our counterparts in the U.S. We see that as the right way to go, but one of the concerns about certification processes, at least to this point, is that the criterion is pretty simple, not to say *simplistic*. They do not take into account either the full-cycle effects or, for that matter, the full environmental effects with which you are dealing, nor do they necessarily account for how that looks relative to the levels of production and the levels of demand that you have to meet. It is a complicated story, not one that is easy to grasp, but we think we need to develop a less simplistic view. I am just wondering what your thoughts are from the oil and gas perspective.

ANSWER, MR. LUFF: I agree with you completely, Mike. The issue is very complex. We see it as being something that is out on the horizon, that the consumers of the resource are demanding increased environmental performance, ultimately moving toward third-party, independent verification of that performance.

The example that we talk about in Canada is Home Depot, a company that is demanding that wood suppliers not log and harvest wood from old-growth forests. When you go into your local wood store, every two by four in there has a bar code, and you can actually follow that two by four right back to the forest and know exactly how it was harvested and under what conditions.<sup>8</sup> It is the consumer that is driving that process.

As an industry, we have not yet focused our attention on the perspective of the consumer by asking such questions as: do we have clean gas? Do we have clean oil? Is the oil or gas coming from an area that is sustainably harvested and managed, and how do we know that? It is very, very complex. Even for the timber industry, the concept of certification is in its infancy. There is no agreement on the process of certification and what factors need to

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<sup>7</sup> See Curtis Rist, *Why We'll Never Run Out of Oil*, DISCOVER, June 1999, at 80.

<sup>8</sup> See Jim Carlton, *Home Builders Centex and Kaufman Agree Not to Buy Endangered Wood*, WALL ST. J., Mar. 31, 2000, at A4, available at 2000 WL-WSJ 3023828.

be considered in that process. It is an issue that I think would bode well for in-depth conversation with the right people, similar to this, around a table for a few days to talk about how and what the implications of certification will be.

COMMENT, MR. MCILROY: Thanks. We now have a question from Professor King.

QUESTION, MR. KING: Mr. Luff, I applaud your very optimistic goals for Alberta. What I am concerned about is: how do you accomplish them? Will this be done through voluntary measures or is there some element of compulsion to get oil and gas producers to do what you want? What happens if somebody does not want to do what you suggest? In other words, how far does voluntary pressure work? Is there some element of compulsion?

ANSWER, MR. LUFF: There is a balance. We are promoting the voluntary approaches, and we think we have a good track record to demonstrate that voluntary initiatives can be successful and can improve our industry's collective performance. What we are asking government policy makers and regulatory decision-makers to do is to tell us what the goal is. Tell us what you want to accomplish, and let us figure out how to get there. Do not prescribe to us how to get to the goal, because that will limit innovation and the ability of people to bring their minds to the question and come up with innovative solutions and technologies.

We are doing that within CAPP. A board consisting of 30 representatives of all of the companies in our association governs us. Our board is now moving toward making our stewardship initiative mandatory as part of a requirement for belonging to CAPP. At this point, however, we are an inclusive rather than an exclusive organization.

COMMENT, MR. MCILROY: Thank you. I know we had a question over on that side of the room.

QUESTION, AUDIENCE PARTICIPANT: Is it possible to see the slide of pipeline again?

ANSWER, MR. LUFF: I am sure it is. How do get that thing back up there?

QUESTION, AUDIENCE PARTICIPANT: Because my question is tied into that.

REPLY, MR. LUFF: Which one do you want, natural gas?

QUESTION, AUDIENCE PARTICIPANT: Yeah, the natural gas pipeline is the one, because the question here deals with the exercise of sovereignty over transmission and free-market distortions.

In preparation for this discussion, I saved a series of newspaper articles. One showed that, since the early part of 2001, the price of natural gas had soared five times, and that New England was experiencing a shortage of power based on unavailability of natural gas due to lack of pipelines. Despite the increase in price, *The Wall Street Journal* reported that natural



gas output in the United States had fallen, and natural gas producers complained that they wanted to be deregulated. I was wondering, in the context of this sovereignty question and the market and pipeline distribution issues that you outlined there, if either of you had any insight into how and why that happened.

ANSWER, MR. LUFF: I am looking over at my colleague, David Manning, from KeySpan; he is probably in a better position than I am to answer that question. I am certainly not in the market part of our business, so I guess, David I would look to you, if you have got an answer to that.

COMMENT, MR. MCILROY: You had a question David, so we will put you in the hot seat now.

ANSWER, MR. MANNING: I think this is a very good question because a lot of the current policy thinking around natural gas is focused on the early part of last year.

What happened was there was an unusual heat wave in the United States the previous summer, from California through to Arkansas, so that the natural gas, which normally went into storage over the summer, was going into generating power for air conditioners. Thus, the storage in the West was down 25 percent of where it should have been come September. The pipeline constraint caused a severe price impact on our consumers, largely in those areas where they are, so to speak, at the wrong end of the pipeline.

As it so happened, September and October were among the coldest months in the history of weather records, so we were drawing from storage in September, where we normally would have been filling storage right into October. We have about 103 billion cubic feet of natural gas in storage, with about 20 percent is on the supply side down to Louisiana, and the remainder is all east of the Mississippi. Storage became critical, so you went into heating season with very little in storage because of the previous air conditioning load and very low prices, and these low prices slowed production.

The reality is that the U.S. domestic gas industry has not been replacing its reserves; it has come up short. The only great hope is in the Gulf region. So that was an anomaly, but the drawback was that the wholesale price of gas, which had averaged around US\$2-\$2.50, shot up to \$10 for a period of time in January and February because the storage was literally running out and the demand response just could not catch up. As a result, there are major studies completed in New York and other states that determined whether or not there is sufficient natural gas for the new power projects. What they are now saying is that it will be a tough sell to switch to gas electricity generation if there is no gas. The job of those of us in the industry is that we have to say it is inevitable that you will have a shortage of gas if you have the alignment of all of those unfortunate events. That is my response, but I would throw that back to the panel.

QUESTION, MR. MCILROY: Any quick comments before we wrap up this session?

COMMENT, DR. HICKEY: My only comment is that I live on Long Island and I was encouraged by KeySpan to switch from fuel oil to natural gas to provide heat. I switched just before the spike and had the pleasure of investing \$5,000 in a new system and then several \$100+ a month for my utility bills than I did in the past, but all is well now, so thank you very much.

COMMENT, MR. MCILROY: I think it is fair to say it has been a stimulating discussion. I was fascinated by Professor Hickey's discussion of how we move from soft law to hard law. We have a lot of lawyers in this room and unless it is hard law, we do not think it is real. I found his explanation of how we might move in that direction very interesting. I also think David's explanation of how, within his association, they are moving from a voluntary codes of conduct into a harder regime was also very, very interesting. I would like to thank both speakers and I hope you will join me in thanking them.

