Closing Remarks and Discussion

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CLOSING REMARKS AND DISCUSSION

Henry T. King, Jr.

This is the time when we talk about the prospects for next year in terms of what kind of program we might have. We look for generic titles, titles that are all-encompassing, and not too narrow. Almost ten years ago, we did the "Law and Economics of Dispute Resolution in the Canada/U.S. Context."¹

We have had NAFTA since January 1, 1994, and we had a chance to assess NAFTA in general two years ago.² Now, it is worth assessing in terms of the workings of the dispute resolution structure that is in place.

There are different categories of dispute resolution. There is private-versus-private, private-versus-public, and public-versus-public. We have made a lot more progress on the private-versus-private cross-border dispute resolution than we have in some of the other areas, but Chapter 11 of NAFTA is potentially quite an explosive topic and one that I think requires some close attention.

The other thing that is of interest is the fact that, in terms of dispute resolution, you can focus on certain categories of dispute resolution, for instance technology disputes, consumer activism disputes, or, obviously, trade disputes. There are many types of activities that can be put under that broad umbrella, but we are always open to suggestions.

COMMENT, MR. WOODS: First of all, Professor King, there is a problem you might want to look into. You are wasting all that time between about 10:00 in the evening and about 6:00 or 7:00 in the morning where you could have us at work, but you let us go off and just sleep.

COMMENT, PROFESSOR KING: Well, we will try to work you harder next time. It was pretty hard to get up today.

COMMENT, MR. WOODS: I think that the dispute resolution topic is a good idea. I would like to suggest that it could be slightly expanded. Last night we had a good discussion down in the pub about things like alternate dispute resolution, which is a really, really hot topic and could draw a lot of people, besides the fact that it is very important. I would back up a little bit and look at the fact that, in November, we are going to be kicking off the Millennium Round of GATT negotiations. We have had discussions during this session, and even going back to last year, about things that involve en-

gaging the private sector and the new ways of negotiating trade agreements. At least in my mind, I question the old approach of using the round as a device and maybe turning to a new kind of structure.

So, I would take a look at new tools to solve the trade and economic issues. That would include a big chunk of dispute settlement, but sometimes dispute settlement narrows the focus of what a lot of people would like to do with trade, and that is to avoid disputes and create new opportunities. I would see it almost as a split between issues of civil society and engaging lawyers in particular, both in government and outside, who have a particular role to play, based on their training and experience. How do you do engage civil society? What are the new tools? What are the new methods? What is the new dialogue? As for the actual negotiations that will be kicked off in Seattle, how are they going to be different from the old set of negotiations?

The other element, which you have already touched on, is dispute settlement. However, I would approach it from the angle of finding new ways to solve disputes. To put in a plug for the University of Montreal, they have something called the Cyber Tribunal, which is a mediation and arbitration device designed for international commerce. People do not have to get on airplanes or even use the phone, they can do it all by e-mail. Using that kind of approach, I could see it split up into three groups, and I think you would be able to draw audiences from each of those three areas.

COMMENT, PROFESSOR KING: That is a good suggestion. I wanted to emphasize what Jean Anderson said last night in the bar, that we have to keep an eye on the WTO. The main problem is that we still want to keep the focus on the Canada/U.S. relationship, but we will have to put all these into a pot and see what we come out with. One of the focuses, I think, could be the management of disputes. In other words, we could talk about early warning systems, the consultations, and mediation conciliations.

Another device that was used in the Pacific salmon dispute was the great case where you have, say, Ruckleshouse from the United States, and a Canadian man of considerable prestige recommending at least a temporary solution, which the parties adopted. In the Middle Ages, the Pope was the person who poured holy water on dispute resolution. Let's take the big Channel Case where Argentina and Chile were almost at war after a tribunal had resolved the dispute and made a recommendation with some very prominent legal types. They were almost going to war, and then suddenly the Pope with

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a representative stepped in and he poured holy water on the dispute settlement and both parties accepted it. 5

So, what I am looking at is possible new techniques for resolution. Tom, did you have a comment?

COMMENT, MR. LADD: Well, it is not quite along the lines of holy water, but I would propose participation by perhaps a social scientist or two to address the topic of the political acceptance of what are politically unacceptable outcomes. For example, if there is a trade dispute decision that says that subsidies to particular forms of journalism in one country or another are in violation of trade agreements, that is apt to be a politically unacceptable outcome in some sectors. Yet, if the decision is made, somehow that decision needs to be coated in such a manner that it can be swallowed. From a social scientist's perspective, how can unacceptable decisions be rendered politically palatable? Further, once those decisions are made and swallowed, what adjustments are made and does society adjust to those decisions and, if so, how can they make adjustments?

COMMENT, PROFESSOR KING: That is a hard one. As to the Gulf of Maine case, the feeling in the United States was that we have got the water and the Canadians have the fish. 6 One approach is advisory opinions rendered by, say, selective panels from the International Court of Justice, and then you let the dust settle on the advisory opinions. What we are looking at, Tom, and I do not know whether we can solve this, is where everybody can win. I mean, that is what you really want.

COMMENT, MR. LADD: Well, even if you have not won, at least there is no salt in the wounds when you have lost. Or you do not sense that there is salt.

One last point I would like to make in a different direction is to repeat what I offered last year, and that is that, while I think that the U.S.-Canadian focus is excellent, NAFTA has brought us a new world, and it is not necessarily any longer a Canadian-U.S. trade situation. It is a three-country trade situation. I would offer that we ought to include our Mexican comrades. This really ought to be a three-party conference.

COMMENT, PROFESSOR KING: Well, I think we tried to do it this year, but it was a hard one. I did contact a Mexican speaker this year, as per your suggestion last year, but there was no reply.

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We will be looking at some new techniques. One thing that is also important is predictability on dispute resolution. One handicap you have in the arbitration field is that a number of organizations do not publish their arbitral decisions. If they did, then you could get to know the arbitrator and the issues, and then you could forecast the outcome. We ought to look at the problem of predictability in terms of publicizing decisions to a greater extent so that, if Canadian and American firms got into a dispute, or even a Mexican firm, then if you selected a particular arbitrator and a particular issue to deal with, you would be able to predict with some certainty what the outcome might be. Maybe you would be dissuaded from raising the dispute.

One factor is that you have to be willing to lose as well as to win. My recollection is that somebody in Congress, I think it was Bob Dole, who was a presidential candidate at that time, wanted to review WTO decisions to see whether we won or not. Well, this makes something very intriguing to pursue, and this is what I like. Maybe we have developed something new, but I do think the one area that needs focus is the management of disputes. For instance, if there is something that goes wrong, there ought to be an alert to people who could move in and possibly help to deal with the dispute. There were some historic controversies that were very difficult to resolve.

Now, I wanted to thank the people who have made this conference possible. I am deeply grateful, again, to Jon Fried for his help in selecting the speakers for the program, and also for his wise comments on my draft of the program. Kent Hughes of the U.S. Department of Commerce was also extremely helpful. Further, I am always grateful to Sidney Picker for founding the Institute. We would not be here without Sidney’s vision.

We had a great deal of help from our student coordinators, Leigh Roach and Michael Cassady, and Rebecca Bodnar, one of last year’s coordinators, was always there when I needed her. She made some very good and strategic suggestions.

I think I would be remiss if I did not also thank Phyllis Banks, who is our Program Coordinator. There is a hell of a lot of work to be done in terms of the logistics of this conference. For instance, our Advisory Board meeting was Thursday night, and then we had the logistical problems with Malcolm Wheeler, who was in Chicago, and we had to figure out how to get him here. He did make it, and we are very glad because he is very much in demand. In addition, David Crane made quite a sacrifice in terms of his personal absence at home to come here.

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7 Senator Bob Dole (R-KS) introduced a bill to establish a commission which would review WTO dispute settlement reports, but the bill died in committee. See WTO Dispute Settlement Review Commission Act, S. 15, 104th Cong. (1995).
We are deeply grateful to our speakers who came from busy personal lives and have added their wisdom. I hope that we have moved the frontier a bit further, and I hope that is the uniqueness of this conference. We do not tackle easy problems; we tackle difficult ones.

COMMENT, MS. BODNAR: Professor King, I think, most of all, we would like to thank you for all of your vision and energy putting this together. Thank you.

COMMENT, PROFESSOR KING: Thank you very much. I think we had full exchanges. Nobody likes to limit the time of their talk. We had some speakers who could go on forever, but the value is in sharing the time. A long time ago, I was put on the program with three speakers. We had two hours. One speaker took one hour and a half and another speaker took a half an hour. When my time came up, I got up and said, "you’re better off in the bar than you are here, so I’m canceling my appearance today. I don’t have the time to do the job, and I’ll leave this with you. I’ve got my paper, I’ll pass it out, and there it is."

But, anyway, thank you all. You are a very interesting group, and I declare us adjourned.