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## Discussion after the Speeches of Robert Cassidy and Simon Potter

Discussion

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## DISCUSSION AFTER THE SPEECHES OF ROBERT CASSIDY AND SIMON POTTER

QUESTION, PROFESSOR KING: There is one thing that I wondered about on the *ad hoc* tribunal. As you span NAFTA, is there not a problem with institutional memory maintaining consistency? What about the problem of consistency? In other words, do you have any doubts about your position at all?

ANSWER, MR. POTTER: None. Granted, there is a problem with institutional memory, however, it is not that great. Having sat on these panels, there was nothing to remember. But the panelists are quite insidious about giving themselves that memory, and you have to ask yourself, what is the cure for the problem? The cure is to have a permanent body consisting of maybe ten people rather than the well of several tens of people from which you can now choose.

COMMENT, MR. GRAHAM: Simon, I quite agree with your opinion. By the way, this gentleman kindly gave me this mace-like object, so if your answer is not correct, I will be down to see you.

COMMENT, MR. POTTER: That is parliamentary democracy.

QUESTION, MR. GRAHAM: Have you seen how they behave in the House these days? I am not in the Reform party, so you do not have to worry.

You are right about the limited number of cases, so you cannot create this large bureaucracy. There would not be any political reason to do it. But would a halfway or partway step be at least to make the *ad hoc* panels representative of all three countries?

One of my objections to the panels is the fact that they are bipartite rather than tripartite. It seems to me in every one of these cases there is an interest of the other nation. You could make a strong case, it seems to me, that in all of them there is a community of interests of all member statements to the agreement, and that it should be determined in an appropriate way. Do you think it would be feasible, either under Chapter 19 or Chapter 20, that you could provide representatives from all three countries who would sit on the panels, rather than just from the two countries that are the subject matter of the dispute? In doing this, you might create a body that would have more credibility.

ANSWER, MR. POTTER: I frankly agree, and there is no

impediment to doing that. Or you could put people on some of these panels who are not from any of the three countries.

However, your question gives me the opportunity to distance myself from the premise. Your premise, I think, is based on what someone told your committee concerning a national lines tendency. Canada wins when Canada has a Canadian-German on the panel, and vice versa. That, in my opinion, is false. We have been remarkably well-treated by these panels, and there is not a national lines tendency.

QUESTION, MR. CASSIDY: Chapter 20 contains a good argument that the panels ought to be tripartite. But with on Chapter 19 I must say the only advantage, from my U.S. point of view, is that you have as your arbitrators people who know what they are doing. They are practitioners. In that context, having a Mexican on a U.S.-Canada Chapter 19 panel would add very little because the Mexican would be totally unfamiliar with the system about which they are talking. There are relatively few practitioners in Mexico in the area anyway. So it does not make much sense to me.

COMMENT, MR. CASSIDY: Oh, by the way, I should also add a footnote on Simon's observations about the national bias based on majority of nationality. I have not heard this before, but I can tell you, having followed a lot of these very closely, I have seen absolutely no evidence that that is the case. There certainly was not any hint of it in the panel in which I was involved. We actually broke across nationalities, and it was more of a conservative versus liberal dispute, not a Canada versus United States dispute.

COMMENT, PROFESSOR KING: I might add that Professor Picker sat on the tripartite panel on Chapter 20.

COMMENT, PROFESSOR PICKER: That was a different kind of partite than that being referred to here. The third nation was not Mexico in that Chapter 20 case; it was Britain. I will say more about that on Sunday, but I do agree. I suspect that the nationality requirements imposed by NAFTA are more for political satisfaction and credibility. I have never seen any evidence that it actually influences the decision-making process. And in looking at all the early Chapter 19 and Chapter 20 cases with a single exception, there is little evidence that it ever broke along nationalities.

QUESTION, MR. BOSCARIOL: I was wondering if you could step away for a second from anti-dumping and countervailing, and possibly consider a question concerning Chapter 11; specifically the private investor state dispute resolution mechanism. My first question has to do with the fact that we have not yet seen any cases brought under the provision. It has been four years, and it was not until two weeks ago, I

think, that we had our first two formal cases filed by U.S. investors with respect to their waste management systems in Mexico. Why have we not seen many cases? I know we have had threats, but why have we not seen any cases go forward yet?

My second question has to do with expropriation. Expropriation seems to be at the heart of all of the threats of using this mechanism, and the definition of expropriation is not exactly clear. The NAFTA seems to say we should be looking at international law to determine the meaning of expropriation now. In Canada we might have a slightly different idea of expropriation than in the United States, given the U.S. constitutional history and the fact that in Canada. I think we are more willing to permit our government leeway on regulatory initiatives. I am wondering whether it was a mistake, or at least it was not well-thought-out when Canada agreed to this provision and subjected itself to these claims of expropriation for what are turning out now to be regulatory measures. This was the case with the Country Music Television matter and the tobacco industry a couple of years ago with the expropriation of the use of the trademarks and so forth.

ANSWER, MR. CASSIDY: I have the same question about why the system has not been used. I can make some guesses, but it is essentially an unanswerable question. My guesses are that, one, it is a fairly obscure procedure, not one that comes to mind readily when people are thinking about these things. Secondly, it has never been used. Lawyers, being the conservative animals that they are, are hesitant to invoke the procedure, particularly when it would obviously have substantial political consequences which are a little bit hard to read in many cases. You might end up, in invoking the procedure, putting yourself in a worse position than you were in before.

Lastly, maybe it just takes time. As I said, I know that there have been a lot of discussions between the U.S. government and various companies about exploiting the market access obligations under GATTs, which are very close to what we are talking about under Chapter 11 of the NAFTA, and I personally think it is only a matter of time.

ANSWER, MR. POTTER: I think you can make an argument that it has been used: The purpose of providing for the binding arbitration in the case of an expropriation is not only to give the compensation which an expropriation justifies, but it is also to avoid the expropriation in the first place. In that sense it succeeded when R.J. Reynolds came to Ottawa and said, if you impose plain packages on our tobacco products, we will consider that an expropriation of our investment in those trademarks, and you will be sued. We did not have plain packages after that.

And the successor legislation to the Tobacco Products Control Act,

the C-71, has passed through the Senate. We are not going to have plain packages. I think you could make a pretty persuasive argument that it was the expectation of having to face the first Chapter 11 case which got us there.

As to your question about the definition of expropriation, you were right, it is a vague and ambiguous word which is likely to give us problems in definition later on, all the more so because of the way it is used in the NAFTA. It is clear that what is meant or considered is vastly wider than just the traditional concept of expropriation of an asset or a building or a piece of land. The definition of investment makes the definition of expropriation a very broad thing for investment to cover, for example, trademarks. It gives you an idea that expropriation is a vast word.

COMMENT, PROFESSOR KING: I agree with the vast sweep of investment, but that is my personal opinion.

COMMENT, MR. HERMAN: I agree entirely that this lack of precedent or familiarity with the system is a problem. But, do not forget that the Chapter 11 provisions provide a choice ranging from the use of the International Convention on the Settlement of Investment Disputes (ICSID), with which Canadian and U.S. companies are not terribly familiar in a North American context, or use of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. There is a bit of the unknown here. But I would watch the *Ethel Corporation* case,<sup>1</sup> because the results of that case could be quite important in terms of setting the stage for future arbitrations. If they win, if they are successful, I think you will see a slate of Chapter 11 cases. There really has not been a problem with expropriation in the classical sense. I do not think Chapter 11 was really aimed at dealing with purely Canada/U.S. issues. Just a footnote, Chapter 11 is being used as a model in the Organization for Economic Cooperation and Development (OECD) negotiations in an attempt to broaden the notion. And there is another precedent, Europeans have used it in the Energy Charter Treaty, almost verbatim. But, watch the *Ethel Corporation* arbitration, it is going to be very important.

QUESTION, PROFESSOR KING: Where does it stand now?

ANSWER, MR. HERMAN: They recently filed the request for arbitration.

COMMENT, PROFESSOR KING: It is quite a field for lawyers.

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<sup>1</sup> The *Ethel Corporation*, a U.S. company, will launch a Chapter 11B action against Canada for its ban, on health grounds, of a fuel additive.

QUESTION, MR. McILROY: I wanted to follow on Simon's comments regarding dumping and countervailing. I am wondering whether in the 1990s we are trying to seek a solution for a problem that existed in the 1980s, but which may have, to most extents, totally disappeared. I think my comment is, other than several sectors like steel and agriculture, it may not be fair to say that cross-border investment is making companies reluctant to try and protect domestic markets. By doing so they are shooting themselves in the foot by adversely affecting their ability to import. A lot of them both import and manufacture in a country, and they also export. They work with certain other countries where they may have joint ventures or they may be exporting.

Is this a general problem or just a sectoral problem that is affecting agriculture or steel, for example? Therefore, should we not be speaking of sectoral solutions rather than seeking a general solution for a problem that is no longer a general problem, but one that has largely disappeared?

I notice in the materials that you provided, Simon, where you have the list of cases. In 1989 there were eleven Chapter 19 cases involving U.S. administrative agencies, and in the five years of the FTA, it averaged about six cases per year. Under the NAFTA it is averaging three, maybe four cases a year. It appears this problem is sorting itself out, and it is disappearing. I was wondering if you had any comments on that.

ANSWER, MR. CASSIDY: It may be, as you say, that this is a problem of the 1980s that has disappeared in the 1990s, because of the integration, but it is very difficult to test the hypothesis. There has been a dramatic decline in import relief cases in the 1990s, at least on the U.S. side, across the board, not merely against Canada and Mexico. The reason for that is quite obvious. It is difficult for companies that are making huge profits to meet the injury requirement that they must meet in order to get any relief. So the test will come at the point at which the economy takes a downward turn, and then we will see.

My guess, for what it is worth, is that you will see a different reaction by company, not by sector. In my own experience there are some companies, some of the most multinational of companies, that are perfectly prepared to use the import relief laws in strategic situations where they see that they suit their purposes. Probably the most obvious example of this view of the world, at least historically, has been the Motorola Corporation. There are other companies which, because of the multinationality of their operations, are averse to using these provisions. An example of that view has been the IBM Corporation. I do not know that it does break down by sector or will, but that is very hard to say in

this current environment.

ANSWER, MR. POTTER: I agree with that, and I think it is dangerous anyway to turn a snapshot into a trend. On the sectoral business, I think you are saying more or less what I was saying, that there are sectors where it just does not make any sense to leave this in place. I might have a view that it is all sectors, or ninety-nine percent of them, or someone else might have a view that it's two percent of sectors that ought to be spared the burden of anti-dumping proceedings, but I think we all agree here that there are centers which just simply ought to be spared.