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## Discussion after the Speech of Donald Macdonald

Discussion

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## DISCUSSION AFTER THE SPEECH OF DONALD MACDONALD

QUESTION, PROFESSOR KING: I had a question on arbitration. For example, if you have arbitrations against the three governments, so that there is consistency in the rulings between these different arbitrable panels, do you not get a panel involved in an arbitration against Mexico that is different from Canada? Should these arbitration panels be institutionalized? Do you need an institutional set-up so there is consistency?

ANSWER, MR. MACDONALD: Henry, you have me there. Maybe somebody else could help. My recollection is, as opposed to the Canada/U.S. Free Trade Agreement, there is more of a bilateral character in NAFTA. There is a policy to try to extend the participation to all three parties. It indeed seeks the intervention of some altogether non-interested parties in the proceedings. It is moving away from A versus B in the dispute as the arbitrators of interest in their own case. I think we have to accept the fact that, for example, on any dispute between Canada and the United States, the Mexicans may find themselves involved and faced with a precedent which will not be at all helpful.

COMMENT, PROFESSOR KING: And I guess that maybe, eventually, it might be necessary to have some standard means of selecting panelists so there is consistency. That is what I am worried about.

ANSWER, MR. MACDONALD: Certainly the procedure is provided for already. Instead of having a list containing practically anyone, both governments have defined lists of potential panelists. The governments have the right to pick their representative from the other country. There is some attempt to arrive at a balance.

COMMENT, MR. CAMPBELL: Don, I cannot resist the temptation here. The irony is I had a small role as a private practitioner in assisting the government in the drafting of that particular chapter, so ironies abound here.

This morning when I raged with righteous indignation about the extraterritoriality, I was reminded by an official of our Department of Justice, no less, that we were not quite so virtuous as we might have been in the past to rail against the United States in this regard. So, just as a footnote to your comments, it is true that when the United States proposed the investor recognizing individuals and corporations in international proceedings, and took a look at the investor-state provisions as proposed, we said for many of the reasons that you indicated this morning, that we cannot do that.

Until it was pointed out to us, that in fact, in two or more recent bilateral investment treaties, we insisted on the same rights for Canadian investors and corporations, and the United States knew that. So we then had to look at this a little differently and decide if we had some better arguments to advance. But there was one other argument, echoed in the MAI. I wonder if you can comment on the issue of unequal treatment.

The suggestion is that, as a result of negotiating these sorts of arrangements, you end up giving a right to a foreigner that, for constitutional reasons, you said is not available to a Canadian. It has been echoed again in the MAI debate. I wonder if you would comment on that.

COMMENT, MR. MACDONALD: Dealing with the second question first, I think that you could have a bizarre situation, where if you had, for instance, a company owned by two Canadians and one American who were adversely affected by a particular decision, there would be litigable reasons why the American could have a pretty good go at the government of Canada. In the case of the government of Canada, believe it or not good old Mr. Defenbaker's charter still has some protection in relation to the property. Let no practitioner forget about that. You can never go against the government of Canada on that one. Mr. Defenbaker's Bill of Rights is still existent to that extent. You may want to tuck that away for future use. In a case against the government, Canadians would not be able to recover against the government. This would be really turning the knife. A citizen in Alaska probably could recover against the government.

COMMENT, MR. ROBINSON: Don, believe it or not I have three small comments, none of which are critical, and none of which are defending provincial rights.

The current government ducked the possibility of a bizarre result when they decided not to reintroduce the Pearson Airport Expropriation bill.<sup>1</sup> I do not think there was any doubt that if the American participant in the consortium had decided to press a Chapter 11 complaint, it would have won. But the bill was Canadian and constitutionally valid because of the absence of property right protection, and the Canadians would have had squat and the Americans would have collected one hundred cents on the dollar, including profits. So that one is still hanging around. Obviously Pearson Airport is gone, but the issue is still there

QUESTION, MR. MACDONALD: What about Defenbaker's Bill of Rights?

ANSWER, MR. ROBINSON: I have looked at that, and I did not feel as sanguine about it as perhaps you do. On the decision by a judge who is one

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<sup>1</sup> See Alan Toulin, *Pearson's Cleared for Takeoff*, FIN. POST, Apr. 5, 1997, at 8.

of our fraternity brothers, I do not think that is representative of the issue of the definition of expropriation. I think it is an international law issue. I had a chance to pick John Castel's brain on this recently for another client, and he just has baskets of cases on expropriation in international law which are very interesting, and I think they would all be argued. So we cannot hide behind that decision by our fraternity brother and say this is just regulation. It is the labor conventions case. Now, Barry may be able to help us on this.

This is for our American friends. Don is referring to a case in 1937 where the Privy Council of England, which was then our final Court of Appeal, held that federal treaties are not effective if they affect provincial rights until the provinces so approve. I was told that the provincial government of Ontario, then a British government opposing NAFTA, had commissioned an opinion. I think it was from a professor out of the University of Victoria, on whether they could win if they made a challenge against the FTA. And that opinion, which is secret, and I would love to get a hold of it, said the Supreme Court of Canada is going to reverse the labor conventions, and Peterson backed off. There was no case.

As to your comments that there is going to be a complaint, you are right. I know that my law firm is looking at one and your law firm is probably looking at one that involves "expropriation" or measures tantamount to expropriation by a province. And of course, the Chapter 11 complaint, if it is brought, will be brought against the federal government, and the phone call will go to the provincial government. It will demand that they send us a check. And the provincial government, as you know, will say "go to hell," and then we will be in court. So that is coming, I think pretty soon. The last point was one that I do not think is made often enough; we Canadians need investment protection more than Americans, more than Mexicans in the international context because we are traders more than the United States and Mexico.

And the international public-private partnerships of which, Don, you are very much aware, having been a founder of the Canadian Institute. They are big. They build, own, operate, and transfer power plants and airports. Canadians are very good at this. Our engineering firms are winning those contracts, and they have no protection for their investments. I think Ms. Barlow and her friends emphasize sometimes that we do not want to let foreigners have special rights. It is quite the opposite; we Canadians need these protections in order to continue to be successful international business people/investors. I would appreciate your comments on some of that.

COMMENT, MR. MACDONALD: The interesting issue was on litigating trade and congressional power, more when I was parliamentary secretary, and less when I was minister. I used to put forward the case to the officials

and say, look, I think we have really got the provinces on this one. Let's take them on. And I was ultimately persuaded by their view, which was that, yes, we think it is a pretty good case, but what if we lose? If we lose, do we really stand to lose an awful lot by not doing anything? But you may recall there was a batch of litigation back in the 1970s around the Trademark Act, and some aspects of the Trademark Act, which were not concerning trademarks at all, they were concerning provincial jurisdiction. There was a question as to whether we should take action at that time, and we were not prepared to do that. However, an outside party could have thrust the government into it. It will be interesting to follow-up on that direction.

COMMENT, MR. ROBINSON: That is very interesting. In the states, there would have been one hundred of them.

COMMENT, MR. MACDONALD: That is a given.

COMMENT, MR. KING: That is the difference.

COMMENT, MS. VERDUN: Yes. I was on the Canadian negotiating team for Chapter 11 of the NAFTA.

COMMENT, MR. MACDONALD: Good. Now you tell me.

ANSWER, MS. VERDUN: Well, Mr. Macdonald, your comments were very insightful, and I would just like to add a little bit of background on a few of them. You talked about investor-state dispute settlement and expropriation, and the history of that is, of course, that it was a U.S. concern, an obsession. It was not directed at the Canadians. It was directed at the Mexicans.

There was a real concern about the Mexican expropriation laws in their judicial system, and at the beginning of the negotiations we were assured that Mexico would never agree to investor-state dispute settlements, so we did not need to worry about it. Of course, that did not turn out to be the case. The reason that Mexico was not going to agree was because of their constitutional problem, which was exactly the issue that had been raised. That is, foreign investors would have rights that domestic investors did not have.

In the end, their constitution is much more flexible than ours, and they were able to get around that when it became clear it was a bottom line issue for the Americans. So we suddenly had to decide how we were going to negotiate on this issue. And the role that Canada played, in fact, was to look at a lot of the procedural issues to make sure that we can actually live with investor-state dispute settlement, because as Mr. Campbell pointed out, yes, we agreed to it with Russia. We never expected Russia, or rather at that time, the U.S.S.R., to use it against us.

We knew damn well that the Americans, because they have piles of lawyers that are very litigious, would bring cases against us. On expropriation,

the situation was a bit different, in that, of course, we had already agreed to the usual expropriation clauses in the FTA.

There are some wrinkles in the NAFTA again because of the situation in Mexico. But we realize that the difference there had to do with investor-state dispute settlement, which is what you are seeing now, that private companies could bring challenges that might not otherwise have been raised.

One of the things that we did with respect to the provinces was consult regularly with the provinces and keep them informed about the developments in the negotiations. Now, some of the colleagues from the provinces may not agree with the adequacy of that consultation, and that is certainly a Canadian problem, but as a practical matter, one of the things we did was to make sure that the obligations that we undertook on behalf of the provinces did not get out of step with where the provinces were in terms of their measures. So, we spent a lot of time looking at provincial expropriation laws and their exceptions to national treatment, to make sure that we were not going to cause them to have to make a lot of changes.

COMMENT, MR. MACDONALD: Thank you very much.

QUESTION, MR. WENDLANDT: Assume for the moment that a province would expropriate and give rise to a claim against the Canadian government by an American company. To what extent do you not feel that that issue is really a theoretical one, rather than a practical one, in the sense that if, in fact, the government of Canada would be held responsible, and would then turn to the provincial government for refunding? I suppose that government would refuse to do it, would it not, and by that fact itself become the pariah of the law?

ANSWER, MR. MACDONALD: I do not know. But I agree with you, there are some practical considerations that at the end of day might weigh with them, but it is at least possible. A begrudging payment after much objection could be very good politics for the province and bad politics for the government members in that particular province.

QUESTION, MR. WISMER: This is not pertinent to NAFTA, but I do know, I have several colleagues in the Department of Foreign Affairs and International Trade who are going around the world negotiating foreign investment protection agreements on a bilateral basis. I am not an expert in this. I do not know exactly whether there is a real standard format to these things or not, but I am curious. It raises a question. When we sign these agreements with foreign countries, do they realize that they could wind up mixed up in our constitutional jurisdictional questions?

ANSWER, MR. MACDONALD: I do not know whether I can answer that. I think they probably look at it as we look at it, that it is more a case of

something they might do to us rather than the other way around. I do not think it does arise.

COMMENT, MR. SCHAEFER: I was just going to make the point, even though the U.S. federal government has a broad treaty-implementing power, they do not exercise it due to the political constraints of federalism. So, in essence, the U.S. federal government behaves much in the same way the Canadian government does. The Canadian government has perhaps constitutional legal difficulties implementing agreements in provincial jurisdiction. The U.S. federal government has political difficulty doing so, and the results end up being quite the same.

COMMENT, MR. MACDONALD: The American agreements in effect are executive agreements rather than treaties.

COMMENT, MR. SCHAEFER: Well, they are congressional-executive agreements. Basically we have reserved and grandfathered existing state laws that do not conform to services and investment obligations, much like what was done with the provinces in NAFTA.

The same thing is going on in the MAI. There are concerns about whether the Canadian federal government would have the legal abilities to bind the provinces. The United States is clear. The federal government has the legal capability of doing so, but they do not have the political will to do so. They do not even have the political will to necessarily enforce what agreements have bound the states.

For instance, on this government procurement agreement, the Massachusetts Burma law that has been discussed, the federal government is not anxious to go out and sue the states. In fact, it is going to take a group of businesses to make a domestic constitutional challenge to the state law to try and bring the states into compliance.

I was going to ask whether you thought federal governments, by not being as aggressive, for instance the U.S. federal government by not using its full legal powers or the Canadian government, even though they might get a revision to labor conventions or an expansion to trade and commerce power, are they making a terrible mistake by not being a little bit more aggressive? The practice is going to build-up, since it is only going to become more difficult ten or twenty years from now.

ANSWER, MR. MACDONALD: I think that if you have a power and you do not exercise it over a period of time, it will be the suggestion of the constitutional convention that has grown around not using it that will be a hurdle growing by accretion.

As the years go on, the situation is different. Of course, there is doubt as to how far the trade and congressional power goes. I guess there is not doubt about how far the Article 2, Section 2 goes if the government, as you say, is

prepared to take the risk of putting that to the Senate for approval, but there is no doubt about the fact that constitutional powers, like muscles, atrophy if they are not used.

COMMENT, MR. ROBINSON: Canadians need foreign investment protection badly. We were looking to the MAI to get us there because the Chapter 11 investments protection powers were virtually just lifted from NAFTA and put in the MAI, at least in the drafts that I have seen. But now that that is gone, for the foreseeable future anyway, until the United States thinks it is good enough to get interested in it again, it highlights the fact that Canada has not signed the ICSID Convention, the International Convention for the Settlement of Investment Disputes. If we did sign it, we would get the benefit of, I think there are now one hundred and thirty-six countries that are members of it. We would not have to be seizing planes under Bilateral Investment Treaties (BITs).

Right now what we are having to do is to play catch-up. We have our officials running around the world. They probably even have to fly economy now with Mr. Martin's stringencies. They are not allowed to fly business class. They are trying to sign BITs with countries knocking them off one after the other. It is too slow, it is too expensive, it is inadequate. I have clients who have these public-private partnership investments that have been expropriated in countries. We have no remedy, and it is a damn disgrace nationally. So, if any of the federal government officials want to defend themselves on why we have not signed the ICSID Convention, I would like to hear it.



