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## Discussion after the Speech of Sidney Picker

Discussion

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## DISCUSSION AFTER THE SPEECH OF SIDNEY PICKER

COMMENT, PROFESSOR KING: I think the important thing is that you pass this along to the secretariat and also to the commission because I think that your thoughts are very important and should be part of our institutional amendment on this.

QUESTION, MR. MCILROY: I just have a quick question, Professor Picker, wearing your hat as a professor rather than a formal panelist. There seems to be two forces tugging at this process. One is the desire to have a fair and transparent dispute resolution process, much like we have in our domestic dispute resolution. It is transparent in both judicial and quasi-judicial proceedings, the public can attend the hearings, et cetera. On the other hand, there is much secrecy associated with diplomacy. The parties feel that there is too much public scrutiny of the process, since it is too delicate to be discussed in public.

What I am wondering is, given the fact that I think it is fair to say that there was a breakdown in confidentiality and particularly with respect to the initial report, and given that the United States is a far more transparent society than Canada, it was easier to get the report in the United States than it was in Canada, do you really think that we should continue on with the charade that somehow this is a confidential process? I was following it on behalf of clients. I had the pleadings, but I was not allowed to go to the hearings. I had the initial report, yet it was supposed to be confidential. I am just wondering whether you think we should admit that confidentiality does not work in this day and age and that we should get on to a more transparent process.

ANSWER, PROFESSOR PICKER: Wearing my professor hat, I, of course, believe in transparency and I think that this should be in the process. It was interesting to note that most of the panelists, when the initial leak about the names came out, were quite happy to announce it publicly. They believed it should be transparent as well.

I suspect that the parties may not be as free of this establishment in using the process. I think the confidentiality of it probably stems historically because that is the way GATT was and they were used to it. And out of that, I think the parties feel more comfortable with this. And I suppose if the real objective is to get the parties to use the dispute resolution mechanism and if this is the price you pay for it, I guess I

am willing to pay for it as long as I can really show that the process functions effectively. In an ideal world, I think it would be better if it were transparent.

QUESTION, PROFESSOR KING: If it is confidential, perhaps the parties can work it out better on a compromised basis so that we do not get rigidly stuck in positions. We are not stuck in concrete.

ANSWER, PROFESSOR PICKER: There actually is some flexibility in the control of confidentiality. The commission and the secretariat do have some flexibility in determining what is and what is not confidential, and actually more in the NAFTA process is available to the public than was under the old FTA process. You do get access to the initial submissions of the parties, the non-confidential portions of the submissions, and that did not happen before. I think that very gradually, as the parties become comfortable with this, we will see this happen. I suspect, and, again, I have no way of knowing, but I suspect that as NAFTA expanded where we have Mexico that perhaps there were some concerns on Mexico's part on this confidentiality also in being encouraged to participate in this process. But, nevertheless, it's better than it was before.

QUESTION, MR. KERESTER: Why do you think the appointment of a permanent tribunal would eliminate the problem of conflict of interest? We have got members of the judiciary from time to time that were challenged . . . .

ANSWER, PROFESSOR PICKER: It was not eliminated; it was simply minimized. There is nothing that will eliminate the conflict of interest, and it should not be eliminated. There is a valid reason for it. I think that it would minimize it because it is truly developed on a case-by-case basis, but you are talking about NAFTA.

If you appoint a permanent tribunal, I suspect it would be a painful initial screening process. But because NAFTA deals with everything, you are going to have to initially put together a tribunal and screen a tribunal of people who are likely never to have conflict of interest in those cases. Once you get the panel assembled, I doubt you will thereafter on a case-by-case basis really have to deal with any conflict of interest. But you will never eliminate it, that is true.

QUESTION, PROFESSOR KING: Did you make any recommendations?

COMMENT, PROFESSOR PICKER: No, we did not make recommendations. I want to make that clear. We could have. Under the terms of reference it is possible to ask the panel not only to make its findings, but to make recommendations. And the complaining party did not ask us to make a recommendation.

QUESTION, PROFESSOR KING: You made findings?

ANSWER, PROFESSOR PICKER: We did.

QUESTION, PROFESSOR KING: Having found what you found, what has happened? I know there has been a loud bark in the United States.

ANSWER, PROFESSOR PICKER: Well, because of the nature of the determination, there is not much to be done. We found in favor of Canada. We found that Canada was not in violation of the NAFTA agreement. So there is nothing for the United States to do. There are no concessions to be withdrawn. There is no real action that has to follow from this. Had we found in favor of the United States, then there clearly would have been something observable that we would have to follow from that. But because of the way the decision came out, that did not happen.

QUESTION, PROFESSOR KING: So you took the heat for U.S. officials. In other words, you were the scapegoats. Do you think the panel served as a safety valve?

ANSWER, PROFESSOR PICKER: Anyone in the room can speculate on that kind of a question as well as I can. I think you are all familiar with the reaction of the United States to the opinion and what effect that will have on the political process in the review of NAFTA. It worries me, it really does, and it would seem to put us in a difficult position. But I think that the parties will have to, hopefully, accept and live with the decision and the process. If it does not, then I think that we are all in serious trouble. The problem may be the same kind of problem that was referred to with respect to the WTO. I think someone referred yesterday to the WTO and Helms-Burton, and that may be the same kind of a problem: How will the United States react when a decision is rendered unto its liking?

QUESTION, PROFESSOR KING: The important thing you are always dealing with is the sovereignty issue, is it not?

ANSWER, PROFESSOR PICKER: Yes.

COMMENT, PROFESSOR KING: That certainly would be a good subject of our next program.

