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Discussion

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Discussion after the Speeches of Richard J. Smith and Michael B. Phillips

COMMENT, *Professor King*: You mentioned the arbitration feature in the International Joint Commission. Many people feel that if you use the arbitration feature, it will destroy its value in the cooperative mechanism.

ANSWER, *Mr. Smith*: I agree.

QUESTION, *Professor King*: It is obvious that in almost every environmental question, the native people are there. Out of special concern for the environment, they are joint stewards with the rest of us in North America. Is there a place for them at the table?

ANSWER, *Mr. Smith*: Clearly there is a place for them at the table. Native people have been, more and more, at least on the U.S. side, involved with these disputes. They have been involved in a number of fishery questions in the west, specially with regard to the Porcupine Caribou Herd where their interest was directly involved. On my negotiating team in Seattle, I had several representatives of different native peoples, and I know they had them on the Canadian side, too.

ANSWER, *Mr. Phillips*: We must remember, of course, that both governments will decide, for example, in terms of the Air Quality Committee, who they want at the table. Mr. Smith mentioned that the United States will send government representatives. But, neither side was so specific in the agreement, that we could not take the native people into account.

In terms of ANWAR, of course, the Caribou Herd is the life blood of a number of people in the Yukon. We are constantly in touch with them about their concerns. I should add that the Porcupine Caribou Board specifically said in the agreement that it would represent the views of these people. Indeed, the native people have been represented among the four members of the board. There is a new group about to be appointed, and among the four U.S. representatives on that board, we will have two representatives of native peoples.

QUESTION, *Mr. Martin*: Some people have argued that in the absence of an environmental charter, there would not be a North American Free Trade Agreement. Others have said more broadly that the link between trade and the environment will be one of the major issues of the 1990s. Could you comment on that?

ANSWER, *Mr. Smith*: You raise a very important point. One of the concerns of the '90s will be the interface between trade and investment issues. My bureau in the Department of State is very much engaged in

this issue. In fact, almost a year ago we brought on as our Deputy Assistant Secretary of Environment, Bob Rynstein, who spent many years with the trade representative. He has written, and I think it will be published soon, a very interesting paper on this range of subjects, specifically with regard to NAFTA.

It is true that the environmental aspect has come up, and it comes up quite a bit more sharply than it did in the U.S./Canadian Free Trade Agreement where our standards on various items may be different. But they are close enough and implementation is similar enough that problems have not arisen in the same way as when one contemplates an agreement with Mexico. With Mexico, the issue of possible pollution havens or the effects of uneven implementation of environmental standards comes up very sharply. Indeed, we are having very intense discussions regarding the Mexican Free Trade Agreement. There will have to be, if not part of the agreement itself, a parallel development regarding environmental issues, in order to make a Free Trade Agreement with Mexico possible.

QUESTION, *Mr. Roman*: I want to focus on dispute avoidance rather than dispute resolution. As someone who has represented environmental groups, I have found that there seems to be a very high degree of unanimity on both sides of the border. There has been no difficulty deciding what to do about the environment, even without resort to mechanisms for dispute resolution. In fact, very often, as with the Victoria case you mentioned today, it may simply be a matter of the Canadian Environmental Group going to a branch of the U.S. government and saying, "We have tried for years in Canada to resolve this and our government will not do anything. Will you make an international issue out of this so finally we can get our government to resolve the problem?"

What I would like to know is whether there is ever a feedback loop that goes in the other direction. Do the diplomats on either side say, "Look, if you do not apply your domestic environmental protection laws any better than you are doing now, this is going to create an international incident; and therefore, you ought to do something about it."

ANSWER, *Mr. Smith*: It is not a question of saying it in a negotiation, but all of us operate in a milieu where we know that this is going on. There is tremendous discussion back and forth at every level in the U.S./Canadian relationship. That is one of the features of our relationship. Canadian groups talk to similarly interested groups in the United States. In the acid rain dispute, one of the keys in developing the political structure that led to the Clean Air Act Amendments was the link in interest between New England and Ontario, which encouraged them to talk to each other a lot.

QUESTION, *Mr. Reifsnyder*: It seems to me that an area in the bilateral relationship with Canada where trade and environmental issues often come together is fisheries. In fisheries, we have resorted to every form of

dispute resolution, from physical confrontation to submission to the international courts of justice. I was wondering if this, in the view of our speakers, represents a contentious exception to the model they were projecting of constant dialogue or whether in their view it is an area that is also managed.

ANSWER, *Mr. Phillips*: In my view, it is managed. There are always disputes about specific stocks and specific rivers. But, in my experience, the environmental elements have always been taken into account.

ANSWER, *Mr. Smith*: Well, I do not think it is really outside the cooperative mold relationship, but it is at one edge. The tone of the relationship in the fisheries area makes it more difficult than some of these other areas.

But when you look behind that, I think the pattern of finding ways to deal with disputes is not fundamentally different. There are very strong political currents that run to fishery interests which complicate it. For example, sometimes you have to delay that point where a dispute is ripe for resolution.

COMMENT, *Mr. Smith*: It is right to say, too, that a lot of our fishery relationships are by species, and are controlled by a treaty or some kind of agreement which does not always allow for these wider considerations to be taken into account.

QUESTION, *Professor King*: You mentioned third party dispute resolution. Could you give an example of a typical third party who might be used to resolve a dispute?

ANSWER, *Mr. Phillips*: Well, of course, in the dispute settlement article, the IJC is to be considered first. Are you thinking about a third party from the private sector?

ANSWER, *Professor King*: No, I am thinking that the third party would be a national from other than the United States and Canada. Would it be a Netherlander, or would it be a somebody from one of the two countries?

ANSWER, *Mr. Smith*: We use the IJC as a third party because traditionally parties have turned to it when they need fact finding, research or advice on a set of questions. We left it open in the area of policy dispute, because we anticipated a broader range of disputes, many of which may not be suitable for the IJC.

I expect that fact finding will be a big part of it. For example, if there was a dispute over a plant built on the border on one side or the other, one country might allege that this will cause damages in the other country. A panel of experts would be needed to determine which way the wind blows. Usually a Canadian and an American are appointed and in turn they appoint someone else.

That over simplifies it, but that is basically the approach. It is not so

much that we will look, at least from our prospective, to third parties to take the onerous political decisions out of our hands. But often the involvement of a third party in some aspect of a dispute has been very helpful. That is the thought behind what we have done. When there is a dispute, and we cannot resolve it by negotiation, we will want the involvement of a third party. Maybe it will only be to simply engage in fact finding.

ANSWER, *Mr. Phillips*: We did not raise a lot of possibilities and dismiss them in the negotiations so that wide scope would be maintained. That was intentionally to leave some flexibility.