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## CLOSING REMARKS AND DISCUSSION

*Henry T. King, Jr.*

THIS IS THE TIME when we discuss future programs. I would like to get everybody's ideas and sort of shake down some of my thoughts on future programs. We have a number of possibilities which I would like to discuss and list for you.

First, of course, is the possibility of an institute on taxes. This is a topic that intrigues me, but not always others. It is a very important topic at this time with the consideration of the flat tax in the United States, and also the differences between the tax systems of Canada and the United States. Provincial taxes are very important in Canada and more important than state taxes are here. The comparison between our tax system and the European tax system based on the VAT tax, is also noteworthy and may have competitive effects.

Another possibility would be environmental concerns in the United States and Canada, including particularly cross-border pollution, and the comparative costs and other aspects of pollution controls in the Canada/U.S. context, and the rest of the world. Environmental concerns are always a sexy topic and one that intrigues people as evidenced by the fact that sometimes environmental issues break down the barriers between liberals and conservatives in both countries. Many conservatives are strong environmentalists.

Another topic would be dispute resolution in the Canada/U.S. context on the private to private, private to public, public to public levels. That is a topic that is well-worn. The problem here is whether it could be combined with something else to make it more unique.

Another possible topic is the role of nongovernmental organizations (NGOs) in the Canada/U.S. context; how do they affect policies in our two countries, for instance, in the environmental area. How do the NGOs affect policy and how we make our laws in Canada and the United States?

What we are seeking in our program, if you look at our history, are umbrella topics. And one topic that appealed to me particularly was the possibility of a NAFTA update, i.e., revisiting NAFTA after three and one-half years, which has been in effect since January 1, 1994. We now have a history of NAFTA in operation, and it might be a good opportunity to take stock. It seems to me that this is sort of an umbrella topic. You have a number of aspects of NAFTA; first is whether it is working as it should be in resolving disputes between the NAFTA countries and secondly what are its economic effects.

And, after all, the Institute's uniqueness is the fact that it is devoted to the study of the interface between law and economics in the Canada/U.S. context, so that it is appropriate that we now look at NAFTA and how it is operating and whether it should be extended, and if so, will it be extended? In doing so we should always be looking at the impact of NAFTA primarily on our two countries. We would of course also have to have Mexican commentators on our NAFTA Revisited program. If we decided to go ahead with a NAFTA Revisited program, we would look at developments in the intellectual property field; we would look at the environmental side agreement of NAFTA; we would look at the investment provisions and whether they are working in terms of achieving their desired effect; and, we would probably want to take another look at the services provision of NAFTA. There are a lot of miscellaneous provisions in NAFTA that have not received as much attention as perhaps they should. And also the problem of cultural sovereignty, which is a battleground between the United States and Canada at the present time would be a point of focus. Another aspect of this is whether we should try to make NAFTA into a true common market and what the implications of that would be.

In the dispute resolution area, we now have the first case under Chapter 20 of the NAFTA, and also the controversy over the operation of the binational panels under Chapter 19, which was raised by an opinion by Malcom Wilkey. Judge Wilkey who served on a Chapter 19 appeals panel, has issued an opinion which is a bombshell both in Washington and Ottawa, condemning the binational panel provisions. So in looking at the whole problem of how you resolve disputes under NAFTA, there would be an update on how Chapter 19 is operating; this is most appropriate because I think there have been sixty-two cases at least started as Chapter 19 dispute resolution proceedings.

The other aspect of revisiting NAFTA that would be intriguing is whether the antidumping legislation in both Canada and the United States should be replaced by a predatory pricing approach which would involve the use of antitrust legislation to deal with problems which the antidumping provisions are designed to address. So these are some of the possibilities.

I would like to get topics that we can do that are unique and I want to get your views on what such possible future topics might be.

Any comments?

COMMENT, *Mr. Robinson*: As we discussed at the advisory board meeting, I think that your proposal about a NAFTA update, taking half-a-dozen chapters of NAFTA covering particular subject areas for review, is an excellent one. I think it would be topical and would attract a good number of participants both from Canada and the United States.

I also agree that we would need at least one Mexican commenta-

tor. I think that should not be hard to do, if there is enough in the budget. Mexicans always want their airfare paid, but we could probably look after that. I wonder if we might think of adding perhaps a commentator from one of the MERCOSUR countries?

COMMENT, *Professor King*: That would be a good idea.

COMMENT, *Mr. Robinson*: Maybe perhaps a Chilean, I have some contacts there, they might be able to help. The Canadians are heavy investors in Chile, particularly in mining. As you probably know, the Chileans are negotiating a bilateral treaty with Canada right now, because of frustration of not being able to join NAFTA at this time.

But they also, just two weeks ago, agreed to join MERCOSUR in a capacity yet to be determined, which demonstrates, I think, a potential problem for NAFTA which is that if MERCOSUR gets strong enough and has enough major industrial countries in it, it will be seen as a significant counterweight to NAFTA. And rather than being able to negotiate the extension of NAFTA with individual South American countries, we may find — and I have some friends in Argentina, particularly, who believe this will be the case — that MERCOSUR comes as a bloc to Washington and says, we are not going to be picked off one by one and negotiated separately. We want to come as the MERCOSUR bloc and talk about, in effect, a union of NAFTA and MERCOSUR. So I think that would add a little spice to the topic.

COMMENT, *Professor King*: It would make it unique. And in regards to Chile, of course, you have to get the Chilean point of view. In terms of Chile, it was a fact that the fast track was not pushed. It did not have as much to do with Chile, per se, as the differences between members of the two parties, the Republicans and Democrats in the United States. I think we ought to look at Chile as a possibility for NAFTA. It would be a good addition to NAFTA.

COMMENT, *Mr. Robinson*: There is an interesting twist on that, though. I know the popular story is everybody wanted Chile in and it was just a political problem with the fast track, but I happen to know from some friends in Santiago that when the preliminary meetings occurred, the position put to Chile by the U.S. negotiators was, you can have NAFTA but you cannot have Chapter 19.

So that was a pretty aggressive and unfriendly position initially taken by the United States, and I think that is one of the reasons why the Chileans are negotiating bilaterally with the Canadians, and why they joined MERCOSUR. They just felt that they were being treated as third-rate participants by the United States.

COMMENT, *Professor King*: That is probably the result of the Wilkey opinion. Wilkey apparently influenced Dole with his negative view of Chapter 19. Dole said he would go for the extension to Chile, but he would not support the binational panel principle for resolving disputes with Chile.

The interesting thing is that Wilkey, who lives in Chile, was not opposed to the extension of NAFTA, per se, to Chile, at least he says he favors it, but that his negative views on Chapter 19 may well have influenced the U.S. position on the extension of binational panels for Chile. Certainly Chapter 19 is a key Chapter of NAFTA.

So I think it would be a good time to do it, Michael, particularly because after the election, at least here you would have a shakeout, and if you did have a president with some legislative clout, then that would be important. The current forecast, for what it is worth, is that the current president will be re-elected.

So I think it is very important to explore Chile because I do not think much consideration has been given in the public eye to the extension of NAFTA to Chile and what it would mean. We talked about it and Chile wants to do it, but nothing has happened. And I would like to have somebody here from Chile; it would certainly add a lot of pizzazz to the conference.

COMMENT, *Mr. O'Grady*: Henry, in view of the timing, I certainly would agree that the update of NAFTA is probably your topic for next year, especially with the things Michael has added. It just occurs to me you might want to add two other things or include them. One is something on this problem that we discussed yesterday of the large number of state and provincial constituencies that have to join in to make large parts of NAFTA workable, and maybe we have to get representatives from the provinces and the states, or the Conference of State Governors to review the implementation of NAFTA in their area.

And the other thing that strikes me that would be interesting would be to begin to survey the case law that is beginning to be developed in some of the hearings and in the panels. Those of us who are not in the field every day do not have much access to this.

COMMENT, *Professor King*: In other words, try to play the part of the institutional memory on the cases so that you get a feeling where the trends are. I think that would be very important.

COMMENT, *Mr. O'Grady*: I think that would be interesting and would draw people. Just while I am on my feet it occurs to me again that you are a U.S./Canada Law Institute, but you have obviously developed a bias in favor of international trade law. Would it be useful to begin to add, say, a half day which would be an annual survey of the broader legal systems in the two countries during the past year, maybe on the theme of new interest in developments in one country that the other country might want to think about in much broader fields; constitutional law, tort law, whatever? I do not think you would want to make a whole program of that, but you might have a segment that would be of interest, particularly to the lawyers.

COMMENT, *Professor King*: Or a handout related to it. Either a survey in its form, or in a handout.

COMMENT, *Mr. O'Grady*: I think you would need more than a handout. You would want two interesting constitutional cases in the United States that would bear on the interpretation of the Canadian charter, if any of us knew about them in any detail. We would want to hear about them in some detail.

COMMENT, *Professor King*: That is a good idea. I take it that since there are no other suggestions, that NAFTA would be ideal for our purposes because it is a topic with a lot of facets, and we would do it differently than other more particularized topics.

We would also have the opportunity to look at the economic effects of NAFTA. I mean, what is its effect? What about Perot's challenge, the idea of jobs being sucked from the United States to Mexico; has this actually occurred? We could develop some very interesting history on that issue and set the record straight. I do not know what the outcome would be, but I would like to look at it. And I think that it is the type of topic that, if we got our teeth in it, would be very a important contribution to the relation between the United States and Canada in terms of identifying problems and possibilities.

I appreciate your coming. I thought our speakers were great. Both Jim McIlroy and Ellen Yost were mentioned in today's *Cleveland Plain Dealer*. It is in the second section, if you look for it. It describes the problems that exist, that NAFTA had created what they thought was a very free border and, instead, you have a lot of difficulties getting across the border back and forth in certain cases. So we thank you, Marc Gleisser of the *Plain Dealer*, for the headline. But our speakers did a wonderful job, all of them, at our conference, and I thank all of them.

I particularly also wanted to thank Tina Myles and Lucia Iannandrea who did nobly by the publication of the book covering last year's conference, which was out in record time.

Lucia and Tina, you broke our course record. And I hope that your successors who worked very hard and very effectively on this conference, John Barrett and Joe Blasko, can equal that great feat. I am sure they will. They did us a great service in getting this conference under way and also in preparing a very, very good set of materials. I had good comments on the materials. The materials are a little heavy, but that makes them very worthwhile, and I thank them for it.

I certainly want to record the significant contribution of Lydia Kosc to the conference. She is our Institute coordinator.

And I also thank in absentia Adria Sankovic for the wisdom that she showed in helping us shape the conference. We are fortunate to have Adria with us in spirit and also as a check point as we try to put these conferences together.

So, I pronounce, perhaps as a matter of self-interest, I pronounce the conference a success and I thank you all for coming.

