
January 1999

Discussion Following the Remarks of Mr. Gero and Ms. Anderson

Discussion

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

Discussion, *Discussion Following the Remarks of Mr. Gero and Ms. Anderson*, 25 Can.-U.S. L.J. 341 (1999)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol25/iss/46>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

DISCUSSION FOLLOWING THE REMARKS OF MR. GERO
AND MS. ANDERSON

QUESTION, MS. RICHARDSON: I am Bonnie Richardson from the Motion Picture Association of America. I first have a comment and then a question. Both of the speakers today are laboring under the assumption that I wish to be true, which is that no country to date has sought to impose customs duties on electronic commerce.

Unfortunately, that is not true. Argentina passed legislation this past December authorizing the establishment of customs duties on all cross-border services and all cross-border forms of intellectual property transactions, at the strong objection of both the United States and the European Union and, perhaps, other governments. The Argentines have promised not to use the authority that was granted to them, but the authority exists in a very threatening way. You can just imagine how this could hurt electronic commerce very badly.

Now, to my question. One of the most important advances in the intellectual property rules with regard to electronic commerce was the passage of the WIPO treaties in 1996.¹ I wondered whether the Canadian government has taken a position on whether it is possible, or useful, to incorporate those treaties in whole or in part or endorse those treaties as either part of the WTO's Third Ministerial conference in Seattle, or subsequently in negotiations in TRIPS?

ANSWER, MR. GERO: Well, there are two things there. There are customs duties, of which the Argentines are one example. Although some people would say that, in the areas where governments are taking on commitments in sectors, such as in the GATS, having customs duties is, in fact, illegal. It then creates a national treatment problem. It will depend on how one implements that in one sector.

As to your other question, we have signed the WIPO treaties, but they have not yet been ratified. Whether they will eventually find their way into the WTO like other WIPO treaties have done, we will have to see. My guess is that it is too early to tell in the context of the Seattle Ministerial conference because I do not think you have a critical mass of ratifiers to be able to do that. I would also think, if there are going to be further negotiations on intel-

¹ World Intellectual Property Organization Copyright Treaty, adopted at Geneva, Dec. 20, 1996, 36 I.L.M. 65 (1997); World Intellectual Property Organization Performances and Phonograms Treaty, adopted at Geneva, Dec. 20, 1996, 36 I.L.M. 76 (1997).

lectual property, that will clearly be one of the areas that will be examined at that time.

QUESTION, PROFESSOR KING: I have a question for Jean. It seems that one of the problems we have here in the United States is congressional involvement. You raised the question, which is the better alternative, a special electronic commerce agreement or the GATT? Do you have any views on which is the easiest to deal with in terms of congressional approval? I think that is going to be a fundamental problem.

ANSWER, MS. ANDERSON: I may not have been very clear in what I was saying. What I was talking about is a sectoral agreement within the WTO agreements, in the way that the telecommunications agreement is sectoral. In a sense, the Telecoms Agreement could be a bit of a model, although there are aspects of it that are not a model of clarity.² I think that the congressional role would be the same whether you did electronic commerce as a sectoral agreement or simply tried to apply other WTO agreements to it.

COMMENT, MR. GERO: May I comment on that? I think it is going to be a very important issue for the WTO Ministerial meeting in Seattle. The basic Telecoms Agreement is not necessarily a good example because it falls within the GATS. It is a service protocol. But there are going to be a number of issues that the WTO is going to be asked to deal with or may end up dealing with that are really cross-cutting.

At the moment, the structured WTO has three agreements: it has an agreement on services, an agreement on goods, and an agreement on intellectual property. If some predictions are correct, there may be agreements on investment and on competition policy. So, you have three, or five, or however many possible agreements. However, in the modern world, that may be not the most optimal way of dealing with certain issues. Electronic commerce certainly falls into that area because it cuts across all those legs of the stool. It has elements of goods, services, intellectual property, and certainly, investment.

The question is, in the context of electronic commerce, are you going to negotiate each of those three or four areas piecemeal, or are you going to negotiate them all together in one area which is likely where the business community is going to be. They do not care whether they deal with goods or services; it is one set of issues in their view. Biotechnology similarly cuts across goods, services, and intellectual property. We are going to have to come up with answers to the questions of border facilitation, and we will have to deal with the whole area of goods, services, and other issues.

² See generally Agreement on Basic Telecommunications Services, 36 I.L.M. 354 (1997).

From the Canadian perspective, there is the debate on how we deal with culture, for example, if it gets discussed at all in the WTO. That, too, has cross-cutting issues along with a whole range of other concerns. That is why I said that one of the issues for Seattle will be the question of negotiating modalities and how it attempts to deal with these cross-cutting issues in the current architecture of the WTO.

QUESTION, MR. WOODS: I have a comment and a question. I find it somewhat ironic that people will be talking about taxing the Internet in Seattle, which is Bill Gates' backyard. That is just an odd place to be talking about taxing the Internet.

My question is rather out of left field. Has the future already arrived? In his last few words, John asked, should we be re-examining the structure of the WTO? We have had round after round of treaty negotiations, and the rounds have been very successful. They have liberalized trade, and with it they have created other structures. But in the United States and Canada, we have a constant process of regulation and legislation dealing with these very complex problems. Yet, even though I know a lot of preparatory work has been done and will continue to be done, a lot of pressure is being put on Seattle. I do not know whether the Millennium Round is referring to the time it starts or how long it is going to take.

But, and this is not to denigrate the people who do that work, maybe we are spending too much time and money on this, not only in Canada and the United States, but also in the European Union. We have not talked much about the viewpoints or readiness to negotiate from Asia and other countries. Is it time to step back and look at how we are approaching something where there is a convergence of ideas about the need to be doing this? For example, on the issue of privacy, in the OECD meetings in Ottawa, should the private sector drive informal rule making, or should we take on the European approach to privacy? How are you going to settle all that when people have to go off into separate camps and follow a separate process here and a separate process there?

I do not really have a clear idea what I am talking about, and that is pretty obvious. I am just saying you have to step back and look at the whole approach. Aside from the substance of it, is there a better, more comfortable way to approach this where you can do this in a more regular, less pressure-packed way?

ANSWER, MS. ANDERSON: I will not say that the only way to get good trade agreements is by holding these gigantic rounds. There might be another idea that would work better, but I have to say that there is a reason they have developed this way. If you have a big round of trade negotiations that covers enough sectors and enough issues of interest to enough countries,

it means that you have some flexibility to negotiate something important. If you do not have a big enough package, you are not likely to negotiate much. That is the reason why it has, to date, been fairly rare for an individual sectoral agreement to be terribly important. I mean the Telecoms Agreement was very useful, but I am skeptical of trying that again. Until somebody comes up with some idea that is convincing about how every country would have negotiating leverage against every other country, which is what you need to succeed in some other system, this system is likely to continue.

COMMENT, MR. WOODS: Just a follow-up to that point. When the convention was signed banning the use of land mines, most countries in the world were signatories.³ That process was started in reverse, by interest groups that got onto the Web and used technology to their advantage. Governments, with the leadership of Canada, jumped on that process. The technology is going to create a third player when you are talking to countries trying to create a consensus in having a quantum mass of materials. You are going to have somebody getting something out of this, where in the old days you had to go back and report to your constituencies. Technology is going to be forcing you to deal with the constituencies right up front. I think the political dimension will encourage the negotiators or trade policy experts to engage that element much more in a day-to-day way than in the old days.

COMMENT, MR. GERO: I think that day is here. That is the nature of the world. The days of the 1950s, when a Minister of Finance could make one phone call to ask if it was okay to move a tariff up or down, are gone in the context of government policy formulation. Also, I think it is becoming quite clear that, having dealt with most of the issues at the border quite successfully in the WTO, there is now more and more overlap between international and domestic policy making to the point you cannot separate them.

What does that mean from a trade negotiations perspective? Well, frankly, what that means is that international trade negotiations are going to become the same as domestic policy formulations. There will be no difference; you are just going to have more players and all the complexities, which means government has to learn to deal with all constituent parts of their society to develop that consensus. This is something that governments are not necessarily very adapted to doing in the international trade context, or at least they have not been in the past. I think that is a vital component of it. It is clear that there are going to be aspects of what I would call the social dimension of trade that are going to be more and more important.

³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997 WL 49691. The United States is not a signatory to this convention.

Next, the whole question of whether it should be done in the WTO or outside the WTO is going to rise on a whole range of things. We are running into this already in the context of environmental agreements, and there are the questions of electronics, commerce, and whether those standards should really be set in the WTO. What does the WTO know about privacy anyway? Is that the appropriate forum?

The unfortunate problem is that we on the WTO or international trade side have really been quite successful in negotiating an international dispute settlement mechanism. You can generate whatever kind of international agreement you want, but if you do not have that enforceability factor, you have a problem. As a result, there is pressure to pile things on the WTO because it has an effective dispute settlement mechanism. That is going to complicate all our lives, but I think it complicates them for the better.

It will force the WTO to become a more open institution. It is going to force what I would call a much more cross-sectoral examination of issues. It is going to force the examination of trade policy by a whole series of interest groups who have never thought about looking at trade policy before. From a trade policy perspective, I think that is great.

QUESTION, MR. ROBERTSON: John, you have just about answered my question. My question was going to be, why are trade policy wonks negotiating all these social agreements and rule setting and policy binding stuff in the WTO? Why not some other forum? Why not a convention, well, you basically answered the question.

ANSWER, MR. GERO: My own preference is that it should not be done in the WTO. The fact is, there are pressures there that there must be a trade and environment component to it, because a number of multi-lateral environmental agreements do not have the same necessary dispute settlement provisions that the WTO has, and therefore they have difficulty in insuring that the countries live up to their obligations under environmental agreements.

QUESTION, MS. JEFFREY: I am glad we have had this particular side of the discussion. I want to throw something out very briefly and then, hopefully, hear your opinion, as well as the American perspective. I would like to suggest that I think it is disastrous for the WTO to be the forum for issues such as privacy, which require a larger kind of discussion and debate, specifically on the cultural side, and also on all the other sides that you have expressed. I cannot quarrel with you about the dispute resolution mechanism, although I think it is useful to point out, even in a case like the cultural dispute going on between Canada and the United States, if we did not have the U.S. trade muscle to back up what we are doing, I am not convinced that Canada would be quite so quick to go along with that. I do not know that we

have yet seen all the details come out on issues like culture that are much harder, and with which the WTO was not even set up to deal in the first place.

What I do think, though, is that when you put something like privacy into the WTO arena, such as we were discussing with the upcoming Seattle meeting, or when you see that E-commerce, which is such a key aspect, but not the only aspect, of the Internet, and the rules that are going to govern transactions, it seems to me that we have to watch very carefully to stick to the basic principle that public policy is supposed to advance the public interest. It is not clear to me that the WTO can effectively do that because it is not, as far as I can tell, mandated to do that beyond its responsibility for ensuring free trading regimes which do or do not serve those kinds of interests within a particular domestic political context. I also think the issue of the democratic side is going to have to arise. I would predict, very simply, that it is going to arise from citizens' groups using the new media, and so the very truth of what you are saying becomes clearer. But I think we are going to get to the next phase where it is not necessarily true that the WTO will be the forum where these issues are going to get decided or ultimately resolved.

I would love to hear your perspective from an American point of view. Do you think there is any other potential arena out there? Obviously, you will not even want to talk about the United Nations or any other kind of alternative that might emerge out of civil society, as opposed to the economic side. Is there anything else, or are we simply condemned to try to alter the mandate in the WTO?

ANSWER, MS. ANDERSON: I would not view it as being condemned. It is certainly true that, if you take an issue like privacy, depending on your perspective, that is either an absolutely critical protection for individuals or it is a non-tariff barrier to trade. It could be either one. It is both in my view. What much of this discussion about issues like privacy and the Internet shows is that there is going to have to be an accommodation among absolute free trade rules. We have never had absolute free trade. It is a myth, and one of the things that free trade in WTO terms has to accommodate is societal priorities for other things.

It is pretty clear to me that there is an interest in privacy protections. I will not say it is universal; there are probably people in the world who have not thought about that issue. But, if they did think about that issue, they might like some privacy. The level of privacy they want and when it becomes a concern to them is going to differ from culture to culture, depending on their situation. But, does it trouble you to imagine an agreement in the WTO that did set some baselines or minimums for privacy protection, for example? Or, on the other hand, what about an agreement that did not try to

do that, but said that, in applying privacy protections, you may not discriminate among members of the WTO in their products and services, including electronic commerce, sort of a most-favored nation or a national treatment concept, as applied to privacy restrictions. Does that trouble you? See, that is probably already in the WTO.

COMMENT, MS. JEFFREY: The answer for me is when you reach the problem of application within different cultural contexts and when you override a national state's ability to make domestic policies.

COMMENT, MS. ANDERSON: I do not think that is going to happen.

COMMENT, MR. GERO: Can I pick that up a little? I think that is a very important issue. I think what we are experiencing internationally is something that we experienced nationally a century ago, which is that economic laws lead the way, and social laws catch up. What is happening in the context of the WTO is, in essence, the same kind of situation we have in national jurisdictions. Look at national jurisdictions vis-à-vis the environment; most of the environmental laws are extremely new in national jurisdictions. I would hazard to guess that a majority of the countries in the world do not even have them yet. So, I think the pattern of development of rules is the same pattern as we have experienced nationally.

There is also the question of feasibility. How much, from a local-versus-international standpoint, needs to be maintained? This is an issue that we have been struggling with for centuries, you know, relating to the creation of a nation-state. How much is the local responsibility, and how much is the national responsibility? Certainly, we from Canada know about that, as does the United States. In a federal system, what is the local responsibility, as well as the federal responsibility?

The unique part of what this electronic commerce is going to do is it is going to empower both sides, because what it does is to create a phenomenal information flow to the local level. The ability of news groups to disseminate information, and of small interest groups to generate support, empowers what some of the people have called the democratization of the system. At the same time, what is created is a truly global system. You have a seamless global communication network that knows no borders. Therefore, in order to have suitable public policy, the question is how do you deal with that concept? It runs right across the range; all our intellectual property laws are national. You have copyright protection only in your country; you have trademark protection only in your country.

Let me give you one example on trademarks. If a Canadian hits a Web site in the United States that has a trademark on it, is that a use of a trademark in Canada? If it is so, because we do not have registration of trademarks either in the United States or Canada, that trademark is automatically

protected in Canada, even though it is on the U.S. Web site, just by the fact it was used by a Canadian.

The national laws at that point really need to be re-examined in light of this global system. We are going to have to figure out a way of doing that, whether it is within the WTO or some other institution, or even a new kind of mechanism. I do not know the answer to it. One thing is for certain. You are going to have to figure out the interrelationships because you cannot just blindly go ahead and negotiate something here, and then negotiate in the WTO and expect that they will not have cross problems. Look at the difficulties we currently have in implementing multilateral environment agreements and their trade sanction provisions in the context of the rules that exist in WTO agreements.

So, if one does it outside the WTO systems, one of the main issues is going to be, how does it relate to the WTO system?

COMMENT, MS. JEFFREY: In a nutshell, the key problem is whether economic institutions are in a position to lay the groundwork for the global society and whether market values are appropriate there.

QUESTION, MR. ROBINSON: I may, just out of good luck, have a partial answer for Ms. Jeffrey, but she is not going to like it. At Queen's University in the fall, we had an E-commerce conference, and some of the representatives there were describing an international organization of users, promoters, industry associations, and others, of which I think at that time there were about 128 members, all private and quasi-private sectors who were working to try to develop standards and give significant input into the next round.

Obviously, I am a proponent of this, but to what extent are governments working with this organization? I know I got the President of the International Bar Association to join as soon as I heard about it, and you now have 14,000 business lawyers from 148 countries around the world involved in it. There they are, waiting to help. Is government working with them? If not, why not?

ANSWER, MR. GERO: I think it is fair to say that governments are going to consult everybody, and it is vital that they do. We have started a fairly wide consulting process in Canada, parliamentary hearings. I do not think anybody has a unique perspective, and I think that one needs to deal with not only groups, but individuals. The reason I say that is because groups do not necessarily represent the individual members. Individual members of groups sometimes have very unique positions and groups sometimes are very much frozen in their ability to come up with a position because of the varying views of its members. I think it is vital for a government to consult and touch base with as many groups, associations, companies, and individuals as it pos-

sibly can in formulating their positions. That is the way governments formulate domestic policy and domestic laws. That is going to have to be the way governments formulate international rules and policies as well.

COMMENT, MR. ROBINSON: These chaps have a very clear idea, which is let it be self-regulatory by the industry. We will tell you how we do it so governments can get out.

COMMENT, MS. ANDERSON: If I have the last word, I think I would say that these issues have to get resolved so that you can have E-commerce without raising privacy concerns in any country, just to take privacy as an example. I think these are the best, newest examples, and there will be a new world in bringing civil society into trade negotiations because it is no longer just about trade. It has not been that way for a while, but it certainly is not going to be such in the next round.

