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Discussion

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DISCUSSION FOLLOWING THE REMARKS OF MR. LOEB AND MR. STEIN

COMMENT, MR. ROBINSON: It is very unusual to have the culture session end up with people congratulating each other on both sides of the border about a valiant attempt to do something worthwhile. I think we should allow Ken a bit of rebuttal in case there are some points he wants to pick up in the spirit of debate, and Hamilton too, and then we should open it up for questions.

One thing I would mention, just to comment on the retaliation bit, is that when the United States decides it is going to threaten retaliation to reach a desired result, which is what happened after the *Sports Illustrated* case¹ Canada went back to the drawing board. Could we pass some law to get around the WTO ruling and get the same results? The threatened retaliation against the steel industry, which just happened to be the one in the Minister's priding, and she was going to be murdered because if the steel industry had shut down in Hamilton, there were going to be about 50,000 people out of work and she was going to take the heat for it. So it was a very poignant retaliation, I guess. Steel had nothing to do with magazines, but it was effective.

Ken, do you want to respond?

COMMENT, MR. STEIN: Hamilton laid it out extremely well, the background on the trade side to this. That demonstrates why we are having trouble winning some of these battles, because of the degree of knowledge and expertise that is there.

I would just make two points. The first point I would make is regarding the exemption in the FTA and NAFTA. I am not a lawyer, I am an engineer and a businessman, and in my view that is not an exemption. The exemption that is in those agreements basically says you can do anything you want, whenever you want, but if you do something we do not like, we can retaliate against you using steel or anything else. That is not an exemption. That is barbarism. I do not know what it is, but it is nothing I am used to in terms of any kind of rules-based system. I am a little surprised that Hamilton actually described it as having a basis within trade as being something worthwhile. I think that exemption was really oversold to the Canadian cultural industry. I do not know whose fault it was, but the split-run magazine issue generally

¹ Canada-Certain Measures Concerning Periodicals, Panel Report, WT/DS31/R, Mar. 14, 1997; Report of the Appellate Body, WT/DS31/AB/R, June 30, 1997.

showed that it was a failure in the FTA to try to do something that had a worthwhile objective.

The second thing which I agree with him on is the whole thing about the future. It is important to note that I do not always agree with Terrence Corcoran, but on this point, he is correct. The Canadian Radio-Television & Telecommunications Commission (CRTC) decided they were not going to regulate the Internet. The world is getting too complicated. We have enough trouble regulating technology from the 1930s. They are not going to touch this stuff with a ten-foot pole. That was real progress from our point of view.

The other part of this, and I really do agree with him here, is that if the WTO has to find a means to deal with this kind of issue, whether it is sea turtles, culture, or whatever, the economic, cultural, and commercial imperatives are there, but the cultural imperative is primary. I do not think we totally sorted this out in our own country. Right now in British Columbia they do about a billion dollars worth of film business a year, which is not cultural. It is basically producing American films using Canadian studios. It is terrific for Vancouver. It is not really what I am talking about or what anybody could pretend to talk about. Michael McMillian, who runs Alliance, or Evan Fitzsan, would say that producing *The X-Files* in BC was terrific because the environment made *The X-Files* what it was; all those rainy, smoky scenes. That is all they can film.

On the other hand, it is really an economic measure. We are not trying to protect those kinds of things. What we are trying to do is find some means within this new world of globalization to say we want to have access for small artists, for small players, to be able to get on screens, to get on the radio, and to be able to support that as a country. We have got to find some means to do that. I am not sure what the right means are. I was very pleased to hear that Hamilton thought it was a worthwhile effort. On that basis, I will go have a Sam Adams, which is my favorite beer.

COMMENT, MR. LOEB: I should acknowledge that Sam Adams is a U.S. beer. I think that they do not really make their own beer, it is contracted out as well.

The only point I would make, because the trade lawyer in me cannot resist, there is one point where Canada is exactly right. There is an established legal history to the procedures that the United States has consistently applied under 301 law, and was continuing to apply all the way through implementation of the WTO agreements, which says that if you do not do what we want, we can retaliate anywhere we want. The anywhere we want part is the part that is really interesting to trade lawyers. It has never been tested and the United States has never had the courage to implement it.

They have played brinkmanship all the way with the Japanese. They said to several governments that they were going to retaliate against something totally unrelated. They create this long list embracing all of the industry's U.S. importers, consumers, and all of the foreign interests, who have items on this potential list that they say they are going to pick and chose from. They threaten retaliation, but ultimately in no case has this kind of retaliation been implemented. The foreign sources always end up backing down, and in the trade bar we regret that we never got to challenge it. We have never had a dispute that went all the way through. I think that is an element of the lawlessness in trade practice, and you see its consequences in negotiations of the kind that Ken just mentioned. We do not have any established international trade law that makes that clear one way or the other.

QUESTION, MR. ROBINSON: Hamilton, was there not at one point a challenge against 301 on the basis that it should not be used unilaterally, but only after it goes through the WTO system? I must say I just forgot what happened to that.

ANSWER, MR. LOEB: That is pretty much what 301 says after the WTO.

QUESTION, MR. ROBINSON: But you have to go through the WTO?

ANSWER, MR. LOEB: Yes, you start at 301. You cannot go all the way to the end and impose a penalty until you have been through the WTO. If the WTO has upheld the complaint of the United States and the United States does not get satisfaction otherwise, then it has got a speeded-up 301 case and it can go directly into the remedy phase. That is the way the law was modified to take the unilateral sting out of it. It is still unilateral for anybody who is not a WTO member, by the way, or for anything that is not a covered WTO service. For example, 301 could easily be used on broadcast satellites right now, because the WTO Telecom Agreement does not cover them.

QUESTION, MR. GRENIER: I should say right from the start, I am a Canadian from Quebec where cultural diversity is not only the concern of the cable industry, it is a wider concern. I must say that on the basis of these two presentations, Canadian cultural protectionism is dead. But then I have spent too much money on expensive U.S. lawyers to believe that. I think Hamilton Loeb has made a masterful presentation. My question is really to Ken Stein, whom I do not know at all. I remind him of something that was said about 150 years ago and that is the "tyranny of small differences." Is Canada's fear of a cultural takeover by the United States based on the fact that Canadians are very similar to the United States? Wouldn't a solution be for Canada to speak French?

ANSWER, MR. ROBINSON: The Mexicans did not need a cultural exemption under NAFTA, and they speak Spanish.

ANSWER, MR. STEIN: I do not think so.

COMMENT, MR. ROBINSON: We all tried. It is very hard in Toronto where I think the principal language is Cantonese.

ANSWER, MR. STEIN: The only comment I would make is that I do not think the battle is lost. I think the increased availability of French language services from a cable point of view across the country is a positive thing, and I think it is interesting in terms of the new technologies. I had this argument with the Bloc at a House Committee where Suzanne Tremblay, the leader of the opposition for the Bloc said that all this new technology is leading to the elimination of the French language. I said that I totally take the opposite view, because now, if you live in Calgary and you speak French, you are going to have more opportunities to receive French services with the new technologies through the Internet than you ever have had before. If it is the desire of the people there to speak it, there are opportunities are there to enjoy French language services more than there ever was before.

COMMENT, MR. GRENIER: That is a good point, but that was not my point. My point was English Canadians should speak French to defend themselves against Americans.

COMMENT, MR. STEIN: I would not go that far.

COMMENT, MS. LUSSENBURG: Just a couple of observations: first of all, there is a lot of merit in that proposition, except I think it might be a hard sell.

COMMENT, MR. ROBINSON: Yes, but you are bilingual.

COMMENT, MS. LUSSENBURG: That is true. But I still think it would be a hard sell. Even with English, we have fundamental differences with our American friends as to what certain words mean in Canadian English versus American English. I have shared this with some people. I interface daily, by the hour, if not by the minute, with my American counterparts given my professional life, and when I say I am going to table an issue, the Americans think it is gone; it is off table. Canadians know that the issue is not off the table. The term means that I have reserved my views until we have finished the debate or the discussion, and I will come back to it and advise whether I agree or not. The word is from the same language, and that is exactly the mouse and the elephant problem Canadians face on a daily basis when we deal with the United States; and it is not from any disrespect or any dislike of Americans. Canadians are different; we do think differently.

I grew up in the Netherlands. I can spot a Dutchman a mile away. There is something about the Dutch that is different. There is something about the French that is different. It is cultural. Canadians suffer from this problem, and I think it is real. We are so close to the United States and often the presumption is that because this is the way it is in the states, that is the way it

is in Canada. We are the little mouse beside the elephant. That is not showing any disrespect or anything intentional on the part of our brothers to the south of us who may disregard Canadian sovereignty or Canadian intent; it is just that, presumption. We all speak the same language; we communicate very effectively, or at least we think we do. I think often we do not communicate well, and that is a real problem.

When you look at our trade agreements, are we being penalized for culture? I think the short answer is that we are. Is that right? If we all spoke French, Carl, I agree with you, we would not be half as paranoid. But our Canadian education system does not promote bilingualism via any second language sufficiently. I sometimes say to my counterparts in the States that they just do not get it. We are a different country. The IRS and Revenue Canada do not see eye to eye. The immigration authorities do not see eye to eye, and Canadian business is different. It would be a lot easier, in fact, if our skin was a different color or if we spoke a different language, because we are so close. I think that is why Canadians are so paranoid about culture. We do not have any way to protect it because the potential for assimilation is so great. But at the end of the day, we are different. We have different views and we do have different backgrounds. I do think it is a problem.

Looking around this room, with no disrespect meant to the other women in this room, if you have been the only man in a room full of women, or the only woman in a room full of men, or the only person of color in a room full of white people, or vice versa, I think you can begin to understand the Canadian, if you will, paranoia. Personally, I have often been the only woman in a room full of men. I do not feel terrible paranoia, but I have to tell you that when I did graduate work on so-called Third World development issues, I was often the only white person in a room. It gave me a totally different perception and understanding of culture and discrimination which I had never appreciated, and until you have an experience where you truly feel you are being singled out by something that is not within your control at all, I mean it is just a state of being, that is the way you were made, I do not think you appreciate the distinction. I think Canadians feel that way often in the company of our American brothers. It is not personal. It is just reality. It is just business. But, is homogeneity what we desire as a culture, as a society? I think the answer is no.

How do we protect Canadian culture? We have all these economic sanctions, but is that the right answer? I would ask our panelists, how can we reach a compromise between the desire for trade and opening up of our borders, versus the desire to protect a legitimate interest?

COMMENT, MR. ROBINSON: You did very cleverly slip a question in there somewhere. Whoever said the Dutch and the Canadians are very quiet did not know Selma.

COMMENT, MR. STEIN: I agree somewhat with those comments. I have worked both in the United States and Canada, so you take a different approach to these things when you have that kind of experience. I generally feel that Canadians do not feel as intimidated as we sometimes let on that we are. I think the bigger problem is that we adore Americans. We really like a lot of things about Americans. There are a few things that we actually detest, but the things we detest generally are not American. For example, we detest guns and gun control. I think the polls show that Americans hate guns just as much as the Canadians. We are pretty much the same, but the Americans have not figured out a way to deal with the problem. The thing is, I do not think Canadians with whom I deal, with whom I work, feel an inferiority about that.

Within our company, Shaw Communications, we get people coming to us from New York and Denver trying to figure out how we make this broad band pipe work. We have more high-speed Internet customers than anybody else in the world. I have more high-speed Internet customers in Fort McMurry than AT&T has in San Francisco, not to criticize your company or the companies they took over.

I do think that Canadians have a problem, which is that they cannot figure a way out of this. The thing is, we all want to have this economic relationship with the United States. It is crucially important. We all want to be part of that, to share and participate in it; at the same time, we want to be able to have a sense of value as individuals in a society that means we are different. I think language is a simple way out, quite frankly. I think that being a Canadian means more than speaking a different language. It means a whole bunch of different things to me.

It is a very personal kind of thing, you know. I probably need a couple more beers to go into it. But, the thing is that that is what we are trying to deal with, within the cultural industries. Do not underestimate the degree to which a lot of angst has gone through my Committee. There is not a cultural group that is not represented. There are thirty people on that committee who represent all kinds of artists and film producers and broadcasters who have gone through a lot of angst to try to say that we cannot just be protectionists. We cannot just say that U.S. stuff is bad and our stuff has to be protected. We have to find some means, though, of preserving what we have and making that popular around the world.

I think Ham put it correctly when he spoke of New Orleans. I have not been to New Orleans in a little while, but from what I understand New

Orleans is a very wonderful place. The fact that it may not be as wonderful a place as it should be would give me concern as a human being, not just as a Canadian. I think diversity is important. I think that is one of the things that we are trying to say to Americans. We want to work with you. You should not be controlled by Jack Valenti.

Actually, I think the Internet is a phenomenal opportunity. It makes anybody an author and anybody a publisher. I think the Internet, interestingly enough, is going to give us the kind of diversity we seek.

COMMENT, MR. SCHAEFER: I wanted to get back to this question of subjecting cultural measures to retaliation. Ken's response was that this is actually the law of the jungle. This is the United States being dominant.

You can make an argument on the opposite side, that this solution does in fact undercut the rule of law, but because you are not ultimately required to come into compliance. It is clear that under the WTO agreements in general compensation or retaliation are supposed to be temporary, pending ultimate compliance with WTO rules. Maybe culture is different enough that you can do that in that sector. But think about the other topics, such as the environment. The United States says that you can keep your environmental measure, but you have to pay for it in the form of compensation, or they are going to retaliate. What about agriculture, which some people connect to culture? Quickly you can get into a situation where the permanent solution is retaliation because you do not have to come into compliance and you cease to form a trade globalization function. You are, in essence, closing markets.

I just wanted to make people aware that there is a different side of that argument, that solution is against the rule of law, not because it gives the United States a heavy-handed approach, but because it does not ultimately require compliance and ceases to form a trade globalization function.

COMMENT, MR. ROBINSON: I agree with all of that except the comparison of agriculture to culture.

COMMENT, MR. SCHAEFER: I am saying there are others who could argue that.

QUESTION, MR. ROBINSON: That is kind of like the Jack Valenti thing. Canadian culture is just a business. Do not bother me with this silliness. Do you want to respond to that?

ANSWER, MR. LOEB: I think the only thing I would say that in this area is the rule of law depends on the effective operation of the bundle of systems that compose the law. Ultimately, there is no Attorney General who will say that Elian Gonzales goes back to his father.² There is no way to

² Elian Gonzales is a six-year-old Cuban boy who was found floating off the Florida coast after the boat carrying him, his mother, and other Cuban nationals, sank, killing most of the people on board. He was subsequently rescued and was taken in by his uncle, starting a

enforce the remedy or the conclusion of violation, other than to impose the retaliatory penalty. It certainly could unwind, but we have got forty or fifty years of experience with this system. We have not really seen many examples where that is the case. I have seen the repeated comment that Canadian cultural policy ought to flip. There is the standard list: Jim Carrey, Celine Dion, Alanis Morissette. It is a list of eight or ten people. But as more and more people from Canada find success, and more and more of the Canadian cultural industries find access to foreign markets, including other cultures which could turn around and apply the same rules, it will be very important to the economic success of those potential Canadian industries. If you allow the model to play itself out, I think you will end up with a relative sense of equilibrium. Dangerous effects in terms of the rule of law that you are imposing probably do not occur.

COMMENT, MR. BAILEY: Paul Bailey, a comment or two and then a question. I guess I have to start off by taking serious issue with Hamilton's opening remarks tonight. They were totally unjustified. Professor King has done a brilliant job both tonight and with the after-dinner speakers. They were the perfect after-dinner dessert, I think. So, that is the first point I have to make.

QUESTION, MR. LOEB: I do not get that apology?

QUESTION, MR. BAILEY: Second, just to make up for that totally gratuitous attack on Ham, I have to commend both speakers on the presentation tonight. I thought it was excellent. As a Canadian, I enjoyed both of them in different ways. It is very interesting, being Canadian, and in my case, being English Canadian, is quite an interesting experience. The challenge of being Canadian, English and French Canadian, is that you are really part of a global community. You have a world heritage, if you will, and all the benefits that go with that. But, at the same time, you are trying to maintain a separate identity, and it is a real balancing act, quite frankly.

It is a tremendous challenge. Part of the challenge, too, is to engage in this rules-based, world-trading system, which everyone benefits from tremendously without losing sight of other things that are important in life by being drawn into this one narrow view of the world. So, we all become Budweiser drinkers and Sam Adams disappears from the world.

After that kind of random rant, I would give you a very specific question. Ham, you were making reference to 301 and the fact that the bar community is looking forward to the chance to deal with the aspect of retaliation. Could you elaborate on that a little bit?

long immigration and custody battle between his Cuban father and the United States government.

I am not sure if my question is clear enough for you, but before you answer what makes me think about this is that retaliation in this case was not meant to provide the United States with an equal amount of compensation for Canada's cultural initiative. It was meant to break the back of our Cultural Minister and get Canada to cave on the policy. It was not a fair exchange. It was an arm-twisting exercise. Would something more general that would allow Canada to continue to maintain that cultural difference, but still pay for it; is that a solution or what do you have in mind?

ANSWER, MR. LOEB: In the trade bar there are people who represent the U.S. steel industry, so there is no homogenous view within the trade bar and the United States. But those of us who tend more frequently than not to take the kinder side in trade cases generally have the view, and this is reflected in some of the work that the International Trade Committee did during the couple of years that I was chairing it, that there would be a stronger case under both international laws for retaliatory measures in the sector that is involved. So, if it is telecommunications, you are retaliating against Telecom.

Of course, that never works from the standpoint of the U.S. retaliation technique for two reasons. One is the one you mentioned, which is that they are really trying to break the political back of the foreign government that is maintaining what the United States has labeled as unreasonable or unacceptable practice. The other reason is that there is a steady reliance in the United States on whatever the product is. In the semi-conductor case, for example, there is no way the United States could retaliate against semi-conductors because the U.S. industry was dependent on foreign manufacturers from Japan and Korea in order to keep making the stuff. So they had to start talking about retaliating in other sectors. That is where the trade lawyers started saying at some point that sooner rather than later once you get out of the sector, there ought to be some potential international law principle that this is not effectively quid pro quo compensation. That is really the principle here. It is compensation, not retaliation. At some point you are not getting compensation in any way other than some sort of number that is written on the paper.

The one time we were really looking forward to challenging that was when the United States was about to retaliate against Japanese luxury cars in 1995, the great payday of U.S./Japanese trade disputes that went away because Japan's economy went down. But those of us who represented Japanese automobile makers were very interested in this issue because of the scenario. The position of the United States was that the U.S. automobile makers were not able to ship a couple of types of cars into the Japanese market successfully. The Japanese market was closed. Therefore, what were

they going to do, file 301 proceedings? This was all pre-WTO. So, they were going to retaliate against relevant imports from Japan. What were they going to retaliate against? Not the same type of imports that are coming in from Japan, because partly the Japanese started making those in plants in Kentucky and Ohio and places like that.

COMMENT, MR. ROBINSON: Ontario.

ANSWER, MR. LOEB: They said the way they could really hurt the Japanese here was to threaten them in their BMW, Cadillac, Lincoln Continental, and Mercedes market by hitting the Lexus and by hitting the Nissan Infiniti. So it was a very interesting legal issue about retaliation a few degrees over in terms of the sector. It is still in the auto sector, but it is not the product that was being foreclosed from the Japanese market. The question was whether that could be attacked. There were a bundle of very interesting issues on that; and, ultimately, as is always the case, the Japanese government caved.

COMMENT, MR. ROBINSON: I am going to take the president's prerogative to add one prediction to this cultural issue before I thank the speakers, and that is that the poor, weak little Canadians need to protect their culture. We are going to enlist the French and the Australians and New Zealand. We are going to get a whole bunch of English-speaking countries and form a little group so we are tough enough to try to drive this issue. That is not going to be easy, because working with the French is never easy on anything, but if you thought that having to deal with the Canadians on cultural protection was difficult, wait till you get the French in there, too. Then it will be a real battle.

I think the speakers deserve to be thanked and you all deserved to be thanked for staying and participating. This was outstanding.