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Discussion Following the Remarks of Mr. Farber and Mr. Monahan

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF MR. FARBER AND MR. MONAHAN

QUESTION, MR. KING: My question concerns Bush versus Gore, where a five to four U.S. Supreme Court decision overruled the Florida authorities, but at the same time, you said that Justice Thomas had moved toward decentralization. Do you have any problem in rationalizing his decision in the Bush versus Gore case with what you described as his following Professor Epstein's approach towards decentralization?

ANSWER, MR. FARBER: Do I have trouble rationalizing the decision Bush versus Gore? The answer is yes. I find the decision very difficult to reconcile with the general trends in the U.S. Supreme Court doctrine. It seems to me to be an aberration to use the most polite term.

COMMENT, MR. ROBINSON: I disagree with you in one very narrow area Mr. Monahan. You made a comment about provinces agreeing to cooperate on changing their laws after the North American Free Trade Agreement (NAFTA). I must disagree. I think that what happened was exactly the opposite. The provinces were invited to agree during the two-year period under NAFTA, where they could agree to change their laws. The feds tried desperately to embarrass the provinces for not doing so. The provinces finally gave a blanket refusal to change any of their laws and opted out of all noncompliance laws. The feds said, "You cannot do that. You have to specify your laws." The provinces refused to do that. The feds had to hire a bunch of lawyers to put together all the non-compliant laws and the book stands six inches thick. The good news is that I think that many of these problems will be solved in NAFTA.

For example, one of our Chapter 11 cases involves a provincial measure where Canada is going to be found guilty of breaching Chapter 11 because of something a province did. Canada is going to immediately debit the province's transfer account for the full amount. The province is going to sue and we are going to get the Labor Conventions case reversed. I do not think there is any doubt that the Supreme Court in Canada would pitch the labor conventions out. We will have trade and commerce power, and we would have a watershed change in Canadian Constitution law. Comment?

COMMENT, MR. MONAHAN: In relation to the NAFTA and the Canada/U.S. Trade Agreement, the way they were sold to the Canadian provinces was by saying, "Your noncompliant laws do not have to be changed." It was only in very specific, very limited areas in NAFTA where the provinces actually had to change their laws, like in the area of dealing

with liquor regulation, and it was in those specific areas that there was a dispute. Eventually, Ontario and I believe a few other provinces, agreed they would modify their laws to conform to the treaty. In those cases, where existing law was non-complaint, the province agreed to deal with it. All other non-conforming measures could be listed and therefore were deemed to be in accordance with the requirements of the treaty.

COMMENT, MS. VERDUN: I would like to add a point of clarification to that because I was on the negotiating team for the NAFTA, for the investment chapter. We were very careful in how we negotiated to ensure that existing non-conforming measures were grand fathered, and that applied to the U.S. as well. The U.S. had exactly the same situation as Canada did, which was, state and provincial government officials were somewhat reluctant to go through the labor intensive exercise of listing all the exceptions. I worked on that part of the process and provincial officials were very much part of the team. I think the provincial officials were concerned about NAFTA being accurate, because if it was inaccurate, it would come back to haunt them. The U.S. had the same problem. The Mexicans did not because they did not have a federal situation to deal with. So we were very careful to make sure that existing non-conforming measures were grand fathered. Where the bite was was that any future measures would have to follow the general principals. That did not require any legislative changes. Legislation was not really required in those areas. The provinces were not required to change their laws.

QUESTION, MR. CHODOSH: I want to raise a broader question. One of the things that has puzzled me is the seemingly conflicting trend towards international integration in North America and decentralization and devolution elsewhere. Is there an explanation to the seeming paradox that federal governments have essentially, through the free trade regime, limited their regulatory powers to the extent they can justify regulation within their country by virtue of it being state regulation or provincial regulation? Do they get to have their cake and eat it too?

ANSWER, MR. FARBER: The two related questions were: First, about the coexistence of an increasingly strong international regime in areas like trade with a devolution or decentralization of powers from the nation state downward to the local and sub-national levels; and second, whether national governments can have their cake and eat it, too, by entering into trade agreements but then having their sub-national units continuing along very protectionist ways.

Let me answer the second question first. On the U.S. side of things, there is some awkwardness about getting states on board. However, I think it is clear that Congress does have the power, if necessary, to simply step in and

preempt state legislation. There may be some difficulties if the state has to actually do something affirmative, but as long as the agreement only requires the state government to step aside and deregulate or non-discriminate, I think that the U.S. has the ultimate power. It is clumsy because of the fact it requires a politically difficult federal intervention, but legally, it is not a major issue.

The first question is about the coexistence of these trends towards power moving both sub-nationally and internationally. It seems to me it is at least plausible that they are related trends. You do not need to have as much power in the nation state as things like the control of the economy drift away towards international institutions and therefore, there is a greater degree of comfort with leaving what is left of regulatory power at the more local level.

I do not know too much about Quebec but I do remember at one point during one of these referendums, an argument being made in Quebec, which said, "We do not need to be in Canada today because we have NAFTA. We will be an open economy and able to trade with the U.S. Therefore, we do not need to be part of Canada today. I think that kind of epitomizes the kind of force that could lead to what some people call the hollowing out of the nation state.

COMMENT, MR. MONAHAN: Just briefly, a comment on that point, which I think ties back to the second part of Mr. Robinson's question, which is what if a province is found, for example, in a Chapter 11 case brought against a province, in which a province of provincial measure is found to violate NAFTA and then you have to compensate and change the measure. Mr. Robinson is suggesting that the result will be federal government will require the province to pay for that.

I would have thought that the position would be the opposite, that the province will take this position and say, "Look, Canada, you signed this agreement, now this compensation has to be paid. You pay the compensation and not only that, you compensate us for the fact that we have to change our law, if we do." In other words, I thought the argument would be, "Look, this is a matter of provincial jurisdiction. It is a valid law we are enacting within Canada." I thought the pressure would be on the federal government to compensate the province. Otherwise, the issue would become a federal provincial issue and the province would say, "Canada, through this agreement is limiting these good laws that we are enacting and we want to have on our books."

COMMENT, MR. ROBINSON: In either case, we get a retrial of Labor Conventions, right?

COMMENT, MR. BRERETON: I want to return to Professor Monahan's presentation. In particular, his study of the first case involving Canada based

on Chapter 11. I think there is an important broader point we are missing and that is the important role that the case under the agreement on internal trade played in that particular dispute. The fact that under the agreement on internal trade, the inter-provincial trade authority of the federal government is constrained. After the legislation was introduced, there was a case brought before the panel under the agreement on internal trade by Alberta and other provinces supporting them in which Canada today was found not to be consistent with its obligations. So in bringing that measure, we were, in fact, removing the regulation that was found to be inconsistent into line with our obligations under the agreement for internal trade. There was obviously a spill over effect into addressing the complaint that Ethyl brought into the NAFTA. It is an important general point that should be given a little more profile in terms of the current situation in Canada today.

COMMENT, MR. MONAHAN: The point that was made was in the Ethyl case, the methylcyclopentadienyl manganese tricarbonyl (MMT) case. There was also a complaint brought by the Province of Alberta under internal trade, and that was a key factor in that ultimate resolution. The point remains, however, that the reason why that complaint was brought or was able to be brought was because the Federal Parliament was forced to regulate the inter-provincial movement of the product as opposed to the real object, which was to prevent the addition or blending of MMT into gasoline.

The objective of that case was to establish that the Parliament of Canada did not have the constitutional authority to regulate the blending of MMT in gasoline. The only thing the Parliament can do is regulate inter-provincial movement of gasoline.

That was an odd result because if you look at the wording of the agreement of internal trade, there is a specific exemption for environmental measures. One would have thought that this measure would have qualified under that exemption because the underlying objective was an environmental concern.

However, the measure was framed as an inter-provincial measure and it was attacked on that basis.

COMMENT, MR. MACH: There are grounds for the federal government to interfere with inter-provincial trade available under the agreement but the federal measures failed on all the tests. No information was provided concerning environmental or health justifications that they were able to demonstrate that there was any negative effect from having the MMT additive included in the gasoline. All these arguments were available for the federal government to use and to make. They did not have any legitimate evidence to substantiate those arguments. Therefore, it was seen

as being nothing other than inter-provincial trade barrier contrary to the agreement on internal trade.

The federal government, being one of the greatest advocates of economic union and advancement of inter-provincial trade, could not sit back and say we refuse to eliminate inter-provincial trade barrier. Their legislation was set up because they could not differentiate between inter-provincial trade and international trade, therefore coming into compliance by de-listing MMT for inter-provincial trade. The federal government would have to de-list it for international trade as well. That is why they had to settle.

QUESTION, MR. KING: I have two questions. First, who pays for all these challenges brought under Chapter 11 concerning state regulations and state activities? Second, who assumes the liability on these cases?

ANSWER, MR. FARBER: I do not know under the current legislative scheme. It is an interesting question, the extent to which the federal government could require the states to pay. I guess that the answer might be, yes, that they could at least require the states to reimburse the federal government. However, given the current interest in the Supreme Court and state immunity, I would want to think about that.

QUESTION, MR. FARBER: To what extent are these general doctrines of decentralization historically linked to the provinces of Quebec?

ANSWER, MR. MONAHAN: I think the link is very strong. In going back to pre-confederation, the Quebec Act of 1774, the concept of property and Civil Rights being subject to the prior, the French Customary Law and the Civil Law, was reflected there and carried forward into 1867. The federal system, many argue, would not have been configured in the way it was except for the Province of Quebec. I think more recently what we see is that the Province of Quebec, although failing in the referendums that they have held to achieve sovereignty, have pushed a concept of sovereignty and of sovereign powers within the limits that exist on the Constitution. The other provinces have taken up that view.

You have, for example, these different agreements that treat the province as sovereigns. For example, we have the Social Union Framework Agreement, which deals with the ability of the federal government to spend money in the provincial jurisdiction. Now, Quebec refused to sign that because they said it was too great an intrusion into their powers. The fact that the federal government tried to get Quebec to sign that the agreement led to greater recognition of provincial sovereignty of areas of jurisdiction. Even though Quebec ultimately did not sign it, the agreement that emerged reflected that recognition. Quebec had an effect on the overall framework and development of federalism.

COMMENT, MR. KING: Well, I think we got off to a great start. Thank you.