

January 2001

Discussion Following the Remarks of Mr. Southwick and Ms. McGuire

Discussion

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Recommended Citation

Discussion, *Discussion Following the Remarks of Mr. Southwick and Ms. McGuire*, 27 Can.-U.S. L.J. 249 (2001)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol27/iss/42>

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DISCUSSION FOLLOWING THE REMARKS OF MR.
SOUTHWICK AND MS. MCGUIRE

QUESTION, MR. KING: Is there a need for an institutional framework or would it be better for states and provinces to discuss these issues between them? There must be other issues of this type. Have we institutionalized our forum for handling other disputes like this? One thing that happened here, which was of concern to me, was it was politicized, and I do not know whether that politicization would benefit both sides.

ANSWER, MS. MCGUIRE: The point I would like to make in response is: What I am really concerned about is capacity building, not the development of new forums.

We spent yesterday talking around the issue. We discussed the question; is federalism a barrier to the U.S. government entering into new obligations where they might affect states? We talked about the capacity of the U.S. federal government to make states comply, because, after all, the U.S. is under the same obligation as the Canadian federal government to ensure compliance by sub-national governments. We talked about whether the U.S. federal government could use legal means to do so. However, then we said, of course, we would not do that because there is a political problem to doing that, so it is unlikely, except in a particularly egregious case.

It seems to us, from the Canadian experience, that the best way to ensure the involvement of provinces and states, the informed involvement of provinces and states, in trade-policy issues is by involving them often, and in an informed way.

Canada and the U.S. have a partnership. Our federal governments talk regularly. We have quarterly meetings. We go through the issues that are at the negotiating table, at the dispute table, to try to build up that capacity. That does not mean we always agree, but it means that we have, I think, an ability to deal with the issue as a public-policy issue and not simply have it become one that is politicized to the detriment of the resolution of the problem.

In terms of your question concerning ways for states and provinces to work together, I think we talked about a couple of forums yesterday.

Ontario has recently joined the Council of State Governments. Our premier works with the Great Lakes governors. I think these are all very useful ways for provinces and states to work together.

Our problem, from a trade-policy point of view, is that we come to these forums and do not really engage in trade-policy issues. They are good for

other things; environment, for one, has been a traditional subject for Great Lakes governments, but, unfortunately, not trade policy.

ANSWER, MR. SOUTHWICK: I disagree with your characterization of this dispute as having been politicized through this action. It was politicized. What it was not was federalized. It was a very highly politicized issue between the State of Minnesota and the Province of Ontario for a decade and a half before it became a trade dispute. It was at impasse precisely because Ontario did not then, as you have heard, and still does not now, believe it had any North American Free Trade Agreement (NAFTA) obligations or any trade obligations in connection with how it regulated its fisheries resources. It assumed that it could regulate its fisheries resources using economic criteria and picking economic winners and losers through the way it regulated its resources without having any international obligations called into question in that circumstance. I did not realize we were going to be relitigating the case today. I think, you have heard, that is still pretty much their point of view, that they have no trade obligations whatsoever in the way they regulate their fisheries resources.

I remember thinking, when we were working on this matter; Canada which has many, many natural resource companies, and the extraction of natural resources from foreign markets around the world is a very big industry in Canada; what would Canada say if, let us say, Chile took the view that in order to extract copper ore in Chile, a Canadian company had to buy a certain amount of services in Chile; had to purchase all of its accounting services from Chilean accountants, had to purchase and all its legal services from Chilean lawyers. Chile could say, "We are regulating our natural resources, obviously, like you are doing it with a very blatantly economic tool."

I notice Ms. McGuire made the point that Ontario well could have zeroed out on nonresident anglers. That would have presented an interesting legal question, but, more importantly, I would wonder what Ontario resorts would think when eighty percent of their clientele suddenly were not allowed to fish. I do not think that was ever a realistic option, because eighty percent of the business of the Ontario resorts, again, came from the U.S. side of the border, and so they were deliberately rewarding those resorts by saying to nonresidents, "Come fish in Ontario, extract the resource but make sure you pay our tourism industry for it." That was the fundamental issue. There was, as Ms. McGuire mentioned, a collapse of the fishery, I think was a great bit of hyperbole. There is a joint management study of the border lakes by the Ontario Ministry of Natural Resources and the Minnesota Department of Natural Resources. It is a virtually unprecedented, cooperative study in management of border resources. The two governments, since 1992, have con-

ducted regular surveys and mapping of all the fisheries and they have accounted for where the fish are located. It is an amazing document and it is attached to our petition. You cannot believe the details into which the state and province have cooperated to study and analyze these fisheries, to know exactly where they go. The Minnesota Department of Natural Resources is adamant in its view, based on the Canadian data and their own data, the fishery was as healthy as they have ever been. They were healthy in a large respect because Minnesota had stopped the commercial harvest of Walleye. Again, sport anglers from the U.S. were not taking eighty percent of the fish in Canadian waters. In the most heavily used area, the people coming from Minnesota, from the northwest angle of Lake of the Woods, they were taking eight percent of the Walleye from that sector of the lake. In that sector, commercial nets were taking something like eighty percent of the fish. As an economic development strategy, commercial netting of a Walleye gives you approximately one-tenth the economic value of having a tourist come and take it. One last correction; The Minnesota limit was not fourteen Walleye, it was six Walleye. Again, if you look at the tons of fish taken out of the lake at that limit compared to the huge amounts of commercial netting on the Ontario side, there was no comparison.

To answer your question about enforcement, I think the discussions got to a low point when Ontario came in to say that the rapacious, arrogant U.S. tourists are completely ignoring the law and raping the resource and doubling the legal catch. We came in and blew up to poster size a picture of a dump in Ontario that was filled with trophy-size, rotting Walleye. Why? Because when you net Walleye commercially for the restaurant business, you want a certain size. If you get bigger than that size, the fillet was too large and the fish was being thrown in the dump. I think the federal governments stepped in at that point and said, "Children, can we agree that strong enforcement of the fishing regulation is important to both governments? Can we agree that adequate resources should be put to enforcing the law?" There was no agreement, and Minnesota said, "We rebut and strongly disagree with all your premises about whether there is a problem with the fishery and whether our enforcement activities are inadequate. However, to help you address your concerns, we will dedicate significant additional resources taking them from other lakes in Minnesota." There was not any increase in the total personnel, but a significant reassignment of Minnesota enforcement personnel to Lake of the Woods and Rainy Lake.

Sorry to relitigate the case. One point has not been relitigated. We have not relitigated the trade and services issues. Let me just say that whether or not there was cross-border provision of services, in this particular factual situation, that would have been the most interesting issue to come out of the

package. So, suffice it to say, since Ms. McGuire threatens we may have to litigate this issue some day, I will not tell you our theory, but we did persuade the U.S. government that we had a winnable case on all issues.

COMMENT, MS. MCGUIRE: I just want to correct one thing. I am not a fish biologist, so I am not going the take you through all the numbers. I did not say that Ontario said it did not have any international obligations, of course we do. We respect them. I said you did not make your case.

COMMENT, MR. PRICE: I would like to respond to the point that there is a need for some institutional framework for state/provincial cooperation. I would say there is no need for an institutional framework for state/provincial cooperation. I would say what is needed, in my experience, is greater political courage and leadership by our federal governments.

Certainly states and provinces have a role to play in advising and consulting with the federal governments, but it is the federal governments who make trade policy, and it is the federal governments that negotiate trade agreements.

I cannot tell you how often I have been hamstrung in investment negotiations because of inconsistent state measures that states wanted to preserve for largely irrational reasons.

There is no reason to shelter from national treatment obligation the dog-grooming requirement in Iowa that only U.S. citizens can hold dog-grooming licenses. There seems no reason to take derogation from that obligation, for that measure, or to punt and say we are going to grandfather all inconsistent state measures, because if we do not do that, the National Governors Association will be upset with us. There comes a point where the federal government must honor its mandate to the nation to negotiate and to its trading partner.

COMMENT, MR. SCHAEFER: I do not disagree with what Mr. Price just said. It is really a situation where federal government has the legal authority to do something, yet they feel politically constrained from doing so.

I think is solution is two-fold: federal government probably does need to be a bit more aggressive, but one thing that will help them or make that more aggressive stance less conflicting is developing a culture of liberalization within state governments.

State government attitudes tend to be more like developing countries, and what you find is a great degree of difference amongst different state officials.

Governors tend to understand trade. They go on trade missions. They understand its impact on jobs. They tend to be more for trade liberalization.

What has happened though, near the end of the Uruguay Round and this continues on today, is that you have state regulatory officials which do not

take a broader view, their jobs do not depend on jobs in the state. They just want their laws protected.

This is true of Attorney Generals as well, and what has happened is that state legislators are getting pulled more towards these regulatory officials and Attorney Generals point of view and the governors are not pulling them more toward their point of view. What is going to happen, once you eliminate state protectionism with these stand still obligations that are in trade agreements and actually want to scale back existing protectionism? You do not want to have to rely on a massive amount of federal suits to bring states into compliance. You do want some voluntary compliance. So the problem is: state legislators tend to be more right now with the state regulators and attorney generals in terms of points of view and not with the state governors.

So there is a real need to educate, build capacity and build understanding. State Legislators are distrustful of United States Trade Representation (U.S.T.R.) advice. They feel like they will not be able to tow the line even. U.S.T.R. will give prophylactic advice. What they are now getting is advice from these nongovernmental organizations that in large part do not understand trade agreement obligations or, even if they do understand them, are really adverse to the obligations.

COMMENT, MS. MCGUIRE: Thank you for reinforcing the point about building capability because we keep talking about this and it is passed the time to start doing something about it. You cannot simply say the federal government is going to do trade policy.

When you get into the General Agreement in Trade and Services (GATS) and greater obligations in the GATS, and you are talking about state and provincial measures, you better have prepared your states the deal with that. You cannot simply say the federal government is going to handle it. There are some issues, you know, that the federal government is simply not top of the hat. Let me give you my favorite example, which is expropriation in Chapter 11. Expropriation is an issue for federal governments, okay, but it is not top of the hat. It is something that we tend to think of as being state and local. Think of some of the U.S. Supreme Court decisions concerning property. It is not the kind of thing federal trade negotiators think about.

Put yourself in my position. Expropriation is very important to me in the provincial government, okay? It is very important because it is one of those things on which we hang our regulatory framework. This is not a simple, frivolous issue. How we define what is regulation, what is acceptable regulation and what is a taking, is a very, very important issue. What did we do in the NAFTA? We said, "We will treat expropriation under the agreement or under international law." It is not defined in the agreement, and I will defy you to find a single interpretation of expropriation in international law, let

alone indirect expropriation. What is indirect expropriation? This is a very important issue to the provincial government. It is one where the federal government needs our advice. It is not something where you can simply say national governments; they do not under trade issues. This affects our bread and butter. This is a very important issue to us. You cannot keep us out of it nor can you keep us out of things like the GATS. We have a schizophrenic attitude towards trade and services. We say we want to improve trade and services. You have got a sixty-five thousand limit on quotas coming into the U.S. You have a very schizophrenic attitude toward services the same as we do. The only way we are going to resolve that problem is with some national governments, through building and understanding.

Ontario, seventy percent of our Gross Domestic Product (GDP), seventy percent of our employment, is in services. We are not a resource economy. Even though we like to fight about fish. You need us in terms of making meaningful commitments in the GATS and you need U.S. states.

COMMENT, MR. SOUTHWICK: I would like to echo Ms. McGuire's point. Before I left U.S.T.R. one of the things I did work on was the effort when the NAFTA was concluded in terms of state and local government commitments under Chapter 11 Investment, Chapter 12 Services, there was a grandfather that went for two years, during which time the three governments were supposed to negotiate further liberalization of those areas and then set forth some liberalization rather than just perpetuate the grandfather, and in the end of the day, we did just perpetuate the grandfather because we were unable to negotiate and come to terms with the further liberalization, and we were unable to do so, in my estimation, largely because we found, when we got right down to it, we really did not understand what these commitments meant. The papers exchanged among Canada, the U.S. and Mexico trying to explain some of those commitments, would this type of measure have been have to be scheduled or not, got extremely complicated. We had attorney generals from the U.S. saying, "What in the world am I supposed to do here?" At the end of the day, we all sat and looked at each other and said we just got to extend the grandfather.

QUESTION, MR. ROBINSON: There are all kinds of definitions of expropriation in international arbitration cases, dozens of them. They may be not as exact as you would like them to be, but there are lots of them.

If conservation and resource management was the issue for Ontario, why did not Ontario just stop or cut back significantly the commercial fishery?

ANSWER, MS. MCGUIRE: Thank you, I know there are lots of arbitration decisions, most of them I think to be incompletely inappropriate in the North American context, which is part of my point.

The commercial fishery was being bought out by Ontario and every time there was a new tourist operator, for example, three buoy houseboats wanted to come onto the lake, they had to buy a commercial fishing quota. I am not aware of whether there still is a commercial fishery on the lake. If there is, it is very small. I think most significant is the aboriginal fishery. This is an area where there are still some lively claims and some big issues that have to be resolved.

QUESTION, MR. CARMODY: We have seen, recently in the Methanex decision, under Chapter 11 of the Methanex process, that is now proceeding the identification of an *amicus curiae* facility or possibility, the ability to submit as an intervener in Chapter 11 disputes, and a similar right has been identified before World Trade Organization (WTO) panels. I am just curious as to whether or not the Government of Ontario would consider making a submission in a Chapter 11 or WTO dispute of that type?

ANSWER, MS. MCGUIRE: I guess we do not consider ourselves to be *amicus curiae* because there has to be governments. In terms of the issue, though, of adding others into these cases. The Ontario government's position has been that, particularly in the case of Chapter 11 cases, they should be handled with the same degree of transparency as a court and we are solidly behind the effort of our federal government to ensure that kind of transparency. We think it is very healthy.

I, myself, spent twelve pleasurable hours watching the Metalclad review on the web. Thank God for the web. It was the best way for me to understand what Mexico's arguments were. I think you have to be very careful in dealing with this issue. I know, for example, in the WTO, people are wrestling with the issue of what could someone bring to the case. They are probably not going to know about the facts of the case. I mean, do you want them to be able to offer comments on some of the legal questions, perhaps, at the appeal level, and, as we know, we are seeing more and more appeals of WTO cases. It has become standard practice. I do not think we have a fully considered view, but certainly, in the case of Chapter 11, we certainly welcome much more transparency.

MS. BRAID: Thank you. Would you please join me in thanking Mr. Southwick and Ms. McGuire?

