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Discussion after the Speech of Richard Cunningham

Discussion

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DISCUSSION AFTER THE SPEECH OF RICHARD CUNNINGHAM

QUESTION, PROFESSOR KING: You raised a lot of questions, and I want to raise some questions with you. You are not going to get away with this. One, you said the political dynamic on environmental and labor was different on those issues. My first question is, is there any way of dealing with that dynamic, or does it just exist without any solution?

My second question is, the NAFTA covers investment issues and gives remedies in cases like that. Do you just dismiss the fact that the multilateral approach can cover investment issues?

ANSWER, MR. CUNNINGHAM: Let me deal with the second question first. I did not mean to imply the multilateral approach cannot cover investments. What I do mean to say is that, in the regional context, investment issues become more immediate and they become more amenable to making the process by bargaining. The countries seeking access to investment have more to trade for it, and they have more leverage to get open investment in a regional context than they do in an isolated multilateral investment-only discussion.

My experience has been that investment issues are difficult for developing countries. These are issues in which the developing country very much needs to get something in order to open up the investment possibility. Were I structuring a negotiation issue of the United States law, I would focus it more on regionalism than on the multilateral basis, and I would try to create a dynamic in which the rules on a multilateral basis flow out of what you achieved on a regional basis.

As to your second question, I think, first of all, it is important to avoid posing the environmental trade conflict in a specific context. I think the United States found out in the tuna/dolphin thing that you can get yourself in lots of trouble doing that. And you end up with the environmentalists hating you or the world trade system hating you. The key to that is to try to find a way to give the environmentalists some satisfaction without using a trade remedy or a trade restriction.

The more difficult question is what to do about the effort of environmental groups to make the environment a rider, as an enforceable element that has to be part of the overall agreement in the one up, one

down Fast Track vote in a regional or even bilateral trade agreement.

It seems to me there are two types of things that you can do about that. I do not believe that you have a good prospect for success by advocating separate agreements on this, and that should satisfy the environmental community as a whole. If that is the approach that you are going to take, and I believe it is the approach the Administration is trying to take now, the only way to get that would be to cultivate a substantial portion of the environmental community to support that view. But, there are differences within the environmental community on these issues, so in order to get such a substantial portion of the environmental community supporting that view, you would have to politically roll over the global environmentalists in the Congress.

That is what they are trying to do. Maybe it will work. But, it will not work without a lot of blood on the floor, and it enables the global environmentalists to have on hold the alliances with protectionists that may turn out to be difficult to defeat, particularly when the party that is proposing the legislation is a party which is, in significant part, allied with organized labor and the protectionist wing.

The other way to do it, it seems to me, is to work with the environmental movement, to lay out in advance some parameters of what can be gotten in the environmental portion of the agreements that are likely to be negotiable internationally.

I think it is a very complicated subject. What is difficult for the Latin American countries or any country we are dealing with, it seems to me, is not the imposition on them of reasonable environmental criteria, particularly if it is put in the terms of goals and a given time frame to achieve it. The problems are creating a mechanism for enforcement and what can be done within the regional agreement against them if they do not meet the goals. It seems to me this has to be worked out with the environmental group beforehand; an understanding that they will settle for less. They claim to be such globalists. We need political pressure in the countries where the goals are not achieved as the major means of getting what they want environmentally in foreign countries, rather than having the United States impose some sanction authorized by NAFTA or FTAA or whatever.

That would be what I would be pursuing. It seems to me that things like that are things you have to think about to try and get that sort of political issue behind you.

COMMENT, MR. EDWARDS: We do have an environmental section, I think, coming after this, so I do not want to take too much time, particularly since you covered so many areas in your talk, which struck so many different nerves. I did want to comment a little bit about the

matter of social issues and their given nationalization. I include here human rights as well as the environment.

I think the thing to bear in mind, first of all, is our long history of internationalization. These are not issues that just recently emerged as international. We have had migratory birds between Canada and the United States. We have had polar bears. We have had a League for the Conservation of Nature based in Switzerland for many, many years. Henry King himself was a prosecutor at Nuremberg, and we ushered in the human rights movement in the 1940s, and so forth. So this internationalization is nothing new.

I think what is new, and basically what has happened, is that those who are concerned with the environment and human rights have looked at ways that can get some leverage. Trade is one; the International Monetary Fund (IMF) is one; and the World Bank is another. Some of these institutions work it through themselves as to how they will deal with it, such as the IMF and the World Bank. It seems to me in the trade area, we need to do the same thing. We need to realize this is something, as you suggested, that needs to be negotiated, rather than take the strong doctrinary position.

QUESTION, PROFESSOR SHANKER: We have heard throughout this evening how it is very difficult to work out treaty agreements with partners who have different cultural systems or different legal systems. One appreciates that, and I do not think it is news to those of us who have been there. We have all known that. In fact, it is pretty tough sometimes for me to work out a deal between Cleveland and Canton people. Canton is a small town, sixty miles from Cleveland.

But you mentioned, and we have heard this before, that the Asiatic people in particular have an approach that is very different from confrontation. They would prefer, instead, to negotiate relationships. I do not think that is really foreign to a Western business person. I think, despite the fact we are much more litigious in the round numbers, overwhelmingly, trade people, even within this context, would prefer to develop relationships, to avoid confrontation, to try to work it out amicably. There are now formal institutions to help you, such as Alternate Dispute Resolution (ADR). When push comes to shove, when all of this fails, what happens? What happens in the Asian countries when, despite all of the attempts to resolve and avoid the controversy, it is not resolved? Can anyone be a trading partner with anybody else anywhere in the world if there is not some mechanism where, eventually, there is a dispute-solving mechanism that becomes binding?

ANSWER, MR. CUNNINGHAM: I would say, first of all, that I would agree that businessmen are much more able to deal with the

Asian approach to issues than governments are, at least in the U.S. government. The U.S. government is not alone on that. The European Union is worse than we are in most of those confrontations.

In answer to your question as to what you do when you have the problem, you have the market access barrier, for example, and all else fails, what do you do? It is a question that has historically bedeviled U.S./Japanese relations. I have been in lots of market-access cases with Japan, in which I have brought, for example, a Section 301 case for a U.S. company that has been excluded from the Japanese market by a very clear violative practice. It is very clear that it is unfair. The Japanese will, in more cases than not in my experience, say, okay, you should be retaliating against us. We would rather have you retaliate against us than open up our market. Politically, it is easier for us that way, and it is less disruptive to our idea of economic and social order in Japan. Think about that for just a moment. You are in the piano industry, for example, and you have been excluded from selling pianos in Japan because Japanese pianos have to have different designs because Japanese fingernails are different than American fingernails, or something like that. That is not irrational — skis could not be sold in Japan because Japanese snow is different. Everybody knows that.

Retaliation is acknowledged and is undertaken against Japan, and we limit imports of Japanese snowmobiles into the United States. What does that do for you and your pianos? Nothing.

In market access, unlike the import problem cases that I and several of you here have dealt with in steel, for example, over the years, the name of the game has to be to get the other side to agree. If the other side does not agree, unless there happens to be two-way trade in the same product, which normally is not the case, failure to get the agreement to open up the market means you lose. Retaliation means you have lost. It may mean that you get some emotional satisfaction when you hit those SOBs, but you have lost.

QUESTION, PROFESSOR SHANKER: I have a follow-up question. Sure, you limit yourself to getting access in the first place. But suppose you had gotten the access and it arises. I have sold my pianos to China or Burma, whatever it might be, and we are in dispute now as to whether I should be paid whether the pianos work or do not work. Unless you have some dispute-resolving mechanism, how can you trade like that?

ANSWER, MR. CUNNINGHAM: You have to have a way to get the remedy. If you do not have a way to get a remedy, how can anybody in the world resolve the dispute? If everybody says Japan or Thailand or Singapore is wrong, or Bolivia is wrong, and the United States

is entitled to retaliate against them; if that is all you can get out of it, you have not gotten anything. And normally in the trade regime, that is what you get in a dispute unless you can get an agreed resolution, and that is where the problem lies.

COMMENT, PROFESSOR SHANKER: Sounds intractable. By the way, Japanese cars, I know from a rather tall person, taller than I, are not made for Americans, because their cars are made for smaller Japanese people. The poor tall Americans

COMMENT, MR. CUNNINGHAM: I have Investor Barchefsky's number here for you.

