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Discussion

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DISCUSSION AFTER THE SPEECHES OF SHIRLEY COFFIELD AND JAMES MCILROY

QUESTION, PROFESSOR KING: I had a question of Shirley Coffield. You said there were legal violations of the provisions of the agreement, where you used standards to restrict trade causing a basis for a lot of disputes. Do you want to talk about the channel of recourse if a firm is concerned with a violation, say on a procurement, where you have a procurement by a province or a state and the specs are such that only one supplier, who may be a local supplier, could meet them? Will you please discuss remedies?

ANSWER, MS. COFFIELD: First, let me say that, when I was talking about flypaper, I was referring specifically to the least restrictive means test. That is that the measure you take has to be the least restrictive means of meeting your obligation. As to disputes, there is a valid and useful place for dispute settlement.

However, I think agreements that we make with respect to standards should try to minimize disputes as well as minimize obstacles. As it now stands, for example, in a situation where a standard arguably has been used to protect domestic production in a discriminatory manner, the dispute resolution mechanisms in the NAFTA allow technical expertise to be used more than has been the case in the past. Panelists can, I think, reach more reasoned opinions, and, hopefully, less politically motivated opinions than before. I am fully supportive of that kind of a mechanism.

What I wanted to address is the question, how do you minimize future disputes when you reach an agreement? I believe the way to minimize disputes is to have a better appreciation of accommodation among countries regarding the way standards are set, what the conformity assessment is, what the substantive standards are. Also, what are the objectives in setting those standards? Let us look, for example, at the E.U. model, which some people dismiss because it is a union and we are not. If you overlook that, you get beyond the enforcement which is done by the E.U. courts, which is obviously not something to which the rest of the world might yet agree. Look beyond that. Look at the mechanisms they are using in terms of policing and spot audits. They are assuring that they maintain the level of comfort they need to accept another country's conformity assessment or their substantive standard. You must look at the harmonization problem, which I consider to be primarily the problem that international bodies do not and can not deal on a timely basis with a lot of the issues that have to be addressed between countries

when they are in the midst of a negotiation. So, to simply say we are going to harmonize with an international standard is not realistic. Mine is sort of a three-pillar approach to an international agreement that will minimize obstacles, but also minimize disputes, because whenever you have these disputes, you will basically set up another obstacle to trade. As a lawyer, it is against my self-interest to say that there are a lot of disputes that simply have the goal of restricting and further hampering trade, and frequently those disputes are not accompanied by a goal of resolving and accommodating the other party.

COMMENT, MR. TUTTLE: I would like to make two comments. The first one is regarding negotiations of the harmonization of standards. It is not just constrained by the struggle between international attitudes and national interests in non-tariff barriers, but it very often is constrained by existing technology. We refer to that as past dependence. As an example, it is a source of considerable astonishment that the European Union could agree on a common currency, but it has not been able to agree on common standards for electrical outlets. A commission that studied that problem threw in the towel after two years.

The second constraint comes from what I would refer to as the risk assessment of new technologies. There might be honest differences between countries on the desirability of setting standards for things like genetic engineering or other new fields in which, very often, the scientists themselves are still in a kind of a controversial learning process.

In both of those cases, I think it is necessary to recognize that harmonization is not just a matter of the goodwill of the participants, but it is, in fact, constrained by existing conditions.

COMMENT, MS. COFFIELD: My comment on that is that it is the importance of sectoral negotiations that will help with the resolution of problems that come up in the standards area in the short term. To say that you want to have a massive overall agreement on standards is not realistic, but you need to work sector-by-sector to try to address the problems you are most concerned about. While I made fun of the fact that it can take fifty-four months for the ISO to set a standard, there are some good reasons for that which have to do with the level of technology involved.

COMMENT, MR. McILROY: I would just like to add, too, that I agree with your point that science is not exact. Really, everybody can find a scientist who will agree to say what they want him to say about a product. Therefore, I have my doubts about a system that seems to be based on the idea that there is one scientific response that everybody is going to recognize.

QUESTION, MR. FITZ-JAMES: In listening to the idea about the effect of professional services on sovereignty, never mind the sovereignty of gov-

ernments, I am thinking about the sovereignty of the professional governing bodies, in particular, the legal governing bodies and the law societies in Canada, and the state bar associations in the United States. I am just wondering whether, inasmuch as these bodies tend to have a kind of quasi-constitutional argument for the independence of the bar going for them, to what extent is that going to be something which will hamper the exchange of professional services under these international statutes?

ANSWER, MR. McILROY: I think that is a good point. I guess the first question, if I were confronted with that argument would be, for what purpose do we have the independence of the bar and from whom are they independent?

You could find a situation where you have a national association representing the legal profession, for example, the Canadian Bar Association, running off and negotiating an agreement with their American colleagues. And then, when the time comes to implement it down at the local level, they might get this argument back from the local licensing bodies. I think in that situation, you would have to ask yourself, are they independent? And, from what are they independent? We have these national lawyers going out and negotiating deals that they think are in the best interest of the legal profession nationally, and the local folks do not seem to think they are good ideas.

When you get right down to it, the higher up you are, the more national and international you are, there is probably more give and take and more of a willingness to open up local markets to competition because you realize that there may be a trade-off with your export services. But when you are dealing with the local bodies, they are going to lose their influence. They are going to lose the number of people that they can allow in or not allow in, and perhaps some people are literally going to lose their jobs.

I am not sure how valid those arguments are. I agree with you that those arguments will be made. I think it will be easier to make those arguments if it is the federal government trying to tell the legal profession what to do than if it is the national body, for example, the Canadian Bar Association, saying, hey, we just negotiated this great deal, do you guys want to sign on? Everybody says no. I think that we could have a very lively debate about the independence of the legal profession.

ANSWER, MS. COFFIELD: My first reaction is that neither the Canadian Bar Association nor the American Bar Association are sovereigns, and they have no sovereign rights.

QUESTION, PROFESSOR SHANKER: A great deal of product standards are imposed by state legislation, and some by judicial decree. In fact, the largest number are by judicial decree. I invite your comments; do these pose the same kind of problems with respect to the products in achieving

whatever it is that you are trying to achieve? Do they pose the same kind of problems that you saw in connection with the states and the provinces?

ANSWER, MR. McILROY: My answer is yes, but I think my colleague Shirley might want to comment on that more, since she is the expert on products standards. However, I agree. These product standards are certainly not solely determined by federal authorities.

MS. COFFIELD: Well, in fact, in the NAFTA, sensitivity is addressed right up front by recognizing the fact that the federal government cannot mandate what the states and provinces do with respect to certain standards, a lot of different standards.

That does not decrease the need to try to find an accommodation that, in fact, is necessary, and it has been done in the United States in many instances between states. Standards is not a dead issue right now between states. California is an excellent example of a state that gets standards-happy with respect to products coming in, even from other states.

It is a continuing issue. It is a continuing problem. It is the biggest element of what I call this tension between the right to set a standard for the health and safety of the individuals in your jurisdiction and the goal to minimize trade obstacles. The NAFTA addresses this by saying that the federal government, while not able to mandate the acts of sub-federal units, is responsible if a sub-federal unit is, in fact, found to have restricted trade, with an unreasonable, unjustifiable, non-legitimate barrier. It does not mean that they have to change it, they just pay the price. That is the way it has been addressed so far. I expect that will continue to be the way it is addressed.

But, getting back to my point on the minimizing of obstacles, plus the minimizing of disputes that come up, I feel very strongly that there needs to be an accommodation that will respect the legitimate needs of the states. That means that maybe they do not have to harmonize with a standard somewhere else, but it is same thing that Jim talked about. You have to come up with a way that you can accept or have mutual recognition of a standard that in fact gives your citizens, as well, the ability to trade either in trade or services, in products or services in that other sovereign jurisdiction. Sovereignty goes two ways with respect to your own individuals. That is why I say these things need sovereignty-sharing agreements and not sovereignty-depleting agreements.

QUESTION, MS. WANG: My name is Jenny Wang. I am from High Tech Industries, and I am also a trustee of the University. My question is to Mr. McIlroy. I really enjoyed your presentation. I wonder, can you extend your comments a little bit about the standards of licensing in North America in comparison with the E.U. and the rest of the world?

ANSWER, MR. McILROY: I have to confess, I am not directly familiar with what is going on in the E.U. However, I can provide you with a comment on what is going on in the WTO.

The WTO really has been trying to move forward on accountancy standards, and the WTO bodies recently recommended some accountancy standards. *Inside U.S. Trade*, which, as you know, is the fountain of all knowledge on international trade here in the United States, ran a very interesting article about a coalition of service-providing groups here in the United States called the Service Providers Coalition, I believe. They rejected the WTO Accountancy Services Agreement on the grounds that it left too much discretion in the hands of the local authorities.

My quick answer to your question is, I think what we see in the Canada/U.S. context is probably occurring in spades in the international context. With respect to the E.U., I think they probably dealt with this because they have a lot more labor mobility, as you know, although I would invite our friend from Brussels to comment on that further. As I said, I am not directly involved in the E.U. labor mobility questions, but I think there is more mutual recognition of services going on there.

COMMENT, MR. PEVTCHIN: I am really surprised at the gigantic difference between the NAFTA, or the Free Trade Agreement, and the European Union. To repeat what I said yesterday, the whole European Union was initiated from the American example with no more advances in mutual recognition certainly for standards. And, if I may say so, in many respects this has been an eye-opener for me.

COMMENT, MR. McILROY: I agree, and I think that what struck me in your talk yesterday was, when you were going through the institutional mechanism in the E.U., you compared it to what Canada and the United States have or do not have. We have these little secretariats, some of which have never been appointed. There is really no permanent institutional mechanism like the E.U. has. You probably need this international, supranational, if you will, institutional mechanism to drive the process of mutual recognition of professional services, because I do not think it is going to percolate up from the bottom.

QUESTION, PROFESSOR SCHAEFER: I want to make one comment on professional services, and then ask one question. I first wanted to thank Jim for reminding us what a big challenge this is. Not only do we have citizenship and residency requirements that states maintained, which are now grandfathered in NAFTA, but, even once we eliminate those, we are going to have standards-related barriers in the three Es: education, examinations, and experience. For example, you must get your degree from a university in the

United States, and you must take the U.S. exam. Your experience must be in the United States. So, I think this is a huge challenge.

My question is, do you think we might do a little bit better if we focused on the big states where foreigners would have an interest going? That might be a little bit more open-minded. For instance, in some professional sectors, should we not focus, as a start, just on California, New York, and Texas?

ANSWER, MR. McILROY: I think that is a good point, and I will share with you the strategy that I recommended to my clients in the engineering profession. Obviously, Texas got onboard in this case because they saw opportunities in the Mexican market. On that happy note, I guess there is a dispute regarding electrical standards here. What I told my clients in Ontario was, do a deal with New York, Pennsylvania, and Ohio, and create a party where there is all kind of back and forth, where everybody is making money and having a good time. Then, you will have other engineers in adjoining states saying, these guys in Ohio seem to be able to go up to Ontario, bid on a bridge project, and make money. They will want to be part of the party. I think that is probably the best way to go about it.

I think this across-the-board stuff is not going to work because, quite frankly, I cannot see the interests, for example, of the state of Oklahoma in getting immediately involved in a tri-lateral agreement like that. But I do see the interest of Texas. We have it already. They are onboard. They see tremendous opportunities, and Texas may pull California onboard. So, I think the idea is, rather than stop the party, start the party on a limited basis, and then other people will want to jump in. I think that is the way it will go.

QUESTION, MR. CHANCEY: My name is Glyn Chancey, and I am with the Canadian Department of Agriculture. I have worked in the trade policy area for the last three years, and I have been involved in the implementation of NAFTA.

Just to reinforce the points that you made about breaking down the problem to a sectoral basis, I would just like to share some of our own experiences, successful ones, and just ask you subsequently whether you think this particular model is generally applicable.

I think, if you look across the spectrum of the Canada/U.S. agricultural trade, the areas where we have the most difficulty are the areas where the respective domestic industry interests do not speak to each other and do not have a common dialogue. Where we do have success, we do have those common dialogues and shared institutional arrangements. I think this reality was recognized when they wrote Article 707 of the NAFTA, which created the Advisement Committee on Private Commercial Disputes Regarding Agricultural Trade, not to be confused with Article 2022, which covers the Advisory Committee on Private Commercial Disputes generally. Article 707

essentially reflects the fact that, in Canada and the United States, there are licensing and arbitration regimes in place, reasonably compatible ones for the fresh fruit and vegetable trade. In Mexico, there was no such entity, and it was high on the minds of Americans, in particular U.S. fruit and vegetable exporters, that they should have some sort of similar protection in Mexico, once NAFTA came into place, for those products. That protection could not be negotiated at a government level in large part because of sovereignty-related sensitivities, i.e. a top-down-imposed model was not viable. But, the agreement did provide for a formal industry-government committee.

What that has succeeded in doing is bringing the parties, both government and industry, to the table and identifying on a very fundamental level what their mutual interests are. It has been very clear from the beginning that there are interests in all three countries that have better access and protection in the other countries' markets. Therefore, there is a very fundamental political incentive for the governments and parties to facilitate the process, and for industry to participate. I think we are at a point now where we will likely see a tri-national private commercial dispute resolution body on a voluntary basis that could, subsequently over time, establish a standard that could be reflected in national standards. I am just wondering if you see that model as one that is generally applicable?

ANSWER, MS. COFFIELD: Looking at the area of standards, whether food standards or other product standards, the objectives of the countries are frequently not differing. Sometimes, the way you reach those objectives differs. None of us want to be electrocuted. No one wants to be subject to unsafe products, whether they are domestic or foreign. And, in the area of food, of course, it is increasingly important to reach accommodations that we understand; that we have the same goals, the same objectives. How you reach those objectives can be a legitimate negotiation that goes on. I do believe that model is going to be a better way of achieving accommodations among different standards, rather than the dispute resolution model, which sometimes comes out a winner or a loser.

