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Discussion

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Discussion After The Speeches of Van Carson and David Hunter

QUESTION, Professor King: Thank you very much. Again, we covered a great deal of ground and you have given us a great deal to think about. One question that occurs to me, as we look at this whole problem of environmental protection, is what, if anything, should the Free Trade Agreement say about environmental protection?

ANSWER, Mr. David Hunter: All I can say is that not knowing what a free trade agreement would look like, I'm a little bit at a loss. I'm sure those people who are involved in it could help out. I certainly would like to see, at a minimum, an agreement which recognized other agreements.

For example, Canada and the United States are negotiating and will continue to negotiate a Great Lakes water quality agreement; although it is not a legally binding document, the two countries have committed themselves under the annexes to specific standards. Those standards are going to require a tremendous amount of funding, federally, provincially and municipally. Obviously one might be concerned and want to specify that that type of federal assistance ought not be treated as a subsidy. Also, there should be no countervailing actions in terms of related industries. That's as much as I can say.

QUESTION, Mr. Graham: I would like to ask a question along that line. What is a "trade-enhancement measure" and what is a "truly environmental directed measure"? The measures seem to relate to how far upstream it is, with one obviously being legitimate and the other illegitimate. You see this in trade law all of the time with respect to trade-related performance requirements. Some of them may be truly investment measures and some of them may be designed to give a benefit. In the cultural area, we run into the same thing as the free trade arrangement. What is truly cultural as opposed to what is helping cultural industries? Somebody has to make that decision. Do you have any feeling about how this could be handled? Do you think that the treaty is going to have to specifically address this, or is this so complex that it is going to have to be thrown over into the dispute resolution mechanism and be handled on a case-by-case basis?

ANSWER, Mr. David Hunter: I'm biased obviously, but at the minimum, I would certainly want an agreement that would clearly identify the public health issues.

The land use management question is also tough. Is stumpage a subsidy or not? What are the legitimate areas of sovereign responsibility

in terms of the management of resources verses sustainable uses? That question would be tough to handle, but I certainly think that anything you could clearly identify as a public health issue ought not to be threatened by a countervailing problem. How do you define public health? I would say that where you are dealing specifically with toxic and conventional pollution abatement, that's a public health issue.

QUESTION, Professor King: One of the questions that occurred to me is the acid rain problem. We generate our power, to some extent, by coal-fired generators. Costs are incident to the people who have the coal-fired power, which is primarily here in the United States. Canada generates power through an extensive system of hydroelectric plants. Yet, under a free trade agreement, Canada could sell its hydropower down here at a much cheaper cost. Canadians seem to want to make sure that the United States cleans up, and that increases costs. At the same time, Canadians want to sell power down here. Thus far there has not been heavy impact in terms of the U.S. utility industry. Do you think this situation could change, or do you see limits as to how much competition could be utilized and soaked up down here?

ANSWER, Mr. Carson: The limit that I see is that, at the present time, what Canada is exporting is the overflow in capacity that was built in the '70s, particularly in the hydro area. To dramatically have an impact on the American market, Canada would have to add considerable capacity. The hydro capacity has been estimated at probably an additional 40 million megawatts in Quebec and Manitoba from hydropower.

It takes time to construct and bring on line new facilities, and the impact on the American utilities just isn't there. I can't imagine that the total impact would be significant enough to really affect acid rain legislation in the United States or to create a true trade problem. It is true that the Canadian electricity is a lot cheaper and also that the sales to the United States in effect subsidize the rate payers in Canada. The use of nearly sixty cents of every dollar is through a sale to the United States and the reason is that the Canadian power, as it is being priced in the United States, is being sold at a tremendous margin over basic production cost.

The hydropower is cheap. In selling it to the United States, Canada is selling at a basis of 80 to 95% of the cost to produce the power in the United States; so while it may cost ten cents to produce the unit in Canada, they may be selling it at eighty cents, because it would cost a dollar to produce the same unit in the United States. This pricing mechanism is very favorable from the Canadian prospective.

If the coal prices go up, the cost of production of coal-generated electricity goes up enormously—just as it would with any acid rain legislation. The resulting margin of difference would be even more significant. The coal industry, the utility industry and the Interior Secretary have all focused on this. I would probably foresee significant impact.

The state, of course, would have to examine these purchase agreements. They could be stopped or slowed down substantially.

COMMENT, Mr. Magnus: I would just like to make a couple of comments, from a trade lawyers perspective, on Mr. Carson's comments. First of all, I think you could have a bit of a problem if you examine it on a regional market basis. For electricity, a regional market concept is what you would like to have, in which case I think the measure of the injury could, in fact, be concentrated.

Second, I'm not sure that all of the sales to the United States have been to where there's been existing plants. That is, we are talking about a new plant and I'm not sure that you would have full coverage of the cost of production. In other words, what I'm suggesting is that I think there may be areas of risk for Canadian utilities.

QUESTION, Mr. Stone: We heard earlier from Mr. Fried and Mr. Horlick that the concept under the new trade agreement would be to draw up a list of prohibited subsidies or a list of permitted subsidies that would not to give rise to countervailing duties. Mr. Hunter has suggested that such a list should contain, for one thing, subsidies or government support for public health measures. I'm just wondering how difficult it would be to phrase government support programs for environmental or public health purposes in an annex of an agreement? If you put a trade negotiator, a lawyer and an environmentalist in one room for ten minutes, could they give us any illustrative programs that would not give rise to countervailing duties?

ANSWER, Mr. David Hunter: I think perhaps Mr. Carson can bring another perspective to this, but I think it can be done, and for a very simple reason. Right now the proposed legislation that the Province of Ontario will be bringing on-line in the next three years, called MISA, will effectively reflect state legislation from New York, Ohio and, to a certain degree, Michigan.

Most of that legislation has some kind of a health test in it; for example, there shall be no discharge beyond a certain point because of the human health factor involved. One would probably look to the tests or to the language of that legislation and attempt to draw something up.

ANSWER, Mr. Carson: I think it is a misconception that there is no subsidy for environmental control in the United States. We subsidize the municipalities from our tax base to the tune of billions of dollars for waste water treatment facilities. We have low-interest loans for private industry to put on air and water controls, and we have new programs where we are taxing the oil and chemical industry to clean up bad disposal practices of the past. So, in the United States we are subsidizing environmental control to a very significant degree.

The impact of that is troubling to really understand. You can look at the low-interest loans for waste water treatment facilities and probably come up with a dollar figure; but if you are talking about giving the City

of Cleveland or the Northeastern Ohio Regional Sewer District a billion dollars of tax payer funds to build waste water treatment plants, which, in turn, treat industrial discharges, as well as domestic sewage, it is much more difficult to trace that back. I think the same would be true in Canada.

It is a tremendous problem to specifically allocate back the costs. To the extent that we are improving the environment, we certainly don't want to discourage any of the subsidies, at least not from an environmental lawyer's perspective.

QUESTION, Mr. Marshall: We have spent the last couple of days talking about harmonization of the competition and trade remedy laws, and the necessity for harmonization within the context of the Free Trade Agreement. We are now talking about regulated industries and the environmental area. Except for the passing reference to the new Ontario legislation, harmonization doesn't seem to carry the same strength and esteem in this area.

Is harmonization going to be significant, or important, in the way in which each country deals with problems, like acid rain, in order to overcome the subsidy arguments?

ANSWER, Mr. David Hunter: Well, I think we can certainly look at the area of water management with the Great Lakes as an example. Within about ten years, the regulatory framework between Ontario and the Great Lakes states will be pretty much the same. How they are to be financed, I don't know. I suspect that there will be massive subsidization. Discussion is increasing about the possibility of privatizing the sewer systems. That is sort of the concept which is developing. To my knowledge, that is the only area between Canada and the United States where there is any harmonization.

There are phenomenal differences from one province to the next. For example, Quebec's legislative framework is completely and totally different from Ontario's. I would like to give an answer to that problem, but I don't see an easy answer.

QUESTION, Mr. Marshall: You don't seem as concerned about the need for harmonization as much as the fact that harmonization is likely to occur as they continue to struggle with the problem. Is that what you are saying?

ANSWER, Mr. David Hunter: I think there are certain areas and certain practices in the United States which I certainly would like to see incorporated in Canada. But I'm not concerned with that. There are some other areas where I would not like to see practices from the United States incorporated. I think the acid rain issue is clearly a continuing area of contention. In terms of water management, over a five to ten-year period, theoretically, there should be absolutely no problem.

ANSWER, Mr. Carson: There is a belief in the United States, at least in the heavy industry segment, that the laws are not harmonized

and that it is much easier to do business in Canada in terms of environmental regulation. Part of the perception is that the Canadian system gives some allowance for older facilities and permits them to continue to operate through their useful life. In comparison, in the United States we have a command system of regulations which basically has forced older, obsolete facilities out of business.

I participated in a study that compared Canadian steel and environmental practices, with American environmental practices. We were surprised to find the environmental controls put on voluntarily by the Canadian steel industry were nearly equal to those which were being mandated in the United States for air quality matters. On the water side, however, the U.S. steel industry was spending far more for waste water control than was true in Canada, particularly Ontario, because of their unique permit system. It is a different system and it had not required the massive expenditures that the U.S. steel producers were being forced to pay to protect Lake Erie and Lake Michigan.

COMMENT, Mr. David Hunter: The reasons for the difference included support for the political position of the new government and the arrival of tougher legislation. The MISA program, when it is on-line in three to five years, will essentially borrow some of Michigan's language and some of New York State's language. That is the easier problem to harmonize.

The harder one is when you get into the management issue of natural resources, such as fish. Canada regulates the taking of fish on the Grand Banks differently than the United States regulates the taking of fish in Maine. The standards are different. Whose are going to prevail? I think Canada's should prevail, because I think they are better with respect to conservation than America's. That's the tough stuff. Who is going to harmonize who?

QUESTION, Professor King: Well, that's a good note on which to terminate this discussion. I want to thank Van Carson and David Hunter. We covered this subject well. It was a stimulating discussion and we thank you for your presentations.

