From the Consul-General, New York and
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Thomas Harris, CMG

3 August 2001

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MacBride Principles: Implications for Inward Investment and British Interests in the USA

Nick Westcott wrote to you on 20 July seeking guidance on our response to the recent flurry of attempts to extend the MacBride principles in the United States. I understand that you have asked for an objective assessment of the trade and investment implications of this new legislation. As Director General for Trade and Investment in the USA, I am responsible for our trade and investment interests over here and I am writing to supplement the points already made by Nick Westcott but also to comment on some of the issues raised in Mrs McAuley's letter to you of 25 July.

The central point made in that letter is the suggestion that previous adoption of the MacBride principles into state (or city/county) law has had no detrimental effect on inward investment flows into Northern Ireland and that recent improvements to Northern Irish employment legislation mean that we have little to fear if new MacBride legislation were to be passed. Mrs McAuley suggests that we need not lobby and that the "Californian approach" should be adopted in relation to the Ohio Bill.

Let me deal with the last point first. The outcome in California was indeed welcome, but it did not happen without the kind of intensive but subtle behind-the-scenes lobbying which we have recently mounted very successfully in Albany and elsewhere when required. We cannot secure either a Californian result or the sort of general statement suggested by

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Mrs McAuley unless we are authorised to engage in local lobbying. One cannot will the end without agreeing to the means.

But I would also challenge her broader assumption that the new round of MacBride legislation is risk free. The fact is that real, material British commercial interests are at stake which must be protected. Both the New York and Ohio Bills violate WTO obligations and the US-EU GPA agreement, both would amount to an assertion of extraterritorial jurisdiction over business activities within the United Kingdom, and both would force major investors, such as Bombardier and BP, to choose between their interests in Northern Ireland and New York/Ohio. That ought to be sufficient grounds for us to be instructed to continue in behind-the-scenes lobbying, to oppose such bills and to support the Commission in matters which involve community competence such as trade policy, including extraterritorial legislation of this kind.

We are aware of the 1997 N10 Ministerial guidelines on MacBride, which were drawn up in consultation with US posts. Those guidelines allow us to oppose MacBride legislation if it threatens British interests but delegates to us the authority to make that judgement. In our view, the Ohio and New York proposals do threaten British business interests and since the Commission will be less likely to take up the cudgels in Ohio than they were in New York, we would argue that it is even more important there that we are seen to be lobbying in defence of British commercial interests. To explain why, it is important to recall the background.

Since the mid-1980s, the MacBride campaign has been orchestrated by a minority of radical Irish-Americans closely allied with Sinn Fein/PIRA. The MacBride lobby crafted two types of economic sanctions against companies doing business in Northern Ireland. The first was to sponsor legislation in State legislatures and City councils to compel the State or City to divest its pension funds from any American company doing business in Northern Ireland if they did not sign up to the MacBride principles. This was usually accompanied by a sustained campaign of shareholder resolutions at companies' annual general meetings. The goal was to force the American companies concerned to choose between maintaining their operations in Northern Ireland and their operations in the State where MacBride legislation had been introduced. (The dilemma which BP now faces in Ohio.) The point here is that companies wishing to invest in Northern Ireland had to comply with two sets of fair employment monitoring; in effect a dual regulatory regime. This was a clear disincentive to invest in Northern Ireland.

We can never know for sure how many US companies have been deterred from investing in Northern Ireland because of MacBride divestment legislation. What we do know is that during this period (1986 to 1992), the intensity of the MacBride campaign was such that any US CEO with the choice of investing in Northern Ireland or the rest of the UK or the Republic of Ireland was more likely to choose the latter unless there was an extraordinarily compelling business case to go to Northern Ireland. With so many other attractive places to invest who needed the hassle? What our records indicate is that in 1988, during this first phase, TRW (headquartered in Ohio) sold its Northern Ireland operation in part because of the MacBride campaign. In 1996, United Technologies shut down their subsidiary in Derry, at least in part because of MacBride. It is therefore wrong to suggest that MacBride has had no impact on inward investment into Northern Ireland.

In the early to mid 1990s, the MacBride lobby became more sophisticated.

Intensive lobbying by the Embassy and Consulates General, prevented passage of MacBride divestment legislation in many states. But some States actually did divest their pension funds from US companies in Northern Ireland and quickly regretted it because they were forced to sell stock when market conditions were bad. Faced with growing concern from State Comptrollers and Treasurers over the loss of State pension funds, the MacBride lobby switched to contract compliance legislation. This was an even more direct threat to British companies operating in the US. In essence, contract compliance legislation prohibited any company of any nationality with any business relationship in Northern Ireland from bidding for state procurement contracts if they did not sign up to the MacBride principles.

However, in 1994 the US-EU GPA agreement transformed what, up to then, had been a purely Northern Ireland problem into a broader trade policy issue involving the rights of British firms under the GATT/WTO agreements to bid on billions of dollars of State contracts. The GPA agreement opened up State procurement in 38 states along with the Tennessee Valley Authority, the Port Authority of New York and New Jersey etc to EU companies. At that time, the Commission estimated that the total value of the contracts now open for bidding by British and other EU firms was in excess of $20 billion. The fact that MacBride contract compliance bills were now GATT illegal became our most compelling and effective argument and was instrumental in stopping MacBride legislation in Connecticut and Pennsylvania in 1996 and 1997.

MacBride contract compliance legislation acquired even broader policy significance when in June 2000, the US Supreme Court ruled against the State of Massachusetts in Crosby versus the National Foreign Trade Council case. In a 7-0 verdict, the Supreme Court upheld the Supremacy Clause of the US Constitution and effectively told State and Municipal governments that they had no business interfering with the authority of the President to conduct foreign trade policy or to frustrate the intent of Congress. This means that MacBride contract compliance legislation is now not only a violation of a US-EU agreement but is almost certainly unconstitutional as well. This has significantly enhanced our ability to achieve our objectives in any lobbying exercise. New York and Ohio are the first states to put their heads above the parapet since the Supreme Court ruling. As we have demonstrated in New York, it is now possible, by working with the Commission and other allies such as the National Foreign Trade Council and the Canadian government to protect British business interests more effectively.

The BP case is a classic example of why we should be acting vigorously to protect British business. The MacBride lobby want to force BP to choose between continuing in Northern Ireland or losing business with the Ohio state. This threat is real. Just a few years ago, BP was forced to move its US headquarters out of Cleveland because of a City ordinance requiring adherence to MacBride which cost them $10 million in annual revenues. BP's legal department (UK) have advised that BP would be in breach of UK law if it complied with MacBride legislation of the kind being proposed in Ohio. The forms they would be required to fill in would oblige them to sign up the MacBride principles. They could not do this as a UK-domiciled company. Nor could they submit to MacBride audits. BP's current business with Ohio state is worth $40 million. In addition they estimate that local authorities in Ohio would feel obliged to follow the state lead and that would cost them an additional $10-15 million. These are hard figures which do not include BP's fuel supply activities at airports (also under state or local control). BP would therefore have to give up over $50 million of business in Ohio. This includes contracts to supply state vehicles, and state employees' use of BP-Amoco credit cards. As noted above, this has already happened in Cleveland, when the city adopted a MacBride ordinance two years ago. So, the argument that MacBride contract compliance bills pose no direct threat to British business is wrong.

The final argument which needs rebuttal is the suggestion that any firm doing business in Northern Ireland that is complying with our own Fair

Employment legislation is also complying with MacBride and that therefore MacBride does not represent a threat. This is not true for two reasons. The first is that the MacBride principles are vague and can be interpreted as requiring employment quotas to achieve their ends. The second reason is that the final determination of whether or not a company is in compliance with MacBride (and therefore eligible to bid for State contracts) is not made by the employment authorities in Belfast but by two entities – the State government itself and the Investor Responsibility Research Centre – whose objectivity in the face of Irish American pressure is open to question. As regards the role of the State government, we know that some Governors (like Pataki in New York) would not hesitate to choose to interpret the MacBride principles in ways which could find a British company in non-compliance if it suited their political agenda. As for the IRRC, we have serious doubts about their impartiality. My predecessors and their staffs had to work hard on the IRRC for many years in order to balance their view of MacBride and the Fair Employment legislation in Northern Ireland. Even now we remain skeptical that they would be even-handed if faced with a sustained campaign against a firm doing business in Northern Ireland. We should not allow the WTO rights of British companies to seek public procurement contracts to be determined by a foreign body like the IRRC which has a vested interest in interfering in Northern Ireland affairs but is not created by statute, elected by the people of Northern Ireland and has no checks and balances to prevent it from delivering biased verdicts. That is an unacceptable business risk and a wholly inappropriate assertion of extraterritorial surveillance over activities within our jurisdiction.

Even if it was acceptable to have an unaccountable US private company monitoring fair employment practice in Northern Ireland, it is our understanding that the criteria for returns under the Fair Employment legislation and under MacBride do not tally and that separate accounting practices are required. That is a business burden.

So in brief, we disagree strongly with the suggestion that we can relax in our efforts to combat MacBride. It is no coincidence that, with the Peace Process in serious difficulty, two MacBride bills have surfaced in New York and Ohio. The MacBride lobby is testing our resolve. For all the reasons outlined above, we must respond vigorously to legislation that poses a real threat to British interests by using tried and tested methods of lobbying.

Tom Harris

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