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Discussion

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DISCUSSION AFTER THE SPEECHES OF DOUGLAS ROSENTHAL AND JONATHAN FRIED

QUESTION, PROFESSOR KING: I have several questions to pose to our panel. Jon expressed concern about U.S. sanctions in cases such as that of Nike employing child labor in Indonesia. There was a voluntary reaction on the part of Nike when it was identified that they were using child labor under very bad conditions over there. One question that I had was, how much can you do with volunteerism in terms of imposing human relations standards? You were concerned about extraterritorial effects, but you also want to develop a set of rules. I think the rules are important, but I am not sure whether there is a sufficient constituency in the United States to support the rules by which we would have to abide. Is a climate change necessary to accomplish what you are talking about?

My observation is that, if there are to be changes in international law at the present time, they have to come from the grass roots level. They do not and cannot come from administrators, at least not in the United States. There has to be a motivation to do it. Do you do it by education? Do you do it by publicity? How do you accomplish it? Do you develop organizations to try to make sure that U.S. courts, for example, abide by international standards? Is this something that could be tackled on a voluntary basis? I would like to get your thinking on this.

ANSWER, MR. FRIED: This is a question we have asked ourselves, not only in the Canadian group, but in governments for some time. In lawyers' terms, you are really talking about soft law. We have had codes of conduct for some decades now.

In the Organization for Economic Cooperation and Development (OECD), for example, the government sponsored something called the Declaration and Guidelines on International Investment in Multinational Enterprises, which purports to suggest good corporate conduct for multi-nationals in foreign countries. It is sort of a pledge of allegiance by corporations to be good citizens in those countries, and it is being promoted annually, at least, if not more frequently by national chapters of the business community supporting the OECD, the BEAC, and the TWOAC, as they are called by their acronyms. We have certainly seen in the last few years a proliferation of voluntary codes of one sort or another set by either corporations or by others. Canadian Occidental Petroleum, for example, led a group of Canadian companies doing business internationally. They sat down with Professor Omendez, who was at the Human Rights Center at the University of Ottawa, and

established the dialogue with a number of non-governmental human rights groups and basically offered a self-imposed pledge of corporate conduct regarding labor standards.

A group of corporations in the United States, urged on by the U.S. State Department, set out a code for doing business in non-democratic regimes with an eye on Cuba, which offered a certain standard about wages, among other things. Greenpeace, of course, has been recommending certain purchasing decisions regarding pulp and paper products originating in Canada, based on their view of what the proper standards of conduct should be.

You mentioned Nike. We have a Rugmart program, in which people who buy and distribute Persian carpets are voluntarily prepared to put a sticker on their product saying that no child labor was involved. I think these programs can be good, and they can be bad. I would divide it three ways. One, who is sponsoring, and who is dictating? This is analogous to the question I posed regarding governments. Is the program reflecting an internationally agreed-upon foundation, or is it a special interest view of world government? Second, what conduct are they proposing should be followed by way of a voluntary guideline? Is the conduct being proposed something that would otherwise run afoul of, if not conflict with, the laws and established policies of the places where the companies receiving the codes are expected to do business? Third, and I know this is of the utmost concern to the members of the corporate community who have an eye open on these things: who audits, who verifies, and who certifies?

Are the non-governmental organizations who are offering these codes any more democratic, any more representative, and any more objective than the corporations themselves in assessing performance and compliance? Increasingly you are beginning to see the Arthur Andersens and the Price Waterhouses and auditors themselves being volunteered or co-opted into performing this verification function. In the OECD trade committee, Canada has sponsored a comprehensive survey and study of all codes of conduct in all OECD Member States, so they have a much better handle on their frequency, on their characteristics, and on both their utility and possible downsides. It is a study whose first stage should be completed by the end of this year in collaboration with the International Chamber of Commerce and others. And we may see by next spring some lesson to be learned from our experience so far.

ANSWER, MR. ROSENTHAL: Let me take a different tack. I agree with what Jon says, but I think that, while the nation-state is still the core unit, we are seeing the development of international public opinion, and that is not a bad development. I think we saw, for example, the influence of the death of Princess Diana in a public outpouring of support for a land mine convention

that swept governments along, taking them beyond where they were, based on their own national consensus.¹

Building up to that point, there was an interesting poll referred to in *The Wall Street Journal* two days ago indicating that many Latin American citizens have very congruent views with many American citizens about major issues of hemispheric policy.²

One of the things that I noted was how poorly the Boeing/McDonald Douglas merger was covered by the business press, both in Europe and in the United States. It reminded me of the journalism that we saw in other areas about ten years ago. I thought we had improved upon that. They were basically just reporting as facts what one side or the other was handing to them, including very little critical comment. There was a reporter in Washington named Perlstein with *The Washington Post*, who was writing more thoughtful, more in-depth studies, and he stood out at least in the United States as being very unique. All that I can tell you is the issue was a lot more complex and a lot more even-handed than was reported in the press in Europe or in the United States.

One thing that it leads me to believe is that when you have problems like Nike or land mines, CNN and the press can play a tremendously important role. One of the topics for a future conference by this Institute might be to work with those who are involved with journalism schools and educating the press. If these issues are so enormously complicated for us, then think how complicated they must be for journalists. And think how important the role is that journalists play in forming international public opinion and reporting on international, national, and regional public opinion. We get so angry at journalists because of so much of the nonsense we are seeing with Monica Lewinsky and the press getting distracted by other minor things. We sometimes just turn off the press and its relevance. We need the press to make democracy work, and all of the issues we are talking about are issues where we need a dialogue and discussion with a much broader range than we are getting now.

Anne Marie Slaughter addressed in her article, *The Real New World Order*,³ one of my own concerns, which is that the United States is full of technocrats, and they are technicalizing the issues in ascendancy. People are

¹ See Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997). The Convention was agreed to in September 1997, but it has only been ratified by twenty-four of the necessary forty signatories.

² See Edward Schumacher, *A Meeting of Minds, From Peoria to Patagonia*, WALL ST. J., Apr. 16, 1998, at A19.

³ See Anne Marie Slaughter, *The Real New World Order*, FOREIGN AFF. 183 (Sept. 1997).

sending to the Commissioner of Patents fundamental intellectual property claims which may affect your ability to afford life-saving drugs for you or your children in the 21st century. Decisions about the scope of intellectual property protection for drugs and other subjects are just not in the public debate. People are not even aware of it. They do not have any role; they do not have any input. Neither, unfortunately, as was suggested in the article, do the antitrust division or some of the other officials in the government who ought to be playing a role have any input in this. This is a problem, and I do not see a simple solution to it without getting an active, informed press more involved in the policy-making process nationally and internationally.

QUESTION, PROFESSOR KING: I had one further question. Perhaps this is a sensitive question between Canada and the United States in terms of compliance with international law, pushing the development of international law. I notice that Canada has taken an increasingly divergent position from the United States on some recent issues. For instance, Canada initiated the Land Mine Convention or at least sponsored it, and is credited with its signing. In the International Criminal Court area, in which I am very much interested, Canada is one of the leaders in pushing the concept of a court which would extend definitions of international law pertaining to war crimes.

These seem to indicate a little more divergence on the part of Canada, at least on foreign policy issues, pushing international peace and security. Do you see that as a trend that will grow in the future, or is that the wrong question to ask you as the man in charge of Canada's foreign economic policy?

ANSWER, MR. FRIED: I disagree with the whole premise. I think, taking up where Doug just left off, part of your impression may be due to the popular press regarding trade. In regards to international criminal law matters, for example, Canada and the United States share almost completely the same legal and political views of the appropriate allocation of responsibility and jurisdiction between national and international courts, and about procedures that should be in place for extradition, evidence-gathering, witness and defendant protection, and so on.

Some of the quirks result from our slightly different constitutional systems, as well as the parliamentary and congressional involvement in adhering to this freeze. We ourselves in recent court cases are still working through the scope of mutual legal assistance and evidence gathering involved in international criminal matters.

More fundamentally, even on the land mine issue, of course, Canada would have strongly preferred for the United States to be an original signatory. We acknowledged those certain, but very limited, national security concerns that had been identified by the United States, particularly those relating to the Korean Peninsula. Canada is a full member of the Western Alliance.

We share our security and defense concerning the operations with the United States. The premise of increasing divergence between us, I am not sure that is quite accurate.

ANSWER, MR. ROSENTHAL: We know that, historically, it is viewed as inappropriate for foreign ambassadors and public officials to “interfere in the international political affairs of nations.” And yet, we also know that in recent years Alan Gottfried certainly developed this sort of interference. He had predecessors who went down that path. There was an increased development of congressional relations and forms of lobbying done by Canadian officials, and officials from other governments as well, for the important questions that came before the U.S. government. U.S. officials have done the same vis-à-vis Canada. Should we not modify this notion about what is and what is not legitimate, and what is and what is not interference? Does it promote transparency more if views are articulated? Obviously, if the President of the United States wishes to make a comment on a Canadian issue, it would help if he were well-informed and had given careful thought to what he wanted to say. And vice versa, is it illegitimate, per se, to have this kind of comment and “interference?”

COMMENT, MR. BAUER: One thing we need is to be more informed. Land mines are pretty clear-cut. As to the child labor question, if the children were not working, they would not necessarily be in some suburban school somewhere. The alternative may be child prostitution on the streets. That is not so clear-cut. Too, the whole environmental question and questions that impact on economic development are not that simple. These are not simple questions nor are they simple legal questions.

ANSWER, MR. FRIED: I think you are right, but there again, I think one must be careful to identify who is saying what. The U.S. administration, whether Democrat or Republican, for example, has never recommended banning the products of low-wage countries. The current administration, in agreement with Canada, says that there is a problem developing. How can we address that? Some in Congress have taken it a step further and said, by definition, it is unfair to put a stop to it. Canada and the United States, for example, are working very closely together in the International Labor Organization to enhance its surveillance, monitoring, and, ultimately, its enforcement capacity on the question of exploitative child labor. Canada and the United States are working together in the World Bank as well to develop new plans for a bilateral aid program to get at the underlying causes which are indeed problems of development.

Your question suggests that neither government has done a very good job of communicating regarding the nature of the problem and the nature of

some of the solutions that we have sought to impose. Maybe we have not done a good job of communicating with our legislatures.

If it comes full circle to what Henry and Doug were saying about working with the media and working with the business community, working with our civil society more actively and more proactively to engage, in a sense, then that brings you back to Doug's question. You are also, if I may read into your question, implying that some questions are neither domestic nor bilateral, they are sufficient international concerns. It is a subject of fair comment.

ANSWER, MR. ROSENTHAL: Let me make an example. If I were President of the United States and we were to have a referendum on the sovereignty of Quebec, I would say privately that it would cause me some personal regret to see Quebec separate itself from Canada. Now, I could decide not to say anything. Probably, if I were the President, I would want to consult with the Prime Minister and ask him or her whether it would be helpful to say something.

I do think that, as Canada and the United States have developed a relationship of such interdependence and such mutual regard, one cannot say that it is per se illegitimate for the President of the United States to make a comment about Quebec's separatism. It may be another thing to say it would be helpful for him to keep silent at a particular time or to moderate what he says, but to say that it is an illegitimate interference in the internal affairs of Canada is not entirely persuasive. I mean, the logic is, the same thing is true. I can see all sorts of political fallout. I can see all sorts of difficulties that come from that. And I can see that the rule of non-interference and non-comment on international affairs is a broad rule, a blunt instrument to discourage fiascos and things that will lead to inflamed feelings and make situations worse. My problem is, though, and I say this from the vantage of a lawyer who takes very seriously the idea of legitimacy, that the concept of legitimacy is very important. It may be politically stupid. It may be wrong. It may be harmful, but is it illegitimate? I have trouble seeing that it is illegitimate.

COMMENT, MR. McILROY: I just want to follow-up on what Doug said. President Clinton made a comment on the Quebec referendum a couple of years ago, and recently, when the Secretary of State was in Ottawa, there was actually a very well-presented Quebec side of the issue. I think that the administration was literally begging that she make a statement on the Quebec referendum. I do not think it is illegitimate at all. I think the countries involved decide legitimacy depending on what was said and what they want to hear.