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DISCUSSION AFTER THE SPEECHES OF ARTHUR DOWNEY AND BARRY CAMPBELL

QUESTION, PROFESSOR KING: Are we being hurt by the sanctions so much that we can demonstrate a need to correct this extravagant extension of U.S. jurisdiction? In other words, what is the economic effect of all this? Is this part of the dialogue that we have to use to get people's pocketbooks to talk?

ANSWER, MR. CAMPBELL: I think this is really perhaps more a question for Art, because it is a question about U.S. domestic politics. I said in my remarks that, unfortunately, business has not taken the lead for reasons I addressed. This government, this administration, will not lead on this issue for various reasons. I was happy to hear Art's reference to the business community coming forward now and actually bringing the kind of case that you suggested Canada might bring. Frankly, I would much rather see the U.S. business community bring that kind of case than Canada right now. But, it depends on who the messengers are. And, I guess, in my business as a consultant, we are often looking for third parties to say certain things because the parties most directly involved do not seem to have as much credibility with the message.

So, I would like to think about who are credible new voices, as I said earlier, to speak out against this neo-isolationism. Who are the new voices to speak about an open trading system and a more cooperative approach to these foreign policy and trade issues?

COMMENT, MR. DOWNEY: It is ironic that you speak of neo-isolationism when, in fact, there is a new involvement in things overseas with noble goals. But we just get it all screwed up in the execution. So we really are more interested in things overseas.

A bill should be passed by the House next month to allow sanctions to be imposed on nations engaging in religious persecutions. I had drinks Thursday night with Joseph Boutros-Ghali, who is the nephew of Boutros Boutros-Ghali, and the Minister of Economy in Egypt. He is a Coptic Christian. He said, in Egypt, they do not understand who speaks for the United States. They look at this legislation that is going to pop out, and it appears to be anti-Arab, anti-Muslim, and anti-Egypt. That is all it appears to be designed to do. It is going to create enormous friction between the United States and Egypt. And he said, I am a Christian, I am a Coptic. It was a wonderful quote. He said, "I would be much more willing to trust a Muslim Egyptian fundamentalist than I would the commitment of any American congressman."

So, we do have the United States reaching out to solve the problems of the world; terrorism, mass destruction, human rights, democracy, female genital mutilation, whatever. Regarding the American business community, it takes more courage than most CEOs possess to stand up and say that they oppose this Libyan legislation, or this Iranian legislation, or whatever, because you might get your head cut off. You immediately get branded a supporter of terrorism.

One reason Senator Al D'Amato got the ILSA legislation passed successfully was because he went to a certain senatorial Republican lunch. He had at the back door, when they left for lunch, a picture of the American hostages in Iran twenty years ago. It showed the Iranian students hanging Uncle Sam in effigy. Above that, he had a little sign that said, "Are you for this kind of terrorism or against it? If you are against it, sign here on my bill." He got thirty-seven co-sponsors. That is how it works.

On the business community issue, the American business community realized they were getting picked off one by one because no single company or sector had the strength to stand up, or the courage to get their head cut off. So they did form an organization two years ago called USA Engage. It has 625 corporate members. The goal there was to attack, to educate people about the concept of unilateral economic sanctions in the future, not trying to deal with any specific law, not trying to take on this lobby or that lobby. It has been quite successful in that regard. I think you will see more of it.

QUESTION, MR. WOODS: You mentioned having courage and worrying about getting your head cut off. As an international lawyer, my concern is that there is a bit too much focus on the process in Washington, especially when you are talking about the world as a whole. As far back as I can remember, only American citizens get to vote in elections. That is the first point. The second point is that I disagree a little bit with just saying, sue us. The best thing that Canada can do is take the United States on in some dispute next time this kind of issue comes up. For example, the national security issue involved in Helms-Burton makes it a difficult case to take. That is one of the reasons why there has been a standoff with the E.U. in the WTO context. It also portrays, for me, a bit of a bankruptcy.

Speaking of courage, as a lawyer, one of the things that I recall when I was called to the bar is a criminal lawyer who gave us a speech. He talked about the play *A Man for All Seasons*,¹ in which Sir Thomas More is confronted by his advisors and told to get rid of his enemies at all costs. As Lord Chancellor, he had the opportunity to twist and use the law as he would. Most people who are lawyers, I think, have seen the play and have heard the

¹ ROBERT BOLT, *A MAN FOR ALL SEASONS* (1967).

comment when More asks his young assistant, “if the devil himself was after you, would you tear down all the laws of England?” The student replies, “Sure, yeah, to get the devil.” And then More said, “Well, then you would turn around, and you would be confronted by the devil with no protection.” The rule of international law in this area is still fragile. But, if the policy of the United States keeps going in this direction, I think that there will be a kind of a bankruptcy.

The Secretary of State, Madeline Albright, who was referred to earlier, went to the governor of Virginia, and to the Supreme Court, citing the Vienna Convention, asking that an execution to be held in that state be stayed. The execution did go ahead, and it was referred to earlier in the context of national sovereignty. I did not see any great outcry in the United States about that issue, nor was there any great response to Albright’s final argument. Her argument was, as Sir Thomas More said in the play, ultimately, there are going to be Americans put at risk, and there would be no due process.

I would like to ask either panelist to address the apparent bankruptcy, or the inability for the international legal system to deal with this issue.

ANSWER, MR. CAMPBELL: Let me speak to two things that you have raised. You are right. We Canadians do not vote in Washington. And, in fact, for a long time, I remember, as a lawyer, involved in such cases, we would prevail upon the Canadian government to get a diplomatic note to the U.S. government and then wait anxiously for the response from the State Department. We would hope that the administration would find ways to communicate with the court to make the views of the administration known. Then, we would be frustrated that it did not seem to make a difference in the end.

We have learned very, very slowly. It is good for my business today that we have learned so slowly because I get to tell Canadians over and over again that the old-fashioned route does not do the trick. Today, if you are sophisticated about trying to change policy in Washington, you have to understand the way the American system of government works. You cannot simply talk to the administration and expect to be delivered from whatever it is you are concerned about. You have to identify like-minded people south of the border. You have to find your allies and mobilize them.

A case in point is a trade case on which I spent about ten years, and continue to work with still. That is *Softwood Lumber*.² It was clear that there were interests, and there are still interests, in this country who ought to be rising up and protesting against the continued actions of American lumber producers. I am not suggesting that things do not happen in other countries that may be unfair or inappropriate, but, what I am speaking to now is simply

² *In the Matter of Certain Softwood Lumber Products from Canada*, ECC – 94–1904–1 USA; Memorandum Opinions and Order, 3 Aug. 1994.

the point that, at the end of the day, the net result of some of these trade actions is that U.S. consumers pay a higher price, for homes, for instance. So it is not surprising then that home builders weighed into the case, as they are again today. If you are sophisticated about trying to change things in the United States, maybe your first instinct should not be to sue as a foreign government or a foreign company, but rather to see if you can identify like-minded people in the United States who can try to bring, if nothing else, some balance to the debate that goes on on Capitol Hill.

The second point is that we are in this new era, this rules-based system, and for those who would suggest that we should use those mechanisms, or we should use the old-fashioned court route, I raise the following concerns.

I am happy, in fact, that the E.U. has backed off from their WTO challenge to Helms-Burton because I would not want that mechanism to collapse, as it would if its decision were ignored by the United States or if the decision was unhelpful to all concerned. I am just as happy that that has not been one of the first major uses of that mechanism.

And then, lastly, on this rules-based era in which we live, the reality is that, when we win in bilateral bi-national panels, or when we win in extraordinary challenges, what happens in Washington? There is an outcry that this is outrageous, that Americans are being robbed of their opportunity to have matters deliberated by American courts, and that we had better change the rules. Obviously, the system is no good if Canadians or other foreigners are winning. You Americans have got to get over this. You are not going to win every time. And, when you lose, which you will do from time to time, maybe you deserve to lose. The problem is not the process.

ANSWER, MR. DOWNEY: On the bankruptcy of American leadership, especially as it bumps up against international law, I agree. It is not only the bankruptcy in our political leadership that is pathetic. It is pathetic that Madeline Albright and the State Department did not move on the Virginia case much earlier.

I do not know of another time when Judge Stephen Schwebel, the President of the World Court, and an American, voted against the United States. That should have delivered a message that this was serious. This was a serious issue, and it just got out of control. Where are the law students? Where are the law professors when these things happen? When we were about to invade Haiti in 1993, I literally had a sign made. I was going to picket in front of the White House. I called fifteen friends who are law professors and who were active in the international community. I said, hey, this is a dead violation of international law. Write your letters to the editors. Get down and picket.

Henry will tell you that, two months ago, when we talked about this program, the United States Navy was just about to do round four on Iraq in a big way. I said, Henry, this is a violation of international law. Are you going to get out there? Get your colleagues in the international legal community to raise their heads and make a statement. I think we are all at fault here. But, most certainly, our political leadership is strongly at fault.

You said suing us, and asking you to understand us, is not enough. When I say understand us, I do not mean excuse us. Just do not get quite as angry. Understand our process. That is not excusing us. I say sue us because I look to Canada as a way to save us from our own foolishness. I think people in the United States will pay attention when Canada asks, what are you doing? We are not going to deal with whether it is stupid American foreign policy. If it is going to hurt Canada and break the international rules, then that will be heard.

I would hope Canada would be much more aggressive in getting that message across, saying, you are harming us. We are civilized countries. We are going to go to a third party to get this adjudicated and to check these rules. That is what I would encourage.

COMMENT, MR. CUNNINGHAM: I want to underscore a thing that Art Downey said about USA Engage and one of its emphases, the *in futuro* emphasis. That emphasizes not only dealing with a specific problem and getting rid of a specific sanction that is imposed, but changing the policy for the future. That is exactly the right approach.

I have a very short anecdote which underlines that. Perhaps, as punishment for past sins, I was involved with a company that was bitten by the earlier Libya sanctions where the President ordered companies that had investments in Libya to divest and get out. But they could not sell to anybody that they were likely to find as buyers.

My client had \$12 billion in oil and oil-related assets in Libya. With the sanction in effect though, and we thought this was the greatest argument in the world, we would end up giving a \$12 billion windfall to Moammar Khadaffi. That is economically irrational, and it undermines the whole purpose of the sanction.

So, I am sitting in a room with the Secretary of the Treasury. The Treasury Department was our ally, and the State Department was on the other side. We were going over this and feeling really enthusiastic. It was a great argument that we had. But, he said, that is all well and good, Dick, but you have to remember what the argument is on the other side. And I asked, what possible argument could there be on the other side? And he says, the argument the State Department makes is that the President has imposed this sanction, and the President cannot look like a fool.

When you are in Washington, and the argument is economic rationality on one side, and the President cannot look like a fool on the other side, it is not a close issue. As I look at this, it seems to me that these things are going to happen. There is going to be pressure to comply from time to time, and it is going to be very difficult to resist. And it seems to me there has to be some outlet. You have to have a U.S. law or policy that creates a vehicle for doing something that we can live with internationally.

We do that, for example, in intellectual property rights violations. We have an outlet for it. Or maybe you have to have some international agreement, to which the United States is a signatory. Maybe the OECD would be a logical place for it. We need an agreement that sanctions should be done plurilaterally, or not at all. Both of those are big uphill fights. But, if you take the position that the United States should never do this sort of thing, I do not think you can do that. I do not think that will ever get you anywhere domestically. It is a tough fight, but those are the roads that we have to pursue.

QUESTION, MR. STOCKFISH: I am Bruce Stockfish with the Canadian Justice Department. As a Canadian, I share some of the outrage expressed by Mr. Campbell, and, perhaps to some extent, by Mr. Downey. But, other countries apart from the United States engage in unilateral extraterritorial sanctions as well. The Americans may be Olympic champions, but Canada certainly does not have clean hands where the environment is concerned.

There was an incident I would like to recount which occurred just a few years ago. I am referring to an incident which involved the Canadian Coast Guard. This is the case of the *Astibe*, a Spanish shipping vessel, which was fishing off the coast of Newfoundland, but in waters outside of Canadian territorial waters. And for reasons not unlike those of concern to the Cuban-American congressman, the then-Minister of Fisheries, Brian Tobin, took some steps which eventually led to the Canadian Coast Guard taking action against that vessel, an armed coast guard vessel at that, to arrest that vessel and bring it into St. John's. The cases are not perfect analogs, but there are parallels. The concern, of course, was over fishing in international waters, just as the concern was democracy in Cuba. Canada desired to take steps against foreign fishers over fishing in that area. The Americans desired to take steps against investors in Cuba.

The point, of course, is that we are not talking about unilateral sanctions in this case. We are talking about an extraterritorial act in violation of international law. Who can forget Brian Tobin, standing up in front of the television cameras with a poor, oppressed fish, to make a point for political reasons, just as this Cuban-American congressman did? And, of course, it did play well back home. Politics eventually prevailed over Canada's principled approach. I raise this really to elicit a response to question whether Canada

had lost a moral authority in making this point. Certainly, we raised the issue among others in the context of the OECD, MAI. I do not know whether that is the best approach to take, but I just wonder if we lost a little bit of our credibility in raising the issue in the international state of it.

ANSWER, MR. CAMPBELL: We have, Professor King, the odd spectacle of a former Member of Parliament of the governing party trying to enter into a debate with an official of our Justice Department about whether or not we lost the moral authority on this issue. It is an excellent question. I was hoping nobody was going to bring that up. I almost got away with it. But you see how good Canadians are. We will not let each other get away with anything.

When I used to be involved in these discussions, twenty years ago, we had moral authority, more than we do today. You are quite right. We have certainly applied our laws extraterritorially from time to time.

I said in my remarks earlier this morning that we agreed that effective enforcement requires extraterritorial reach, and I think both countries agree there are a whole range of situations in which you enforce your laws extraterritorially because that is required for effectiveness. But, I did differentiate between that agreed extension and where it is primarily politically motivated. We could argue the case of the poor abused cod fish. On both sides of that, you could say that is effective enforcement, because the effectiveness of the controls that we had within our territorial waters depended on people not catching the fish as they swam into Canadian territorial waters. Politics plays a big part. And, in talking about Helms-Burton, as I did this morning, we saw that as pure local ethnic constituency politics, and not really as a question of effective enforcement.

COMMENT, MR. DELAY: I would like to comment on Mr. Cunningham's situation where his client had \$12 billion worth of assets in Libya that were potentially going to be taken away from them, and whether there is an outlet for that. It seems to me that there is a domestic outlet for that under the United States Constitution. I am thinking of the takings clause of the United States Constitution, where it states that there shall be no taking without just compensation. If the President or the Congress imposes this kind of decree, and an American company loses \$12 billion in assets, that seems to be a taking without just compensation. I do not see the fact that the government of the United States is not taking title to those assets is an obstacle to that. I think it is still a taking because the takings clause does not say that the government has to take title to anything. You may have an inadvertent constitutional violation by the over-exercise of international jurisdiction.

COMMENT, MR. CUNNINGHAM: You have to understand that any U.S. company that is in the situation that mine was, having \$12 billion in

assets in a foreign country, is going to be an internationalist company that has an immense number of things going on with the federal government at any time. Once you become a really internationalist company, you are, in innumerable ways, a partner with the federal government, a beneficiary of federal government programs, or a cooperator with the government, which this company certainly was, for example, on east/west trade relations. And the step you take is one that companies are reluctant to take in a situation in which a company subject to that sort of problem is likely to find itself.

COMMENT, MR. DOWNEY: I can give you a parallel war story that bridges your comment and the comment about the takings issue. In 1980, I had as a client a large chicken company in Florida that had just made a deal with the Soviet Union. It was worth \$300 million; \$100 million worth of frozen chickens were to go there. They bought feed. They had the chickens. They had the plastic wrappers, the whole thing. They leased a ship to come pick it all up, and boom, the United States announced the grain embargo, which included, among other things in the fine print, chicken. So, my client was stuck with millions and millions of dollars of losses. I looked at the takings clause. There is a huge amount of research on whether the Constitution follows the flag, and whether you can recover under those circumstances. As Dick said, there was a practical accommodation in that case. We made an arrangement with the federal government school lunch programs and the VA hospitals. They had an awful lot of frozen chickens.