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SYMPOSIUM

INTRODUCTION

ANN ELIZABETH MAYER\*

In May 1997, the Legal Studies Department of the Wharton School organized a conference that brought together government officials, lawyers, ethics specialists, economists, and others concerned with the problems of law and ethics in emerging economies. The purpose of this conference was to assess how legal and ethical dilemmas overlap in emerging economies and where the integration of legal and ethical approaches could be fruitful. Selected conference papers presented here wrestle with some of the major unresolved controversies on the international economic scene. These include the following questions: In the transition from command to market economies, what role should the various players accord to ethics, as opposed to law? To what laws should international businesses operating in emerging economies look — local laws, laws in force in their home countries, or international law? What are the merits or drawbacks of upholding universal standards, as opposed to recognizing

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\* Associate Professor of Legal Studies, The Wharton School of the University of Pennsylvania.

divergence in cultural and legal traditions?

In Africa, Asia, the former Eastern Bloc, and Latin America, countries are scuttling the theory that state-controlled economies provide the best engines for achieving rapid development. Simultaneously, they are shifting to market models, in whole or in substantial part, and treating the law as an instrument for effectuating this shift. The development prospects of many countries may be seriously compromised where their schemes for managing the multifarious legal dimensions of difficult transitions prove deficient. They face urgent needs to accomplish difficult tasks, including the following: revising laws to fit rules of international institutions such as the World Trade Organization ("WTO"), devising suitable corporate laws, dealing with the delicate problems of moving from state ownership to a regime of private ownership, establishing capital markets and a regime of protection for intellectual property, readjusting subsidies and social welfare policies, and also finding mechanisms to curb criminality and exploitative practices. As yawning gaps widen between the haves and the have-nots, strains on the social fabric may lead to destabilizing crises. Realistically, capital importing countries cannot expect to erect perfect frameworks overnight for comprehensive regulation of all aspects of their economies, but they should have ways to assign priorities and avoid dangerous pitfalls.

There has never been a situation where so many countries have tried simultaneously to engineer rapid economic breakthroughs. There is no settled formula for what a country should do to effect a smooth transition to a market economy, no consensus on the legal principles that would maximize the chances of successfully balancing economic and social changes. Having few real precedents to follow, planners and legislators may be obliged to resort to best guesses. Perhaps it might seem that the quickest route to economic success would be to copy a fabulously successful pioneer, such as Singapore. Copying every step that Singapore took, however, will only make sense for a country that is essentially similar to Singapore as it was when its surge began. It is difficult to imagine that Bolivia, Ukraine, Vietnam, or Zaire could all manage to develop optimally while ignoring local specificities and the gaps separating their situations from Singapore's.

Another critical point is how to regulate incoming foreign

direct investment. Since private foreign investment has emerged in the 1990s as the most important source of development capital and expertise, it is vital for emerging economies to set up, at the earliest possible stage, a framework that will attract foreign businesses and both enable them to prosper and ensure that they are regulated in ways that will lead to sound contributions to local developmental goals. Balancing the desire to bring in foreign capital and to direct investment to the benefit of locals and the local economy has never proved easy, even for countries with greater experience with open markets.

Emerging economies that are struggling to effectuate these challenging transitions receive much “expert” advice from international institutions, Western economists and financiers, and professional consultants. They have reason, however, to mistrust this advice and to question whether or not its social and ethical underpinnings are sound. Outside consultants may present excessively rigid prescriptions and may fail to give sufficient weight to the distinctive problems of individual countries. Moreover, experts can become addicted to abstractions, leading them to insist on certain formulas with indifference to the actual social costs and human suffering these entail. Planners in emerging economies will often have reason to conclude that outside advice shows insensitivity to the consequences of charging ahead with reforms that cast the harshest burdens of adjustment on the most vulnerable segments of the population. Hence, the blueprints offered by foreign advisors may be suspect on both economic and ethical grounds.

International businesses also face troubling dilemmas in emerging economies — dilemmas not readily acknowledged in past decades. Today, it is appreciated that the disparity between the careful regulation of business in capital-exporting countries and frequently lax regulation in capital-importing countries is problematic, and that the proverbial “rush to the basement” by First World business buccaneers involves irresponsible plundering. Recognizing, however, that there may be ethical problems when companies engage in conduct abroad that would be strongly sanctioned in their home countries does not answer the question as to where they should look for guidance when operating abroad.

When operating at home, U.S. businesses, like other businesses originating in capital exporting countries, routinely turn to lawyers to determine if a proposed course of conduct is legal. In

most cases, the reassurance that the proposed course of conduct is perfectly legal will end the inquiry. In the highly regulated environments in which businesses operate in First World countries, the maze of legal regulations will often leave little room for discretion in deciding how to conduct business operations. If tempted to engage in conduct that, although technically legal, might cause harm to other interests such as the environment or the public welfare, businesses may feel inhibited by potential exposure to private lawsuits or damaging publicity. Naturally, people acculturated in such business environments might rely on the comforting assumption that if they are not doing anything illegal and are not operating in a way that could result in lawsuits or condemnation in the media, they will, in the normal case, be acting properly and according to defensible ethical standards.

What standards, however, are to govern these same businesses from highly regulated environments in the First World when they venture into one of today's emerging economies? What if they are trying to do business in countries such as China, Peru, Egypt, Nigeria, or Russia? There, companies may be able to reap windfall profits from low costs and lack of legal constraints on their activities. In some settings, foreign investors may be advised to disregard completely a formal legal system that in no way embodies the actual rules of the game. Old hands may urge them to adapt to what are supposedly local cultural norms and to follow an operational code completely incompatible with what is regarded as good business practice in their home markets. For example, they may be advised that local statutes criminalizing bribery are never enforced or may even learn that substantial bribes to local officials are essential to close all business deals. A muzzled press, an inaccessible or biased court system, and a corrupt infrastructure may mean that foreign businesses are able to make any deal acceptable to those in power, regardless of injury to the environment, society, or the development prospects of the country involved.

In many situations, a business from a capital-exporting country such as the United States, disciplined to act like a good corporate citizen at home, can find itself trying to conduct business in a setting of virtual lawlessness when operating overseas. Investors have to confront unintelligible or unpredictably fluctuating legal regulations, inadequate or unreliable protection for private property, bizarre and chaotic regimes of taxation and exchange

controls, and official rapaciousness. What should international businesses do if they decide to proceed with investments in emerging economies that entail venturing into such legal and ethical vacuums? Should they accept the advice, which they will frequently receive, that respect for sovereignty and local culture require that they adjust their standards downwards? Should they conclude that consistency is a virtue and refer back to the familiar legal standards in force in their home markets, attempting to apply these in a setting where they are unsupported by the local legal system? Should they forget about legal regulation and turn instead to ethics to ascertain guidelines for conducting their business?

This same problem worries at least some governments of capital-exporting countries, which are troubled by the idea that their nationals operating in emerging economies may be deviating widely from what are regarded as responsible business practices. One recent response to this issue was the promulgation of the 1995 Model Business Practices by the Clinton Administration. The Model Business Practices are not law, but amount to hortatory injunctions for conducting business abroad according to certain consistent standards. Are such non-binding standards helpful, or should there be more legal initiatives such as the 1977 U.S. Foreign Corrupt Practices Act ("FCPA"), which extended U.S. domestic law to the operations of U.S. businesses abroad? The unilateral aspect of the FCPA seems to have placed U.S. firms at a competitive disadvantage without stopping the practice of bribery in emerging economies. Is the lesson ultimately that all capital-exporting countries must collaborate to work out a multilateral framework that will require all of their nationals to follow consistent standards in their overseas operations?

If one shifts from a legal to an ethical focus, can the history of the FCPA teach lessons about the merits of trying extraterritorial extensions of morality? There is much in the background of the FCPA suggesting that a moral impulse lies behind it. Indeed, the statutory language itself indicates that it is meant to punish conduct that is wrongful and corrupt. The original U.S. pronouncements hailing this statute and urging the rest of the capital-exporting countries to follow suit had little practical impact for two decades. Looking at the failure of the FCPA to inspire emulation, one could speculate that a moralistic, value-laden approach to regulating international business in emerging

economies cannot be readily assimilated. A sharply contrasting approach has been adopted by Transparency International ("TI"), an international non-governmental organization ("NGO") with chapters in countries around the world, including emerging economies, that was set up to fight corruption in emerging economies. The founders of TI regarded the FCPA as a manifestation of a puritanical moral strain in U.S. culture, one not susceptible of successful transfer to other countries. TI has quite deliberately elected to steer away from moralism and instead to emphasize the harmful practical consequences of tolerating corrupt payments both for international business and emerging economies. For the former, these corrupt payments mean severe distortions of competition and interference with the free market, and, for the latter, these payments can mean grievous setbacks to economic development and may also set in motion the processes that convert governments into destructive kleptocracies. It seems that TI's calculated avoidance of moralistic discourse has facilitated the acceptance of the TI program in emerging economies, where grassroots chapters have sprung up. Indeed, the United States has indirectly paid tribute to the validity of the TI approach by insisting in its most recent denunciations of the failure to criminalize foreign corrupt payments that such payments distort the free market and harm the development of poorer countries. In recent years, TI has been able to celebrate the production of a Latin American anti-bribery convention and the 1997 launching by the countries of the Organization for Economic Cooperation and Development ("OECD") of a new initiative designed to stop foreign bribes by OECD nationals. Perhaps these measures will signal the onset of other multilateral and regional initiatives to deter international business from engaging in practices in emerging economies that would expose them to criminal and/or civil liabilities in their home markets. That is, it seems now that at least a tentative consensus is emerging to the effect that bans on bribery should be universally applied, regardless of whether bribes are tolerated by officials in emerging economies.

Can international law provide a substitute for national legislation regulating international business in emerging economies? In 1977, the United Nations ("U.N.") produced a so-called "code" for transnational corporations, but this never developed into a formal treaty. A highly politicized document, this "code" was informed by the Third Worldism then prevailing in the U.N.,

which treated international businesses as predatory exploiters that had to be curbed in the interests of protecting the autonomy of Third World countries. The authors of this “code” did not conceive of the possibility that international businesses could or should be encouraged to adhere to a higher standard of conduct in their international operations than that required under the laws of host countries in the Third World.

Today, perspectives have changed and, in some cases, changed to such an extent that converting international businesses into responsible global citizens may be regarded as offering brighter prospects for success than trying to curb the exploitative tendencies of entrenched ruling elites in the Global South. Human rights activists and others concerned with the welfare of emerging economies are insisting on the adoption of universal standards — often over the protests of governments of emerging economies. Believing that private investors are such a powerful force in shaping economic development that they must be ranked with governments as subjects of international law, they see a role for these investors in securing the universal observance of human rights principles. Perhaps human rights law constitutes one foundation for a new global ethic that binds all actors, including international businesses. One has to recognize, however, that businesspersons are not likely to be human rights specialists and that their training does not leave them especially well qualified to analyze human rights problems. How are they to be educated in the relevant principles?

International human rights law already accepts the notion that the nation-state is not the final arbiter of right and wrong in its territory and that sovereignty should constitute no barrier to criticizing a state’s treatment of persons on its territory where such treatment violates international law. Under this logic, if employing child labor violates international human rights law, international businesses should consider themselves bound not to violate this precept, even when operating in a milieu where the government has enacted no laws, or no effective laws, prohibiting the employment of children. If international labor standards require allowing employees the right to form associations and to bargain collectively, international businesses should respect this right, even if they are operating in a country where no law requires them to respect labor rights. If international law requires avoiding operations that will devastate the environment, interna-

tional businesses should adhere to standards that will protect the environment even in a setting where the host government allows or even encourages practices that seriously degrade the environment.

In some cases, international businesses have adopted a proactive stance, taking steps to work out internal corporate guidelines to ensure that they act responsibly in emerging economies. Recognizing the perils of operating in what amount to legal and ethical black holes when they move overseas, some U.S. companies engaged in international business have already moved to create their own "law" by establishing codes of conduct for their international operations. These codes, however, are not simple duplicates of domestic laws, being more closely tied to individual corporate understandings of morality and responsibility. Therefore, they may vary considerably and may be far from embodying the full range of principles that would be worked out by policy makers concerned with optimally regulating businesses in emerging economies.

Not surprisingly, pursuant to such codes, several major companies have elected not to conduct business in Burma or even to withdraw from engagements there, where investment entails collaborating with a particularly brutal and grasping military clique, the State Law and Order Restoration Council ("SLORC"). Many decisions in international business, however, are not as simple as refusing to be associated with Burma's SLORC. For example, the following questions arise: What about employing impoverished children in a situation where, without the chance to earn a salary, these same children may be even hungrier and more desperate? What if the employment does not prevent the children from going to school, because they are, in any case, too poor to afford the fees that must be paid in order to attend the local schools? Where does the well-intentioned executive look to find authoritative guidance in such matters? Is it fair or realistic to expect international businesses to resolve such conundrums? If not, who or what will offer viable solutions?

If, as part of an investment decision, businesses from the First World try to scrutinize whether the government of an emerging economy is representative or oppressive and how bad its human rights record is, they will open themselves to accusations from officials to the effect that they are imperialistic and are affronting national sovereignty. Businesses may consequently shy away from



such scrutiny, but a failure to make basic inquiries about the human rights record of the local government may lead them to stumble into ethical quagmires. One could speculate that a failure to appraise critically the Nigerian political scene is what led to Shell's Nigerian debacle. Shell apparently failed to scrutinize the degree to which the Nigerian regime could speak for the Nigerian populace before making its fateful deal to develop the oil resources of the impoverished and neglected Ogoniland region.

On its face, Shell's Nigerian deal was perfectly legal. It entailed collaboration, however, with a despotic kleptocracy that had thwarted the democratically expressed will of the Nigerian citizenry. General Abacha's military regime enjoyed the trappings of power but lacked the legitimacy of the elected regime that it had ruthlessly terminated. Naturally, the oppressed Ogoni people protested oil extraction that degraded their environment but offered them no benefit. The prominent Ogoni writer and rights activist Ken Saro Wiwa was one of the leaders of the protests against Shell's operations, Shell being regarded as a partner of the despised Abacha. And, not surprisingly, when the Abacha regime arranged for the judicial murder of Ken Saro Wiwa, thereby provoking an international outcry, Shell emerged from the situation with a severely tarnished corporate image. Not only was Shell seen to be guilty of taking advantage of the relative helplessness of the Ogoni people and contaminating their homeland, but it was held to share some of the blame for the execution of an eminent man of letters. Shell's subsequent announcement that it would make a practice of consulting environmental and human rights groups for guidance in its overseas operations may be an attempt at damage control. The announcement, however, could also represent a recognition that in today's global village, companies increasingly will be accountable for deviating from an emerging consensus on international standards for corporate conduct. This view suggests that businesses must show sensitivity to human rights issues.

One wonders if Shell executives were not among the many who have fallen for the myth that everything in a foreign culture that seems exotic should be subsumed under the rubric "culture." Westerners seem all too ready to ascribe to "culture" an undemocratic government, brutal working conditions at low pay, official corruption, gender and race discrimination, and low standards of environmental protection. When international business executives

try to justify their acquiescence in such conditions by asserting that they are obliged to show respect for the local culture, they may hope to obscure the ethical dilemmas that are raised by their engagement. Arguments based on the need to accommodate cultural diversity, however, cannot relieve international business of the responsibility to make independent, informed judgments about the ethical implications of proposed courses of action.

“Cultural” arguments have all too often been a pretext for taking advantage of a situation stacked in favor of an alliance of foreign capital and an exploitative native elite. Therefore, one of the important questions to ask when using respect for local culture to rationalize tolerance for environmental degradation, governmental oppression, corruption, discrimination, exploitation, and other ills is whether the people who lose when these ills are tolerated or exacerbated accept their situation as being “culturally” mandated. The Nigerian case illustrates how deferring to the mandate of a foreign state in the guise of respecting a local “culture,” rather than considering the welfare of the affected population can lead business into conduct that borders on criminality. If Shell executives had consulted ordinary Nigerians about their views regarding the abuses and grotesque malfeasance perpetrated by their military masters, they might have heard scathing denunciations such as the ones made by a courageous Nigerian TI activist who spoke fervently on behalf of a universal standard of corporate responsibility at our May 1997 conference. (If I do not record the activist’s name here, it is because the Abacha regime has not hesitated to kill, jail, and torture its critics and even the relatives of such critics.) If Shell executives had inquired about how the Ogoni people felt about the oil exploitation on their land, they would have learned about the stark regional cleavages and disputes dividing the different peoples inhabiting Nigeria and how helpless and disadvantaged the Ogoni people were. Shell could have ascertained that there was no such thing as a unitary Nigerian “cultural” consensus that Shell could rely to legitimate its investment and its collaboration with Nigeria’s thuggish leadership. With some investment in learning about recent developments in Nigeria, Shell could have appreciated that, in pursuing oil extraction in Ogoniland, it would be in effect taking one side in a bitter domestic power struggle, siding with the forces that were against democracy, against accountable and transparent government, against fair treatment for minorities,

and against equitable distribution of national resources. That the democratically elected head of government had been summarily thrown into jail after Abacha's coup and that massive corruption permeated all levels of the governmental infrastructure were the kinds of obvious signs of a rotting political structure that should have prompted a critical inquiry.

Both law and ethics can potentially provide tools for guiding economic development in countries currently seeking to negotiate difficult transitions. In some areas, local particularisms may need to be taken into account, but in others, the players need to adopt more universal standards. The time is ripe for further examination of what the international community, capital-exporting nations, emerging economies, and international business can and should be undertaking to address the problems of laying the legal and ethical foundations for economic development in emerging economies. With our conference and with these papers, we hope to encourage further discussion about how these efforts can be coordinated with a view to enhancing such development in the interests of all concerned.