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Forward

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FOREWORD

EDWARD E. POTTER *

INTRODUCTION

In the last 100 years, the world has made enormous strides in medicine, life expectancy, food supply, transportation and technology, to mention but a few. The world's real gross domestic product per capita grew by 600 percent in the 20th century; in contrast, prior to the onset of the Industrial Revolution, there was no increase in the material wealth of the average citizen throughout the history of mankind.¹ During the 1800s, material wealth grew by 225 percent as a result of innovations in production processes, utilization of capital goods, and improvements in workers' skills and education.²

Notwithstanding the substantial overall economic gains in the last century, we live in a world of vast inequality, vastly different economic circumstances, and diversity. As reported by Harvard professor emeritus David Landes, the difference in income per head between the richest industrial nation and the poorest non-industrial

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1. J. BRADFORD DELONG, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER 7602, CORNUCOPIA: THE PACE OF ECONOMIC GROWTH IN THE TWENTIETH CENTURY 35 (graphing an explosion in the world's gross domestic product per capita from the nineteenth to the twentieth century and demonstrating almost completely static levels of gross domestic product per capita from the eleventh through the eighteenth century) *available at* http://www.j-bradford-delong.net/pdf_files/Cornucopia.pdf (last visited Nov. 20, 2004).

2. *See id.* (showing marked increases in material wealth during the nineteenth century).

nation today is several hundred to one. Two hundred fifty years ago, the gap between the richest and poorest countries was around five to one, and the difference between Europe and South Asia was about two to one.³ At the extremes, the gap is still growing. Not only are some countries gaining, but others are growing poorer relatively and, in some cases, absolutely.⁴

Unlike the beginning of the last century and the time before it, today's world is increasingly interconnected. Diminishing trade barriers, instant communications, relatively fast and inexpensive transportation, and rapidly-changing technologies are shaping the world economy. Today, it is clear that the world that we live in is fundamentally different from the beginning of the 20th century, when day-to-day change in the world was comparatively slower and more predictable. We now live in an economic era in which the economic well-being of citizens is more directly connected to the competitive success of employers and their employees at the establishment level. The articles in this issue of the *American University International Law Review* are set in this environment.

DEMOCRACY, MARKETS, HUMAN RIGHTS AND ETHNIC CONFLICT

In her Grotius Lecture, Amy Chua summarizes the main thesis of her 2003 book, *World on Fire*.⁵ That thesis is that "contrary to the conventional wisdom, markets and democracy—at least in the form in which they're currently being promoted—may not be mutually-reinforcing in the developing world." She points out that "[m]arkets magnify the often astounding wealth of the market-dominant minority, while democracy increases the political power of the impoverished indigenous majority."⁶ As a consequence, there is a contradictory backlash against markets and the wealth of market-dominant minorities, against democracy by those favoring market-

3. *Id.*, citing Paul Bairoch, "Ecart international des niveaux de vie avant la Révolution industrielle," *Annales: économies, sociétés, civilisations*, 34, 1 (Jan-Feb. 1979), 145-71.

4. See DELONG, *supra* note 1, at 31 (providing an empirical measure of rich countries growing richer and poorer countries lagging behind).

5. AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003).

6. *Id.* at 1242.

dominant minority (“MDMs”), and violence by the majority hopeful of killing off the MDMs. The upshot is that markets and democracy do not always create a winning environment for the majority.

Overall, Chua believes that the wrong version of free market democracy is being exported by the international legal community, i.e., capitalism without safety nets or mechanisms for redistribution and universal suffrage. She points out that no Western nation has a *laissez-faire* economic system; nor has any Western nation extended blanket democratic rights to its citizens from the outset. Chua maintains that free markets, free and fair elections, civil society, rule of law, and human rights do not always work in the same direction, and can create tensions across values and norms. She suggests that MDMs step up and take a role and avoid objectionable practices. In doing so, Chua is not suggesting a “one size fits all” approach, nor is she blaming ethnic conflict on globalization, markets, or democracy.

HUMAN RIGHTS, CORRUPTION AND PRIVATE CAPITAL

In commenting on Chua’s Grotius Lecture, Upendra Baxi reflects, in part, the international law community’s view of free market democracy by criticizing Chua’s rare invocation of the phrase “human rights.” He points out, for example, that people’s struggles against corruption or for democratic accountability can arise autonomously. Baxi asks important questions about development policy and human rights in terms of, e.g., whether plebiscitary democracy may be restricted by global governance if it incites ethnic hatred or slaughter. Baxi finds it surprising that Chua does not focus on specific strategies for human rights education, having suggested that MDMs are part of the solution.

Baxi highlights the troublesome relation between corruption and capitalism explored by Professor Chua, concluding that we need to know more about the linkages between political corruption and civic violence. At the same time, he sees the UN Global Compact as emblematic of the private sector buying and selling a unique common public good, the United Nations.

CORRUPTION AND PRIVATE SECTOR CERTIFICATION

Philip Nichols’ paper logically follows Chua’s and Baxi’s papers by addressing “Corruption as an Assurance Problem.” An assurance

problem exists when all actors are better off if they adhere to the same minimum standard. If there are defectors, actors are second-best if they join the defectors. The standard solution to an assurance problem is to impose penal sanctions on defectors, but this is effectively not possible in internally-corrupt systems. As Nichols highlights, non-enforcement of standards can be purchased through a corrupt relationship, making the enforcement agencies more corrupt themselves.

Nichols points out that corruption is always bad, but that its effects are particularly acute in developing economies. He documents that corrupt institutions are dysfunctional and expensive because people do not trust them. Nichols shows that corruption decreases foreign investment, prevents development, distorts decision-making by bureaucrats, diverts scarce domestic resources to parallel institutions, erodes support for change, and degrades societies. In sum, while recognizing that corruption can confer a short-term benefit, Nichols concludes that all actors are better off if a system operates without corruption.

The question is what to do when state institutions fail in a country in which corruption is rampant. Nichols suggests that a certification process by a group of business leaders in Panama is informative, and that business is an underappreciated resource for combating corruption. Because corruption is an assurance problem, these Panamanian business leaders recognize that corrupt relationships are not optimal. In addition to initiating education programs on corruption and working with the government to create laws on transparency and accountability, Panamanian business leaders have suggested that companies should be certified based upon the integrity of their decisions where corrupt influences may be present.

Citing the International Standards Organization's ("ISO") *ISO 9000*, which rates the quality of management processes, Nichols points out that privately-developed certification of business decision-making processes is not novel, and is instructive in thinking about an auditing and certification process for decisions involving corruption. Many non-governmental organizations ("NGOs"), however, would question whether a national organization of business leaders can establish a process akin to the ISO's that can genuinely review multiple and distinct parties for the presence of corruption in a

transparent fashion that accounts for all business funds.

NGOS AND TEN POLICY ALTERNATIVES FOR ADDRESSING MULTINATIONAL ACCOUNTABILITY

To a large extent, Amy Chua's MDMs of globalization are multinational corporations. Multinationals are perceived as having great economic power relative to developing countries. Isabella Bunn's article, entitled "Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community," considers ten NGO policy issues related to corporate social accountability of multinational companies.

Bunn's policy analysis is set in an environment in which, over the last several years, a new set of private sector and market-oriented regulatory processes has emerged in response to concerns about human rights, the environment, and working conditions—primarily through the development and implementation of non-governmental monitoring systems. These NGO strategies seek to regulate multinational firms across their supply chains through "voluntary" standards, internal and external monitoring systems, new sanctions and incentives, and different levels of public reporting. Practically speaking, NGOs have been taking on activities that were previously the purview of national and international regulatory bodies.

Non-governmental systems of labor monitoring are both more diverse and complicated than traditional national and international regulatory approaches. These initiatives go beyond the past procedures of government regulation based upon fixed rules and standards, government monitoring and enforcement, and judicial review. Non-governmental initiatives involve multiple actors in new roles and relationships, experimenting with new processes of standard setting, monitoring, benchmarking, and enforcement. By their sheer volume and variety of content, private NGO-led efforts may be contributing to the assurance problem they intend to solve.

It is hard to see, however, with the multiplicity of codes, how NGOs can avoid an assurance problem as long as codes have the appearance of uneven applicability and divergence from national and international standards. Significantly, Bunn highlights that NGOs are giving considerable thought to how companies can be held accountable under human rights law and the international legal

framework. At bottom, however, even with attention given to supply chains, the NGOs' focus on multinationals excludes from attention those national MDMs who have a greater impact on national legal systems.

As Bunn underscores, the inadequacy of these voluntary, private, market-driven initiatives are recognized by NGOs not in the way I have described above, but rather because there is a need to move toward legally-binding norms for corporations. In addition to these initiatives, Bunn's article addresses nine other policies: intergovernmental efforts, the UN Global Compact, the UN Commission on Human Rights, foreign direct liability, Corporate Social Responsibility ("CSR") and development, CSR and trade, the parameters of international law, an international legal framework, and national laws and regulations. With the possible exception of national laws and regulations, the policy alternatives considered are primarily focused on multinational companies, and not on MDMs in a given country.

Bunn's discussion highlights that international governmental efforts and the UN Global Compact are viewed as inadequate by NGOs because they have insufficient scope, are voluntary, or do not involve monitoring. As Bunn points out, the adoption of the UN's "Draft Norms on Responsibilities of Transnational Corporations and other Business Enterprises With Regard to Human Rights" was, for many NGOs, an important step toward forging a legal framework on corporate responsibility for human rights. This view prevails even though the Organization for Economic Cooperation and Development ("OECD") and UN codes of conduct already address workplace human rights and the environment, and although most nations are accountable for fundamental workplace human rights in the ILO.

In some instances, NGOs seem to be focused on creating new international standards which are divorced from the meaning of international standards and national law. What seems particularly important to NGOs is that there is independent monitoring discrete from national labor inspection systems and economic penalties, either as a result of the code itself, or through trade sanctions or civil liability under statutes such as the Alien Tort Claims Act. As Bunn points out, this apparatus has complex jurisdictional and procedural

issues and produces inconclusive legal rulings.

CONCLUSION

These articles address, in different ways, various stresses on economic development in developing countries: ethnic conflict, human rights violations, corruption, and barriers to development, to mention a few. When read in the context of Chua's Grotius Lecture, they make clear that the prescription for economic development cannot be a "one size fits all approach;" nor is it realistic to expect economies to run without rules or democracy in full flower, at least at the outset.

Moreover, concentrating solely on the accountability of multinational companies on human rights, corruption, conditions of employment, and other issues will, in all likelihood, do relatively little to help the powerless majorities in developing economies that account for the vast majority of the world's population. Overall, the articles highlight that there is a clear tension between establishing responsible, accountable national legal structures that can address corruption and human rights violations, and alternative corporate social responsibility regimes promoted by NGOs. In sum, it is clear that a more holistic approach to these issues needs to be undertaken that does not undermine national law and international standards.