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## **Trade and Investment Treaties, the Rule of Law, and Standards of the Administration of Justice**

Alejandro M. Garro<sup>1</sup>

Thank you very much for the invitation to this exciting brainstorming session about the impact that trade agreements have on human rights. When Professor Rosenn extended the invitation to me, I saw it as an excellent and very propitious challenge to think about some areas of the law that don't generally occupy my time. As Professor Rosenn observed, international trade and human rights have generally been treated separately. But as Professor Powell told us, it is academic settings like today's symposium that allow specialists in the two fields to think about how they are linked with each other—or, as Professor Grossman put it, to draw analogies across different domains of communication. That is what I intend to do today.

Part of the challenge of this discussion is to take seriously the comparisons that can be drawn between the two fields of international trade agreements and the international protection of human rights, especially in implementation and enforcement. Both fields challenge us to think about how to implement, adapt, and actually enforce broadly worded treaty-based rules in everyday life.

But more than a comparison is at stake. International trade and human rights are inevitably linked. One tends to think that fostering free market societies is generally coupled with individual prosperity and happiness. And why should free markets not also foster respect for basic human rights and democracy? What we don't know yet is how to make them coordinate and work together in a way that one would mutually support the other.

Professor Powell proposes that the trade liberalization regime could be quite favorable to human rights protection. Including human rights protections—even if limited to labor and environmental rights—in a free trade agreement potentially extends the benefits of trade law's enforcement mechanisms to human rights.

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But as he acknowledges, this outcome is not guaranteed, especially if the dispute resolution mechanisms for the human rights provisions are weaker than those that apply to the trade portions of the agreements. Professor Gantz argues, in his very thorough analysis of dozens of regional trade agreements, that rather than focus on strengthening the dispute resolution mechanisms for the human rights provisions, it would be most helpful to improve what he calls the procedural mechanisms of implementation for them; well-funded agencies charged with enforcing these basic labor rights and environmental protection provisions could do much to bring trade and human rights together.

To these fruitful contributions by Professors Powell and Gantz concerning international trade, I would like to add a focus on the regime of the protection and promotion of foreign investments. Much of the foreign investment that has been spurred in the last decades has been through regional trade agreements and bilateral investment treaties—not dozens, or even hundreds, but now probably almost twenty thousand. Each one of them includes substantive provisions, very broadly worded, that push the governments that are host to these investments to adhere to the rule of law or to protect individual rights. Some of these provisions, including national treatment and most favored nation treatment, focus on ending discrimination by nationality. But what are we to make of the more broadly worded provisions, such as those calling for “fair and equitable treatment” or “full protection and security”? What does it mean for a country to commit itself to provide fair and equitable treatment and full protection and security to foreign investors or nationals from the other contracting states?

International human rights law presents an analogous problem. Professor Rosenn remarked how “elusive” many of its substantive rights are, expressed in broad phrases such as due process, freedom of expression, the right to life—all terms that are conceivably susceptible to more than one interpretation. Yet through many years of the development of jurisprudence, in part through enforcement by supranational regional tribunals such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights, we have come close to some kind of harmonized agreement about the minimum standards of human rights protection.

In the area of the protection and promotion of foreign investments, we don't have enforcement through supranational regional tribunals. Defining and gradually agreeing on what phrases like

“fair and equitable treatment” and “full protection and security” mean will come through the mechanism of investor-state, treaty-based arbitration. This mechanism consists of hundreds of *ad hoc* arbitral tribunals which have the duty to make judgment calls as to what it means, for example, to give protection to the legitimate expectations of foreign investors.

As you can see, even these words, “protection” and “legitimate expectations,” are extremely troublesome. They raise the question whether the particular expectations that a foreign investor may have when it makes an investment are justifiable, and what duty the host government may have to protect the investor by improving its legal regime after the investment has been made. Even more challenging, it seems to me, is the obligation to provide investors with legal or full protection and security. That phrase means at least some kind of physical police protection, but it clearly means something more than that, for without legal security investments and trade cannot take place.

Now what are the obligations of “legal security”? They definitely include protection of certain substantive rights, coupled with meaningful remedies—some kind of due process—to enforce them within a reasonable time. But what, concretely, does this mean?

Consider the *Loewen* case, to which Professor Rosenn referred.<sup>2</sup> It raises the basic issue of what minimum standard of legal security that any system—jury-based or otherwise—should provide. In *Loewen*, Mississippi’s legal system had awarded a U.S. plaintiff \$400 million in punitive damages and \$75 million for emotional distress as part of a \$500 million judgment against a Canadian corporation for state tort, contract, and antitrust claims; it had then required the defendant to post a bond of 125 percent of the total damages just to appeal. Should the standard of “legal security” forbid punitive damages because many if not most countries consider them to be against public policy? Or should punitive damages be allowed but limited to torts as opposed to breach of contract? Should there be a requirement of proportionality between the punitive damages and the compensatory damages—a requirement the U.S. Supreme Court has imposed in the

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2. *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, reprinted in 42 I.L.M. 811 (2003), NAFTA Chapter 11 Arbitral Tribunal, June 26, 2003, available at <http://www.state.gov/documents/organization/22094.pdf>.

U.S?<sup>3</sup>

These questions, and many others, are far from being definitively delineated in international law. Might it be possible to formulate a minimum or core set of standards for the legal security host states owe investors? In taking up this challenge, one approach would be to look to the bright-line minimum standards of international human right law, which forbids certain core wrongs, including torture, forced disappearances, summary executions, and censorship of expression. Similarly, in 1998 the International Labour Organization formulated a limited set of core labor standards, represented by four fundamental principles.<sup>4</sup>

The interest of this basic question—what content to give broad phrases like “fair and equitable treatment”—was evident in an arbitral case in which I was involved as a member of the arbitral tribunal.<sup>5</sup> Foreign investors had made a very significant investment in a country that was party to a bilateral investment treaty promising foreign investors “fair and equitable treatment,” “full protection and security,” and treatment equivalent to that provided to any other foreign investors or domestic investors. The investment involved the purchase of a sizable amount of land for citrus plantations in an almost abandoned area of the country. The plantations were subsequently invaded by squatters who lived in the neighboring area and sought land to cultivate. Not surprisingly, this massive land invasion moved the foreign investor to seek redress in the local courts. Yet after many years of frustrating experience trying to have the leaders of the squatters group apprehended, prosecuted, and convicted, and of also making all kinds of efforts to obtain relief through diplomatic means, the squatters were still there. The failure to evict the squatters eventually prompted a notice of arbitration, filed against the country. In the notice of arbitration the foreign investor asserted that it had plainly not received the full protection and security that not only a foreign investor but also a national investor should expect.

The arbitral case was discontinued before it reached the mer-

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3. *E.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

4. *See* Declaration on Fundamental Principles and Rights at Work, ILO, 86th Sess. (June 15, 1998), available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>.

5. Fernando Cabrera Diaz and Damon Vis-Dunbar, *Canadian Investors Sue Costa Rica Alleging Failure to Protect Their Farm*, Investment Treaty News, Oct. 28, 2008, available at <http://www.iisd.org/itn/2008/10/29/canadian-investors-sue-costa-rica-alleging-failure-to-protect-their-farm/>.

its,<sup>6</sup> and I never had the occasion to discuss the substance of the case with the other members of the panel or reach any conclusions about the merits of the claims put forth in the complaint. A case of this sort, though, raises some interesting general questions about the extent to which a host country should or could be held liable for failure to provide full protection and security. To resolve a claim of this sort would require a tribunal to do something which major tribunals actually are asked to do all the time—to pass judgment on the degree to which a particular country adheres to the rule of law. For example, in the United States a defendant may assert a claim of *forum non conveniens*, a claim which if accepted will result in dismissal of the case, leaving it be litigated abroad.<sup>7</sup> Resolution of the assertion of *forum non conveniens* requires American courts not only to make sure that an alternative forum is in fact available, but also to determine whether the foreign legal system provides an “adequate legal system.” U.S. courts have generally required only a very basic threshold for this standard to met, ruling that as long the foreign legal system provides “meaningful” remedies, it is adequate.<sup>8</sup> What is interesting is that resolution of an assertion of *forum non conveniens* calls on the U.S. courts to pass judgment on the adequacy of a foreign legal system.

What is the rule of law promised by standards like fair and equitable treatment or full protection and security? At the very beginning of the symposium today, Professor Rosenn, asserted that the rule of law of course implies those formal aspects that every legal system should have—aspects that foreign investors and international commercial traders want. These include accountability, transparency, predictability, and stability. But more is needed than these formal aspects, some substantive minimum content that is consistent with basic protection of human rights postulates of international justice.

In practice, the substantive constraints that trade agree-

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6. *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB (AF)/08/1 (Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs) (Oct. 27, 2010), available at <http://ita.law.uvic.ca/documents/QuadrantPacificGrowthFundVCostaRicaOrderEng.pdf>.

7. *E.g.*, *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

8. *See, e.g.*, Virginia A Fitt, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT'L L. 1021, 1031 (2010) (“Systemic problems within a foreign judiciary are only viewed as a justification for denying a *forum non conveniens* dismissal in the gravest of circumstances.”).

ments and bilateral investment treaties will place on governments are hard to predict in concrete cases. Not surprisingly, arbitral tribunals and annulment committees do not always agree on the application of the standards of fair and equitable treatment or full protection and security, particularly when asked to render difficult judgment calls about the regulatory power of the host state. How much "margin of appreciation" a state is accorded varies starkly from arbitral award to arbitral award.

The challenge is to build transparent, consistent, and predictable outcomes under trade and investment treaty-based standards. Perhaps the substantive content of the rule of law could include a bright-line minimum standard for the protection of investments—a minimum degree of legal security that every country in the world should be expected to provide to foreign investors. There are reasonable arguments for this position. Certainly, no country should be able to claim it has adequately observed the rule of law where it reaches decisions in an arbitrary or xenophobic fashion. And while massive invasions of squatters—a serious problem in many Latin American countries—can present especially difficult challenges, a stable country with a well-developed legal system and adequate resources should be able to provide a relatively swift, effective response. The response does not necessarily have to satisfy the investor, of course. What is required is that the courts resolve the investor's claims in good faith and reach a reasonably tenable decision, even if that ruling is wrong.

In my view, though, apart from the case of arbitrary or discriminatory actions, there is a reasonable argument that the obligation to provide fair and equitable treatment or full protection and security should be measured in accordance with the range of responses most realistic in light of the host country's judicial and legal infrastructure. A poor country besieged by chronic failures in its administration of justice simply might not be capable of providing as effective a response as a wealthier country to investor claims. Not all countries have the same legal infrastructure to redress wrongs, especially the type of socially explosive wrong such as land invasions in developing countries with a large housing deficit and an unequal distribution of land.

One might question whether it is fair to investors to let the host country escape its responsibilities by simply proving that the government did the best it could have under the circumstances. The answer lies in the notion of legitimate expectations. The due

diligence that an investor performs before entering into a multi-million dollar investment in a foreign country should leave the investor reasonably well-informed about the state's legal system and administration of justice. Foreign investors in a poor country cannot reasonably ignore the state's level of development, capacity, and resources. In practice, these resource constraints may limit the host country's ability to provide the same type of legal infrastructure and protection as one might see in a wealthier country. There should, then, be a standard of due diligence on the part of the investor—a standard which, while protecting foreign investors from unfair, unequal, or arbitrary government action, is sensitive to the resources available to the host country to provide full protection and security.

How to articulate the rule of law is fundamental question of great importance. Drawing both on trade and investment law and on human rights law has the potential to give us more insightful answers to this question. I now leave it to discussion and debate by my commentators. Thank you very much.



## Comment

Stephen J. Schnably<sup>1</sup>

How much protection should foreign investors expect from a state's judicial and law enforcement systems? As Professor Garro notes, investment treaties typically promise foreign investors "fair and equitable treatment" or "full protection and security."<sup>2</sup> Not unreasonably, investors expect these standards to include access to a domestic system that reliably provides efficient, impartial, and effective protection against invasions of their legal rights.

The quality of a state's administration of justice is important even though under many investment treaties, foreign investors may press claims before an international arbitral tribunal without exhausting local remedies.<sup>3</sup> Where private actors invade an investor's rights, it might well be simpler for the investor to seek help from local authorities, so long as they abide by the rule of law and take appropriate action. In the example that Professor Garro gives, however, peasants seeking land to cultivate repeatedly invaded the investor's citrus plantations; the investor pressed the state over several years to evict them, but to no avail.<sup>4</sup> The failure to provide adequate protection gave rise to the investor's claim that the state had breached its investment treaty obligations, a claim he was entitled to pursue before an international arbitral tribunal. Had the state dealt effectively with the problem through its local law enforcement and judicial systems, there would have been no need for a treaty claim in the first place.

Professor Garro raises an important general question about how an arbitral tribunal is to judge this kind of failure to provide protection. He draws our attention to two different kinds of approaches. One would be the establishment of a "bright line minimum standard of protection,"<sup>5</sup> a standard that any nation, even a relatively poor one, could be expected to meet. This standard, he suggests, could be like the international law prohibition of "tor-

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1. Professor of Law, University of Miami School of Law. I am grateful to Arthur Baker for excellent research assistance.

2. Alejandro M. Garro, *Trade and Investment Treaties, the Rule of Law, and Standards of the Administration of Justice*, 42 U. MIAMI INT-AM. L. REV. 269 (2011).

3. See Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 127-28 (2006).

4. See Garro, *supra* note 2.

5. *Id.* at 274.

ture, forced disappearances, summary execution, and censorship of expression.<sup>6</sup> In the example that Professor Garro cites, this approach would suggest that application of the “fair and equitable treatment” or “full protection and security” standards should not be affected by the nation’s level of development. A complete failure to protect a landowner’s exclusive right to use its property would seem to constitute a clear breach of the investment treaty.<sup>7</sup>

The other approach contemplates a variable standard for the administration of justice, one which would look at “the State’s level of development, capacity, and resources.”<sup>8</sup> Suppose an investor invests in a relatively poor developing country that is “besieged by chronic failures in its administration of justice.”<sup>9</sup> Should not the investor have known that realistically, the state might well not be able to provide the kind of protection a more developed nation could?<sup>10</sup> In the kind of case that Professor Garro cites, for example, it might be that although the law formally protected the investor, the state’s law enforcement and judicial systems were simply not capable of handling the cases effectively. If the country were poor and violations of the law endemic, an organized land-invasion movement of many squatters might simply be too much for law enforcement or the courts to handle. Perhaps the claim that the investment treaty has been breached is unwarranted under such circumstances.

Confronted with a choice between a universal minimum stan-

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6. *Id.* at 272.

7. *Cf., e.g., Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, ¶¶ 3.04, 6.12-6.13 (Feb. 21, 1997), *reprinted in* 36 I.L.M. 1531, 1537, 1550 (1997) (state’s failure to prevent looting of investor’s property by renegade military members breached obligation to provide fair and equitable treatment). *See also* GAMI Investments, Inc. v. The United Mexican States, UNCITRAL, Final Award of Nov. 15, 2004, ¶ 94, available through <http://www.state.gov/s/l/c7119.htm> (“The duty of NAFTA tribunals is . . . to appraise whether and how preexisting laws and regulations are applied to the foreign investor. It is no excuse that regulation is costly. Nor does a dearth of able administrators or a deficient culture of compliance provide a defence. Such is the challenge of governance that confronts every country. Breaches of NAFTA are assuredly not to be excused on the grounds that a government’s compliance with its own law may be difficult.”).

8. Garro, *supra* note 2, at 274.

9. *Id.*

10. *Cf. Peter Muchlinski, ‘Caveat Investor’?: The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, in INVESTMENT TREATY LAW: CURRENT ISSUES II, at 205, 212 (Federico Ortino et al., eds. 2007) (“Not all investment risks can, or should, be protected against. . . . Any assessment of regulatory fairness will need to be made in the light of this factor.”); *id.* at 223-25 (discussing arbitral rulings holding investor responsible for taking the risk of investing in countries with troubled legal systems or economies).

dard and one that varies with resources, Professor Garro argues for a mixture of the two. There should be, he concludes, a “standard of due diligence on the part of the investor—a standard which, while protecting foreign investors from unfair, unequal, or arbitrary government action, is sensitive to the resources available to the host country to provide full protection and security.”<sup>11</sup> His approach is certainly not without precedent. An investor’s legitimate expectations about the possibility of changes in the host country’s laws can play a key role in determining whether there has been an expropriation. An investor may reasonably expect some stability in the host country’s relevant laws;<sup>12</sup> but as one arbitral panel put it, “[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”<sup>13</sup> Professor Garro’s approach would extend the question of legitimate expectations to include what the investor might expect about the efficacy of the administration of justice in light of the nation’s resources.

Though his analysis moves us a long way toward a better understanding of it, there is probably no fully satisfactory answer to the question Professor Garro raises about how to judge a state’s administration of justice. Trade-offs are inevitable. I would like to add some thoughts about what we might learn from international human rights law about these trade-offs.

The first point I would make is that the two approaches correspond roughly to the division between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The “bright line minimum standard of protection” that Professor Garro outlines corresponds roughly to the typical approach to civil and political human rights. Both are universal and not dependent on a state’s level of development. Torture is torture, whether practiced by a rich or a poor country. To be sure, questions of cultural relativism have long been debated in human

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11. Garro, *supra* note 2, at 270.

12. *E.g.*, *Occidental Exploration and Production Company v. The Republic of Ecuador*, Case No. UN 3467, ¶¶ 180-87 (London Court of International Arbitration July 1, 2004) (Ecuador’s alteration of tax law violated duty of fair and equitable treatment by undermining investor’s legitimate expectation of stability of the legal environment), available at [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf). See Susan D. Franck, *International Decision: Occidental Exploration & Production Co. v. Republic of Ecuador*, 99 AM. J. INT’L L. 675 (2005).

13. *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, ¶ 305, available through [http://www.pca-cpa.org/showpage.asp?pag\\_id=1149](http://www.pca-cpa.org/showpage.asp?pag_id=1149).

rights, particularly when it comes to women's rights,<sup>14</sup> but arguments for relativism based on the level of development, while not unknown,<sup>15</sup> are hardly standard fare. The universal nature of the obligation is reflected in Article 2(1) of the International Covenant on Civil and Political Rights, under which each state party undertakes to "respect and to ensure to all individuals . . . the rights recognized in the present Covenant."<sup>16</sup>

In contrast, the resource-sensitive approach Professor Garro discusses has strong resonance with the key obligation under the International Covenant on Economic, Social and Cultural Rights.<sup>17</sup> Article 2(1) of that treaty obligates each state party to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the right recognized in the present Covenant by all appropriate means." The ESC Covenant does place binding obligations on states that ratify it. A complete failure to do anything to ensure everyone adequate housing, for example, is a breach of the duty to take steps toward that end.<sup>18</sup> Plainly, though, the concrete content of economic and social rights varies with the state's level of development. "Adequate" housing does not mean the same thing in a poor country as a rich one.

The analogy between the two types of human rights and the two approaches Professor Garro outlines might make investors nervous about the resource-sensitive approach. Economic and social rights seem less well implemented than civil and political rights, precisely because they are resource-sensitive. Of course, while measuring compliance with human rights is complicated,<sup>19</sup> violations of both civil and political rights and social and political

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14. See, e.g., Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 5-18 (1997).

15. E.g., Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 4-17 (Adamantia Pollis & Peter Schwab, eds., 1979).

16. International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

17. International Covenant on Economic, Social and Cultural Rights, art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ESC Covenant].

18. ESC Covenant, art. 11(1), *supra* note 17.

19. See generally, e.g., AnnJanette Rosga and Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. 253 (2009); Todd Landman, *Measuring Human Rights: Principle, Practice, and Policy*, 26 HUM. RTS. Q. 906 (2004); Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights*, 16 HUM. RTS. Q. 693 (1994).

rights are widespread. Still, the mechanisms for enforcing civil and political rights are, in general, much more developed than those for enforcing economic and social rights. Only recently has an individual petition mechanism for violations of the ESC Covenant been put in place,<sup>20</sup> whereas the Human Rights Committee, which hears individual petitions for violations of the ICCPR by states that accept its jurisdiction, has been in business since 1977.<sup>21</sup>

One reason mechanisms for implementing economic and social rights have been less developed is the very fact that the rights are framed in resource-dependent terms, rendering them less easily susceptible to judicial or similar enforcement. Article 11(1) of the ESC Covenant, for example, guarantees a right of adequate food and housing.<sup>22</sup> Read in light of Article 2(1), though, the obligation this right imposes on states is to use the maximum of “available” resources to “take steps” toward the “progressive realization of the right.”<sup>23</sup> Enforcement of obligations of this sort poses very difficult problems for any judicial or arbitral determination of whether the right has been violated and what remedy is appropriate. The problem is not *per se* that developing nations have limited resources. It is that most courts and arbitral tribunals are ill-positioned to make binding decisions about how to allocate limited resources. How is any tribunal (particularly an international one) to determine what resources are truly “available” and whether the state has used them to the maximum—particularly considering that there is a range of rights to be respected?

Not surprisingly, adjudication of economic and social rights has proved difficult. Domestic courts have found violations most readily where the state has failed abysmally. Even then, fashioning concrete, meaningful relief is difficult. The *Grootboom* case, decided by South Africa’s Constitutional Court in 2000, provides a good example.<sup>24</sup> South Africa’s constitution guarantees economic

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20. See Tara J. Melish, *Introductory Note to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 48 I.L.M. 256 (2009); Jan Kratochvil, *Realizing a Promise: A Case for Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights*, 16 HUM. RTS. BR. 30 (2009).

21. P.R. GHANDI, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION: LAW AND PRACTICE* 29, 55 (1998).

22. ESC Covenant, art. 11(1), *supra* note 17.

23. ESC Covenant, art. 2(1), *supra* note 17. See M. MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 311-78 (2003).

24. Gov’t of the Republic of S. Afr. v *Grootboom*, Case CCT 11/00 (Constitutional

and social rights in a way similar to, though not identical with, the ESC Covenant.<sup>25</sup> The Constitutional Court found a violation of the right to housing when a local municipality evicted squatters from privately owned land, leaving them homeless. It declined, however, to specify a minimum core obligation regarding housing.<sup>26</sup> Instead, it issued declaratory relief that left the government with a wide degree of discretion, ordering it to “devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.”<sup>27</sup>

In one narrow respect, *Grootboom* might provide some level of reassurance for investors caught up in the kind of situation Professor Garro describes. The *Grootboom* Court firmly stated that governmental tolerance of land invasions could not be justified on the basis of the right to housing.<sup>28</sup> But it also illustrates the difficulties that courts face when the contours of a right depend on the resources available to the state. In considering whether to order even temporary relief to the plaintiffs, the Court was acutely aware that “[l]arge sums of money” had already been spent to increase the housing stock,<sup>29</sup> and that the plaintiffs were “not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions.”<sup>30</sup> The difficulty of judicial determination of how to allocate resources made the Court draw back from ordering even temporary housing for those whom the municipality had evicted (though it noted that the government had voluntarily offered some alternative relief on the day of the hearing before the Court). Irene Grootboom herself died homeless some eight years later.<sup>31</sup>

Consider an arbitral tribunal attempting to assess whether a

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Court of South Africa) (4 October 2000), available at <http://www.saflii.org/za/cases/ZACC/2000/19.pdf>. For an account of the case by a member of the Court, see Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673 (2007).

25. See, e.g., S. Afr. Const. (Act 108 of 1996) ch. 2 (Bill of Rights), arts. 26 (right to adequate housing), 27 (right to health care, food, water and social security), 29 (right to education), available through <http://www.info.gov.za/documents/constitution/>. For a comparison of the language used by the Constitution and that used by the ESC Covenant to express the obligations, see Gov't of the Republic of S. Afr. v *Grootboom & Others*, *supra* note 24, at ¶¶ 27-46.

26. Gov't of the Republic of S. Afr. v *Grootboom*, *supra* note 24, at ¶ 33.

27. *Id.* at ¶ 99(2)(a).

28. *Id.* at ¶ 92.

29. *Id.* at ¶ 53.

30. *Id.* at ¶ 80.

31. See Ibrahim Steyn, *Access Rights No Guarantee of Concrete Relief*, CAPE TIMES

state had provided “full protection and security” to a foreign investor in the circumstances Professor Garro describes. The task might well seem daunting. Suppose, for example, that the state asserted that it had done “the best it could have under the circumstances,”<sup>32</sup> given that its law enforcement or judicial mechanisms (or both) were simply overwhelmed.

This situation presents the strongest case for a resource-sensitive approach. Why, after all, should any investment treaty be construed to require a state to do something it simply cannot do? “Achieve the impossible” might not seem like an interpretation of the treaty “in good faith in accordance with the ordinary meaning” of its terms.<sup>33</sup> As Professor Garro notes, moreover, this standard might seem fair to the investor. Due diligence before making an investment might include assessing the level of protection the state is capable of providing.<sup>34</sup>

There are, though, two problems with this approach. First, how did the state end up being overwhelmed—and what should the tribunal make of the reasons for it? If the tribunal simply assumed that the state had done everything it could to avoid the problem, the resource-sensitive standard would too easily exonerate the state. If the tribunal looked beyond simple assumptions, on the other hand, it would need to ask some very demanding questions. Did the state invest less in its judicial and law enforcement systems than it could have? Should the tribunal take into account the size and necessity of the state’s military budget or the efficacy of its tax collection system? After all, spending less money on the military or increasing the government’s tax revenues could free up resources to improve its law enforcement mechanisms. Equally important, either of these measures could allow the state to address housing or land needs more effectively, avoiding the land invasions in the first place. Rather than fault the investor for failing to anticipate that a developing country might provide a lesser standard of protection, one might fault the state for entering into a treaty to which it was not able (or prepared) to give full adherence.

Second, how would the tribunal distinguish “doing the best

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(South Africa), Aug. 11, 2009, at 9 (available in LexisNexis); *South Africa: Death in Shack Despite Ruling*, AFRICA NEWS, Aug. 7, 2008 (available in LexisNexis).

32. Garro, *supra* note 2, at 274.

33. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980), available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

34. Garro, *supra* note 2, at 275.

the state can do" (which would be acceptable) from "doing the most it chooses to do" (which presumably would not)?<sup>35</sup> Suppose, for example, that local law formally protected the investor under the circumstances and the state's law enforcement and judicial systems were in fact capable of handling the cases—but the state chose for policy reasons to limit its enforcement efforts or even to abstain from them entirely. Of course, if those policy reasons reflected discrimination against foreign investors, or an arbitrary singling out of a particular foreign investor for rough treatment, it would be easy to find them incompatible with the investment treaty, as Professor Garro correctly notes.<sup>36</sup> But these policy reasons might also reflect a different kind of judgment. The government might be acting—or rather, failing to act—based on genuine concern for landless peasants who, facing destitution, sought to cultivate land currently not used by the investor. Or its uneven response might reflect political judgments about how best to deal with organized land-invasion movements in the context of large numbers of landless or land-poor peasants.<sup>37</sup> Drawing the distinction between governmental incapacity and governmental choice might not be impossible, but it would require some very intrusive inquiries by the tribunal into the reasons for the government's conduct.

So far I have addressed the insights the international human rights law might have for deciding whether to adopt a resource-sensitive approach to the standard of protection under an investment treaty. It is worth asking a different question as well. What impact might the adoption of such an approach have on the protection of human rights? The question arises because the argument is often made that the spread of investment treaty regimes helps promote the rule of law. Restricting a state's power to act arbitrarily in one sphere may reduce the state's propensity for arbitrariness in others. States may also have an incentive to improve their administration of justice and general adherence to the rule of law to avoid giving rise to occasions for foreign investors to bring them up before international arbitral tribunals in the

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35. See Muchlinski, *supra* note 10, at 225 ("the 'investment climate' cannot be used as an excuse for bad governance where the host country is able to offer high standards of administrative action but fails to do so").

36. Garro, *supra* note 2, at 274.

37. See CHARLES D. BROCKETT, *LAND, POWER, AND POVERTY: AGRARIAN TRANSFORMATION AND POLITICAL CONFLICT IN CENTRAL AMERICA* 123-42 (1990) (Costa Rica and Honduras).



first place.<sup>38</sup>

How much the enhancement of respect for the rule of law with respect to foreign investments affects the protection of human rights is an important question, one I need not attempt to answer here. What matters is that if the connection is real, a resource-sensitive approach to the administration of justice in the context of foreign investors' rights could be the basis for a similar approach in the context of protecting human rights, including civil and political rights. In part, the connection is simply conceptual. It would be hard to think of a standard like "fair and equitable treatment" varying with a nation's level of development, while thinking of judicial protection of individual and group rights as having nothing to do with the nation's resources.<sup>39</sup>

The connection might also be more than conceptual; the investment treaties might themselves dictate a connection. Suppose a state provided a resource-sensitive level of judicial protection to foreign investors, but an invariant (and perhaps higher) standard of judicial protection to domestic investors. How could that be compatible with the requirement not to discriminate on the basis of nationality? And if the domestic legal system adopted a resource-sensitive standard of judicial protection for domestic investors in response to this problem, why would that approach not spill over into the question of the level of judicial protection for, say, torture victims or persons subject to censorship?

This would be a troubling development. The right of access to effective judicial protection is central to international human rights law. Consider the Inter-American Court of Human Rights' judgment in 1988 in *Velásquez Rodríguez v. Honduras*.<sup>40</sup> Interpreting Article 1(1) of the American Convention on Human Rights, which, like Article 2(1) of the ICCPR, obligates states to "respect" and "ensure" the rights guaranteed in that treaty, the Court laid down a stringent obligation. States have a duty "to organize the governmental apparatus and, in general, all struc-

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38. E.g., Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1 J. INT'L DISPUTE SETTLEMENT 341, 346 (2010) ("the network of BITs [bilateral investment treaties] contributes to the rule of law"); *id.* at 347 ("a country governed in accordance with the rule of law has little to fear from BITs, or from international tribunals").

39. Of course, as pointed out earlier, human rights law already has a relatively invariant set of rights (civil and political rights) and another set that is more openly resource-sensitive (economic and social rights). But the general lack of judicial enforcement of the latter keeps the two fairly distinct.

40. *Velásquez-Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, at 91 (July 29, 1988), reprinted in 28 I.L.M. 291 (1989).

tures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."<sup>41</sup> It is not enough, the Court continued, merely to recognize the rights on paper. Rather, states "must prevent, investigate and punish any violation of the rights recognized by the Convention" and provide injunctive relief and damages.<sup>42</sup> Recall that Central America was wracked by armed conflict in the 1980s; Honduras, a poor country, had a powerful military complicit in a systematic campaign of disappearances.<sup>43</sup> Yet none of this in any way lessened Honduras' legal obligation to provide effective judicial and law enforcement protection against disappearances. Indeed, not even in a state of emergency that "threatens the independence or security" of the nation is a state entitled to suspend the "judicial guarantees essential for the protection of such rights."<sup>44</sup>

These concerns point to the conclusion that arbitral tribunals should go with a core minimum standard of "fair and equitable treatment" or "full protection and security." In general, from a human rights point of view, that approach would seem preferable to making it expressly dependent on the level of the state's development. Still, Professor Garro's mixed approach—barring unequal or arbitrary treatment but taking limited resources into account—captures two very important truths.

First, in reality, core minimum standards of civil and political rights are not in fact as bright line as they appear to be. Consider torture. Waterboarding is an egregious example.<sup>45</sup> But note the disagreement between the former European Commission of

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41. *Id.* at 324 (¶ 166).

42. *Id.*

43. Honduras: The Facts Speak for Themselves: The Preliminary Report of the National Commissioner for the Protection of Human Rights in Honduras 206-37 (trans. Human Rights Watch Americas & Center for Justice and International Law 1994), available at [http://www.cja.org/downloads/Honduras\\_Report-%22The\\_Facts\\_Speak\\_for\\_Themselves%22.pdf](http://www.cja.org/downloads/Honduras_Report-%22The_Facts_Speak_for_Themselves%22.pdf).

44. Organization of American States (OAS), American Convention on Human Rights art. 27(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. See *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987), reprinted in 27 I.L.M. 513 (1988).

45. See David Stout, *Holder Tells Senators Waterboarding Is Torture*, N.Y. TIMES, Jan. 15, 2009; UN Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture*, ¶ 24, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf?OpenElement>.

Human Rights and the European Court of Human Rights on the question whether the five interrogation techniques employed by the U.K. in interrogating detainees in Northern Ireland amounted to torture.<sup>46</sup> The techniques were forcing detainees to stand for hours spread-eagle against a wall; keeping them hooded all the time except for interrogation; subjecting them to continuous noise; depriving them of sleep; and depriving them of adequate food and drink.<sup>47</sup> The Commission called this torture; the Court said otherwise.<sup>48</sup> Similarly, the prohibition on censorship is the subject of a complex body of international human rights case law.<sup>49</sup> Granted, this kind of complexity does not stem from differences in resources available to states. But what it does mean is that adopting a core minimum standard approach would not necessarily produce simplicity or easy predictability.

Second, even civil and political rights are in fact resource-sensitive in an important respect. Consider, once again, torture. The international law right not to be tortured is not simply a negative right, entailing a duty on the part of the state to refrain from committing it. It is a positive right, requiring the state to undertake a range of affirmative steps to prevent it and deal with it if it does occur. These steps include making the judiciary genuinely independent and effective, and training and supervising law enforcement personnel. And they require time and resources, as the record of rule-of-law foreign aid programs has shown. For all the money poured into them, the effects of these programs have been limited and their gains have come slowly.<sup>50</sup> Borrowing the language of the ESC Covenant, it may well be more realistic to think of the judicial protection of basic civil and political rights as something that states can achieve only progressively, in steps, using

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46. *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (ser. A) (1978); 2 E.H.R.R. 25 (1979-80), available through <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+atabase/>.

47. *Id.* ¶ 96.

48. *Id.* ¶¶ 165 (Commission), 174 (Court). The Court did find them to constitute "inhuman treatment." *Id.* ¶ 174.

49. See generally FRANCISCO FORREST MARTIN, ET AL., *INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS* 750-844 (2006).

50. Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD* 3, 11 (Thomas Carothers ed., 2006).

After more than ten years and hundreds of millions of dollars in aid, many judicial systems in Latin America still function poorly. Russia is probably the single largest recipient of such aid, but is not even clearly moving in the right direction. . . . Aid providers have helped rewrite laws around the globe, but they have discovered that the mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement.

(ideally) the maximum of their available resources at any given time.

In short, the notion of a universal, minimum core obligation in the administration of justice—an obligation realizable now, not in the future through progressive measures—may be something of a fiction. It is, however, a useful fiction. Another way to put it is this: Whatever one may think of the power of multinational corporations vis-à-vis states in a global economy, multinational corporations typically have more power in relation to the state than do torture victims or victims of repression. Expressly giving a developing state a break in the standard of the administration of justice when it comes to the more powerful claimant asserting an injury is unlikely to do the weaker victims any good.

## Comment

Pedro Martinez-Fraga\*

First, I want to thank Professor Garro for his thoughtful paper and even more thoughtful remarks. I have to confess that I largely agree with him and will thus identify four basic questions that go to the very root of his paper. Professor Garro's paper reminds me of two works that are dramatically and distinctively apart. The first, is Matthew Arnold's "Dover Beach," and more specifically the first verse of that poem "the sea is calm tonight." The verse comes to mind because Professor Garro uses a seemingly innocuous paradigm: his personal experience in an ICSID arbitration that dealt with the squatters.<sup>1</sup> The second work that comes to mind is Professor Gerhardt's book, "The Power of Precedent."<sup>2</sup> At the end of the day, that is what a large part of Professor Garro's paper is about with respect to tribunals and investor state tribunals.

A fundamental question that is inferred from Professor Garro is the following: Do capital importing and exporting countries reach a meeting of the minds when negotiating and implementing a bilateral investment treaty? Or are they subject to the economic limitations and conditions that – in the exercise of their sovereignty – will inevitably lead to material discrepancies between the two? This is a fundamental point. This is not a question that should lead to a theory of relativism, with changing standards depending on the country. No, it is a question of whether we are

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Mr. Martinez-Fraga has significant experience and exclusively practices in the field of international litigation and transnational arbitration, including complex jurisdictional disputes concerning the common law and civil law issues, sovereign immunity, act of state contentions, international investment law corporate governance, anti-suit injunctions, cross-border energy disputes (oil and gas, co-generation, and geothermal), asset tracing cross-border interim relief, and issues concerning the recognition and enforcement of foreign judgments and arbitral awards. He has represented seven sovereignties in Latin America, in addition to the Kingdom of Spain, together with geopolitical subdivisions and state instrumentalities.

1. *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/08/1)

2. MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008).

in a moment of time, because of economic globalization, where international law is seen as a failed project.

International law is seen as a failed project because it is the law *between* states. In a time where global problems are shared by all states and there is a movement toward a more global law. A global law that from the point of view of humanity would be responsive to issues such as poverty, global exploitation, corruption, the vertical and horizontal proliferation of nuclear weapons, and in effect underlying Professor Garro's paper, the quest for a global law to remedy these global situations.

I will try to contextualize it in the area of investor state arbitration. If the answer is negative to the first question, then it is a proposition that those administering justice should consider to what extent are specific critical elements of the administration of justice in investor state arbitration an objective definition of such terms as "fair and equitable", "full protection and security", and "most favored nation treatment" reasonable and legitimate in terms of expectations. Here, I do think Professor Garro goes to the very heart of the question. One of the issues that he raises is what about the investor's due diligence in going into the host country? Did not the investor investigate what is the rule of law in the host country? Doesn't the investor have a whole history with respect to the host country in terms of what kind of remedies can be sought there? Isn't there a risk element that is assumed by the investor by going into the host country? I think that's an element in Professor Garro's paper that is excellent and certainly invites a lot of sustained analysis.

Another critical question that arises from Professor Garro's paper is whether a new type of sovereignty has arisen in a world of economic globalization. In other words, are bilateral investment treaties cutting so deeply into traditional notions of sovereignty that when the regulatory state is passing regulation that impinges upon foreign investment for reasons of public health, strategic resources, or public order, they are treated differently? Is that really an indirect taking? Is that one of the risks that the investor group assumes? Is this an issue that we should carve an exception for in traditional models of sovereignty versus the new model of sovereignty that we find forming and transforming itself in this new era of economic globalization? I think some sustained analysis there would be certainly welcome.

Throughout Professor Garro's paper there is something that is a bit disturbing, and it is the following. We see a numerous

references to the term “Latin America,” and the problems in “Latin America” and the disputes in “Latin America.” I wonder if in the context of investor state arbitration there is something that we can identify for as particularly or idiosyncratically Latin American. Perhaps one way of approaching this issue is to think about caducity proceedings in investor state disputes. In other words, going back to Dean Schnably’s point, the exhaustion of administrative remedies, which quite often in bilateral investment treaties involve carve-out provisions that call for the exhaustion of certain remedies as a predicate to going forward.

These carve-out provisions are one way in which we can very genuinely and legitimately say that that is a “Latin American” process of justice particular to the territorial political subdivision. Latin American, as opposed to being Central European or second world, where the legacy of the Soviet Union and former Soviet Block countries, leads us to find a lot of Central European investor-state disputes in which we can identify administrative remedies that tend to be different from those that we see in Latin America. And perhaps that is a way of getting to Latin America in a more focused way.

Finally, a fleeting observation on the doctrine of *forum non conveniens*. The last element of *forum non conveniens* is certainly not an “adequate alternative system of law”. It is an adequate alternative forum, which is very different. It requires an analysis of maximizing access to proof while minimizing the expense of getting to that proof. Now, to be fair to Professor Garro, there is an element that he does talk about, which is whether in fact you can get justice in a particular jurisdiction. That is a judgment call from one court as to the system of justice in another jurisdiction in another country. But, the case law and analysis on that particular section of *forum non conveniens*, is very restrictive and limited to about three or four rogue countries. Countries we won’t mention here, but we all know who they are. Therefore, that aspect is really not an important part of the doctrine.

Audience Member:

I have a question for Professor Martinez-Fraga. You mentioned precedent in investment state arbitration disputes. The problem I see with precedent is that it is are merely persuasive. So you have got in some instances long lines of cases that tribunals disregard. What role do you think an precedent should have in arbitration?

Pedro Martinez-Fraga:

Right, that's an excellent question. The question of precedent in investor-state disputes. Professor Garro is one hundred percent correct, there is a very serious problem when we turn to ad hoc arbitral tribunals that are not the subject matter of the state exercising sovereignty through the courts as is the case with judicial systems. One ad hoc tribunal is not bound by the next even though a lot of ICSID opinions tend to be or purport to be grounded in precedent. What I do think happens, and I think it is a positive element, is that there is a lot of doctrine and scholarly material that has developed from these opinions tends to contribute to some sort of continuity, if you will, and some sort of uniformity and clarity. But the truth of the matter is that this is problematic because they are just persuasive in nature and these terms are very elusive.

Another problem that the tribunals have is that it is a tremendous challenge to try to harmonize conventional international law and customary international law while, at the same time taking into account municipal law in rendering the decision. So that is an extra problem. What I was trying to suggest is that there are areas where the problems at issue, even though they arise in the context of an individual state, are really problems that pertain to humanity. The administration of strategic natural resources, for example, is one of those problems. Healthcare is yet another one of those problems. And the suggestion that where the state exercises its regulatory powers in these limited capacities and categories, perhaps we should rethink the extent to which this exercise of sovereignty can be characterized legitimately as a taking.



## Comment

David Abraham\*

There has been a very interesting convergence of topics since this morning. I had earlier intended to start my remarks, in fact, by saying that what was missing from this discussion of “rule of law” and human rights was the issue of “sovereignty.” Now, lo and behold, Martinez-Fraga has just put it back in the center of the discussion —where I think it might well belong.

Notwithstanding all of the policy debate that has taken place since the onset of the Great Crisis, one doesn’t very much, if at all, hear the term “national economy.” The term “national economy,” or “Nationalökonomie” in the original German as coined by the 19thC economist Franz List, represents the notion that economics exists for the sake of the state, the entire nation rather than for the sake of utility maximization or individual actors. This conception of national economy was used to produce the powerful economies of Germany and the United States in the nineteenth century. It is certainly what guided the Whigs and Republicans both before and after the Civil War to make America a powerful new economy. “National economy” featured a high tariff policy, import substitution and the development of a strong domestic market grounded in strong production capacities.

Although criticized by some for being semi-autarkic, “national economy” policies were key to the rise of both the U.S. and the Soviet Union. Subjecting economics to national power development worked for the U.S. in the 19th century, for the Soviet Union in the early and middle 20th century, and it was a policy of China in the late 20th century, probably until the 1990’s. Although we think of China today as a mass exporter, and it is, China came to its newfound power by largely removing itself from the world market and building internally. These internal development strategies sought to substitute for imports, build human capital capabilities, and preserve foreign currency for the absolute essen-

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tials. There are strong resemblances between these policies and those that seem to be working well for Brazil today.

But even when import substitution has not been at the core of the strategy, what was at the core was the construction of a powerful state and a domestic surplus. What we subsequently saw in the U.S. from the 1890s to the 1930s (and may still see in places like China) is a social battle for the state and for the distribution of goods along class and sectoral lines. That conflict could take place within an increasingly democratic framework, as was the case in the U.S. and much of the European continent. Stable capitalism within a democratic polity was not always achieved, just as they have not always been achieved within free-trading countries. What is consistently true is that it was not the free market or free trade that was the incubator or the place of incubation for the creation of rights, for the creation of citizens. No, not the market, but the state and the battle over control of it produced the conditions for possible democracy.

The twentieth century was split worldwide between protectionism and free trade, and in the end it is unclear that there is a consistent connection between those policies and political outcomes. (See Gourevitch, Katzenstein, Stephens and others.) It was only in the latter portion of the 20th century that free trade seemed to be the obvious winner, in terms of either economic efficiency or filiation with democracy. After World War II there was certainly free trade but largely within either of two very fixed blocs, the EU/US on one hand and the Soviet Bloc on the other. Outsiders either went nowhere or tried to escape this domination of what certainly some Latin Americans considered neo-colonial or neo-imperialist domination characterized by commodity exports, foreign borrowing, and consumer good importation. (The “development of underdevelopment” as it was sometimes called.) Mexico, among others, somewhat erratically tried for a while a kind of national economy of import substitution strategy. How much wealth or democracy that created remains unclear even now, and both friends and foes of NAFTA, for example, point to that period to support their current positions.

Ironically it was the end of the Soviet Union that produced the most extreme form of capitalism, namely the revolutionary capitalism Marx had predicted back in the *Communist Manifesto* of 1848, a capitalism under which “everything that is solid melts into air” and which just blows tradition and other accumulated social forms out of the way. This capitalism was an irresistible

force, globalization and Washington Consensus combined, and takes over the field. Countries like South Africa, emerging from apartheid in this period, really no longer had the opportunity to try an American or Chinese model of internal market and human capital development. Although a huge country with lots of wealth, in the regnant international context, South Africa did not have really the opportunity to try to develop itself on the basis of a contained, internal, semi-autarkic development. Rather, it had to become part of the international market immediately, thereby sacrificing the opportunity to build internally in order to attract foreign capital.

In sum, I don't think one can establish any clear connection between international trade and human rights. It seems to me a totally indeterminate relationship. When Professor Grossman earlier suggested that free trade encourages democracy, well maybe: on the other hand we have the Chinese example to suggest that that need not be true, and there is no evidence that Mexico's turn to NAFTA free trade has done anything for democracy there. Does free trade bring peace? Maybe. As far back as Montesquieu and Montaigne it was argued that commerce brings peace because the bourgeoisie is of a more pacific caste of mind than an aristocracy whose roots are in the warrior nobility. (See Albert Hirschman on "doux commerce.") It's not clear that that's an inextricable relationship either, since economic spheres of influence generally require forceful protection.

Can foreign investment occasion improved domestic politics? Both Garro's paper and the general discussion certainly have raised that issue. On the one hand, one used to talk cynically about establishing "favorable investment climates," which usually meant a race to the bottom and the promise of the local government to repress any popular pressures for a share of the wealth or "excessive" consumption. So, is a race to the bottom what foreign investment relations' treaties are about? Perhaps that was once true. Now, however, the question is whether we are in a new phase where international agreements, soft law, best practices, etc., provide a way to avoid that race to the bottom and avoid international treaties being simply about protecting private people's money from the natives? Presumably there is now a level of mutuality of advantage that acts as a constraint. There is, or might be, some reason that the Colombian government might commit itself to stop killing labor organizers (as opposed to the

U.S. policy which is merely to fire them whenever they attempt to organize).

Is there something in the mutuality of advantage that would, for example, lead the Colombian government to undertake such a commitment? I'm not sure. Pinning ones hopes for the advancement of decency and the rule of law on the security of property rights is again; it seems to me, rather unwise. On the one hand, property rights in the abstract, as we've known for a very long time, are for all, provide all with some kind of guarantee of security, some kind of platform for human development, some kind of basis for fighting back against power. On the other hand, property is also the basis for the inequality that threatens democracy. To have and to be are two very basic verbs that interact with each other in all political relationships. Property rights are central to individual freedom, but they are also the ground for that inequality that undermines, not only equality, but also perhaps freedom and law itself, a problem that students will recognize from Madison's *Federalist 10* and Rousseau's *Discourse on the Origins of Inequality*. Inequality is a natural outcome of freedom; on the other hand, it threatens freedom.

So what political constellation will emerge? What is the contribution of these free-trade oriented treaties, bilateral or multilateral, to the emergence of a democratic politics? We have focused here especially on Latin American, partly because this is the area of the journal's commitment. One could talk about Southeast Asia; one could talk about Central-Eastern Europe. But nowhere is the connection between the internationalization of trade and internal democratization of the country more contested than for Latin America. Indeed, for many years political parties across South America were defined as either export-oriented (generally of commodities) or linked to foreign capital or domestic-industry oriented and linked to nascent domestic industries. The Red/White-Colorado/National divide in Uruguay was typical.

Certainly if free trade were the chief basis on which domestic populations looked for democratic opportunities and more equitable societies, it would be a thin reed indeed. If it is one at all, it is a very weak mechanism for the establishment of more democratic or equitable societies. The "rule of law" is surely a good thing, but combine free-market free trade with legal enforcement, and the results may be very mixed as far as democracy and justice are concerned. Let us take the example in Professor Garro's paper: If the elimination of "squatters' rights" in order to assure foreign inves-

tors is going to be the contribution that the rule of law as articulated in international trade agreements is going to make, then, in fact, what we have is little more than an attack on the poor. Of course, I would not propose that squatters' rights or adverse possession have been a major mechanism of democratic assertion by the poor, whether in early modern England or contemporary Brazil. But if the goal of insertion of countries into international agreements of this sort is to enforce a rule of law that is modeled on stable, liberal, capitalist democracies into situations where those do not exist, then it becomes just as possible that the future course of development will be anti-democratic as democratic.

Free trade agreements may compel respect for property rights, both on the books and in judicial and extra-judicial enforcement. The agreements we have been talking about may contribute to capital accumulation and foster investment, but of a very particular sort, which we would not necessarily associate with either democratic political rights or equitable social development. Investors certainly do have legitimate expectations. It is certainly true that changing rules on people in the middle of the game or treating foreigners less fairly than domestic parties—opposition to practices like those enjoys a consensus that certainly embraces legal theory and scholarly world. At the same time, the turn to reliance on private arbitral mechanisms suggests a lack of confidence in the local judiciary, but also in the administrative and presumably the entire executive branch, to treat foreign investors and foreign parties with the same respect as natives. This can be either because the local judicial system is entirely unreliable for anybody or because it would pick on and discriminate against foreigners, who presumably have fewer available resources (bribery, influence-peddling, etc) to sway it.

So I think there are in fact not just hardware and software issues, but there are also transactional issues that go to the internationalization of trade agreements. Further, there are issues of internal development and democratization or non-democratization that have now been linked to the internationalization or globalization of the economic arena. We should be cautious in our optimism as to the positive contributions they may make to future development in developing countries.

#### QUESTION AND ANSWER

I think Mr. Robert-Ritter's question had two aspects to it: not only was it about the unequal bargaining power between states,

but it was also about the fact that each state has a political structure and a social structure which is going to be the deliberate or accidental object of the negotiations. So, for example, we have seen NAFTA operate not only as an agreement between the United States and Mexico, but also as an agreement that has in fact reshaped the Mexican social structure, economic structure, and political structure. And these dramatic changes have not been the product of democratic deliberation in either of the countries that produced the outcome. But yet, once in place, these structures constrain future political action. Certain options are now foreclosed in Mexico. Mexico is much changed under NAFTA in ways that no Mexican voter could have imagined. At the same time, it is impossible to "democratize" NAFTA. I think perhaps the best example of this phenomenon may have been Fernando Enrique Cardoso, the former Brazilian president— probably the only head of state ever to appear as an author in *New Left Review*, the preeminent international Marxist journal of the 70's and 80's. Once inserted into these structures, he introduced policies as head of state that were entirely consistent with integrating Brazil into an international capitalist economic order, even at the expense of his putative constituency in Brazil.