

# INTERNATIONAL LAW CONFRONTS THE GLOBAL ECONOMY: LABOR RIGHTS, HUMAN RIGHTS, AND DEMOCRACY IN DISTRESS

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What role does law play in a modern national economy? The answer, of course, is many roles. The range of law's reach is immense. Well-functioning markets require rules, from contract law and commercial codes to banking and financial regulations. Statutes and regulations often provide minimum standards for labor, health and safety, environmental and consumer protection. Law protects private property, intellectual property, and sometimes communal property. The common law plays its part as well. Tort law provides compensation for victims of lawful and unlawful economic activity. And the state, through its taxing and spending powers, provides subsidies, encourages research and development, and invests in social and physical infrastructure.

How much more complex is the relationship of international law to our global economy, where law must deal with challenges posed by geography, language, and cultural tradition, as well as competing sovereignties and diverse political and social systems? While economics provides a useful lens for analyzing international law,<sup>1</sup> there is no easily definable discipline of international economic law.<sup>2</sup> It has been suggested that the closest we can come to defining international economic law are

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<sup>1</sup> Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999).

<sup>2</sup> According to Jeffery Atik, the few published definitions of international economic law "are catalogues of stray topics." Jeffery Atik, *Interfaces: From International Trade to International Economic Law*, AM. U. INT'L L. REV. 1231, 1235 (2000) (suggesting that the difficulty in defining the field suggests a "simple failure of a discipline to form").

several interrelated, but distinct fields of law, all impacting the global economy.<sup>3</sup>

As the pace of globalization has intensified, lawyers and scholars continue to develop an appreciation for the many ways their own areas of expertise and practice relate to the global economy.<sup>4</sup> This symposium issue of the *Chapman Law Review*, featuring papers presented at the inaugural conference of Chapman University's Center for Global Trade & Development, reflects the dynamic and evolving relationship between international law and the global economy, and the profound impacts of each on the course of democracy and human rights in the world today.

#### LAW'S CONFRONTATION

Each of our panelists and speakers were asked to consider the various ways that international law confronts the global economy for the purpose of protecting labor rights, human rights, and substantive and procedural norms of democracy itself.<sup>5</sup> The term "confrontation" suggests an encounter of two expanses, international law and international economics, each worthy of study in its own right, and each suddenly filled with great uncertain potentials to alter and shape the other. Confrontation implies opposition, conflict, and perhaps cooperation. Moreover, it presumes the possibility that the course of events can be shaped by human agency and will — the hope of any democracy.

The Center for Global Trade & Development provided an ideal venue to discuss these confrontations. Multi-disciplinary by design and inter-disciplinary in approach, the Global Center, like the Chapman University School of Law, is committed to genuine ideological diversity and the free exchange of ideas. In this spirit of inquiry, our symposium heard from speakers and panelists on a wide range of international legal confrontations, including global efforts to protect the environment, address future energy demands, and promote sustainable development; the many consequences of China's emergence in world trade; human rights litigation in U.S. and foreign forums; the role of international

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<sup>3</sup> *Id.* (arguing that international trade law provides the core of international economic law, complemented by a variety of other areas of law, including international monetary law, competition/antitrust law, intellectual property and law and development).

<sup>4</sup> *Id.* at 1235-36 (describing the field of international economic law as an accommodation, "a big tent, embracing multiple subdisciplines, methodologies and approaches")

<sup>5</sup> See the Appendix to this Introduction for full descriptions of the symposium panels, *infra* p. 22. The two-day symposium is also available by WebCast at <http://www.chapman.edu/law/students/lawReview/symposiumWebCast.asp> (last visited May 1, 2005).

financial institutions in addressing labor standards and human rights in developing countries; the protection of indigenous rights and culture; the legal and extra-legal treatment of immigrant workers; and the development of socially responsible investment policies and codes of conduct for the protection of labor and human rights.

Given the wide range of these concerns, it is not surprising that many of the confrontations between international law and the global economy are inherently political, though not necessarily in any partisan sense. In fact, as played out in both the academy and the streets, the so-called “globalization debates” of the 1990s were extremely contentious. In 1992, Francis Fukuyama declared the end of history.<sup>6</sup> According to his thesis, liberal democracy and free market capitalism were the ideological winners of the Cold War.<sup>7</sup> This conclusion was compatible with a central premise of the prevailing consensus on globalization, namely that private and corporate-led globalization was better than any and every possible alternative.<sup>8</sup>

Yet, the actual course of events of globalized trade and finance soon produced its own stresses. Transition economies faltered, failed states degenerated into anarchy, and collapsing currencies swept the globe in a contagion that brought severe economic hardship to millions. Perhaps history had not ended after all.<sup>9</sup> While policy was safely dominated by an orthodox consensus, ideological debate was still alive.<sup>10</sup>

Globalization means very different things to different people.<sup>11</sup> To many, globalization has been synonymous with

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<sup>6</sup> FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

<sup>7</sup> *Id.*

<sup>8</sup> The consensus was often referred to as the Wall Street-Washington consensus, and by its critics, as The Neoliberal Model. See Timothy A. Canova, *The Disorders of Unrestricted Capital Mobility and the Limits of the Orthodox Imagination: A Critique of Robert Solomon, Money on the Move: The Revolution in International Finance Since 1980*, 9 MINN. J. GLOBAL TRADE 219, 228 n.43 (2000) (contesting the artificial limits on alternative paths of globalization).

<sup>9</sup> BENJAMIM R. BARBER, *JIHAD V. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* (1995); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998).

<sup>10</sup> The strength of the Wall Street-Washington consensus was made apparent when Joseph Stiglitz was purged as Chief Economist at the World Bank for his repeated public criticisms of the orthodox model, and particularly the International Monetary Fund, the World Bank's sister institution. But the ideological debate only intensified, and can be seen to have peaked in 2001 with news that Stiglitz had been awarded a Nobel prize in Economics. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

<sup>11</sup> Frank J. Garcia, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 56-57 (1999) (recognizing the multiplicity of meanings, while articulating objective definitions of various kinds of globalization, including economic, transactional, regulatory, and market globalization).

global progress. International trade expands the benefits of free market capitalism. Consumers get cheaper foreign imports, workers get more efficient, and shareholders get higher returns on their investments.<sup>12</sup> Commerce and trade creates new wealth, restrains the welfare state, and disperses ideas and technology around the globe.<sup>13</sup> To others, globalization has described a process by which multinational corporations ruthlessly exploit the factors of production by chasing after ever-cheaper labor and ever laxer environmental regulations.<sup>14</sup> The result, according to these critics, is often a race to the bottom which undermines wages and living standards, while eroding the sovereign capabilities of the modern welfare state.<sup>15</sup>

This wide divergence of views is reflected in the globalization debates, particularly beginning in the 1990's when the pace, as well as the increasingly private character of the globalization phenomenon, intensified. As serious academic inquiry sought to explain what was happening in the global economy and in the shifting legal relationships between and within the nation state, scholars often provided a useful legitimizing cover for a process that was arguably based more on market and political power than on consent.

Public choice theory has offered a legitimating explanation of globalization, one premised on the view of national regulation as an illegitimate exercise of the state's coercive power. Regulation provides regulators and regulated alike, often acting in concert, with ample opportunities to transfer wealth (or "extract rents," in the words of some public choice scholars) from the unorganized and geographically diffuse.<sup>16</sup> According to this view, free trade undermines rent-extraction: technological change and easy exit to foreign jurisdictions make it more difficult for regulators to regulate, while the previously protected and privileged become subject to the market forces of intensified foreign competition.<sup>17</sup>

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<sup>12</sup> William A. Niskanen, *A Personal Overview of U.S. Trade Policy*, in *FUTURE VISIONS FOR U.S. TRADE POLICY*, 38 (Bruce Stokes ed., 1998), available at [http://www.cfr.org/pub177/bruce\\_stokes/future\\_visions\\_for\\_us\\_trade\\_policy.php#memo2](http://www.cfr.org/pub177/bruce_stokes/future_visions_for_us_trade_policy.php#memo2).

<sup>13</sup> According to John O. McGinnis, "[f]ree trade and global markets restrain the government's ability to redistribute wealth and hamper enterprise." John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 *CARDOZO L. REV.* 903, 914 (1996).

<sup>14</sup> See, e.g., Jim Chen, *Fugitives and Agrarians in a World Without Frontiers*, 18 *CARDOZO L. REV.* 1031 (1996).

<sup>15</sup> Jim Chen argues that the effects of economic globalization "are far from wealth-neutral" and "they aggravate existing inequalities within and between nations." Jim Chen, *supra* note 14, at 1050. He argues that the rising tide of economic growth "will not raise all boats." *Id.*

<sup>16</sup> See, e.g., McGinnis, *supra* note 13, at 911.

<sup>17</sup> *Id.* at 933. Proponents of free trade often celebrated the downward harmonization of regulatory standards resulting from the processes of globalization. Niskanen, *supra*

Globalization, therefore, becomes a progressive force that is justified by utilitarian calculations of the greatest good for the greatest numbers.

Ricardian notions of comparative advantage also supported the easily observable: liberalized trade coincided with increased economies of scale, diversification, and economic growth. Critics of globalization, unable to dispute the reality of growing trade and wealth, pointed to the unequal distribution of growth and to those left behind by the liberalization of trade.<sup>18</sup> While trade might bring a larger economic pie, some groups in society invariably lost out. Therefore, as foreign competition replaces jobs in domestic industries, there is a greater need for government regulation and redistribution to compensate the “losers” of the global competition.<sup>19</sup>

Noticeably absent from the public choice explanation of globalization was any critical assessment of the role of the multinational corporation, the primary institutional vehicle of globalization. Corporations internalize benefits and externalize costs onto society.<sup>20</sup> Profitability is determined by how efficiently both objectives are achieved simultaneously. But if the corporation is seen as the predominant mechanism for private collusion with public officials to extract rents from the unorganized, then tax and regulatory policies may be seen as the progressive forces necessary to require corporations to internalize more of their costs.<sup>21</sup>

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note 12, at 45 (arguing that globalization undermines “those fiscal and regulatory policies that increase the relative cost of American firms in the global market”).

<sup>18</sup> See Jeff Faux, *Fast Track's Problem: Not the Marketing, the Product*, in FUTURE VISIONS FOR U.S. TRADE POLICY 38 (Bruce Stokes ed., 1998), available at [http://www.cfr.org/pub177/bruce\\_stokes/future\\_visions\\_for\\_us\\_trade\\_policy.php#memo2](http://www.cfr.org/pub177/bruce_stokes/future_visions_for_us_trade_policy.php#memo2).

<sup>19</sup> *Id.* (calling for a minimum annual budget for retraining and worker adjustment assistance of “about \$8 billion – or about \$20,000 per worker”); cf. RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW 992-1005 (1998) (reporting budget cuts and low level of assistance under the Trade Adjustment Assistance program). While many free trade advocates accept the need for trade adjustment assistance in theory, it remains a relatively low priority on the free trade agenda. See Niskanen, *supra* note 12, at 45 (“The major problem presented by both globalization and new technology is their impact on the earnings of low-skilled workers; this should lead us to address the performance of our public school system, the school-to-work transition, and the opportunities for vocational training on the job – rather than close off the opportunities presented by globalization and technology.”).

<sup>20</sup> The classic example of externalized costs would be pollution that is generated from corporate activity. Public choice theory would suggest that corporations, like any interest group, may influence legislatures and regulators to gain favorable regulatory treatment, such as legal sanction to externalize costs. Cf. Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 50 n.28 (1988) (suggesting dilution of environmental protection as result of lobbying by corporate polluters).

<sup>21</sup> Likewise, if the corporation is seen as a vehicle for rent-extraction (from the public to management elites and shareholders), then legislation and regulation that protects

Critics of globalization, often without engaging in the discourse of public choice, implicitly identify this problem of externalized costs when they call for harmonized standards for labor and environmental protection. They argue that as the market expands across borders, so must the regulatory authority of the nation state. Our conceptions of sovereignty must expand along with the market.

These were some of the general contours of the globalization debates that animated academic discourse and contributed to an increasingly worldwide anti-globalization movement by the end of the 1990s. For many of us, the mass street protests against the World Trade Organization's Millennium Round Ministerial meeting in Seattle in the late fall of 1999 confirmed that there were serious cracks in the orthodox consensus. Suddenly concerns about democratic deficits were not so esoteric or theoretical; ideological debate was both more urgent and more political.<sup>22</sup>

Until Seattle, discussions about globalization asked whether free trade would deliver on its utilitarian promise of greater economic growth and prosperity, questions that implicitly assumed our capability of measuring the costs and benefits traceable to trade liberalization. Seattle seemed to change the questions themselves in ways that undermined people's faith in our ability to scientifically and objectively analyze the myriad of consequences resulting from globalization. The questions were no longer limited to economic growth and financial stability, but now included concerns about social justice, social stability, and security.<sup>23</sup>

Over a two year period, the street demonstrations grew in size and frequency—resembling a global stalking movement that appeared wherever there was a major meeting of the world's leading multilateral institutions.<sup>24</sup> The protests indicated how

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workers (including minimum wage and maximum hour laws, and protection of union organizing and collective bargaining) can be seen as correctives that reward merit and hard work by spreading benefits beyond the management elite, CEOs and passive investors.

<sup>22</sup> In late November 1999, some 50,000 protesters descended on Seattle, thereby disrupting the World Trade Organization's ministerial meeting. The demonstrations were recognized as decisive in bringing together organized labor with environmentalists and human rights activists. Marc Cooper, *Teamsters and Turtles: They're Together at Last*, L.A. TIMES, Dec. 2, 1999, at B11 (predicting, correctly, that the next WTO meeting would have to be held "in some place like Singapore or Jakarta" where mass demonstrations would be more difficult").

<sup>23</sup> In February 2000, the International Law Group of the American Society of International Law, at ASIL's annual conference, posed this question to its symposium: "Will the new world economic order we describe lead to greater peace, stability, fairness, and justice?" See Jeffery Atik, *supra* note 2, at 1246.

<sup>24</sup> After Seattle, there were mass protests directed at the following forums: the

politically contentious the orthodox model of corporate-led globalization had become.<sup>25</sup> Protesters were often met with force or fenced off, far away from trade delegates and government officials.<sup>26</sup> Some trade summits were held in locations less accessible to protesters,<sup>27</sup> while others were forced to cancel or end early because of the size of the mass demonstrations.<sup>28</sup>

The demonstrations reached a peak during the so-called “summer of resistance” in July 2001, with an estimated quarter of a million protesters surrounding the Group of Eight Summit in Genoa, Italy.<sup>29</sup> One protester was shot to death and approximately two hundred were injured.<sup>30</sup> Following Genoa, the

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World Economic Forum in Davos and Zurich in February 2000; the April 2000 annual meetings of the International Monetary Fund (IMF) and World Bank in Washington, D.C.; the Democratic and Republican National Conventions in Los Angeles and Philadelphia in the summer of 2000; a World Economic Forum conference in Melbourne, Australia in September 2000; the September 2000 meetings of the IMF and World Bank in Prague; a European Union summit in Nice, France in December 2000; the Summit of the Americas in Quebec City in April 2001; a World Bank conference in Barcelona in June 2001; a European Union summit in Goteborg, Sweden in June 2001; and a G-8 Summit in Genoa, Italy in July 2001. Romesh Ratnesar, *Chaos Incorporated*, TIME, July 23, 2001, at 32.

<sup>25</sup> There were many factors that no doubt contributed to this deepening disquiet about globalization: the Jubilee 2000 call for third-world debt relief which combined communities of religious faith with popular culture; apocalyptic fears of the new millennium; and organized labor's sense of urgency at the prospect of Communist China's entry into the World Trade Organization. Just weeks after the Seattle protests, Al Gore, then Vice President, did a complete flip-flop on trade with China in the course of only twenty-four hours. Compare Katharine Q. Seelye, *Cozying Up to Labor, Gore Vows to Shift China Trade Policy*, N.Y. TIMES, Feb. 18, 2000, at A27 (reporting Gore's private pledge to labor leaders to negotiate a tougher trade agreement with China that would include labor and environmental protections), with David E. Sanger & Katharine Q. Seelye, *Gore Back In Step With White House Over China Trade*, N.Y. TIMES, Feb. 19, 2000, at A1 (reporting that “just a day after reassuring union leaders . . . Gore felt obliged to write a letter today to reiterate his support for the trade agreement that President Clinton is trying to push through Congress”).

<sup>26</sup> Protesters were fenced off at both the Democratic and Republican National Conventions in the summer of 2000, the Summit of the Americas in Quebec City in April 2001, and the Group of Eight Summit in Genoa, Italy in July 2001. See *Investigation Into Police Charge in Barcelona Demanded by 350 Organizations*, EL PAIS, June 26, 2001, at 24 (reporting the Spanish bar council's call for an investigation into possible police infiltration and provocation).

<sup>27</sup> A new tactic was also employed to deter mass demonstrations: meetings were held in relatively inaccessible locations, where protest would be difficult. Elizabeth Olson, *W.T.O. Picks Qatar Capital as Meeting Site*, N.Y. TIMES, Jan. 31, 2001, at W1 (reporting criticism of Doha as site for WTO ministerial meeting because of “authoritarian Qatar's human rights record and the difficulty of organizing protests there on anything like the scale of those in Seattle”). Likewise, the Group of Eight Summit was brought to the Kananaskis, a remote spot in the Canadian Rockies in the fall of 2001. See David E. Sanger, *Bush and Putin Tie Antimissile Talks to Big Arms Cuts*, N.Y. TIMES, July 23, 2001, at A1.

<sup>28</sup> See *World Bank Cancels Session*, WASH. POST, May 22, 2001, at E2; Ben Fenton, *Protesters 'Beat' World Bank*, DAILY TELEGRAPH, May 22, 2001, at 15 (reporting on other meetings that had been ended early).

<sup>29</sup> Mike Bygrave, *The Globalization Debate*, THE OBSERVER (London), July 14, 2001 (referring to the “Siege of Genoa” as the “peak of the anti-globalization movement”).

<sup>30</sup> Alessandra Stanley & David E. Sanger, *Italian Protester is Killed by Police at*

U.S. braced for the prospect of massive street demonstrations for the annual IMF and World Bank meetings and the Group of Seven Summit, all to take place in the nation's capitol in late September.<sup>31</sup> However, these mass demonstrations were all but cancelled following the September 11th terrorist attacks.<sup>32</sup>

As suddenly as the mass anti-globalization protests appeared, they disappeared. World Terror replaced World Trade in the fears and imaginations of many. For good or ill, September 11th brought an abrupt end to the strategy of mass civil disobedience.<sup>33</sup> This closing off of political activity seems to have erased any hope for grand alternatives to the corporate-led globalization model. And yet, the confrontation continues. It may not be as loud, but the stakes are even higher and the role of law, and lawyers, more important than ever before.

#### CONFRONTATION FOR A PURPOSE: RIGHTING WRONGS

We refer to human rights as fundamental rights because the desire for individual liberty and autonomy is innate within all human beings.<sup>34</sup> From the time of its founding, the history of American democracy reflects this perennial struggle—from the American Revolution to the Civil War, from the New Deal's broader definitions of liberty and economic freedoms, to more recent movements for civil rights, environmental justice, and

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*Genoa Meeting*, N.Y. TIMES, July 21, 2001, at A1.

<sup>31</sup> See Arthur Santana & Paul Blustein, *IMF Trims D.C. Session to 2 Days; Police to Seek \$38 Million in Federal Aid for Security*, WASH. POST, Aug. 11, 2001, at A1; James Toedtman, *DC Police Brace For World Bank Protests*, NEWSDAY, Aug. 21, 2001, at A42 (reporting that police were expecting 100,000 demonstrators on one side of barricades and 17,000 World Bank and IMF delegates and at least 17 heads of state on the other); Alan Beattie, *Legal Battle Looms Over Protests in Washington*, FINANCIAL TIMES (London), Sept. 5, 2001, at 6 (reporting on lawsuit filed by coalition of anti-IMF activists to prevent the Washington, D.C. police from erecting a 9-foot, 2.5 mile fence around the White House and IMF/WB headquarters).

It appeared that organized labor was also preparing for a larger role in these protests. See Larry Witham, *Labor Takes Cause to Nation's Pulpits*, WASH. TIMES, Sept. 3, 2001, at A6 (reporting that AFL-CIO president John J. Sweeney urged united protests to protect worker rights to coincide with IMF and World Bank meetings in Washington scheduled for late September 2001).

<sup>32</sup> See *Bridal Bash*, FINANCIAL TIMES (London), Oct. 8, 2001, at 19 (reporting that there had been just three protesters, standing rather forlornly on the corner of 14th Street and Pennsylvania Avenue); Elizabeth Becker, *Marchers Oppose Waging War Against Terrorists*, N.Y. TIMES, Oct. 1, 2001, at B7 (reporting that instead of mass demonstrations against the IMF, there were several thousand protesters against any military response to the September 11th terrorist attacks).

<sup>33</sup> See Bygrave, *supra* note 29 (reporting "that the era of big street protests was over"); Alan Beattie, *Anti-Globalisation Warriors Shift Their Ground: The Appetite for Mass Confrontations at International Conferences has Diminished*, FINANCIAL TIMES (London), Nov. 9, 2001, at 10.

<sup>34</sup> DAVID HACKETT FISCHER, *LIBERTY AND FREEDOM: A VISUAL HISTORY OF AMERICA'S FOUNDING IDEAS* (2004) (arguing that the ideas of liberty and freedom are intertwined through the core of American life).



human rights. While the human struggle for freedom is perennial, the forms of conflict and cooperation to secure fundamental rights have changed over the past two centuries. The evolution of state power, the rise of multilateral institutions, and the development of corporate power have shaped the forms of international law and its varied confrontations today.<sup>35</sup> While what follows is by no means a complete synopsis of the various topics addressed by the articles in this symposium issue, it is intended to highlight some of the main areas of confrontation discussed and debated over the two-day symposium.

Jon Van Dyke, in his keynote address and article, argues that victims of human rights abuse have a fundamental right under customary international law to an effective legal remedy consisting of the distinct elements of an investigation and accounting, an apology, compensation, and prosecution of wrongdoers.<sup>36</sup> He spans the globe to inventory the many legal forums giving content to these elements, including criminal prosecutions in national courts and international criminal tribunals, and civil judgments in U.S. and foreign courts.

While Van Dyke reminds us that what's at stake is nothing short of justice and the rule of law,<sup>37</sup> he concludes with the disturbing cases of human rights violations by Americans at Abu Ghraib and other military prisons in Iraq, Afghanistan, and Guantanamo Bay. While it seems unlikely that any high-ranking U.S. official will be held legally responsible anytime soon for overseeing the use of torture against detainees, Van Dyke's discussion of several long-running cases, including the case against the former Chilean dictator Pinochet, suggests that justice delayed need not always be justice denied.

Legal redress for foreign human rights violations has been sought in U.S. courts perhaps most aggressively under a provision of the Judiciary Act of 1789 known as the Alien Tort Claims Act,<sup>38</sup> which permits federal jurisdiction to foreign

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<sup>35</sup> The corporation did not even exist in its present form at the time of the American founding. Today it is arguably the primary institutional vehicle for economic globalization, and it therefore remains the focus of much legal confrontation to secure human liberty and economic freedoms.

<sup>36</sup> Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAP. L. REV. 148 (2005).

<sup>37</sup> Van Dyke's work on behalf of victims and their families demonstrates the importance of legal skill and argument in redressing human rights violations. When confronted with official and societal indifference to such heinous crimes, lawyers and scholars find meaning through engagement in the struggles of our day. ALBERT CAMUS, *RESISTANCE, REBELLION AND DEATH* 249 (1960).

<sup>38</sup> Donald Kochan refers to the act as the Alien Tort Statute. More than a semantic difference, this reflects a view of the act as conferring jurisdiction rather than creating any new causes of action. Donald J. Kochan, *No Longer Little Known But Now a Door*

plaintiffs for torts “committed in violation of the law of nations.”<sup>39</sup> Since there is no legislative history, what Congress intended by this provision remains uncertain. As Van Dyke suggests, this dispute is not just over statutory interpretation, but is part of a larger debate about sovereignty and the use of international and foreign law in U.S. constitutional decision-making.

Donald Kochan employs, in part, a public choice approach to argue that the increased use of this 1789 statute is not based on sound jurisprudence, but has been heavily influenced by the plaintiffs bar and international law advocates.<sup>40</sup> Based on concerns of judicial competence, federalism, and the rule of law, Kochan offers a spirited and comprehensive critique of grafting ever-expanding twenty-first century claims onto a limited eighteenth century statute. His is a strict constructionist approach that would apparently freeze the plain meaning of “law of nations” to that which existed in 1789. As exhibited in his article, this approach finds considerable support in the dissents of Justice Scalia warning against an activist unelected judiciary creating new causes of action through an amorphous federal common law.<sup>41</sup>

Kochan’s description is accurate: the Alien Tort Claims Act was largely dormant for nearly two centuries, until its relatively recent revival to recover for wrongs committed overseas by not just official state actors, but also private individuals acting in concert with corrupt foreign government and military officials. Armin Rosencranz and David Louk recount the case of *Doe v. Unocal*, in which Unocal was sued under the Alien Tort Claims Act and California constitutional and statutory provisions for aiding and abetting in human rights atrocities committed by the Burmese government and military.<sup>42</sup> While Unocal settled out of court for an undisclosed amount, federal and state court rulings on various pre-motions suggest that future plaintiffs may be able to hold U.S. corporations liable for their overseas complicity in

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*Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 100 (2005).

<sup>39</sup> Kochan was part of a panel on “Litigating Human Rights and Labor Standards in Domestic and Foreign Forums: From Courtrooms and Arbitral Tribunals to Multilateral Trade Dispute Panels” that included Dr. Armin Rosencranz, Professor Michael D. Ramsey, and Paul L. Hoffman, Esq., of Schonbrun DeSimone Seplow Harris & Hoffman LLP (counsel for plaintiffs in the Unocal litigation).

<sup>40</sup> Kochan, *supra* note 38, at 103, 107-08.

<sup>41</sup> *Id.*

<sup>42</sup> Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 130 (2005). Rosencranz and Louk also report that foreign and diverse sources of law were used in *Doe v. Unocal*. *Id.* at 141 (reporting that decisions by the U.S. Military Tribunals after World War II were used as precedent to argue the standards for imputing Unocal’s knowledge and approval of slave labor practices).

human rights abuses.<sup>43</sup>

Kochan criticizes this trend to use the Alien Tort Claims Act as bad policy as well bad law. He warns that by imposing liability on U.S. corporations for their foreign operations, such suits may discourage foreign investment, thereby impeding economic development in those poverty-stricken lands in need of U.S. capital.<sup>44</sup> Others may argue that corporations should pay the costs of their externalities, including harms to innocent people in foreign lands, if proven in a civil courtroom.<sup>45</sup>

How effective such claims will be against multinational corporations in the future remains uncertain. For now, the Supreme Court has articulated a sufficiently flexible approach to interpreting the “law of nations” that will keep lawyers and scholars arguing about what should constitute “a norm of international character accepted by the civilized world” and whether any such international consensus wrongly intrudes upon U.S. sovereignty.<sup>46</sup>

Issues of sovereignty were also paramount in our panel on “International Trade, Multilateralism, and Sustainable Development” that brought together three leading scholars to consider national and multilateral attempts to safeguard our environment, protect our natural resources and animal life, and plan for a sustainable future. Howard Chang discusses the jurisprudence of the World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT) in the context of U.S. efforts to protect marine mammals and endangered species through trade restrictions.<sup>47</sup> Known as the *Tuna-Dolphin* and *Shrimp-Turtle* cases, these were among the more highly visible and symbolic cases subjecting the WTO to sharp criticism. Chang shows how WTO jurisprudence has developed, no doubt in response to criticism of earlier panel and Appellate Body

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<sup>43</sup> *Id.* Dozens of suits have been filed, and are pending in U.S. courts, against multinational corporations for their overseas activities resulting in human rights violations. Kochan, *supra* note 38.

<sup>44</sup> Kochan, *supra* note 38, at 126-29.

<sup>45</sup> According to this view, it is the globalization of U.S. corporate activities that now breathes new life into a once dormant statute. To maintain a strict constructionist approach to interpreting the “law of nations” would be like freezing in time “the right to bear arms” to include only the muskets that existed at the time the Second Amendment was adopted.

<sup>46</sup> The Court held that claims under the Alien Tort Claims Act, in addition to enjoying wide international acceptance, must be “defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2762 (2004). The torts contemplated at the time of the 1789 statute as violating the law of nations included offenses against diplomats, violations of safe conduct, and piracy. Van Dyke, *supra* note 36, at 159.

<sup>47</sup> Howard F. Chang, *Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT*, 8 CHAP. L. REV. 25 (2005).

decisions, to a stricter interpretive approach. By confining its analysis to the “ordinary meaning” of GATT provisions in the *Shrimp-Turtle* case, the Appellate Body took a step forward in recognizing the authority of sovereign states to use trade measures to promote environmental interests.<sup>48</sup>

There is a certain irony and potential cost, however, from upholding such environmental trade measures. Earlier U.S. attempts to restrict imports of tuna which were caught with high incidental dolphin kills were struck down by the WTO for, among other reasons, the U.S. unilateral approach. But as a result, the U.S. was encouraged to successfully negotiate multilateral conventions and conservation programs, a harmonization approach that included at least some modicum of inspection and enforcement to protect the dolphin. This contrasts with the environmental “victory” in the *Shrimp-Turtle* outcome that ultimately upheld the U.S. environmental trade restrictions without providing any incentives to negotiate multilateral protections of ancient sea turtles.<sup>49</sup>

Lakshman Guruswamy argues that the nature of our most pressing energy and environmental problems demands multilateral coordination and initiatives.<sup>50</sup> The most visible effort in this regard was the 1997 Kyoto Protocol to the United Nations Convention on Climate Change, which set limits on carbon dioxide emissions from industrialized countries. While the Bush administration has been subject to tremendous criticism around the world for withdrawing from the Kyoto negotiations, Guruswamy argues convincingly that the Kyoto Protocols fell short of what is needed to seriously address the world’s looming energy shortages by failing to identify and offer any plan to develop new sources of energy.<sup>51</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *But see* Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 809 (2001) (arguing that a “jurisprudence of compulsory multilateralism is especially unfortunate because it hobbles the very multilateral negotiations it purports to promote”).

<sup>50</sup> Lakshman D. Guruswamy, *Energy, Environment & Sustainable Development*, 8 CHAP. L. REV. 74 (2005).

<sup>51</sup> *Id.* Less than one week before our conference, leading U.S. scientists from the Scripps Institution of Oceanography in California, working for several years with the Lawrence Livermore National Laboratory to analyze the effects of global warming on oceans, reported “the most compelling evidence yet” that human activities are responsible for global warming.” Clive Cookson, *US Scientists Say Man Has Caused Global Warming and Warn Over the Gulf Stream*, FINANCIAL TIMES (London), Feb. 19, 2005, at 1. “They used computer modeling combined with millions of temperature and salinity readings, taken around the world at different depths over five decades. . . . Tim Barnett, the Scripps project leader, said . . . ‘The debate over whether there is a global warming signal is over now, at least for rational people.’” *Id.* Although the report appeared as a headline on Page 1 of London’s *Financial Times*, it was hardly reported in the U.S.

The search for solutions to the world's energy deficits requires an inventory of resources, new and emerging technologies, and institutional capabilities.<sup>52</sup> The Energy & Environmental Security Initiative ("The Initiative"), which Guruswamy directs at the University of Colorado, is an ambitious project to move us forward on that long and urgent road. The Initiative contemplates a wide range of national and international efforts and legal instruments that include trade and investment agreements, as well as future multilateral conventions and protocols.

Ved Nanda provides a historical summary of the existing range of multilateral conventions, protocols, and resolutions concerning trade and sustainable development adopted over the past three decades.<sup>53</sup> He reminds us that a primary purpose of international law and the multilateral system should be that of sustainable development: a development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>54</sup> As Nanda argues, it is one thing for the nations of the world to agree to the substantive objective of sustainable development, but quite another to find the political will to "operationalize the concept."<sup>55</sup>

While Guruswamy advocates for a range of targeted and functional international legal instruments for alternative energy development, it may be that our present multilateral system would be more effective in imposing such an instrument on poor and dependent countries than on those wealthier countries in need of discipline in energy conservation and encouragement in the development of alternative resources.<sup>56</sup> This is not to suggest that a multilateral approach is not worth pursuing—Guruswamy demonstrates that there is no other choice. It suggests only that efforts to address the complex challenges of energy and

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<sup>52</sup> Kevin Morrison & Javier Blas, *Call for World to Turn Away from Oil*, FINANCIAL TIMES (London), March 13, 2005, at 1 (reporting International Energy Agency warning that the rapid rise in global oil demand must lead to greater energy conservation and promotion of alternatives to oil).

<sup>53</sup> Ved P. Nanda, *Sustainable Development, International Trade and the Doha Agenda for Development*, 8 CHAP. L. REV. 52, 52 (2005).

<sup>54</sup> *Id.* at 54 (quoting OUR COMMON FUTURE: THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 43 (Gro Brundtland ed., 1987)).

<sup>55</sup> *Id.* at 54, 72.

<sup>56</sup> Our panel on "International Financial Institutions and Social Ordering: Law, Human Rights, and Labor Flexibility in the Global Economy" suggested the significant power of the International Monetary Fund and World Bank to encourage major policy conditions on countries in need of their financial assistance. Panelists included Professor Sabine Schlemmer-Schulte (former World Bank Senior Counsel), Dr. David Ellerman (former Economic Advisor to the Chief Economist of the World Bank), and Elizabeth Drake (International Policy Analyst in the Public Policy Department of the American Federation of Labor-Congress of Industrial Organizations).

sustainable development will require bold, persistent experimentation, as well as reconceptualizing the role of multilateral institutions in tying trade, finance and development assistance to objectives that are presently considered as illegitimately outside the narrow confines of trade and finance.<sup>57</sup>

Likewise, there has been much discussion about tying trade to labor protections. Our panel on "The World Trade Organization and the Lifting of Quotas for Garment Imports from China: Will the Race to China Become the Long-Awaited Race to the Bottom?" considered the relationship between labor rights and trade liberalization. The panel discussion was led by our keynote speaker, the Honorable C. Donald Johnson, who negotiated the U.S.-Cambodia Textile Agreement, a landmark agreement which for the first time linked trade benefits to labor protections, including inspections by the International Labour Organization.<sup>58</sup> Ambassador Johnson articulated the case for extending such linkages to other bilateral and multilateral trade relationships, an idea that has surfaced more recently during congressional debates about the Bush administration's proposed Central American Free Trade Agreement (CAFTA).<sup>59</sup>

Ellen Rosen endorses the linkage approach and concludes that "Cambodia's garment industry truly blossomed and its workers saw positive changes in the ways they were treated"<sup>60</sup> as a result of Ambassador Johnson's achievement. But Rosen warns that the end of the Multi-Fiber Agreement's system of quotas for the global textile market means profound dislocations and job losses in developing countries, as well as in the U.S.<sup>61</sup> Moreover, Rosen provides a scathing indictment of the role of U.S.

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<sup>57</sup> Sabine Schlemmer-Schulte, *The World Bank and Human Rights*, 4 AUSTRIAN REV. INT'L & EURO. L. 230 (1999) (articulating the World Bank's adjustment to the changing needs of its borrowing members). *But see* Garcia, *supra* note 11, at 97 (concluding that the international trade system, as presently constructed, leads to decisions "which are fundamentally skewed in favor of trade over other values" such as human rights).

<sup>58</sup> Ambassador Johnson served as President Bill Clinton's chief textile negotiator and principal advisor to both the President and the U.S. Trade Representative on all textile and apparel trade matters. His keynote address is available by WebCast. *See infra* note 5.

<sup>59</sup> Christopher Swann & Edward Alden, *New Democrats Deal Blow to CAFTA Approval*, FINANCIAL TIMES (London), May 5, 2005, at 4 (reporting criticisms by the House New Democrat Coalition that CAFTA "reduces our ability to enforce labour standards"); Elizabeth Becker, *Free Trade Pact Faces Trouble in Congress*, N.Y. TIMES, May 10, 2005, at C1 (reporting that U.S. labor unions criticize CAFTA for demanding "better enforcement of existing labor laws in Central America without imposing real sanctions").

<sup>60</sup> Ellen Israel Rosen, *The Wal-Mart Effect: The World Trade Organization and the Race to the Bottom*, 8 CHAP. L. REV. 253, 258 (2005).

<sup>61</sup> *Id.* *See also* Ginger Thompson, *Fraying of a Latin Textile Industry*, N.Y. TIMES, March 25, 2005, at C1 (reporting that the end of quotas has resulted in factories shutting down and thousands of lost jobs in El Salvador).

multinational companies, using Wal-Mart as a case study, in undermining labor standards by promoting a race to the bottom “where the lowest production price wins, regardless of human cost.”<sup>62</sup>

According to Rosen, Wal-Mart is now the largest single buyer of goods from the People’s Republic of China, and today more than seventy percent of merchandise sold in Wal-Mart stores is made in China.<sup>63</sup> There are several reasons for this “race” to China, including China’s complete lack of political freedom and/or workers rights, which result in lower wages, longer hours, and unsafe working conditions.<sup>64</sup> Rosen concludes with a discussion of the efficacy of Wal-Mart’s Code of Conduct to improve working conditions at its suppliers in China and elsewhere. As she points out, there is ample evidence that the Codes are routinely evaded.<sup>65</sup>

In response to Rosen’s critique of Wal-Mart’s business model, some might say that the only thing worse than being exploited is not being exploited at all—that Chinese workers are fortunate to have the jobs they have, harsh conditions and all. This view offers a false dichotomy by suggesting that there are no alternatives between sweatshop labor conditions and unemployment, and it ignores the wide range of possibilities, including harmonized minimum standards supplemented by vastly increased levels of foreign aid and public investment in education and infrastructure.<sup>66</sup>

Indigenous populations certainly top the list of those that

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<sup>62</sup> Rosen, *supra* note 60, at 256. See also ELLEN ISRAEL ROSEN, MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY (2002) (arguing that trade liberalization benefits corporations and shareholders, rather than consumers or workers).

<sup>63</sup> Rosen, *supra* note 60, at 263.

<sup>64</sup> Rosen also mentions China’s other advantages over some of its competitors, including China’s “impressively modern ports, highways and power supply,” its ability to adopt export processing and attract foreign direct investment, and the fact that it was not encumbered with structural adjustment programs imposed by the International Monetary Fund. *Id.* at 263. The latter factor was the result of conscious decisions to reject capital account liberalization of portfolio investment. See also DAVID ELLERMAN, HELPING PEOPLE HELP THEMSELVES: FROM THE WORLD BANK TO AN ALTERNATIVE PHILOSOPHY OF DEVELOPMENT ASSISTANCE (2005) (praising China’s incrementalist transition in comparison to Russia’s embrace of the one-size-fits-all “shock-therapy” model pushed by the IMF).

<sup>65</sup> Rosen, *supra* note 60, at 268-271. Our symposium also included a Roundtable Discussion on “The New University Activism: Socially Responsible Investing and Codes of Conduct for Labor and Human Rights Standards in the Licensing of Apparel” that included Dr. David Ellerman, Dr. John A. Hall, and myself (speaking about the University of New Mexico’s history in adopting a progressive Code of Conduct and Socially Responsible Investment policy).

<sup>66</sup> Canova, *supra* note 8, at 228.

have been ignored and marginalized by global capital.<sup>67</sup> Our panel on “Perspectives on Sovereignty, the State and Multilateral Institutions in International Human Rights” brought together scholars from various disciplines to discuss the particular challenges to human rights posed by changing conceptions of sovereignty.<sup>68</sup> Unfortunately, the rights of indigenous people are often easily dismissed because the sovereignty of nation-states conflicts with those of tribes within their borders.<sup>69</sup> Likewise, the prosecution of human rights abusers are often impeded by the structures of national sovereignty that supported the atrocities in the first place.

Michael Struett argues that the creation of the International Criminal Court (ICC) was not, as charged by its critics, a radical departure from state sovereignty, but rather built upon developing conceptions of state sovereignty.<sup>70</sup> The history of discord surrounding the creation of the ICC highlights the divide between liberal and statist conceptions of sovereignty in the multilateral system. One view holds that the international legal regime depends on a liberal conception of democracy, rule of law, and human rights for its legitimacy.<sup>71</sup> Restrictions on trade are therefore justified to protect a range of human rights, including the right to be free from various state and corporate oppressions. If taken to extremes, some would dismiss this Kantian conception of legitimacy as one that fosters ethnocentrism, even a

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<sup>67</sup> One apologist for the International Monetary Fund has wrongly equated my own criticisms of the systematic effects of IMF policy with alleging that the IMF intentionally decides to inflict harm and subjugate peoples of other cultures. John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 KAN. L. REV. 521, 535 n.24 (2004). It is unfortunate that Professor Head confuses cause-and-effect with questions of intent. *Id.* Scott Idleman correctly recognized that my critique did not in fact charge the IMF with any “concretely malicious acts,” but rather suggested that any racial or ethnic bias inhered “in the very social structures, from language to legal processes, that constitute the cultural and juridical baselines according to which principles such as equality and fairness are discerned and measured.” Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COL. HUM. RTS. L. REV. 589, 595 n.13 (2004).

<sup>68</sup> Thanks to Dr. Wayne Sandholtz, University of California at Irvine, who served as the moderator and discussant of this panel.

<sup>69</sup> MacKenzie Batzer describes the competing conceptions of tribal sovereignty that complicate the history of relations between the U.S. and American Indian tribes. MacKenzie T. Batzer, *Trapped in a Tangled Web: United States v. Lara: The Trouble with Tribes and the Sovereignty Debacle*, 8 CHAP. L. REV. 275, 299 (2005) (arguing that the federal government, “while insisting that Indian tribes are sovereign nations, continuously appears to disregard their sovereignty”).

<sup>70</sup> Michael J. Struett, *The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 CHAP. L. REV. 172 (2005).

<sup>71</sup> IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107 (Ted Humphrey trans., 1983) (arguing that a morally legitimate system of international law depends, in part, upon an alliance of separate nations that are united by their moral commitment to individual freedom).



cultural imperialism, by pushing Western political values on illiberal systems.<sup>72</sup> Such critics would argue that the legitimacy of the international trading system should depend on formal equality in relations between sovereign nation states.<sup>73</sup> Accordingly, liberal states cannot exclude or restrict trade with other illiberal states merely because their political systems do not sufficiently respect individual rights.<sup>74</sup> The danger of this statist approach, however, when taken to its extreme, is that of moral relativism.

While the accession of the People's Republic of China to the WTO would suggest that the statist position has prevailed in the global trading system, Struett suggests that the legal concept of sovereignty in international law is evolving from the statist toward a liberal conception of sovereignty. He argues that there is an "emerging preference in the international legal system" for democratic and participatory forms of government.<sup>75</sup> The ICC, according to Struett, is a step in the same direction. It creates "an important institutional incentive for member states to prosecute genocide, war crimes, or crimes against humanity."<sup>76</sup>

Struett dismisses concerns that the ICC will infringe upon the sovereignty of non-party states such as the U.S., while recognizing the benefits for state parties, particularly weak states "that have difficulty maintaining law and order in their own territory."<sup>77</sup> Seen this way, the ICC is an innovative approach to the problem of failed states that enhances the legitimacy of the international legal system.<sup>78</sup>

As implicitly suggested in the work of Marina Hadjioannou, the statist approach brings its own kinds of cultural imperialism

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<sup>72</sup> John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36, 66 (1993) (arguing that a liberal conception of international law is not ethnocentric so long as it does not seek to force hierarchical societies to abandon their illiberal institutions and adopt liberal ones).

<sup>73</sup> Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1528 (2000) (arguing against Jackson-Vanik and human rights review, and instead for permanent, unconditional normal trade relations for the People's Republic of China as necessary for "compliance with international legal obligations").

<sup>74</sup> Rawls, *supra* note 72, at 66-67 (arguing that it would be unjust for liberal states to exclude well-ordered hierarchical societies). Rawls does concede, however, that a liberal international system need not accept tyrannical and dictatorial regimes as members in good standing in the international community. *Id.* at 67.

<sup>75</sup> Struett, *supra* note 70, at 179 (citing Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, 48, 71-86 (Gregory H. Fox & Brad R. Roth eds., 2000)).

<sup>76</sup> *Id.* at 180.

<sup>77</sup> *Id.* at 184.

<sup>78</sup> Struett's view is shared by Van Dyke, who shows how U.S. opposition to the ICC was often based on far-fetched, nightmare hypothetical scenarios. Van Dyke, *supra* note 36, at 165-70. Just weeks after our symposium, in a triumph of pragmatism over narrow ideological concerns, the Bush administration agreed to a United Nations Security Council referral of war crimes in the Darfur region of Sudan to the ICC. *Id.* at 168-69.

by empowering state sovereigns to violate the cultural heritage of indigenous peoples.<sup>79</sup> Hadjioannou points to a host of international conventions, declarations and resolutions that have called for international legal protection of indigenous culture and property rights.<sup>80</sup> Some may despair that these instruments lack legally enforceable mechanisms to protect the interests of indigenous peoples, always it seems a discrete and insular minority that is underrepresented and often unable to achieve protection through the political process. Such is all the more reason for indigenous people to mobilize their own resources and use the tools of international law, however imperfect and unrefined, to force recognition on state sovereigns.

Hadjioannou's discussion of the Maya Atlas Project in Southern Belize shows how vital is the role of indigenous people themselves in gathering evidence, documenting their use of land and mapping their traditional land boundaries.<sup>81</sup> Working with lawyers, the Maya have argued for recognition of their property rights under customary international law and charters for regional institutions such as the Organization of American States. For the Maya, the outcome thus far has been a favorable ruling by the Inter-American Commission on Human Rights that affirms the obligation of Belize to protect their rights. It also suggests the value of self-help, mobilizing resources, and inspired lawyering during times when political action is largely stalled or even foreclosed.

Arthur Manuel and Nicole Schabus recount the difficulties facing Canada's Aboriginal Peoples, beginning with the Canadian government's disregard for its own constitutional law and Supreme Court rulings recognizing Aboriginal title, reminiscent of Andrew Jackson's infamous defiance of U.S. Supreme Court rulings relatively early in American history.<sup>82</sup> Manuel and Schabus argue that, as a result, large integrated wood-processing corporations have expropriated the land and physical resources

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<sup>79</sup> Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 CHAP. L. REV. 193 (2005).

<sup>80</sup> See, e.g., Alan Riding, *A Global Culture War Pits Protectionists Against Free Traders*, N.Y. TIMES, Feb. 5, 2005, at A19 (reporting on the drafting of the provisional Convention on the Protection of the Diversity of Cultural Contents and Artistic Expression).

<sup>81</sup> Hadjioannou, *supra* note 79, at 213-16. The work of the Maya Atlas Project to document their land use is reminiscent of the work of the Peruvian economist Hernando de Soto to record land titles and grant legal property protection to those who live on and work the land. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

<sup>82</sup> Arthur Manuel & Nicole Schabus, *Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law*, 8 CHAP. L. REV. 222, 225 (2005).

of Aboriginal peoples by the Canadian government's granting of long-term non-competitive licenses to log on Aboriginal lands.<sup>83</sup>

In 1996, Canada's Royal Commission of Aboriginal Peoples concluded that current levels of poverty and underdevelopment among indigenous peoples are directly linked to their dispossession from their lands, which has undermined the legitimacy of their institutions and capabilities to govern themselves.<sup>84</sup> Such dire consequences should not come as a surprise. Orthodox economics teaches that respect of property rights is a fundamental incentive for economic activity.<sup>85</sup> Manuel and Schabus, the chairperson and a legal advisor for the Indigenous Network on Economics and Trade (INET) in British Columbia, describe the evolution of their legal strategy, from failed attempts to secure indigenous land rights under Canadian law, to the symbolic use of international human rights law and the more effective use of international trade law, which typically has the advantages of sanctions and enforceability.

They also point to the experience of some Native American Tribes in the U.S., especially in the Pacific Northwest, that "have gained control over forestry on their lands and have developed sustainable forest management practices."<sup>86</sup> Indigenous people on both sides of the border have a stake in seeing that the Canadian government begins respecting Aboriginal land title. American Indians in the Pacific Northwest are unable to compete with cheap Canadian lumber imports harvested from corporations that are able to avoid the costs of environmentally sustainable practices. And of course, Canada's indigenous peoples would benefit from gaining control over their land and natural resources.

Politics makes strange bedfellows, and INET's legal strategy was able to attract the support of the U.S. lumber industry and environmentalists in arguing that Canada's licensing system that ignored the internationally-recognized property rights of its indigenous peoples constitutes an unfair and illegal trade subsidy to Canadian timber companies under WTO law and the

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<sup>83</sup> *Id.* at 246-47. (contrasting the ability of multinational companies to sue for the expropriation of future profits, while also expropriating the land and resources of indigenous peoples).

<sup>84</sup> *Id.* at 225.

<sup>85</sup> DE SOTO, *supra* note 81.

<sup>86</sup> Manuel & Schabus, *supra* note 82, at 239 n.93. One Mexican ejido recently auctioned a hunting permit to kill one endangered bighorn ram on ejido lands. It uses the proceeds from such auctions to protect the ram's habitat and grow the herd, while providing jobs and income for members of the ejido. See Daniel Duane, *Sacrificial Ram*, MOTHER JONES, March/April 2005, at 67 (reporting that since 1996, the ejido has raised \$200,000 a year through such auctions, "funding a drinking water project, a school, a health clinic, and conservation programs").

North American Free Trade Agreement (NAFTA).<sup>87</sup> This may point the way for environmentalists, indigenous people, labor unions and workers to make similar arguments in the future.<sup>88</sup> The goal, we are reminded, is not protectionism, but to provide incentives for sovereign nations to respect property rights, worker rights, and human rights for their own citizens.

The strategy of INET also shows how international law can confront powerful economic institutions, such as the corporation and the organs of the state beholden to the corporation, to secure the fundamental rights of Aboriginal peoples. We are also reminded that law's confrontation need not always be one solely based on conflict, but includes cooperation, compromise, and building of coalitions across borders. As Galit Sarfaty suggests, there is room for progress in our multilateral institutions, like the World Bank in its efforts to internalize indigenous rights norms into the domestic laws of client states through binding loan agreements, an effort that is supported through alliances between local civil society activists and advocates within the Bank.<sup>89</sup>

Finally, our symposium included two panel discussions not reflected in this volume: a Roundtable Discussion on "The New University Activism: Socially Responsible Investing and Codes of Conduct for Labor and Human Rights Standards in the Licensing of Apparel," and a Practitioner's Panel on "The Third World Within the First World: Legal Protections for Immigrant Labor in the United States."<sup>90</sup> Both of these panels, along with the rest of our symposium, can be viewed by WebCast.<sup>91</sup>

#### GLOBAL CHALLENGES AND GLOBAL PERSPECTIVES

The Center for Global Trade & Development at Chapman University, in conjunction with the Chapman Law Review, was privileged to host this inaugural symposium and we are grateful to the many fine, distinguished and thoughtful participants for sharing their work with us.

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<sup>87</sup> Manuel & Schabus, *supra* note 82, at 235-50.

<sup>88</sup> For instance, one can imagine U.S. workers complaining that China's failure to respect internationally-recognized labor rights of its citizens in a specific industry or company should constitute an illegal trade subsidy under WTO law. According to Ron Gettelfinger, president of the United Automobile Workers, "China's repression of its own workers and its manipulation of its own currency are unfair trade practices which must no longer be tolerated by the U.S. government." Keith Bradsher, *China Looms as the World's Next Leading Auto Exporter*, N.Y. TIMES, April 22, 2005, at C1.

<sup>89</sup> Galit A. Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L. J. 1791 (2005).

<sup>90</sup> For descriptions of these panels, see Appendix *infra* p. 22.

<sup>91</sup> See *infra* note 5.

We live in a time when the local and the global are increasingly interrelated, even if the relationship between the two is often invisible or hard to quantify. Trade, commerce, and cultural exchange are booming, even while division and hatreds deepen. We are confronted by the same “common enemies of man” that were faced a generation ago: “tyranny, poverty, disease, and war itself.”<sup>92</sup> The challenge and the work of human rights are therefore as important today as ever before.

The pages that follow in this volume demonstrate the diversity and richness of perspectives and concern about human rights in this era of globalization. As business and finance has gone global, so too have the legal consciousness and conscience. International law will continue to play a vital and instrumental role in confronting the institutions of our global economy to protect our rights, do justice, and secure our freedoms. Lawyers will continue to test the boundaries of the possible with new theories, bold ideas, and innovative arguments at the forefront of this global struggle for justice and human rights.

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<sup>92</sup> John F. Kennedy, Inaugural Address (Jan. 20, 1961), in PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: JOHN F. KENNEDY 1961 2 (1962).

## APPENDIX

## PANEL DESCRIPTIONS

*The World Trade Organization and the Lifting of Quotas for Garment Imports from China: Will the Race to China Become the Long-Awaited Race to the Bottom?*

Members of the World Trade Organization agreed a decade ago to abolish all trade quotas on apparel and textile imports, effective January 1, 2005, to permit the free flow of goods around the world. The end of quota protections is likely to result in the rapid and unchecked growth of the Chinese garment and textile sector, posing a profound threat for many developing countries, as well as garment manufacturing in the United States. This panel will examine the impact of the end of quotas on the developing world, with case studies of the implications for labor rights and economic development in Cambodia, India and the Philippines, as well as an analysis of the potential political, labor and social instability resulting from the anticipated shift of apparel and textile manufacturing to China.

*International Financial Institutions and Social Ordering: Law, Human Rights, and Labor Flexibility in the Global Economy*

With financial assistance programs in nearly a hundred countries, the International Monetary Fund and World Bank play an increasingly important role in the international trading and financial system and in the lives of millions of people around the world. Panelists will consider the impact of International Monetary Fund and World Bank policies on labor and human rights, as well as contemporary debates concerning the interpretation of legal mandates of these international financial institutions to promote implementation and compliance with international human rights and worker rights, and to improve labor conditions and living standards.

*Litigating Human Rights and Labor Standards in Domestic and Foreign Forums: From Courtrooms and Arbitral Tribunals to Multilateral Trade Dispute Panels*

An increasing array of plaintiffs, activists, and non-governmental organizations are taking their grievances over labor and human rights abuses in foreign nations to the judicial system in the

United States, as well as other venues like arbitral panels and multilateral trade dispute panels. The main vehicle allowing the application of international law in U.S. courts has been the Alien Tort Statute. This panel will examine this growing trend of using civil litigation, private arbitration, and trade dispute panels as means for employing, enforcing and developing international law. The panel will address these issues from a variety of perspectives, including its implications for law, policy, national security, business, labor and human rights.

*International Trade, Multilateralism, and Sustainable Development*

The globalization of trade and finance has presented significant challenges to the capabilities of nation states, regional alliances and multilateral institutions to promote economic development while protecting the environment. Panelists will consider the relationship between the multilateral trading regime and environmentally sustainable development including efforts to reach bilateral and multilateral accords on environmentally sustainable energy development, the Kyoto Protocol on Climate Change, and analysis of World Trade Organization Appellate Body decisions concerning environmental trade measures under the General Agreement on Tariffs and Trade.

*Perspectives on Sovereignty, the State and Multilateral Institutions in International Human Rights*

Globalization has altered the traditional balance of sovereignty between nation states. Free trade accords and liberalized trade rules have often empowered private corporations, many argue, at the cost of individual freedoms, human rights, and the protection of ethnic, racial and religious minorities throughout the world. But the evolving, multilateral patchwork of new forms of sovereignty has also created opportunities for greater legal protection of human rights. Panelists will consider efforts to protect indigenous people's rights to land and natural resources through the World Trade Organization, the North American Free Trade Agreement, and the Inter-American Human Rights System, as well as efforts to enforce human rights norms through the International Criminal Court.

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*Int'l Law Confronts the Global Economy*

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*The Third World Within the First World: Legal Protections for Immigrant Labor in the United States (Practitioner's Panel)*

A great number of American businesses rely on immigrant labor. Workers from other countries enter the United States, both legally and illegally, in large numbers. Given that immigrant labor underpins a substantial portion of the American economy, it is important for both employers and employees to understand what rights and obligations each has, and what dangers and pitfalls each may face. This panel is intended to assist businesses, employees and those who counsel them to understand the legal landscape facing foreign workers in the United States. Experts in the fields of immigration, employment, litigation and taxation law will speak about how their areas of the law affect foreign workers and those who employ them, and what can be done to improve the current legal regime.