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Introduction

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Introduction

Robert Shawn Hogue*

On February 26, 2011, a diverse group of legal scholars and prominent practitioners converged on the campus of the University of Miami School of Law to discuss the effect of Regional Trade Agreements (RTA'S) on human rights and the rule of law. The idea for the symposium emerged from a general desire to facilitate a critical academic discussion concerning how policies oriented to promote free markets and trade intersect with the rule of law.

The rapidly approaching twenty-year anniversary of the North American Free Trade Agreement provided the appropriate opportunity to discuss positive and negative externalities associated with the Agreement and free trade generally. The following symposium allowed for a multidisciplinary exploration of economic, legal, and political concepts in a methodical and disciplined manner, bringing together scholars in the fields of trade and human rights that rarely interact in a single forum.

The articles in this symposium edition and the thoughtful commentary that follow reflect not only the richness of the forum's discourse, but also the benefits that flow from interdisciplinary dialogue. The papers and presentations of Professors Steven Powell, Alejandro Garro, and David Gantz each represent an important contribution to understanding how human rights and trade intersect and inexorably affect the rule of law.

Professor Powell and Dr. Ludmila Mendonça Lopes Ribeiro's paper, "Managing the Rule of Law in the Americas: An Empirical Portrait of the Effects of 15 Years of WTO, MERCOSUL, and NAFTA Dispute Resolution on Civil Society in Latin America," explores the dispute settlement mechanisms associated with regional trade regimes in the Americas. Using both qualitative and quantitative analysis and a plethora of data collected by the University of Florida School of Law's International Trade Law Program, the authors argue that the dispute settlement mechanisms of the WTO, NAFTA, and MERCOSUL have "assisted Latin

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American governments in perfecting the rule of law," which in effect strengthens civil society. To bolster this argument, the paper examines decisions of the regional trade dispute panels, whose decisions often provide the impetus for legislation that positively corresponds with governmental transparency, due process, and freedom of expression within Latin American countries.

In his response to Professors Powell and Ludmila Mendonça Lopes Ribeiro, Zachary Kaufman proposes a future research agenda, which may account for the "real" reasons behind the dispute settlements, and what the authors contend has helped to cause the increase in the rule of law. Mr. Kaufman draws an analogy from the U.S. court system, postulating that the identities of arbitral panelists may in fact help to predict the outcome of a case. He also cautions that politically motivated cases coming before the WTO and other regional dispute settlement bodies may provide ammunition for critics opposed to other multilateral dispute settlement regimes associated with enforcing human rights.

Dean Claudio Grossman, building upon his experiences serving on the United Nations Committee against Torture and as a former member and President of the Inter-American Commission on Human Rights, centers his comments upon the recent evolution of human rights occurring within Latin America. He argues the interaction between free trade and human rights that Professors Powell and Ludmila Mendonça Lopes Ribeiro describe in their paper has resulted in socially beneficial progress. He agrees with the hypothesis that free trade agreements can and do contribute to democratic transition, but without provisions relating to environmental, labor and other human rights will not promote what he calls "citizen security". He contends that dialogue between trade and human rights advocates is not only important, but also necessary for the protection of citizen security.

Professor Alejandro Garro's presentation centered on how international trade and human rights are inevitably linked. He observes that people assume fostering free market societies is generally coupled with individual prosperity and happiness. To determine whether this assumption is inaccurate, Professor Garro draws upon his experiences as an international arbitrator and panelist within the regional dispute settlement regime that Professor Powell describes. He also explains how the protection and promotion of foreign investment also contributes to strengthening the rule of law in developing countries.

Responding to Professor Garro's presentation, Professor Ste-

phen J. Schnably raises some questions about how well it would work in practice to hold poorer states to a different standard of judicial protection of foreign investors. He argues that a resource sensitive approach has the potential to entangle arbitral tribunals in some very intrusive questions about how states manage their internal affairs. He also worries that a standard of judicial protection that varies with the level of a state's resources might undermine the approach that human rights tribunals have taken, which is to demand that all states, without exception, provide adequate judicial and law enforcement protection against human rights abuses.

Pedro Martinez-Fraga, a well-known international litigator, provides a laudatory comment concerning Professor Garro's presentation, harping upon two important and central points. First, the flexibility within international tribunals, which often help to ameliorate the palpable deficiencies within a forum's judicial system, underscores the failure of international law to bring about uniform legal outcomes. Second, the system that Professor Garro describes is a new system of sovereignty based upon the functionality of collective experience managing globalization rather than positive law promulgated through more formal international bodies like the United Nations.

Professor David Abraham provides a sobering criticism of Professor Garro's presentation through the lens of political economy, history, and the legal status of the parties affected. Through this analysis, he questions the entire premise that free markets and trade yield individual rights. He argues that to simply assume free markets and trade inexorably promote an adherence to human rights and the rule of law serves to perpetuate the myth that the protection of property rights alone is enough to ensure justice. Professor Abraham acknowledges that these safeguards are important, but singling them out and elevating them over other factors, will not ensure a vibrant civil society.

Professor David Gantz's paper "Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements" argues that free trade agreements ("FTAs") should be considered not only in economic terms, but as human rights agreements as well. He compellingly argues that not only do the FTAs incorporate provisions protecting internationally recognized labor rights and undertakings designed to lead to a cleaner environment, but they also contain obligations relating to international human rights affording respect for the rule of law and

transparency in government. He limits his discussion and analysis of FTAs to which the United States is a party. While Professor Gantz acknowledges the achievements realized under the FTAs and RTAs, he also recognizes the need for addressing citizen complaints, and having an effective enforcement mechanism to redress such complaints. Professor Gantz believes such changes may help to reconcile citizen concerns by balancing them with the needs of commerce, which serves to augment the rule of law.

Ryan Reetz, another prominent international litigator, focuses his commentary on the enforcement mechanism process. Mr. Reetz cautions that even with strong enforcement mechanisms that promote rights it is the state that has the most significant impact. He argues governments are only willing to agree to and do what is in their best interests. They are not necessarily going to feel pressured to comply with an award or give in to other forms of dispute resolution pressures when they know that they can subsequently renegotiate an agreement.

Guillermo Aguilar-Alvarez, who served as Principal Legal Counsel for the government of Mexico for the negotiation and implementation of the North American Free Trade Agreement, responds to Professor Gantz by reflecting on his broader concerns that policy makers and academics see NAFTA as a medium for implementing other multilateral agreements. Mr. Aguilar-Alvarez comments at the core of the conference reflect a deeper concern about human development, and the utilization of multilateral agreements to guide human development. He argues that the rigidity to which a nation adheres to and enforces the law accounts more for civil society than the horizontal integration of human rights norms through FTAs and RTAs.

Professor Jan Paulsson, a world renowned international arbitrator, summed up much of the substantive discussion surrounding the symposium, particularly the moral hazards and quandaries that often surround investment treaties. He points to the fact that investors want low risk and high returns, but often compromise these high returns in favor of minimal risk. This functional analysis correlates with his broader insights that the rule of law is a way of improving the terms of trade and improving the terms of long term investment for the state that receives them. And if that's not true, there is no interest in it whatsoever. Thus, while there are salient intersections between FTAs, enhancement of human rights, and the rule of law these corollaries may be incidental byproducts of the value associated with the dominant

power negotiating the treaty rather than more genuine altruistic concerns.

It is our sincere hope that this conference and this edition serve as a starting point for critical discourse concerning the many important issues relating to NAFTA. We also hope that our readers will pause and reflect on how free trade, economic liberalization, and globalization have transformed not only Latin America, but also the world. Reasonable people can disagree about the positive and negative consequences of these developments, but no one can reasonably contend that these trends are reversible. We believe this edition provides some constructive lessons for the present and the future of not only regional trade agreements, but foreign and domestic policy around the world.