THE GLOBALIZATION OF ECONOMIC HUMAN RIGHTS

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Introduction

We have just heard two very interesting presentations by Frank Garcia and Mark Warner. I have been asked to offer comments on both papers and on the issues before us at this conference. The conference organizers succeeded in arranging for two very different perspectives to be presented on the first panel. Professor Garcia is worried about globalization and sees inherent tension between international trade law and international human rights law. Mr. Warner is worried more about the political response to globalization. He would agree that there is tension between trade law and social values, but would resolve this tension by relying upon the market.

Garcia does a good job of framing the important issues. Globalization is a problem because it makes it harder for the State to regulate (he calls this "regulatory impotence"). This occurs both because the market influences governments (e.g., capital mobility) and because globalization spurs international agencies to impose more restrictions on national governments. Yet, in other ways, Garcia perceives that globalization presents new opportunities. Globalization can help reorient the international regulatory system toward more liberal and less statist lines. In this scenario, the market would come to be regulated according to the principles of individual dignity and rights as "defined by a transnational polity itself." Garcia puts it well when he says "insofar as globalization involves the elimination of governmental interference with private economic decision making, then globalization can itself be seen as a direct enhancement of human rights."

Garcia seems to lean over backward to be fair to the market-centered perspective before he criticizes it. He notes that a globalized market spreads ideas and values and may strengthen domestic pressure for increased political and social rights. He credits international trade law with bequeathing a respect for the rule of law, and points out that such respect serves as a core principle of international human rights law.

Having made these points, Garcia then aims his cannon at international economic law and international trade law. He says that international economic law and international human rights law "are, if not incompatible, then at least in fundamental tension." This "conflict" exists because international economic law "is based on a set of values which are fundamentally antithetical to the values on which

the modern human rights movement is based." Garcia explains that economic law is utilitarian while human rights law is deontological. Economic law is based on a process of exchange and preference satisfaction, while human rights law embodies minimum standards of treatment that recognize the equal moral worth of each individual. Because of the deontological nature of human rights, Garcia claims, human rights law is resistant to trade-offs.

Warner does not agree that international economic law and human rights law are in constant tension. He sees economic globalization as benign and declares that these two bodies of law run in the same direction. In Warner's view, the market and human rights can coexist. Indeed, he believes that they reinforce each other.

Warner could have rested the defense there, but in his usual provocative way, he tries to stimulate our thinking. He brings his skeptical eye to the text of the Universal Declaration of Human Rights and finds it "hopelessly incoherent." He explains that child labor can be defensible because working in a factory may be better for a child than working in the underground economy.

Although he does not directly address Garcia on this point, Warner does not share the vision of a "transnational polity." Warner is troubled by the growing role of non-governmental organizations (NGOs) in international policymaking. He gives an example of the International NGO Committee on Human Rights in Trade and Investment and wonders why this group objects to new treaties. He has heard the International NGO Committee call for greater transparency and democratic accountability in intergovernmental organizations, and that leads Warner to wonder who is financing this NGO and how democratic its procedures are.

Economic Versus Human Rights Law

Let me first address the tension between international economic/trade law and human rights law. I think Garcia lays out the issues fairly, but I agree with Warner that there is more to the story. There is greater synergy between international trade law and international human rights law than is generally recognized. When I look at international human rights law, which Garcia characterizes as deontological, I perceive that it is also efficiency oriented. (For example, Warner alludes to research by Jeff Sachs showing that democratic government can promote economic growth.) When I look at international trade law, which Garcia characterizes as utilitarian, I perceive that it can also be deontological in affirming the rights of individuals to conduct transborder transactions.

This year we celebrate the fiftieth anniversary of the Universal Declaration of Human Rights. But we also celebrate fifty years of another legal landmark, the General Agreement on Tariffs and Trade (GATT). Is this mere coincidence? Or is there something deeper to be noticed--that the postwar United Nations made it a high priority to launch better regimes for both human rights and world trade. Indeed, the relationship looks even stronger when one recalls that new trade law was to be embodied in the International Trade Organization (ITO), which contained provisions relating to full employment, fair labor standards, and economic development. Unfortunately, the ITO never came into being.

When they are viewed in a stylized way, international trade law and international human rights law can look different. International trade law focuses on the market while international human rights law focuses on the individual. International trade law is utilitarian while international human rights law is deontological. International trade law centers on values of wealth and well-being, while international human rights law centers on affection and respect. International trade law looks at cross-border transactions while international human rights law looks at intra-border transactions.

But when they are viewed more abstractly, international trade law and international human rights law grow in resemblance. Indeed, I would argue that they are topologically similar. Both international trade law and international human rights law are largely *deregulatory*--they declare what the State should not do. In each regime, the problem to be solved is the overbearing State which wants to control voluntary activity (e.g., buying, selling, associating, or protesting) that may be beneficial for the individuals involved, but is construed as being bad for the State. This problem is solved with international rules that seek to prevent States from making the wrong utilitarian judgment about the value of human freedom. In both regimes, States agree to international norms that inspire them to give more space to the individual. International trade law and international human rights law are also similar in being *non-dependent* regimes. That is, the operation of the regime does not really depend on the degree of combined governmental participation. Contrast that with other policy goals, like protecting the ozone layer, conserving fisheries, controlling epidemics, avoiding the proliferation of weapons, and maintaining peace, in which the essence of the regime is to prevent defection and encourage cooperation.

Of course, neither international trade law nor international human rights law is exclusively deregulatory. In the Uruguay Round, governments agreed to require that each member of the

World Trade Organization (WTO) provide legal protection for intellectual property to foreign applicants. In the human rights regime, there are many provisions that suggest more government intervention. For example, the Universal Declaration of Human Rights states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care...." But I would suggest that such aspirational provisions are not what gives international human rights law its authority.

The problem with propounding such "positive" rights is not just that they are vague and hard to operationalize. The deeper problem is that such "rights" will always conflict with other rights. Although Garcia states that international human rights law is resistant to trade-offs, once the regime goes beyond negative rights (that is, leaving individuals alone) and moves to positive rights (that is, guaranteeing outcomes), there will always be trade-offs. There will be trade-offs between outcomes--for example, housing versus medical care. And there will be trade-offs between the right of the individual to keep the income he earns and the power of the State to redistribute it to others.

It should also be noted that international trade law has traditionally not been articulated as upholding the rights of the individual. Technically, it is one step removed. In other words, the *raison d'Ítre* of the GATT was not to allow individuals in different countries to carry out mutually beneficial transactions. Rather, it was to help governments enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." This is not the same thing as saying that people have a right to trade. But if we peel off the mercantilism from international trade law, which looks at States as trading entities, we discern that the true beneficiaries of GATT are the individual traders.

Our debate on this panel points to the need for more thinking about achieving synthesis between international trade law and international human rights law. It probably goes too far to suggest that they are fundamentally the same law. But we should be more aware of their commonalities and potential synergies. International trade law needs to become more like international human rights law in establishing norms for what a State owes its own citizens. International human rights law needs to become more like international trade law in enforcing norms through mandatory dispute settlement and potential penalties for non-compliance.

Let me illustrate this theoretical presentation with a consideration of some points of interface between international trade law and international human rights law. Consider the issue of how States treat aliens. This issue has been a longtime concern of both bodies of law, and logically so, because aliens are more vulnerable to oppression than members of a community. The first norm that evolved was *national treatment* (i.e., treating the alien no worse than the national). For example, in the treaty of 1836 between the United States and the Peru-Bolivian Confederation, the two parties agreed to give judicial recourse to citizens of the other party on the same terms as are usual and customary with the natives or citizens of the country in which they may be; for which purpose they may employ, in defence of their rights, such advocates, solicitors, notaries, agents, and factors, as they may judge proper ....

Analogously, in the treaty of 1926 between the United States and El Salvador, the parties agreed that the nationals and merchandise of one party would receive the same treatment within the territory of the other party as nationals and merchandise of the other party, with regard to internal taxes. Another norm that evolved was a *minimum standard of treatment* for the alien. For example, we see this in the Red Cross treaty of 1906 (human rights) and in the Customs Simplification Convention of 1923 (economic law).

While the paradigm concern for international trade law remains the treatment of the alien, international human rights law is more concerned about the way that a State treats its own citizens. But these respective concerns inform each other. There have been episodes in which guarantees to aliens on human rights have led to an upgrading of the treatment granted to citizens. For example in 1864, Switzerland and France concluded a treaty that provided for rights of establishment by French traders (irrespective of religion). Following this treaty, Switzerland decided that it made little sense for it to continue denying such rights to its own Jewish citizens, and so it changed its Constitution. Although international trade law norms have not generally been applied internally within a State, the new intellectual property provisions in the WTO will lead to such osmosis because the baseline intellectual property protection required for foreign inventors and authors is also being granted to domestic inventors and authors.

Our limited progress in integrating international trade law and international human rights law can be seen in the attempt to negotiate the Multilateral Agreement on Investment (MAI), within the Organization for Economic Co-operation and Development (OECD). The negotiators viewed MAI

as a part of international trade law. They did not view it as international human rights law. Although the human rights regime is not embarrassed to discuss how a State treats its own citizens, the international trade law framework views that as too intrusive of "sovereignty." Thus, the MAI talks sought to protect only foreign investors. But in seeking to upgrade international disciplines on the expropriation of property, the MAI negotiators ran into the buzzsaw of giving greater protection to foreign investors than domestic investors. This alarmed various interest groups who feared that if the MAI agreement gave greater rights against "regulatory takings," there would be pressure to protect domestic investors against indirect expropriation too.

It is not surprising that environmentalists opposed to the concept of regulatory takings would oppose the MAI for that reason. But what was surprising is that this concern drew some sympathy from the trade policy community. For example, Monty Graham of the Institute for International Economics wrote that:

[T]he critics [of MAI] are right in this regard: it would unacceptably encroach on governments' sovereignty to impose, via a multilateral agreement, a doctrine of compensation for regulatory taking that is not generally accepted in domestic law. Whether or not such compensation should be awarded is not the issue. Rather, that is a matter that should be decided at the level of national (or even subnational) governments, not in a multilateral negotiation. And while a multilateral agreement on investment should provide for strong investor protection, this protection should not exceed that which would be afforded similar domestic investments under established and accepted principles of law.

This statement demonstrates how immature international trade law is in comparison to international human rights law. Whereas international human rights law aims to transmit norms from international law to domestic law (e.g., ILO treaties, the Genocide Convention, and so on), international trade law takes as a given that the responsibilities of a government towards citizen property owners is a matter to be determined by each government, not by the international community. Indeed, there is a recoiling from the idea that the established principles of domestic economic law might be improved through multilateral talks. By using the international trade law style, rather than the international human rights law style, the MAI negotiators backed themselves into a corner of being unable to upgrade international norms against measures tantamount to expropriation. Regulatory takings is obviously a difficult issue and I am not suggesting that there is any simple solution to it. But if the MAI negotiation had been

conducted as a matter of both international trade law and international human rights law, then it might have been easier to debate the central issues.

Protecting Human Rights in a Global Economy

The issues before this conference have received a lot of attention this year. A few weeks ago, President Clinton told the Joint IMF/World Bank Annual Meeting that "[w]e must put a human face on the world economy." Garcia suggests that "[t]he WTO should recognize the legitimacy of trade sanctions for egregious human rights violations either unilaterally applied, or under the jurisdiction of an international human rights body." I agree with Garcia on that point, and believe that more attention by the trade regime to human rights would strengthen the WTO. It has been little noted that the WTO Agreement on Agriculture gives attention to a human rights concern--food security. Article 12 states that in instituting new export controls on foodstuffs, a government "shall give due consideration to the effects of such prohibition or restriction on importing Members' food security."

Warner is cautious about deepening human rights. Indeed, he is skeptical of many of the rights already included in the Universal Declaration of Human Rights. For example, he points out his puzzlement regarding cultural rights and wonders what they were. I would respond that perhaps they are a little puzzling at times, but the notion of cultural rights is not something that was invented in 1948 in the Universal Declaration. It goes back at least as early as the Minorities Treaties under the League of Nations in 1919, a series of treaties that establish rights of communities and cultures and linguistic minorities. So it is an older tradition than the Universal Declaration and one that I think is quite fundamental to our appreciation of human rights in the twentieth Century.

Perhaps Warner would agree with me on this point; I think the Universal Declaration does not go far enough in some areas. It is particularly weak on the topic of economic rights important to helping individuals realize their full potential in a global economy. For example, I would like to enshrine the right of individuals to export, to import, to invest, and to divest.

On the other hand, it should be noted that the Universal Declaration is strong on at least one transborder issue. Article 19 states that everyone has a right to "receive and impart information and ideas through any media and regardless of frontiers." The issue of e-trade and the transmission of data is a very active one in trade policy today. The U.S. government forbids the export of high-level

encryption software. The European Commission is trying to ban the export of data about individuals to countries that do not ensure an adequate level of privacy protection. These issues have been characterized in trade talks as commerce versus security or as commerce versus privacy. But so far they have not been perceived as issues of human rights.

As noted above, Warner expresses concern about the increasing role of NGO coalitions at the OECD and the WTO. He wonders what legitimacy international NGOs have to speak at meetings with governments. Let me try to answer that. Although I disagreed with how the NGO networks attacked the MAI, I believe that organizations of like-minded people have a right to make their views known to global agencies. A transnational NGO gets its legitimacy at the WTO in the same way that a citizen gets legitimacy to petition a government. Article 6 of the Universal Declaration provides the answer in stating that "[e]veryone has the right of recognition everywhere as a person before the law." I think the growth of transnational civil society is a very positive development that can improve international trade law in the same way that it has improved international human rights law.

Let me call your attention to a recent decision by the WTO Appellate Body that has important implications for NGOs. In the Turtle-Shrimp case, the Appellate Body ruled that WTO procedures permit dispute panels to consider unsolicited amicus curiae briefs from NGOs. This will allow NGOs to present observations about the legal and factual issues in a dispute. Although few international trade cases in the past have implicated human rights, there will surely be more such cases in the future. Soon, there will be a WTO panel reviewing the dispute between the European Commission and the U.S. government over a Massachusetts state procurement law that seeks to steer business away from vendors who do business with Myanmar (Burma). The Appellate Body ruling provides an opportunity for a law school human rights clinic to find a client NGO that wants to support Massachusetts, and then to submit an amicus brief for this client to the WTO panel. The brief could explain why WTO law (international trade law) ought to tolerate procurement penalties against companies that seek to profit from transactions with pariah governments like Myanmar that require forced labor.

Conclusion

Our conference asks the question: Is the global market a friend or a foe of human rights? Certainly, global markets have the potential to interfere with the attainment of human rights. Since all markets are composed of voluntary, mutually beneficial transactions, one might wonder how a

transaction that makes two people better off can interfere with anyone's rights. The answer is that this can occur because of the spillover impact on individuals external to the transaction. For example, a purchase of a chlorofluorocarbon (CFC) can engender production of the CFC which can deplete the ozone layer. A series of currency transactions can destabilize an economy and cause unemployment. The hiring of a child for factory work can lead to future health costs that are socialized upon the community. Competition between governments to attract investment can lead to a retrenchment on worker rights. For any transaction, these and similar possibilities need to be considered in order to reach conclusions about whether markets are raising or lowering human rights.

When markets are found to be a foe of human rights, then it would be appropriate to take collective action to improve that aspect of the way the market operates. This could be done by governments through changes in international economic and human rights law and by NGOs through social labels and publicity. Our two presenters would probably disagree on particular changes in international law, but would probably agree that economic globalization will continue and that it may require greater inter-governmental oversight.

Note: Footnotes deleted from this version.