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International Investment and Human Rights: Political and Legal Issues

A Background Paper

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Executive Summary

While there have been many high-profile cases of corporate misconduct in developing countries, great human hardship caused by the volatility of capital flows and numerous investment disputes with a human rights dimension, there has not yet been a systematic analysis of investment in developing countries from a human rights perspective. As investment rules are debated and negotiated in various fora in all regions of the world—such as at the World Trade Organization (WTO) or in relation to the Free Trade Area of the Americas (FTAA) or the New Partnership for Africa's Development (NEPAD)—it has become important for the human rights community to reflect upon the challenges that lie ahead in this rapidly evolving area of international law. It is also important for government officials and private sector actors to be cognizant of their human rights obligations in the increasingly globalized economy.

While international investment flows primarily between developed countries, its impact in the developing world cannot be ignored. In quantitative terms, foreign direct investment remains on average four times higher than international aid figures. Further, a large portion of foreign direct investment is actually not new investment—with a high potential for job creation, for example—but rather reflects the privatizations, mergers and acquisitions that were predominant during the ascendancy of the neo-liberal economic paradigm in the 1980s and 1990s. Portfolio investment, notoriously unstable, brings with it a whole set of challenges for governments seeking predictable budgetary conditions in order to fulfil human rights obligations.

States have, by virtue of the international human rights treaties they have ratified, obligations to respect, protect and fulfil human rights. In some cases, their obligations are immediate: for example, discrimination can never be justified and freedom of association is always to be respected. In other cases, their obligations involve a progressive realization of rights: for example, with respect to the right to an adequate standard of living, the right to the highest attainable standard of health, the rights to food, education and housing. Despite the high moral status of international human rights norms, States for the most part have failed to provide adequate legal protection for victims of economic, social and cultural rights violations, many of them resisting the notion that this category of rights are justiciable. For this reason, the primary means of international recourse—an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*—remains at the drafting stage.

Incongruously, many effective legal protections are available to investors, notably through bilateral and regional trade agreements, and in particular the investor-state mechanism, which provides investors with enforceable property rights, backed by financial compensation for losses incurred. Investment agreements such as NAFTA's Chapter 11 also typically contain clauses prohibiting governments from making performance requirements obligatory or insisting on certain technology transfers as part of the investment contract.

The rules (GATS and TRIMs) which touch on investment at the WTO are also explained in the background paper. The authors argue that these restrictions can actually prevent or dissuade governments from fulfilling their human rights obligations.

Finally, the authors consider what legal avenues can be pursued and what outcomes are conceivable in the instance where the right of an investor came up against the obligation of a State to fulfil a human rights obligation. The role of customary law is discussed, as are the possibilities of invoking human rights at the Dispute Settlement Body of the WTO. Ultimately, the relationship between international investment law and human rights law must deal with the thorny question of the intent of the legislator—or, more bluntly, the question of political will. How have we come to a stage in the development of international law where the rights of some citizens receive so little protection while the rights of private actors receive so much?

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 103 of the *Charter of the United Nations*

In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

Article 103, North American Free Trade Agreement

Introduction[1]

Throughout most of the post-war period, human rights and trade law have been understood as two separate bodies of international law. The fact that there was little or no dialogue between them was not seen as a problem. Over the past ten years however, human rights organizations and experts have grown increasingly concerned about international trade agreements, the provisions they contain and their potential for undermining human rights protections. This concern has been driven by dozens of documented violations resulting from unregulated corporate activity in some parts of the world; dispute settlement decisions that have negative impacts on policies related to rights protection; powerful intellectual property regimes that compromise people's access to medicines, control over resources and the access to technology; agricultural trade that has resulted in subsidized imports destroying livelihoods of subsistence farmers; increased concentration of wealth stemming from the logic of comparative advantage; and ongoing liberalization of services that many fear threaten public policies (or potential policies) which favour universal and non-discriminatory access to health, education, water and other social services.

There is now a vast literature on the topic of trade and human rights, in academic circles, popular writings, non-governmental organizations and inter-governmental bodies[2]. This is a

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[1] Rémi Bachand is a legal researcher with the Centre d'Études sur le droit international et la mondialisation and the Groupe de recherche sur l'intégration continentale. Stephanie Rousseau is doctoral candidate at McGill University in political science. The authors thank Diana Bronson, Lucie Lamarche, Christian Deblock and Luke Peterson for their precious comments on the first draft of this essay. Please send your comments to dbronson@ichrdd.ca

[2] See publications by Rights & Democracy at www.ichrdd.ca including Robert Howse and Makau Matua, Protecting Human Rights in the Global Economy: Challenges for the World Trade Organization (Montreal, 2000), Diana Bronson and Lucie Lamarche, A Human Rights Framework for Trade in the Americas (Montreal, 2001) and Lauren Posner, Unequal Harvest: Farmers' Voices on International Trade and the Right to Food. Other references include Caroline Dommen, "Raising Human Rights in the World Trade Organization: Actors,

most positive development. There is also beginning to be an interesting body of critical literature on the question of investment, dealing with its relationship to sustainable development, democracy, development[3] although there has not yet been a systematic attempt to look at investment from a human rights perspective. Much of this discussion emerged around the aborted negotiations of the Multilateral Agreement on Investment (MAI) in 1999. Indeed, it was the debate provoked by the MAI that spurred the Office of the UN High Commissioner for Human Rights to look into the topic and produce a series of papers on the human rights dimension of international commerce. Still, human rights treaty bodies have not yet looked at the impact of investment on human rights and nor have investment negotiators looked at the human rights impacts of the provisions of bilateral, regional or international investment agreements.

There are many reasons for the human rights community to be interested and involved in debates around investment. In 2001, the net flow of foreign direct investment to developing countries was $205 billion (out of $735 billion in all countries)[4] a figure which dwarfs official development assistance ($53.7 billion in 2002)[5]. Investment rules are currently being discussed and/or negotiated in several different fora, notably many bilateral initiatives, as well as in the New Partnership for African Development (NEPAD), the Free Trade Area of the Americas (FTAA) and the World Trade Organization. In addition many important international agencies such as the World Bank, the UN Conference on Trade and Development (UNCTAD), the International Monetary Fund, the regional development banks

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Processes and Possible Strategies, Human Rights Quarterly, 2001, European Journal of International Law 13 (2002) on trade and human rights; Alison Brysk (ed), Globalization and Human Rights, (Berkley, University of California Press, 2002) Scott Sinclair, GATS: How the World Trade Organization's new Services Negotiations Threaten Democracy and other related publications from the Canadian Centre for Policy Alternatives. From the Office of the High Commissioner of Human Rights, there are three very notable publications: Liberalization of Trade in Services and human rights (E/CN.4/Sub.2/2002/9); The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights (E/CN.4/Sub.2/2001/13); Globalization and its impact on the full enjoyment of human rights (focusing on the Agreement on Agriculture) E/CN.4/2002/54

[3] See in particular work from Third World Network (www.twnside.org); the International Institute for Sustainable Development, (www.iisd.org); and the Centre for International Environmental Law (www.ciel.org)

[4] UNCTAD, World Investment Report 2002 Overview, p. 9

[5] J. Randel, T. German and D. Ewing (eds) The Reality of Aid 2002, Manila, IBON Foundation, 2002 , p. 145

and national export credit agencies are concerned about investment rules and involved in reflections about their reform. There are some 2000 bilateral investment deals world-wide, most of which are between developed and developing countries, many of which have entailed changes in domestic laws for host-countries.[6] In most of these processes, human rights considerations are not taken into account during discussions of the economic and legal dimensions. Furthermore, foreign direct investment, which implies a presence in the territory of another state (using its resources, labour, domestic law) has arguably more potential impact on human rights that the rules governing exports and imports, or other aspects of international trade law.

The ongoing process of investment liberalization responds to the current need for states, particularly developing countries, to attract foreign investment, partially at least to generate the revenue needed to repay their debt. As a result of twenty years of structural adjustment, most developing countries are now required to intervene in the economy as little as possible. This limits their capacity to influence the course of development through the investment of public funds, and to fulfill their human rights obligations. The pattern is all the more striking in that the same period witnessed a significant decline in the level of public development assistance provided by the industrialized countries.[7] Meanwhile, domestic sources of private capital are sorely lacking in many of these countries, which must then depend on foreign private capital.

The fundamental question behind this paper and the seminar it has been written for is: How can we reconcile the obligation of states to protect, respect and fulfill their international human rights commitments at the same time as these states seek to liberalize investment and

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[6] For example, in 2001, 208 changes in foreign direct investment laws were made by 71 countries and 194 of those changes made them more favourable to FDI. Supra, note 4, p. 9.

[7] As an example, in 1990 Canada devoted 0.44% of its gross national income, the United States 0.21%, and Japan 0.31% to official development assistance, while in 2000, the same countries devoted 0.25%, 0.10% and 0.28%, respectively; UNDP, *Human Development Report 2002*, New York, United Nations, 2002. Canada did increase its development assistance budget in 2002; according to initial estimates, the budget of the Canadian Development Assistance Fund rose from $2.37 billion in 2001 to $3.16 billion in 2002, a 31.6% rise in constant dollars. Canada's public development assistance now amounts to 0.28% of gross national income. Press release, Canadian International Development Agency, 23 April 2003.

protect the rights of foreign investors? What is to be done in cases of conflict? How do such conflicts emerge and how can they be reconciled? Surely, the two quotes at the beginning of this paper, one from the UN Charter, the other from NAFTA, each asserting their own primacy, is symptomatic of a deeper problem of competing regimes of international law. While having no pretension of undertaking a comprehensive analysis of the many complexities in this debate, this paper is an exploratory examination of some of the issues involved in the foreign investment-human rights nexus. It first provides a synthetic overview of FDI flows in today's world. It then provides a quick overview of the main obligations of states under international human rights and investment treaties. Finally, it raises a number of questions for the ongoing reflection and the search for more coherence in international law.

1- Foreign Investment and Human Rights

Foreign investment may be divided into two broad categories: direct investment (FDI) and portfolio investment. The former is characterized by a greater degree of ownership or control, which varies from one domestic legal system to another but is generally around 10%. With portfolio investment, the investor acquires less than 10% of the total value of a company. As we shall briefly discuss below, these two types of investment have different implications for human rights.

1.1 Foreign Direct Investment

Tables 1 and 2 illustrate two crucial trends about FDI. First, the two dominant patterns are North-North and North-South capital flows. Exemplifying the first pattern, developed countries in 2001 accounted for 93.5% of world total outgoing FDI and 68.4% of incoming FDI; exemplifying the second, developing countries accounted for only 5.9% of outgoing FDI but 29.9% of incoming FDI.

Table 1

FDI flows, 1996-2000 (average), selected regions and countries ($US million)

Country/region	Outgoing	Outgoing (% world)	Incoming	Incoming (% world)
World	794 918	100.0%	827 775	100.0%
Developed economies	719 187	90.5%	607 466	73.3%
Western Europe	531 414	66.9%	359 386	43.4%
United States	130 149	16.4%	189 315	22.9%
Canada	26 725	3.4%	27 004	3.3%
Developing economies	72 841	9.2%	198 870	24.0%
Africa	2 306	0.3%	9 423	1.1%
Latin American and Caribbean	20 495	2.6%	82 815	10.0%
Asia and Pacific	50 040	6.3%	106 632	12.9%

Source: UNCTAD, World Investment Report 2002, United Nations, New York and Geneva, 2002.

Table 2

Foreign direct investment flows, 2001, selected regions and countries ($US million)

Country/region	Outgoing	Outgoing (% world)	Incoming	Incoming (% world)
World	620 713	100.0%	735 146	100.0%
Developed economies	580 624	93.5%	503 144	68.4%
Western Europe	380 434	61.3%	336 210	45.7%
United States	113 977	18.4%	124 435	16.9%
Canada	35 472	5.7%	27 465	3.7%
Developing economies	36 571	5.9%	204 801	27.9%
Africa	-2 544	-0.4%	17 165	2.3%
Latin America and Caribbean	7 217	1.2%	85 373	11.6%
Asia and Pacific	31 897	5.1%	102 264	13.9%

Source: UNCTAD, World Investment Report 2002, United Nations, New York and Geneva, 2002.

Foreign direct investment can be divided into three broad categories: purchase of privatized companies, mergers/acquisitions, and investments that create new firms (so-called "greenfield" investments). Not all kinds of investment have the same impacts on human rights and development.

Privatization, of course, was rampant in the late 1980s and early 1990s due to the structural adjustment programs then being implemented in developing countries. In many cases, the new owners immediately purged these companies of jobs they considered unproductive. Notwithstanding a putative productivity rise for these companies, it must be admitted that in many cases, workers' rights protections and the capacity of these newly jobless citizens to earn a living were significantly diminished by privatization, resulting in violations of other rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Joseph Stiglitz, the Nobel laureate in economics, convincingly explains the positive and negative effects of the wave of privatizations imposed on developing countries by the IMF:

> *Privatization often turns state enterprises from losses to profits by trimming the payroll… There are social costs associated with unemployment, which private firms simply do not take into account. Giving minimal job protections, employers can dismiss workers, with little or no costs, including, at best, minimal severance pay… Privatization has been so widely criticized because, unlike so-called Greenfield investments — investments in new firms as opposed to private investors taking over existing firms — privatization often destroys jobs rather than creating new ones.*[8]

By 1998, however, mergers and acquisitions had overtaken privatization as the number one form of FDI. Figure 1 shows that slightly more than 50% of FDI came in the form of mergers/acquisitions in 2001, down from a peak of nearly 60% in 2000. These proportions were maintained even as the value of transactions dropped by over one-half. The majority of the transactions took place in developed countries but the overall pattern appears to be the same for developing countries.

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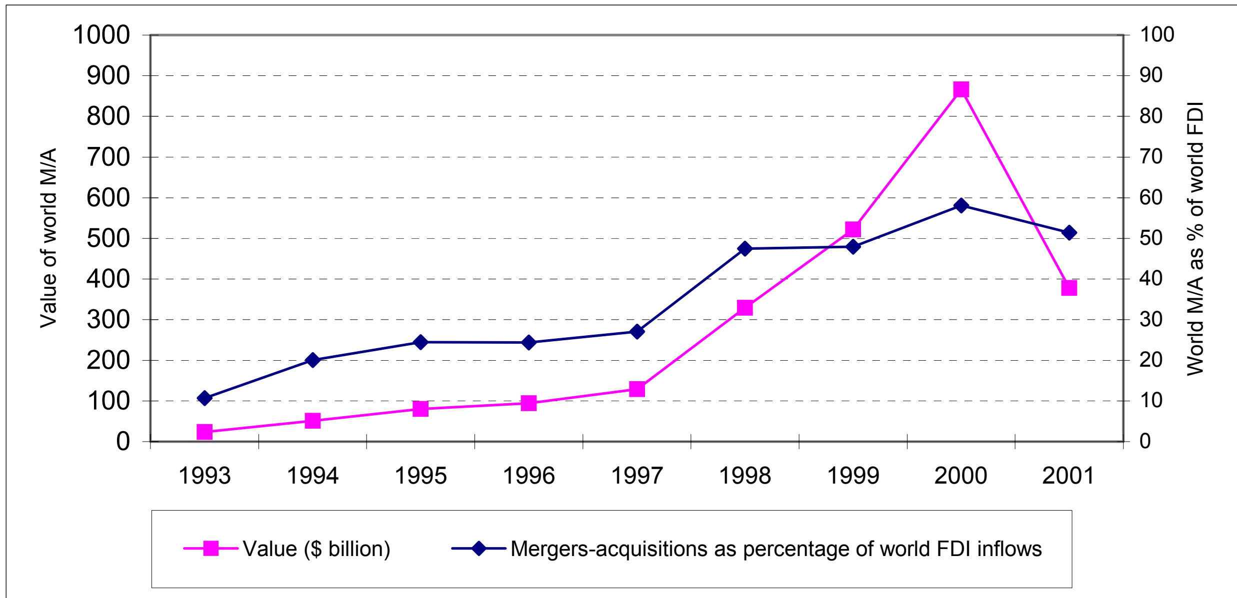
[8] J.E. Stiglitz, *Globalization and Its Discontents*, New York, W.W. Norton & Company, 2002, pp. 56–7.

Figure 1

Absolute and relative value of mergers/acquisitions*



Source: UNCTAD, *World Investment Reports,* United Nations, New York and Geneva, 1999, 2000, 2001, 2002.

*Only mergers/acquisitions worth over $1 billion are included.

Mergers and acquisitions do not necessarily lead to job creation, which in any case should not be equated with the right to work. As UNCTAD notes, many observers in the host countries see these mergers and acquisitions as a cause for concern:

> *"FDI through M & As is less likely to transfer new or better technologies or skills than greenfield FDI, at least at the time of entry. Moreover, it may lead directly to the downgrading or closure of local production or function activities (e.g. R & D)"*[9]

We may conclude that of the three types of FDI, the one with the most immediate potential is greenfield investment since it has the greatest capacity to generate new ongoing revenues for the state in addition to potential for job creation. Yet for over a decade, if not longer, this type of investment has been losing ground.

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[9] UNCTAD, World Investment Report Overview 2000, Geneva, p. 29

Moreover, despite this (limited) impact on job creation, debate as to the influence of these investments on human rights in general is still as relevant as ever. Some observers point out that foreign investors do not necessarily respect workers' rights as defined by the main conventions of the International Labour Organization (ILO); in fact, they benefit from the climate created by regimes that severely repress trade union organizing and other fundamental freedoms. China is a compelling case in point.[10] While foreign investment around the world dropped by nearly half between 2000 and 2001, China's absolute and relative share of investments increased.[11] Despite its routine human rights violations, the country has become a "blue chip" choice for foreign investors.

The conditions prevailing in the world's 3000 export processing zones, established in 116 countries,[12] also deserve scrutiny in light of the numerous human rights violations catalogued in these areas. These violations include arrests of union leaders, fertility control measures and other violations of bodily integrity experienced by female workers, routine exposure to toxic substances, arbitrary dismissals, insufficient wages, and so on.[13]

Another way in which FDI contributes to human rights violations involves the complicity of certain companies with authoritarian governments that commit grave and systematic violations. Direct responsibility occurs where the company participates in violations committed by a state, e.g. by forced displacement of civilian populations; it may also be assigned where the company could reasonably have presumed that the state would commit

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[10] On China's violations of labour rights, see the publications of the China Labour Bulletin, published in Hong Kong, at www.china-labour.org.hk.

[11] In 2000, of US $1,491,934 million of foreign investment around the world, US$40,772 million (2.7%) went to China. In 2001, of a world total of $735,146 million, US$46,846 million (6.4%) went to China. UNCTAD, World Investment Report, 2002, United Nations, New York, Geneva, 2002.

[12] International Labour Office, Committee on Employment and Social Policy, *Employment and Social Policy in Respect of Export Processing Zones*, GB.285/ESP/5, Geneva, November 2002, p. 2.

[13] See, among others, Gloria Tello Sanchez, "Human and Labour Rights of Women Maquiladora Workers in Coahuila, Mexico," in Rights and Democracy and Alianza Civica, *"Self-Made Citizens": Building Democracy Through Human Rights in Mexico*, Montreal and Mexico, January 2003; Human Rights Watch, *From the Household to the Factory: Sex Discrimination in the Guatemalan Labour Force*, February 2002; Human Rights Watch, *A Job or Your Rights: Continued Sex Discrimination in Mexico's Maquiladora Sector*, December 1998.

violations in the context of measures aiming to "protect" the company's activities. Indirect responsibility occurs where a company benefits from human rights violations perpetrated by a state without being actively involved or linked to them in any way.[14] Finally, private companies are often accused of "silent" complicity where they fail to act in the face of grave and systematic violations perpetrated by a state.[15] Conflict situations like the one prevailing in the Great Lakes region of Central Africa are particularly problematic; there, private companies are illegally exploiting natural resources, taking advantage of occupation by several foreign armies and the ensuing confusion.[16]

From a more systemic point of view, it should be realized that FDI from industrialized countries typically comes in the form of loans taken out with host country banks; when the debt is repaid and the profits are repatriated to the investors' countries of origin, what was originally classified as an export becomes an import of capital and wealth into Northern countries.[17] FDI, then, does not always have the effect of capitalizing the host country; it may, on the contrary, cause a flight of the wealth and capital so necessary to the effective protection of human rights such as the right to health and education.

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[14] See, for example, Human Rights Watch, *The Niger Delta: No Democratic Dividend*, October 2002. Another interesting source is provided by the reports of nongovernmental organization Project Underground on its website at www.moles.org.

[15] Andrew Clapham and Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses," based on a background paper for the Global Compact dialogue on *The role of the private sector in zones of conflict*, New York, 21-22 March 2001, online at http://www.business-humanrights.org/Clapham-Jerbi-paper.htm. See also Commission on Human Rights, Sessional Working Group on the Working Methods and Activities of Transnational Corporations, *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises,* submitted for discussion in July 2002 at the 54th session of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2002/WG.2/WP.1 and Addenda 1 and 2. Also see the excellent work of the International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* at www.ichrp.org.

[16] United Nations Security Council, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo,* 16 October 2002, S/2002/1146.

[17] On this subject, see S. Latouche, *Critique de l'impérialisme*, Paris, Anthropos, 1979.

1.2 Portfolio Investments

As is well known, portfolio investments are characterized by their volatility. Since the owners of this kind of capital need not move physical infrastructure with every transfer of ownership, they can invest and divest from companies with much less ado. One example of this kind of investment is currency speculation, in which traders seeking fast profits buy and sell national currencies on a daily basis in response to late-breaking information.

Despite the instability of portfolio investments, some analysts think that, in the absence of domestic capital, they are one of the only modes of development financing available to developing countries.[18] But their instability has an extremely serious downside in that entire financial systems can be and have been thrown into crisis by massive capital withdrawals. The example of Mexico and its financial crisis of 1994 is striking; the total capitalization of the Mexico City Stock Exchange plunged from US$3.173 billion in January 1994 to only $187.3 million in January 1995 following the capital flight.[19]

In many cases, these hurried capital withdrawals happen when, following a rumour (be it true or false) about the poor economic situation of a country, a critical mass of short-term investors convert their investments and move them to sunnier — or, at any rate, stabler — climates. The rumour becomes a self-fulfilling prophecy as the currency sell-off devalues it on the market. The country is then faced with the intolerable dilemma of either letting its currency be dragged down or investing precious public funds to shore it up. This is precisely the situation that caused the crash of the Thai baht in 1997 and drove the region into financial crisis in the following months. The effects of the crisis on human rights in Thailand and neighbouring countries are now well-documented: massive job losses, particularly among lower-income people, runaway inflation affecting food prices, decreased public health and education budgets, and so on. The social and economic rights violations experienced by these populations were exacerbated by grave violations of civil and political rights. Arrests of trade

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[18] See A. Gutiérrez Arriola, "La inversion extranjera: mito y realidad" (1998) 29:114 *Problemas del Desarrollo* 127, p. 142.

[19] G. Emiliano del Toro, "Foreign Direct Investment in Mexico and the 1994 Crisis: A Legal Perspective" (Fall 1997) 20 *Hous. J. Int'l L.* 1, p. 26.

union leaders and other attacks on freedom of association were facilitated by the adoption of emergency measures and the weakening of labour standards by certain governments.[20]

2- Human Rights Obligations of States[21]

In order to understand the obligations acquired by states under international human rights treaties, we shall briefly review their normative content, the responsibilities of various parties, and the mechanisms available for their protection.

The *Charter of the United Nations* imposes on member states the obligation to promote "universal respect for and observance of human rights and fundamental freedoms."[22] The UDHR, for its part, provides in Article 28 that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[23] These rights include but are not limited to the right to work and to just and favourable conditions of work (Art. 23), a standard of living adequate for the health and well-being of oneself and one's family (Art. 25), life, liberty, equality before and equal protection of the law (Arts. 1, 3, 7 and 8), and freedom of thought, conscience and religion, expression and association (Art. 18, 19, 20). These obligations were subsequently codified in two major

[20] See, for example, Amnesty International, *Republic of Korea (South Korea): Workers' Rights at a Time of Economic Crisis*, February 1999; Human Rights Watch, *Bearing the Brunt of the Asian Economic Crisis: The Impact on Labour Rights and Migrant Workers in Asia*, March 1998; UNCTAD, *Trade and Development Report 1998*, United Nations, New York and Geneva, 1998, p. 73.

[21] For a good overview of human rights, their effective protection, and their relationship with the current economic situation, see L. Lamarche, "Les droits de la personne à l'heure de la mondialisation," in C. Deblock (ed.), *L'Organisation mondiale du commerce: Où s'en va la mondialisation?,* Montréal, Fides, 2002, p. 181.

[22] *Charter of the United Nations*, *26 June 1945, R.T. Canada, 1945, no. 7*

[23] *Universal Declaration of Human Rights,* G.A res. 217A (III) U.N. Doc A/810, 71 (1948) art. 28.

international human rights treaties: the *International Covenant on Civil and Political Rights* (ICCPR),[24] ratified by 149 states,[25] and the ICESCR,[26] ratified by 146 states.[27]

Rights are also enshrined in regional conventions and become enforceable by virtue of a state's membership in a regional multilateral organization. Additional treaties cover particular groups or subjects (such as women's and children's rights or the prohibition against torture). The International Labour Organization is responsible for the oversight of some 190 treaties on various workers' rights-related subjects, some of which have acquired status as human rights. By virtue of the *pacta sunt servanda* principle, all these treaties are binding on the states that have ratified them. In addition to the human rights norms codified in treaties, certain norms have acquired the status of *jus cogens* or peremptory norms of international law; that is, they may not be violated under any pretext, and any treaty provisions contravening them would be nullified.[28]

We note here a recent advance of law that is particularly relevant to our topic. Article 17 of the UDHR states that "Everyone has the right to own property alone as well as in association with others."[29] This right appears elsewhere, such as in Article 21 of the *American Convention on Human Rights*, which states that "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."[30] In the *Awas Tingni v. Nicaragua* case, the Inter-American Court ruled that Article 21 of the Convention protects the communal property rights of indigenous communities, even if they do

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[24] *International Covenant on Civil and Political Rights,* G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 RTNU 171 (in force 23 March 1976).
[25] *Status of Ratifications of the Principal International Human Rights Treaties,* Office of the High Commissioner for Human Rights, United Nations, 2 May 2003.
[26] *International Covenant on Economic, Social and Cultural Rights*, G.A res. 2200 (A) (XXI), U.N. Doc A/6316 (1966) 992 RTNU 3, (in effect 3 January1976)
[27] *Status of Ratifications,* supra note 25.
[28] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 R.T.U.N. 354 (in force 27 January 1980); see also R. Howse and M. Matua, *Protecting Human Rights in the Global Economy: Challenges for the World Trade Organization,* Montreal, Rights & Democracy, 2000, pp. 10–11.
[29] UDHR, *supra* note 23, art. 17.
[30] *American Convention on Human Rights*, 1144 U.N.T.S. 123 (in force 18 July 1978), art. 21(1).

not hold formal title of ownership granted by the state.[31] The Awas Tingni community had filed suit before the court to stop the illegal forest clearing being carried out by foreign companies on its ancestral lands, among other matters.

Article 28 of the UDHR (whose content also constitutes one of the central principles of the *Declaration on the Right to Development*[32]) is especially important since it calls on states to create and guarantee the domestic and international conditions for the realization of fundamental rights and freedoms. States have the primary responsibility for ensuring that human rights are respected, protected, and fulfilled, which does not, of course, exempt individuals and private corporations from the obligation of respecting these rights and cooperating with states in their protection.[33] In 1993, over 170 states adopted the *Vienna Declaration and Programme of Action,*[34] stating that human rights were indivisible, interdependent and universal; and furthermore that their protection was the first responsibility of government. Civil and political rights generate immediate obligations, whereas economic, social and cultural (ESC) rights generally place more emphasis on the obligation of progressive realization, with the exception of the ban on discrimination (Article 2) and the guarantee of union freedoms (Article 8), which create an immediate obligation. In the case of ESC rights guaranteed by the ICESCR, the states have committed to guaranteeing that rights may be exercised without discrimination, and to taking steps to achieve "progressively the full realization of the rights recognized," particularly through the adoption of legislative measures.[35] Thus, states must enact laws, policies and mechanisms favouring the progressive

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[31] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Inter-American Court of Human Rights, 31 August 2001.

[32] *Declaration on the Right to Development,* G.A. Res. 41/181 (1986).

[33] *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, supra* note 22, para. 18, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,* adopted in January 1998 by a group of over 30 human rights experts.

[34] *Vienna Declaration and Programme of Action,* World Conference on Human Rights, U.N. Doc. A/CONF.157/23. This declaration is of particular importance in that it was adopted by consensus. Even the United States, the only country to oppose the *Declaration on the Right to Development*, supported it. See A. Sengupta, "On the Theory and Practice of the Right to Development," (2002) 24 *Human Rights Quarterly* 837.

[35] ICESCR, *supra* note 26, art. 2.

realization of the right to health, healthy and adequate food, and just and favourable working conditions which ensure an adequate standard of living.

The fulfillment of human rights is greatly compromised by problems relating to their justiciability and overall weak mechanisms for enforcement. To begin with, a relatively small number of treaties grant legal remedies to individuals.[36] In addition, there are general constraints imposed by the requirement of exhausting domestic legal remedies as well as the limited enforceability of decisions by the competent bodies, whether the UN Human Rights Committee, the Inter-American Commission on Human Rights, or the African Commission of Human and Peoples' Rights. To these obstacles may be added the phlegmatic political will of governments to implement these decisions. The Human Rights Committee reported that in only one-fifth of cases of ICCPR violations between 1991 and 1999 did it note the state's will to implement measures of relief, remedy or compensation (and these, be it said, are far from realization itself).[37]

Even more than civil and political rights, the justiciability of most economic, social and cultural rights is deplorably limited at present. Despite General comment No. 9 of the Committee on Economic, Social and Cultural Rights (CESCR), which states that "a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are

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[36] At the UN: Optional Protocol no. 1 to the ICCPR, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The tripartite mechanisms of the ILO allow trade union organizations represented there to file complaints; in the inter-American system, the *American Convention on Human Rights*, the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* (San Salvador Protocol) for Article 8(a) trade union rights and Article 13 (right to education); in the African system, the *African Charter on Human and Peoples' Rights* (with restrictions).

[37] Andrew Byrnes, "An Effective Complaints Procedure in the Context of International Human Rights Law," in Anne F. Bayefsky (ed.), *The UN Human Rights System in the 21st Century*, Boston, Kluwer Law International, 2000, p. 153. The enforceability of decisions of the European Commission and Court of Human Rights is a notable exception.

unnecessary,"[38] there is a chronic lack of protection for these rights in domestic legal systems. It is difficult to assess the real effect of states parties' five-year reports to the Committee on Economic, Social and Cultural Rights and to consider the latter's recommendations in attempting to improve compliance with treaty obligations. Furthermore, discussions on the adoption of an optional protocol to the treaty have gone no further than the drafting of a preliminary document by the CESCR and, in 2003, the formation of a working group under the Commission on Human Rights to study the matter. This delay, due among other factors to the staunch opposition by the United States (a non-signatory of the ICESCR), Australia, and now Canada, is a considerable hindrance to the development of ICESCR jurisprudence. As a result, millions of people suffering from malnutrition, famine, or chronic lack of access to basic health care are deprived of effective legal remedies or any international recourse.[39]

Three main points should be kept in mind regarding the human rights obligations of states: (1) a sizeable corpus of positive human rights law is codified in international treaties and other documents; (2) by virtue of the *pacta sunt servanda* principle, states are bound to respect their commitments in good faith when they ratify such treaties; (3) states' fulfillment of the obligations arising from the positive nature of these rights has been inconsistent, to say the least, due to the weaknesses of domestic and international enforcement and sanction mechanisms.

3- International Investment Law and Human Rights

It may be said that there are three levels of economic integration: bilateral, regional, and multilateral. Agreements to protect and promote foreign investment exist at each level. The interaction between these agreements and the obligations arising from international human

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[38] Committee on Economic, Social and Cultural Rights, *The Domestic Application of the Covenant,* General Observation No. 9, U.N. Doc. E/C.12/1998/24.

[39] See Bruce Porter, *The Justiciability of Economic, Social, and Cultural Rights: A Review of the Position Taken by Canada in International and Domestic Fora* (preliminary unpublished document, 2002).

rights instruments has been insufficiently documented to date. We offer a modest examination of this issue in this section.

3.1 Bilateral and Regional Agreements: The Case of NAFTA

In its last World Investment Report, UNCTAD inventoried 2099 bilateral investment treaties (BIT) in force as of year-end 2001.[40] The purpose of all these treaties, the earliest of which dates back to the 1960s, is to create a more stable international legal framework for investment.[41] Most of them are built on the same principles, including national treatment and most-favoured-nation (MFN) status [42], rules favouring capital transfers, a ban on performance requirements, and implementation of dispute settlement mechanisms enabling investors to appeal to international arbitration.

Several free-trade agreements also contain such rules. The best-known example is surely the investment chapter (Chapter 11) of the North American Free Trade Agreement (NAFTA).[43] The rules in this chapter are very similar to those found in the BITs between the United States and Canada and, increasingly, between other countries of the Americas. The wording of NAFTA Chapter 11 serves as a model for the investment rules in several free trade agreements, including those between Canada and Chile and between Mexico, Colombia and

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[40] UNCTAD, *World Investment Report 2002*, United Nations, New York, Geneva, 2002, p. 8.

[41] G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection" (1997) 269 *RCADI.* On the history of BITs and investors' rights in general, see D.R. Adair, "Investors' Rights: The Evolutionary Process of Investment Treaties" (1999) 6 *Tulsa J. Comp. & Int'l L.* 195. For a liberal vision of the economic effects thereof, see the indispensable work of Kenneth J. Vandevelde, e.g. "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties" (1998) 36 *Colom. J. Transnat'l L.* 501.

[42] National treatment means that each party "shall accord to investors of another Party, treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation , and sale or other disposition of investments". *NAFTA*, art 1102. The most favoured nation treatment provisions stated that foreign investors will receive "treatment no less favourable than that it accords, in like circumstances, to investments of both Parties and non-Parties. *NAFTA*, Art 1103.1

[43] *North American Free Trade Agreement*, December 17, 1992, R.T. Canada 1994, no. 2 (entry into force January 1,1994).

Venezuela. Our information on the status of negotiations around the creation of a Free Trade Area of the Americas suggests that certain states are seeking to institute this type of rule in such an agreement.[44] Given the similarity of the rules in these bilateral and regional agreements, we limit our analysis here to NAFTA Chapter 11 and assert that our conclusions are largely applicable to all of them.

BITs and NAFTA define investment very broadly. The definition given in the Canadian BITs generally resembles the following, taken from Canada's agreement with Ecuador: "'investment' means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other…"[45] A list of sample investments covered by the agreement generally follows. NAFTA has an equally broad definition;[46] although only those investment types listed in the agreement are covered by it. However, this list being very lengthy, it seems that nearly all imaginable entities are covered.[47]

Under these agreements, states commit to offering national and MFN treatment to foreign investors. In all cases, this standard applies after the investment is made, and several agreements stipulate that states must also grant national treatment at the time the investment is

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[44] We stress that there appears to be a debate in the negotiations around the relevance of inserting an investor-state dispute settlement mechanism in such a chapter. On this subject, Canada's official position is to avoid reproducing such a mechanism: DFAIT, "Free Trade Area of the Americas (FTAA), FTAA Draft Text, Canada's Positions and Proposals and Frequently Asked Questions, Draft Chapter on Investment," at http://www.dfait-maeci.gc.ca/tna-nac/I-P&P-en.asp.

[45] *Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments,* 29 April 1996, R.T. Can. 1997 no 25 (in force 6 June 1997), art. 1(g).

[46] NAFTA, *supra* note 43, art. 1139.

[47] R. Adair, *supra* note 41, p. 203.

made. This latter obligation implies, as is readily evident, an "open-door regime for foreign investors, with a few exceptions and safeguards."[48]

The majority of bilateral and regional trade agreements prevent states from imposing performance requirements on foreign investors. NAFTA, specifically, prevents states from requiring foreign investors:

> ...
>
> *(b) to achieve a given level or percentage of domestic content;*
>
> *(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;*
>
> ...
>
> *(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement;...*[49]

This prohibition on states' subordination of economic activity to certain social objectives must be analyzed from the standpoint of human rights. When states are prevented from requiring investors to attain certain levels of domestic content[50] or purchase domestic products and services, they are deprived of an important means of ensuring that private economic activity has an impact on social development and, *a fortiori,* on the progressive realization of human rights. And by preventing a state from making investments conditional on technology

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[48] C. Leben, "L'évolution du droit international des investissements," in Société française pour le droit international, *Un accord multilatéral sur l'investissement: d'un forum de négociations à l'autre?*, Paris, A. Pédone, 1999, 7, p. 12.

[49] NAFTA, *supra* note 43, art. 1106 (1).

[50] Domestic content refers to the obligation of companies to assure that a part of their production uses domestically-sourced primary materials for example. *NAFTA,* Supra note 43, art. 1106.

transfers, the trade rules deprive it of the possibility of requiring companies to help them implement Article 15(b) of the ICESCR which recognizes the right of every person to "enjoy the benefits of scientific progress."[51]

These agreements also force states to "permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay."[52] On this point, we discussed above the enormous potential impact of portfolio investment volatility on human rights. One way of reducing this impact and stabilizing capital within a country is to impose controls on this type of speculative transaction. Commenting on the Asian crisis, Stiglitz explains that if Malaysia was able to recover more quickly than its neighbours South Korea and Thailand, and if India and China were much less affected by the crisis, it is because these countries had controls on capital transactions.[53] Yet countries ratifying agreements like NAFTA must negotiate specific exemptions to implement such rules.[54]

NAFTA and several other bilateral agreements also establish rules on expropriation that have been used on several occasions in lawsuits filed by investors against state parties. To provide some background, the codification of investors' rights originally came in the context of a debate around the definition of expropriation in customary law. For some authors, expropriation ensued from the English concept of "taking of property" and comprised two

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[51] See also *Vienna Declaration and Programme of Action, supra* note 33, §11.

[52] For example, NAFTA, *supra* note 2, art. 1109(1).

[53] J. E. Stiglitz, *Globalization and Its Discontents, supra* note 8, from p. 168. See also the paper by J. Bhagwati, a neoliberal economist and staunch free trade proponent, arguing that crises are inevitable in a system where the "myth" of free convertibility holds sway; "The Capital Myth: The Difference between Trade in Widgets and Dollars" (1998) 77:3 *Foreign Affairs* 7.

[54] It should be mentioned, of course, that as in any international law treaty, a state may negotiate exceptions to the agreement. Thus, in its agreement with Canada, Chile reserved the right to establish a waiting period before Canadian investments can leave the country; *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile,* 5 December 1996, R.T. Can 1997 no. 50, (in force 2 June 1997), Appendix G-09.1.

elements, an act of the state and a transfer of ownership.[55] Others held that customary law had always considered "creeping expropriation," or "actions of government that have the effect of 'taking' the property, in whole or in large part, outright or in stages,"[56] as expropriation in the same sense as a transfer of ownership by the state.[57]

In NAFTA, this provision reads as follows:

> *1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:*
>
> *a) for a public purpose;*
>
> *b) on a non-discriminatory basis;*
>
> *c) in accordance with due process of law and Article 1105(1); and*
>
> *d) on payment of compensation [...].*[58]

As is evident, the addition of the terms "directly or indirectly" signifies a definitive inclusion of indirect expropriation in the definition. This concept being relatively vague, some observers fear that it might be used to prevent state parties from exercising regulatory authority, in the areas of labour and environmental law for example. One may draw three main conclusions from the decisions of the arbitral panels formed under NAFTA that have dealt with this issue. First, it is clear that the definition of expropriation extends beyond transfer of ownership to

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[55] See J.P.Laviec, *Protection et promotion des investissements: étude de droit international économique*, Geneva, PUF, 1985, p. 161, explains this conception.

[56] American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States,* St. Paul, Minn., ¶ 712 (1987).

[57] On this subject, C.N. Brower and L.A. Steeven, "Who then should judge?: Developing the International Rule of Law under NAFTA Chapter 11" (2001) 2 *Chi J. Int'l L.* 193 and M. Romero Jimenez, "Considerations of NAFTA Chapter 11" (2001) 2 *Chi. J. Int'l L.* 243.

[58] NAFTA, *supra* note 2, art. 1110(1) (our italics).

include creeping expropriation.[59] Second, there is a gray area as to the distinction between a direct expropriation and a "regulatory measure"[60] or "act of public authority."[61] This gray area is extremely problematic in that governments face uncertainty when implementing measures that may be necessary to protect human rights. Finally, a certain level of impact is necessary in order for a measure to be interpreted as an expropriation.[62] These clarifications aside, significant gray areas persist as to the interpretation of this type of provision, making it impossible to predict how a panel will rule on disputes brought before it under the Chapter 11 rules. The fear of being sued by a foreign investor may well have a chilling effect on states when they consider enacting legislation to respect, protect, promote or fulfill obligations relating to human rights. Furthermore, such lawsuits become effective pressure tactics for investors when a state's actions put their interests in jeopardy. Been and Beauvais[63] mention several examples where companies successfully threatened NAFTA member states with the use of the Chapter 11 dispute settlement mechanism if the latter implemented measures that might interfere with the enjoyment of the former's property. One case involved threats by the tobacco company Philip Morris in response to Canada's announced intention to ban the use of the adjectives "light" and "mild" on cigarette packages since they might imply that these cigarette types are not as harmful. The company claimed that such a regulation would violate Article 1110 by being tantamount to an expropriation of its trademarks and goodwill. This

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[59] See, for example, *Metalclad v. United States of Mexico Final Award* (CIRDI No ARB(AF)/97/1, (2000) (Arbitrators: E. Lauterpcht, B.R. Civiletti, J.L. Siqueiros), par. 103 and *Robert Azinian and others v. United Mexican States* (CIRDI no ARB (AF)/97/2) (1999), (arbitrators B.R. Civiletti, C. Von Wobeser, J. Paulsson), §90.

[60] *S.D. Myers v. Canada, Partial Award* (13 November 2000) at http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf (last accessed 26 April 2002) §282, in which the distinction between regulation and expropriation is held to "reduce the risk that governments will be subject to claims as they go about their business of managing public affairs."

[61] See the definition of "act of public authority" given in Pope & Talbot, Inc. vs. Government of Canada, Interim Award (2001), on line at http://www.dfait-maeci.gc.ca/tna-nac/Award_Merits-e.pdf (last accessed 1 October 2001) (arbitrators L. Dervaird, B.J. Greenberg and M.J. Belman), §99.

[62] *Pope & Talbot v. Canada* and *S.D. Myers v. Canada, Partial Award, supra* note 60.

[63] V.L. Been and J. C. Beauvais, "The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine" (2003) 78: 1 *NYU L. Rev.*

example clearly illustrates the potential chilling effect of Chapter 11 on states as they attempt to fulfill their obligations in the area of human rights, in this case the right to health.

3.2 Multilateral Integration: The World Trade Organization

At the WTO, two main agreements govern direct investments: the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS).

3.2.1 The TRIMs Agreement

The debate around the inclusion of investments in the multilateral forum of the WTO (and GATT prior to it) has been raging for many years.[64] The Agreement on Trade-Related Investment Measures, or TRIMs agreement is an extremely limited agreement, and developing countries' resistance on this score shows how keenly they sense the potential loss represented by the liberalization their markets to foreign capital.[65] The TRIMS Agreement.[66] only prevents members from implementing trade-related investment measures that are inconsistent with national treatment (Art. III of GATT of 1994), such as requiring the use of domestic content, or imposing quantitative restrictions (Art XI of GATT of 1994) [67]

3.2.2 GATS (General Agreement on Trade in Services)

GATS is an agreement designed to regulate members' measures affecting trade in services. All services are covered by this agreement except those supplied "in the exercise of

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[64] R. Bachand, "Les investissements: le conflit Nord-Sud" in C. Deblock (ed.), *L'Organisation mondiale du commerce: Où s'en va la mondialisation?,* Montréal, Fides, 2002, 151; R. Dattu, "A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment" (Nov.-Dec. 2000) 24 *Fordham Int'l L. J.* 295.

[65] P. Civello, "The TRIMS Agreement: A Failed Attempt at Investment Liberalization," (1999) 8 *Minn. J. of Global Trade* 97 (on the disappointment of Western countries with respect to this Agreement) and E. M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investments in the World Trade Organization" (1997) 12 *Am. J. of Int,L L. & Pol'y* 1038 (concerning the position of developing countries).

[66] *Agreement on Trade-Related Investment Measures*, 15 April 1994, Agreement Establishing the World Trade Organization, Annex 1A (in force 1 January 1995)

[67] TRIMs are not defined in the Agreement but an illustrative list is given in an annex. It is evident from this list that TRIMs are the rough equivalent in the WTO system of performance requirements in NAFTA.

governmental authority";[68] that is, services provided "neither on a commercial basis nor in competition with one or more service suppliers."[69] GATS must be considered an investment agreement in that one of its four modes of service supply consists in the supply of a service "through commercial presence in the territory of any other Member."[70] This means that foreign investors in the service sector are protected by the GATS rules.

GATS sets up two types of obligations: general obligations and disciplines, covered in Part II, and specific commitments, covered in Part III. The principal obligations of Part II concern both MFN treatment and transparency. Prior to the entry into force of the agreement, members were allowed to maintain measures incompatible with MFN treatment, subject to these measures being listed in the annex on exemptions. These exemptions are, in general, few in number.

Access to markets and national treatment are the two types of specific commitments contemplated in the agreement. Contrary to the obligations set up under the general disciplines, those covered by specific commitments *only apply to sectors expressly included by the members in their schedule of commitments.* Whereas the majority of members have liberalized several sectors and sub-sectors, only a small number of countries have made commitments in obviously sensitive human rights-related sectors such as health and education. Nevertheless there is a risk to citizens of the countries that have undertaken or will undertake service sector commitments that the potential for effective realization of rights — to the highest attainable standard of health, for example — may be diminished.

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[68] General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B (1994) L.L.M 1168 (entry into force January 1, 1995) hereafter GATS, art.1(3)(b).

[69] *Ibid*, art. 1(3)(c). On this point, see M. Krajewski, *Public Services and the Scope of the General Agreement on Trade in Services (GATS)*, Geneva, Center for International Environmental Law (CIEL), 2001, who concludes that "the main concept of the phrase 'on a commercial basis' is the supply of a service in return for a price paid for the service. However, it might be necessary to take other circumstances or the amount of the price into account… The meaning of 'competition' depends on the question if the same or a comparable service is provided and on the scope of the targeted market, which has to be decided on a case-to-case basis," pp. 17–18.

[70] GATS, *supra* note 68, art. 1(2)(c).

To be sure, the market of many developing countries has not yet proven sufficiently attractive to multinationals to justify massive investments. Analyzing the situation in Africa, Turshen notes that Western companies have their eyes on this continent as a potentially profitable health insurance market.[71] Certain countries have undertaken market access and national treatment commitments in this sector, and pressure for further liberalization probably exists within the ongoing negotiations. The threats to human rights involve two possible shifts: 1) from a public to a private model in which profit inevitably takes precedence over the right to health, and 2) from a preventive to a curative model in which prevention is given short shrift because it is not seen as profitable by the private sector.[72] Though, as noted, few countries have yet undertaken health-related commitments, new ones might well surface at the ongoing GATS negotiations. The structure of this agreement is such that once the commitment is undertaken, it can only be amended by payment of compensation to the members affected by the "de-liberalizing" measure.[73] This monetary penalty makes withdrawal from commitments highly improbable or even impossible.

3.3 Dispute Settlement Mechanisms

The highly effective mechanisms for settlement of trade disputes between parties to various treaties are probably one of the most important innovations in international economic law in the last decade. These mechanisms take two forms: state-to-state and investor-to-state.

The NAFTA dispute settlement mechanism[74] has jurisdiction over the entire agreement (with the exception of Chapter 19 on antidumping and countervailing duties, which contains its own dispute settlement mechanism). Where an arbitral panel formed to rule on a dispute determines non-compliance with the Agreement and the member fails to apply the panel's

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[71] M. Turshen, *Privatizing Health in Africa*, Rutgers University Press, 1999, p. 43.

[72] H. Waitzkin and C. Iriart, "How the United States Exports Managed Care to Developing Countries" (2001) 31:3 *Int'l J. of Health Services* 495, p. 500; and Fidler, who explains that in developing countries, the emergence of private insurance is playing havoc with the principle of universal health care coverage: D.P. Fidler, "Neither Science Nor Shamans: Globalization of Markets and Health in the Developing World" (1999) 7 *Ind. J. Global Leg. Stud.* 191, particularly pp. 109 and 208.

[73] GATS, *supra* note 68 art. XXI.

[74] NAFTA, *supra* note 43 ch. 20, particularly articles. 2003–19.

recommendations, this chapter allows for suspension of the benefits to the losing party. For our purposes, however, the relevant mechanism is the one instituted under Section B of Chapter 11. The special feature of this mechanism is that it allows investors themselves, not their state of origin, to submit a dispute to arbitration where they feel that their rights under the chapter were violated.

How should an arbitral panel should deal with an incompatibility between a Chapter 11 rule and a human rights obligation? Article 1131 stipulates that a tribunal instituted in accordance with Chapter 11 should make its decision "in accordance with this Agreement and applicable rules of international law."[75] *A priori*, this means that provisions of human rights or environmental law treaties should be taken into consideration in the tribunal's decisions. However, Articles 103 and 104 stipulate that in case of incompatibility with other treaties, NAFTA prevails,[76] except in regard to certain specific agreements determined by Article 104[77] and Annex 104.1.[78] In adhering to these agreements, "the Party [shall choose] the alternative that is the least inconsistent with the other provisions of this Agreement."[79] Thus, the parties were allowed to give precedence to *a small number of agreements* existing in 1994 over NAFTA, but they must show that they have done everything possible to avoid an excessive violation of the trade agreement. As for all the agreements signed after 1994 as well as those relating to other subjects, including human rights, they are subordinate to NAFTA.

Notwithstanding these considerations, there is a presumption in international law that there is no hierarchy of legal sources. Articles 103 and 104 only mention NAFTA's superiority over *other treaties* but do not mention customary law. Although NAFTA unequivocally prevails over provisions of another treaty in the event of incompatibility, it does not prevail over

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[75] *NAFTA*, *supra* note 43 art. 1131(1).
[76] *Ibid*., 103(2).
[77] These Agreements are the *Convention on International Trade in Endangered Species of Wild Fauna and Flora,* the *Montreal Protocol on Substances that Deplete the Ozone Layer* and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*.
[78] These are two bilateral environment treaties relating to the Mexico-United States border region and to hazardous waste transfers; *NAFTA,* Annex 104.1.
[79] *Ibid*, art. 104(1).

customary rules. An arbitral panel would be obligated to take these into consideration where they conflict with NAFTA.

If a tribunal should examine such a situation, it would probably presume *a priori* that the sources were compatible. The state having violated the rules of the trade agreement would then have to demonstrate two things. It would first have to show that the measure had been taken to conform to an existing obligation under customary law. Hence, it would have to show that, for example, the right to life, work or health are indeed guaranteed under customary law.[80] The state would then have to convince the tribunal that *the two sources are indeed incompatible,* and that the measure in question and no other measure could enable it to fulfill its obligations under customary law. One can only imagine the magnitude of the task! Once these two facts were proven and the possibility of adhering to both sources simultaneously was established, the tribunal would have to decide on the order of precedence to be given to these sources according to the traditional rules of interpretation. The result is difficult to foresee in the abstract. It is not totally impossible that a treaty signatory could convince a tribunal that it had, during a period of turbulence on world financial markets, violated its obligation to allow the free transfer of capital in order to conform to customary law obligations concerning the right to health, to life or to the security of the person. It could argue that the potential effects of a financial crisis on its capacity to respect, protect, promote, and fulfil its human rights obligations demanded such a course of action.

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[80] The ICJ has previously ruled that: "There are a number of reasons for considering that, even if two norms belonging to two sources of internaitonal law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty law and on that of customary international law, these norms retain a separate existence" (Case Concerning) Military and Paramilitary Activities in and against Nicaragua, C.I.J. Recueil 1986, 14, § 178. Thus, the right to work or to health, although the subject of treaties, could be a customary source. On the possibility that human rights may be a customary source, see T. Meron, *The Pull of the Mainstream: Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989; and the comment of M. Koskenniemi, (May 1990) *Michigan L. R.* 1946; on the content of these customary norms, see *Restatement of the Law, Third, Foreign Relations Law of the United States,* ¶ 702 (1987).

At the WTO, disputes are settled in accordance with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU),[81] which establishes a Dispute Settlement Body (DSB). Contrary to the mechanism implemented by NAFTA Chapter 11, this mechanism can only be used by members (all of them states), not nationals thereof. The institutional phase of dispute settlement begins with the formation of a panel, which issues a recommendation. The parties to the dispute can then appeal to the Standing Appellate Body, which reviews issues of law and legal interpretations of the special group.

In answer to the same question raised in regard to NAFTA, we first note that the mandate of the panel is limited to WTO agreements,[82] and members cannot use them to complain of the violation of human rights norms by another member. Likewise, the Appellate Body's jurisdiction expressly excludes agreements outside the WTO system.[83] Secondly, we must consider whether a panel or the Appellate Body could use legal norms originating outside the WTO system, in this case human rights norms, once a complaint has been filed against an alleged violation of a WTO agreement. That is, how should the DSB rule on a situation of incompatibility between a WTO agreement and human rights provision?

On this subject, Gabrielle Marceau explains that the body of law arising from the WTO is a *lex specialis* system and, as such, cannot be overruled by another body of law.[84] Referring to the second part of DSU Article 3(2) which reads, "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements,"[85] she states that:

> *The covered agreements are explicitly listed, and it cannot be presumed that members wanted to provide the WTO remedial system to enforce obligations and rights other than those listed in the WTO treaty. WTO adjudicating bodies cannot give direct effect to human rights in any*

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[81] *Understanding on Rules and Procedures Governing the Settlement of Disputes,* (1994) 33 I.L.M. 1125, hereafter DSU.
[82] *Ibid*, art. 7(1)
[83] *Ibid*, art. 19(1)
[84] G. Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13: 4 *EJIL* 753, p. 767.
[85] *DSU,* supra note 81 art. 3(2).

> *way that would set aside or amend a WTO provision. If they were to allow a non-WTO provision on human rights to supersede and set aside a WTO provision and therefore to give a legal effect to and enforce a non-WTO provision in superseding a WTO provision, they would be adding to or diminishing the WTO covered agreements (or amending them).*[86]

Pauwelyn differs somewhat from this analysis. For him, new conventions, even if negotiated outside the WTO, could be regarded as altering the intent of the parties and be taken into consideration in DSB decisions. He points out, for example, that the International Court of Justice uses sources in its decisions that are not cited in its Article 38. Stressing the presumption that sources are non-hierarchical, Pauwelyn thinks that the DSB could use sources other than its own treaties, provided that these are accepted by all the parties to the dispute and that the sources may be interpreted as prevailing over the treaties related to the dispute under the usual rules of interpretation. In this way, a party could justify violating a WTO treaty with reference to an obligation external to the WTO.[87]

As is evident, the debate on whether a Party can justify a violation of a WTO agreement based on other obligations in international law is not resolved. However, it seems clear that international law can be used to *interpret* the WTO agreements. DSU Article 3(2) states that the purpose of the dispute settlement mechanism is "to preserve the rights and obligations *of Members under the covered agreements,* and to *clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.*"[88] The special group formed to rule in the case *Korea: Measures affecting government procurement* interpreted this article as follows:

> *Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or*

[86] G. Marceau, *supra* note 84, p. 778; see also E. Canal-Forgues, "Sur l'interprétation dans le droit de l'OMC" (2001) 105 *RGDIP* 1 for whom the agreements in question consitute the only applicable WTO law, p. 11.

[87] J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 *Am. J. of Int'l L.,* 490.

[88] *DSU, supra* note 81, art. 3(2) [our italics].

inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[89]

Therefore, the DSB must use customary law where its rules do not conflict with the WTO agreement or, as Pauwelyn puts it, to fill the holes in a treaty.[90]

3.4 Investors' Rights versus the Political Sphere and Human Rights

The right of every individual to participate in the conduct of public affairs is codified by the UDHR,[91] of which Article 21(3) states that "the will of the people shall be the basis of the authority of government."[92] Likewise, the *Vienna Declaration and Programme of Action* posits democracy as being "based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives."[93] We think, therefore, that the right codified by Article 21 of the UDHR must be understood as a right to participate not only in public institutions but also in the determination of political, economic, social and cultural systems. A similar interpretation should apply to the right of peoples to self-determination and to freely determine their economic, political, and social development.[94] Article 1 of the two covenants enshrines the right of peoples and the individuals forming them to choose their economic system and, consequently, to influence the process whereby wealth is produced and distributed. Thus, notwithstanding Article 17 of the UDHR which guarantees individual property rights, people and individuals possess the inalienable right to participate in that process.

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[89] *Korea - Measures Affecting Government Procurement – Report of the Panel* (WT/DS163/R) (1 May 2000), §7.96.

[90] J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 *Am. J. of Int'l L.* 490, pp. 541–542.

[91] UDHR, *supra* note 8, art. 21(1).

[92] *Ibid.,* art. 21(3).

[93] *Vienna Declaration and Programme of Action, supra* note 34, §8.

[94] ICESCR, *supra* note 26, art. 1(1); ICCPR, *supra* note 24, art. 1(1).

In his *Pure Theory of Law,* Kelsen explains that the law only creates obligations and that it is these obligations which create rights, or "reflex rights" as he terms them.[95] Property, for Kelsen, as the dominion of a person over a thing, is an obligation of all other people not to disturb an individual in his disposition over a thing, and the individual then possesses a reflex right of property over that thing. In this conception, property is first and foremost a *social relation,* a relationship between individuals, and only secondarily a relationship to a thing.[96] In a market economy, where production is largely in private hands, this *dominium* over things becomes an *imperium*[97] over society and individuals, by virtue of determining the production of wealth and hence its distribution among the population. The public authorities must intervene if they are to limit this *imperium* to *activities obeying the common will and serving public needs and interests.*

The components of international economic law relating to investment law tend to reinforce private property rights and to restrict the latitude of the public authorities to ensure that wealth production and redistribution serve the general interest. NAFTA Chapter 11, for example, restricts the powers of states to interfere with foreign investors' property. This is accomplished by provisions on expropriation that exceed even the protection offered by the Fifth Amendment to the US Constitution, itself the world's most favourable document vis-à-vis the protection of private property;[98] and similarly, by provisions prohibiting states from requiring investors to pursue their economic activities with adherence to certain social objectives (performance requirements). Within the WTO, the TRIMs Agreement also limits the latter possibility, and the GATS, as we have seen, is highly favourable to service sector investors. These limitations imply two important things: 1) the consolidation of the investors' *imperium* over wealth production and distribution and, consequently, over the political sphere, and 2) all other things being equal, the diminished capacity of citizens to interact with the political sphere, thus limiting the full enjoyment of their political rights.

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[95] H. Kelsen, *Pure Theory of Law,* 1967, Berkeley, University of California Press, pp. 127–130.
[96] *Ibid.*, from p. 130.
[97] On this subject, see M.R. Cohen, "Property and Sovereignty" (1926–27) *Cornell L. Quaterly* 8.
[98] V.L. Been and J. C. Beauvais, *supra* note 63.

The Metalclad and Bechtel cases illustrate the difficulties faced by citizens in influencing public decisions in areas as sensitive as access to basic public services such as water and sanitation, and in exercising their rights under international law. In the Metalclad case, the rural township of Guadalcazar and the state of San Luis Potosí, Mexico denied a permit to a US company seeking to operate a toxic waste burial site overlying an aquifer, after the federal government had granted the necessary permits for commercial use of the site. The denial followed several public demonstrations by local residents who feared that their drinking water would be contaminated. The company sued Mexico under Chapter 11, claiming that it had violated Article 1110 on expropriations. The panel formed to hear the case found in favour of the company on several points, and Mexico had to pay nearly $17 million in damages.[99]

Useful lessons may also be derived from the attempted privatization of drinking water services in Bolivia's third largest city, Cochabamba. This well-known case began with the signing of a $2.5 billion contract with the Aguas del Tunari consortium, granting the latter an exclusive 40-year operating concession on Cochabamba's newly privatized water delivery and treatment system. In short order, the company raised its rates to the poorest consumers by 43%,[100] causing a popular uprising, strikes and demonstrations. The movement spread throughout the country, leading to widespread denunciations of the country's economic situation. The Bolivian government brought in the army and the police, and even declared a state of emergency in order to repress the opposition and protect the Aguas del Tunari facilities. Hundreds of Bolivians were arrested and a young man was killed in clashes with the army. In April 2000, the company withdrew and the government assigned the concession to a coalition of local NGOs. A little over a year later, Bechtel resorted to the dispute settlement mechanism provided by a bilateral agreement between Bolivia and the Netherlands (the consortium had transferred its head office to that country in the interim). The company demanded $25 million

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[99] *Metalclad v. United Mexican States*, *supra* note 59. For a detailed legal analysis, see L.J. Dhooge, "The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States" (2001) 10 *Minn. J. Global Trade* 209.

[100] Source: The Democracy Center, http://www.democracyctr.org/bechtel/waterbills.

in compensation from the Bolivian government for expropriation of its investments and ensuing loss of potential profits caused by the revocation of its contract.[101]

By privatizing this essential service without ensuring that the company would implement a non-discriminatory pricing policy, Bolivia constrained its capacity to fulfill its obligations under ICESCR Article 11 (the right to an adequate standard of living) and Article 12 (right to the enjoyment of the highest attainable standard of health) since, as the CESCR recognized in its General Comments No. 6 (1995) and No. 15 (2002), the right to water is essential to the realization of the two articles.[102] More specifically, the state has the obligation "to prevent third parties from interfering in any way with the enjoyment of the right to water" and to "[adopt] the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water." Furthermore, "Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water."[103] When La Paz reversed its decision on privatization in response to the pressure exerted by the population of Cochabamba, the corrective measures it implemented ran counter to its commitments under international investment law.

Conclusion

There is clearly positive law in the spheres of both international investment law and international human rights law. By virtue of the *pacta sunt servanda* principle, states that have consented to these norms must, in good faith, fulfill their obligations ensuing from this positive law (*jus cogens* provisions constitute an exception, of course, in that they bind states

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[101] Bechtel v. Bolivia, CIRDI no. (ARB/02/3).

[102] Committee on Economic, Social and Cultural Rights, *The Right to Adequate Food.* General Comment 12, Doc. UN E/C.12/1999/5.

[103] Committee on Economic, Social and Cultural Rights, *The Right to Water*. General Comment 15, Doc. UN E/C.12/2002/11.

without the need for consent). Thus, these provisions do not signify a "loss" of sovereignty, as is often believed, but an *exercise* thereof.[104] However, this sovereignty was expressed differently when deciding on the specific means to be used to concretize these commitments or, in other words, when implementing mechanisms to sanction defaults. Indeed, the difference between the mechanisms established in human rights law and investment law is a major problem with the relationship between these two bodies of law. While the investment agreements enable investors to sue states that impede the full enjoyment of an investor's property, international human rights treaties provide weak or non-existent remedies to citizens, however grave the violations.

This first set of comments leads us to an initial question: What was the real intent of the "legislator" — in international law, the community of states or, at any rate, the strongest or most hegemonic among them — when it made the law? It is clear that precedence was given to the interests of investors over those of citizens. This is manifested by an extremely powerful and effectively enforced body of investment law, on the one hand, and a body of human rights law with useful normative content but lacking in effective enforcement mechanisms, on the other.

One way to start addressing the current puzzle involved in the duality of sometimes contradictory international legal commitments is to go back to one of the original motivations for the creation of both legal regimes, that is, how to promote sustainable development. Arjun Sengupta, UN Independent Expert on the Right to Development, reminds us of the challenge of implementing the right to development as a basic framework to guide international cooperation and policy design:

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[104] It hardly seems necessary to recall the famous passage from the Permanent Court of International Justice decision in the Wimbledon case: "The Court declines to see, in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. No doubt any Convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right to enter into international engagements is an attribute of State sovereignty." *S.S. Wimbledon (Gr. Brit., Fr., Italy, Japan, Pol. v. Ger.),* 1923 P.C.I.J. (ser. A) No. 1.

> *"Recognizing the right to development as a human right raises the status of that right to one with universal applicability and inviolability. It also specifies a norm of action for the people, the institution or the state and international community on which the claim for that right is made. It confers on the implementation of that right a first-priority claim to national and international resources and capacities and, furthermore, obliges the state and the international community, as well as other agencies of society, including individuals, to implement that right. The Vienna Declaration not only reaffirmed that the promotion and protection of such a right "is the first responsibility of Governments," but also reiterated the commitment contained in Article 56 of the Charter to take joint and separate action, stating specifically: "States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development"*[105]

Within the framework of the right to development or otherwise, reviewing the (in)compatibility of these different bodies of international law and designing innovative means to ensure that international investment law does not compromise respect for human rights obligations are an urgent task. This paper is but one modest contribution to the ongoing effort to strike a new balance in international law, a balance that would permit more cohesiveness and ensure that the development of each society is based on the core objective of respecting, promoting and realizing the human rights of all its citizens.

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[105] Arjun Sengupta, "On the Theory and the Practice of the Right to Development" Human Rights Quarterly 24 (2002) p. 845-846.