

Copyright (c) 1996 University of Miami

The University of Miami Inter-American Law Review

Winter, 1996-97

LENGTH: 8838 words

COLLOQUIUM PROCEEDINGS: PANEL TWO: HUMAN RIGHTS IN INTERNATIONAL ECONOMIC LAW: LOCATING LATINAS/OS IN THE LINKAGE DEBATES

ELIZABETH M. IGLESIAS *

BIO:

* Professor of Law, University of Miami School of Law.

SUMMARY: ... My comments today are designed to map a preliminary field of analysis through which to begin articulating a LatCrit perspective on international law. ... These four models are reflected in (1) U.S. statutes imposing labor rights conditionality on developing countries seeking preferential access to U.S. markets; (2) the regional arrangement embodied in the North American Agreement on Labor Cooperation (NAALC), otherwise known as the NAFTA Labor Side Accord; (3) the U.S. embargo of Cuba, read as an effort to promote the so-called right to democratic governance; and (4) proposals to link the enforcement of international human rights to the decision-making processes of the World Bank. ... Viewed as an example of the fourth linkage model, the proposal offers yet another perspective on the way human rights linkages may impact and be affected by the concept of state sovereignty. ... The substantial incursions on sovereignty, already apparent in the current international legal order, suggest that the concept of sovereignty operates primarily to retard the struggle to promote the enforcement of international human rights through the development of international economic law, and the focus of LatCrit scholars interested in promoting human rights enforcement must shift from a defense of sovereignty to other alternatives suppressed by dependency discourse. ...

[*361] I. INTRODUCTION

My comments today are designed to map a preliminary field of analysis through which to begin articulating a LatCrit perspective on international law. I begin with the simple observations [*362] that global capitalism and the interstate system are undergoing fundamental restructuring n1 and that this restructuring has already had and will continue to have profound impact on the lives of Latinas/os, both in the United States and in Latin America. n2 To intervene effectively, the LatCrit movement needs to develop the conceptual resources that can help us understand the competing world orders embedded in these processes, assess their implications for the different communities whose common interests we seek to identify and purport to represent, and develop the political alliances we need in order to effect pro-active reforms.

I would like to focus on four models for linking the enforcement of international human rights to the development of international economic law. n3 After briefly describing each linkage model, I explore some of the difficulties involved in attempting to locate Latinas/os in the debates over these linkages or, more precisely, the difficulties involved in identifying a critical perspective from which to evaluate these alternative linkage regimes. Through the discussion of the four models, you will see why this can be a very difficult task. These four models are reflected in (1) U.S. statutes imposing labor rights conditionality on developing countries seeking preferential access to U.S. markets; [*363] (2) the regional arrangement embodied in the North American Agreement on Labor Cooperation (NAALC), otherwise known as the NAFTA Labor Side Accord; (3) the U.S. embargo of Cuba, read as an effort to promote the so-called right

to democratic governance; and (4) proposals to link the enforcement of international human rights to the decision-making processes of the World Bank.

The difficulties begin with the observation that each linkage regime offers a different legal trajectory for the future world order, spanning an imaginary continuum of possibilities. At one end, the failure to devise effective linkages may contribute to or reflect, or both, a complete capitulation of international law and the nation-state to the processes of anarcho-capitalism. At the other end, the struggle for increasingly effective and comprehensive linkages may promote processes that might eventually produce a one world government. The contest between these alternative trajectories for global governance, in turn, bears directly on the prospects for eliminating Latina/o poverty as well as for the continued viability of many Latin cultural traditions and identities, both in the United States and Latin America. n4

These difficulties are further exacerbated by the concerns and commitments LatCrit scholars have inherited from the RaceCrit movement--most specifically, concerns about the theoretical and practical impact of "essentialism" in legal discourse and a commitment to explore and identify the differences, as well as the commonalities within and between subordinated groups. n5 That LatCrit theory should focus on international law makes particularly good sense given the impact of international processes and regime structures on Latin communities; however, [*364] for LatCrit scholars, the debate over different human rights linkage regimes must be located within a broader debate over the normative commitments of the LatCrit movement.

Proposals to enforce human rights through the institutions and procedures established by international economic law are designed to change the conditions of production, investment, and trade in order to achieve specific substantive ends, such as increased respect for workers' rights to organize and bargain collectively, and rights to democratic participation, to food, and to a healthy environment. These substantive ends are controversial, and not all Latinas/os are similarly situated in relation to the economic arrangements, political institutions, cultural processes, and interstate structures that would be transformed by different linkage regimes designed to achieve these ends.

On the contrary, Latinas/os occupy many different positions in national and international structures of class, race, and gender hierarchy, just as different Latin communities occupy different positions in relation to the political processes of the state and the historical processes of colonialism and American expansionism. n6 These differences underscore the importance of identifying the points of reference, that is, the perspective from which the LatCrit movement will be "critical." Put differently, the antiessentialist imperative does not derive from some abstract philosophical ideal, but rather from the imperative of practical politics, that is, the need to find the appropriate starting point from which to construct effective alliances, to coordinate advocacy, and to promote progressive reforms. n7

After briefly describing the four linkage models, I proceed into this quagmire of multiple (and apparently incommensurable) Latina/o interests and identities by proposing to read these differences as artifacts of the way different discourses encourage Latinas/os to identify our interests and construct our political [*365] identities. I organize my analysis of the four linkage models around three distinct but interrelated discourses, which I call "development," "dependency," and "neoliberalism." Each discourse offers different points of reference from which to assess these four linkage regimes because each discourse identifies distinct institutional structures and social relations as the source of the problem of Latina/o political and economic subordination.

The competing ways in which these different discourses would constitute our critical perspectives and organize our political alignments suggests that the most promising starting point for LatCrit theory is in recognizing that, as *individuals*, Latinas/os often experience our interests and identities as fragmented by the conflicting ways we find ourselves positioned in various networks of intersecting social relations constructed around the hierarchies of race, class, and gender. n8 Because most of us experience some form of both privilege and oppression, the positions we embrace as our political identities are, to a

significant extent contestable. The likelihood that any of us will define our interests through one identity position or another is as much a product of the political alignments and normative commitments we decide to prioritize, as it is a product of the privileges we might seek to preserve. n9

In short, proposals to promote the enforcement of human rights through the procedures and institutions of international economic law, like any other reform proposals, tend to promote different political alignments among Latinas/os depending on the discourse through which these linkages are represented. My approach is designed to bring to the foreground the relations of privilege and oppression that would be reinforced by adopting the critical perspective expressed in each of the three discourses I examine given the priorities each discourse establishes. Two things follow. The first is that understanding how to maneuver through these various discourses is a crucial step in combating the manipulation of common interests and differences that might otherwise prevent LatCrit scholarship from developing an effective [*366] critique of the international processes that are reconstructing the world we inhabit. The second is a call to conscience. One of the most important contributions LatCrit scholarship can make is to keep reminding us that after all the discourse and debate, the critical perspectives we assume are simply reflections of the priorities we embrace.

II. FOUR MODELS FOR ENFORCING HUMAN RIGHTS THROUGH INTERNATIONAL ECONOMIC LAW

Each linkage model would be a good point of departure for a more comprehensive analysis of the relationship between human rights enforcement, development objectives, interstate relations, and international economic law. Nevertheless, because my primary purpose here is to illustrate how different linkage models would be analyzed through the discourses of development, dependency, and neoliberalism, my discussion of these four regimes will be general and schematic.

A. Labor Rights in United States Trade Preference Regimes: Unilateral Conditionality

The United States has various statutes conditioning trade relations on foreign compliance with unilaterally designated labor rights. Most of these statutes are aimed at developing countries seeking preferential access to U.S. markets. n10 The first [*367] preference scheme to incorporate labor rights conditionality was the Caribbean Basin Economic Recovery Act (CBERA), enacted in 1983 to implement President Reagan's Caribbean Basin Initiative (CBI). n11 In 1984, the General System of Preferences Renewal Act added labor rights provisions to the General System of Preferences (GSP). n12 More recently, in 1991, labor rights conditionality was incorporated into the Andean Trade Preference Act of 1991. n13

These trade preference programs are designed to promote investment and economic growth in developing countries by granting designated articles from beneficiary countries duty-free entry into the U.S. market. The theory is that duty-free entry will provide exports from beneficiary countries significant cost-advantages over competing articles from non-beneficiary countries, thus generating greater sales in the United States and increased production and investment in the beneficiary countries. Because the labor conditionality provisions in these trade preference statutes are defined by reference to the GSP Renewal Act of 1984 provisions, I will limit by discussion to the labor rights provisions and enforcement mechanisms established by the GSP. n14

[*368] The General System of Preferences Renewal Act conditions country eligibility, among other things, on a presidential certification that the beneficiary country is "taking steps" to enforce five "internationally recognized worker rights." n15 The Act defines "internationally recognized workers rights" to include the following five labor rights: 1) the right of association; 2) the right to organize and bargain collectively; 3) prohibitions on the use of forced or compulsory labor; 4) a minimum age for employment; and 5) acceptable conditions of work, including minimum wages and hours, and occupational safety and health. n16 Although these five rights are designated "internationally recognized," the list excludes such fundamental labor rights as the right to be free from employment discrimination and includes

other worker rights not deemed fundamental, at least not by the International Labor Organization (ILO).
n17

The GSP statutory scheme sets up complaint and review procedures administered by the United States Trade Representative (USTR). n18 The GSP enforcement mechanism is organized primarily around an Annual Review process conducted by the GSP Subcommittee, an interagency committee constituted by representatives from the Departments of State, Commerce, Agriculture, and Treasury. The Subcommittee accepts petitions from interested parties seeking removal of beneficiary countries because of their worker rights violations. It reviews these petitions [*369] in two phases. The first phase involves a preliminary determination whether the petition meets the regulatory standards for review. n19 The second phase involves a review of the merits of the petition and an investigation of the labor practices of the country at issue. n20 Following review, the Subcommittee makes recommendations to the full Trade Policy Staff Committee, which in turn makes recommendations to the President. n21 Significantly, these review proceedings are not conducted pursuant to the Administrative Procedure Act nor are the President's final decisions subject to judicial review. n22

B. The North American Agreement on Labor Cooperation: A Multilateral Rights Regime

The North American Agreement on Labor Cooperation (NAALC) is the labor accord portion of the NAFTA. n23 In the debate over alternative models for linking human rights to enforcement of international economic law, the GSP model of labor conditionality is often compared to the labor rights regime established [*370] by the NAALC. n24 This is, in part, because the NAALC may eventually replace the GSP labor rights regime, particularly if and when other countries in the region begin to accede to the NAFTA. n25 Equally important, the GSP and the NAALC are worth comparing because they represent two very different linkage models.

In the GSP model, the linkage is effected through the imposition of labor standards that have been unilaterally defined by the U.S. Congress and are interpreted and enforced through the nonjusticiable determinations of the U.S. executive branch. The NAALC, by contrast, is an international agreement among the three state parties to the NAFTA which, in deference to state sovereignty, begins by "affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards," n26 and ends by establishing a nonenforcement mechanism, whose sanctions can be invoked in cases involving only three of the eleven labor standards the parties have agreed to promote "to the maximum extent possible." n27

The NAALC identifies eleven "labor law matters" and sets up a three-tiered system of review. The first tier establishes procedures limited to review and consultation. Three of the eleven labor rights cannot progress beyond this initial tier. These three rights are the right of association, the right to organize and bargain collectively, and the right to strike. Viewed as a linkage regime, the first tier of the NAALC provides minimal enforcement for these fundamental labor rights. Violations can be reviewed by another party's National Administrative Office and are subject to consultation by the Labor Ministers upon the request of a state party; however, but there is no authority established to sanction such violations. These limitations reflect the [*371] operative impact of the concept of sovereignty in the negotiation of the NAALC linkage regime.

The other eight labor rights are designated "technical labor standards" and concern forced labor, child labor, minimum wage and hour standards, employment discrimination, equal pay for men and women, job health and safety, workers' compensation for occupational injuries and illnesses, and protection of migrant workers. Technical labor standards are subject to evaluation and recommendations by an Evaluation Committee of Experts (ECE).

Although the NAALC provides for fines or suspension of trade benefits under NAFTA, these penalties can only be imposed after dispute resolution procedures, involving extensive consultation, have failed.

Moreover, of the eight labor standards that can proceed beyond the first tier of review, only three of the standards, child labor, health and safety, and minimum wage and hour standards, can proceed to dispute resolution and possible sanctions.

C. The U.S. Embargo of Cuba: The Human Right to Electoral Democracy and a Market Economy

If a comparison of the GSP model of labor rights conditionality and the NAALC regime provides a useful point of reference for examining the pros and cons of unilaterally imposed versus multilaterally negotiated linkage regimes, the U.S. embargo of Cuba adds a few more perspectives on the debate. The U.S. embargo against Cuba might be viewed as a model for linking trade and investment policies to the enforcement of human rights generally and the right to democracy in particular. Certainly, that is the embargo's stated purpose and objective. n28 Viewed from this perspective, the U.S. embargo highlights many of the broader issues and concerns LatCrit theory must address in determining whether and how to link human rights enforcement to the processes and institutional arrangements of international economic law. This is precisely because even as the U.S. embargo reflects the unilateralism of the GSP labor conditionality model, it vastly exceeds the scope of labor conditionality, both in terms of the [*372] conditionality it imposes and the enforcement mechanism it deploys.

In the most recent manifestation of the U.S. embargo, the Cuban Liberty and Democratic Solidarity Act of 1996 conditions the suspension of the embargo on a Presidential determination that a "transition government" is in power in Cuba. n29 Moreover, until such transition government is replaced with a "democratically elected government," any suspension of the embargo is subject to reversal upon the enactment of a joint congressional resolution. n30 The Act establishes eight specific requirements n31 and four additional factors n32 for determining when [*373] a transition government is in power in Cuba. In a similar manner, it establishes six requirements for determining when a democratically elected government has been elected. n33

As conditions precedent for suspending the embargo, these requirements represent much more extensive interventions in the internal domestic political and economic processes of the Cuban state than either the GSP or the NAALC. First, the scope of conditionality is expanded far beyond the obligation to respect internationally recognized or multilaterally negotiated labor standards to the very political form of the Cuban state and the organization of the Cuban economy into a market-oriented economic system based on the right to property. n34 Second, these conditions are imposed through the unilateral enforcement of a broad economic embargo as compared to the denial of a trade preference under the GSP or the suspension of a trade benefit or fines under the NAALC.

Aside from underscoring the question of the kinds of rights that might be subject to enforcement through alternative linkage [*374] regimes, the unilateralism embedded in the U.S. embargo of Cuba raises an additional set of problems. This is because the means used to promote respect for human rights in Cuba, the embargo, has itself been declared illegal under international law on the grounds that it impinges both on Cuban sovereignty and on the freedom of third party states to trade with Cuba. n35 The persistence of the United States in maintaining and even tightening its illegal embargo suggests that the most important analysis may begin with the question of how to ensure that any future linkages reflect an international consensus or, lacking that, a normatively defensive world order model rather than simply reflecting the geopolitical and economic interests and ideologies of politically dominant groups in the most powerful states. n36

D. International Organizations: The World Bank and the Human Right to Development

The fourth and final linkage regime shifts the frame of reference from nation-states to the activities of international organizations. This shift introduces an entirely new perspective on some of the most crucial debates triggered by proposals to link human rights enforcement to the development of international economic law. Viewed through the framework of the first three linkage models, state sovereignty appears

as a fundamental, though perhaps inevitable, limitation on the prospects for devising and implementing effective human rights linkages. Viewed through the prism of this fourth model, however, securing respect for basic human rights in the policies and practices of international organizations is probably the last hope and most [*375] promising way to begin achieving effective sovereignty for developing countries. This is because this fourth model emphasizes the extent to which human rights violations are generated by the policies developing countries must often implement in order to comply with the conditions imposed by organizations like the World Bank and the International Monetary Fund (IMF) (organizations dominated, not insignificantly, by developed countries). By regulating the policies and projects these institutions can impose on developing countries as well as the procedures through which they operate, human rights linkages can be instruments for promoting effective sovereignty, democratization, and sustainable development.

I would like to describe one proposal that fits nicely into this fourth model. Professor Jim Paul of the Rutgers School of Law-Newark has written extensively about the human right to development, a right asserted in the United Nations General Assembly Declaration of December 1986. n37 Conceptualizing development as "a diverse aggregate of activities carried on by a huge international industry," Paul focuses on the impact development projects have had on the basic human rights of affected communities. n38 These projects, often implemented through a combination of legal maneuvers, pay-offs, co-optation of local elites and outright coercion, routinely produce development victims. Projects to construct large scale dams, commercial farming and irrigation projects, ranching, tourism, and the development of industrial zones have produced hundreds of thousands of displaced persons. Victims of development displacement are, in many instances, subjected to involuntary resettlement. Herded into poorly planned and managed resettlements, they suffer "disease, hunger, loss of livelihood, loss of self-reliance" and rarely receive adequate compensation for the forcible removal from their lands and property. n39

Rather than attempting to elaborate the substantive meaning of development, Paul conceptualizes the human right to development as the right to enjoy the fundamental human rights articulated in the Universal Declaration and other international [*376] human rights instruments. Thus, the realization of basic human rights, in and through the process of development, becomes the essence of the Human right to development. This, in turn, imposes on development actors the obligation to respect basic human rights in designing and implementing development projects. For Paul, the most important right implicated in the development process is the right of participation. "The denial of full and effective rights of participation in project activities constitutes not only a violation of fundamental political rights central to our concepts of human rights, but also leads directly to the violation of other basic rights." n40

By defining the Human right to development as the realization of internationally recognized basic human rights, Paul's formulation avoids the rhetorical traps that might otherwise be triggered by the suggestion that the peoples of the world have a right to development. n41 By focusing on the way these rights are incorporated into the process of development and the practices of development actors, Paul's formulation legitimates the kinds of grassroots mobilization necessary to assure affected communities effective participation in and monitoring of the interventions through which they are being developed.

Viewed as an example of the fourth linkage model, the proposal offers yet another perspective on the way human rights linkages may impact and be affected by the concept of state sovereignty. Like proponents of labor conditionality and the U.S. embargo as well as critics of the NAALC regime, Paul's formulation of the human rights problem positions itself against the concept of sovereignty because this concept has often been deployed by developing country governments to shield their participation in development wrongs. Nevertheless, by recognizing that human rights obligations govern international economic organizations [*377] (not just developing country governments) and explicitly limiting the purposes for and conditions under which international organizations may conduct activities in developing countries, Paul's formulation of the Human right to development provides a glimpse of the kinds of linkages that might help address human rights violations generated by the structures and processes of the international political economy.

This is particularly true if the Human right to development produces effective procedural mechanisms through which affected communities may challenge the human rights implications of investment decisions, financial policies, and other activities of international economic organizations, such as the World Bank, the IMF, and the World Trade Organization.

III. THREE DISCOURSES FOR LOCATING LATINAS/OS IN THE LINKAGE DEBATES

Now that I have introduced these four models for linking human rights enforcement to the procedures and institutions of international economic law, I will suggest some of the difficulties involved in developing a critical perspective from which to assess the implications of these different models for Latinas/os and the various communities we comprise. I will do this by organizing my analysis of these linkage models around the critical perspectives offered by the three discourses I have already mentioned. The discourses of development, dependency, and neoliberalism each offer different points of reference from which to evaluate these alternative linkage models because each discourse identifies different institutional arrangements and social relations as the source of the problem of Latina/o political and economic subordination. Moreover, while each discourse invites its exponents to assess proposed linkages in terms of their likelihood of marshaling the rule of law to deal with their particular version of the problem, each discourse is contested both internally, through alternative representations of the problem of subordination, and externally through the deployment of other competing discourses.

A. Development: Discourse and Counter-Discourse

By the term development discourse, I refer to a cluster of arguments and representations that organize our understandings [*378] of the causes and cures of Latina/o economic and political subordination around accounts linking subordination to underdevelopment and underdevelopment to the persistence of social practices, relations, and expectations that are represented as elements of Latin culture. n42 In the United States, this discursive construction appears in the deployment of "culture of poverty" arguments to explain the poverty and marginalization of Latin communities. In Latin America, this formulation is used to support arguments that the solution to economic and political subordination is to promote the assimilation of Western capitalist cultural values and to increase the transplantation of Western capitalist modes of production, socio-political organization, and legal institutions. n43 Since arguments for and against human rights linkages are often articulated through the deployment of development discourse, n44 it is important to approach this discourse critically. In a longer work in progress, I take a critical look at the cultural imperialism embedded in formulations linking development to the absorption of Western cultural values, economic arrangements, and political structures, paying particular attention to the way Latina/o identities are positioned and alternative development trajectories are suppressed by these formulations. [*379] More specifically, I examine the way this discourse links underdevelopment to the representation of the Latin subject as a premodern subject and Latin political culture as embedded in hierarchical and authoritarian traditions.

Clearly, these representations are operative in debates over the appropriateness of U.S. unilateralism, justifying measures ranging from the labor rights conditionality of the GSP to the embargo of Cuba. It is also clear that these representations help construct a sense of the rightness and necessity of these measures, which, in turn, tends to distract us from the implications of such unilateralism. Combating these representations is thus the first step toward redirecting our attention. To combat them, I begin by deploying an account of the postmodern subject of anarchocapitalism. If Latin subjects are embedded in a premodern culture that prevents them from being integrated into the modern world of free market enterprise and pluralistic democracy, the postmodern subjects of anarcho-capitalism are fragmented and disorganized across a culture of consumerism and alienation. Similarly, I combat the representation of Latin interventionist state as authoritarian and antidemocratic through an account of Western representative democracy as a gridlock of special interest factions. The possibility suppressed by a formulation that glorifies the sePtion of powers and identifies the interventionist state as "the problem" is the emergence of a

"democratic hard state," that is, a state that integrates political legitimacy and the effective power to regulate economic activity, tax private property, and redistribute. n45

What I suggest today is that analyzing the linkage debate through mainstream development discourse is problematic because this discourse presupposes that human rights linkages can undo the socio-economic, cultural, and political impact of the [*380] trade agreements and investment decisions to which the rights are linked. Indeed, what the counter-discourses of development help underscore is that even the most effective human rights enforcement mechanisms will not produce a higher level of human rights enjoyment if the international political economy continues to produce political marginalization and systemic poverty for the majority of the world's peoples. The idea that poverty will be alleviated through the assimilation of Western economic and political models simply ignores the extent to which "the Third World" has already been assimilated into the political economy of global capitalism, and the extent to which Third World poverty (and the authoritarian state) are artifacts of that assimilation. n46 Human rights linkages cannot undo structurally generated poverty, particularly not when the meaning of poverty and development are themselves contested. n47

B. Dependency: Discourse and Counter-Discourse

Dependency discourse provides a second perspective on the linkage debate. By the term dependency discourse I refer to a cluster of arguments and representations that organize our understandings of the political and economic subordination of Latin peoples by linking this subordination to the inequality of Latin [*381] American states within the interstate system. Interstate inequality is, in turn, linked to various accounts of the historical processes and structural arrangements through which colonial expansion and neo-colonial relations have rendered Third World sovereignty a legal illusion.

By linking the elimination of subordination to a defense of state sovereignty, dependency discourse tends to encourage Latinas/os to identify their common interests and construct their political alliances in ways that ignore the relations of privilege and oppression that are organized around differential access to the state. The defense of sovereignty is a double-edged sword precisely because not all Latina/o communities have equal access to or control over the state apTus, either in the United States or in Latin American countries. Put differently, the critical perspectives organized through dependency discourse tend to ignore the way that conditions of subordination experienced in Latina/o communities are linked to the different positions these communities occupy in relation to the state. They also tend to ignore the extent to which these differences might become even more entrenched if the defense of sovereignty were ultimately successful.

Second, by defining the lines of Latin solidarity around a defense of sovereignty, dependency discourse also tends to suppress the critical perspectives that might help to mobilize Latina/o legal and political opposition to the current structure of the interstate system. Latinas/os in the United States know (or should know) that both the terms of their immigration and their current relationship to the U.S. state are historically and legally linked to the nature of the political relations between the United States and their nations of origins. n48 What is not so obvious, however, is the extent to which the interstate system of unequally powerful nations states is both produced by and central to the processes of uneven development, and the extent to which uneven development is produced by and central to the reproduction of international capitalism, as it is currently organized. n49 By organizing [*382] Latin political alignments around a defense of sovereignty, dependency discourse tends to suppress the possible emergence of a more transformative struggle against the processes of uneven development, both in the United States and throughout Latin America.

These points can be illustrated by examining the way dependency discourse intervenes in the debate over different arrangements linking human rights enforcement to international economic law. In this context, our assessments of the human rights linkage are made to depend on how such linkages impact Third World sovereignty. Linkages that promote respect for the sovereignty of Third World states or that compensate for the weakness produced by dependency are viewed approvingly, while linkages represented as incursions on

Third World sovereignty are viewed critically. These judgments are, in turn, justified by different accounts of the way preserving sovereignty promotes the human rights of Third World peoples. n50

In dependency discourse, state sovereignty is at best a meaningless legal category in a world of unequal states and multinational business organizations, whose economic power and hypermobility make regulation difficult, if not impossible for dependent states. However, dependency discourse tends to suppress recognition of the fact that even the powerful core states have been unable to prevent substantial inroads on their sovereignty, limitations that reflect the interests of the most powerful players in the increasing globalization of production, investment, and exchange, as well as domestic elites. n51

[*383] The substantial incursions on sovereignty, already apparent in the current international legal order, suggest that the concept of sovereignty operates primarily to retard the struggle to promote the enforcement of international human rights through the development of international economic law, and the focus of LatCrit scholars interested in promoting human rights enforcement must shift from a defense of sovereignty to other alternatives suppressed by dependency discourse. n52 One alternative trajectory is international trade legalism. n53 Rather than equalizing nation states, respect for human rights may require their ultimate replacement by an increasingly integrated international legal order that recognizes individuals and stakeholder groups as the subjects of international law at all levels of the international legal system, from norm prescription to dispute resolution.

C. Neoliberalism: Discourse and Counter-Discourse

Neoliberal discourse provides a third perspective on the linkage debate. Like the other two discourses, neoliberalism provides a particular account of the reasons for and solutions to the problems of economic and political subordination of Latinas/os, both in the United States and Latin America. Moreover, like the other two discourses, neoliberalism can be contested internally through alternative representations of the problem of subordination and externally through the deployment of other [*384] discourses. n54

Neoliberalism represents the economic and political subordination of Latina/o communities as artifacts of failed statist policies, inefficient government interventions, market rigidities, and bureaucratic corruption. n55 The solution to subordination is located in reforms designed to free the market from the constraints imposed through these antiliberal policies and institutional arrangements. Accordingly, this discourse organizes political alignments around support for and opposition to the policies of structural adjustment, flexibilization (e.g. short-term labor contracts), deregulation, and privatization, as well as retrenchment in government welfare programs, in short, the package of reforms promoted as "the Washington Consensus." n56

Neoliberal discourse and policies tend to encourage Latinas/os to embrace political identities and construct alliances around their positions within domestic and international class structures. This is because the impact of neoliberal policies, that is the way they are experienced by different groups of Latinas/os, depends on the way these groups are positioned in the markets that neoliberalism seeks to free. This is easy to see, while Latina/o workers and business elites might find a common base of solidarity in nationalistic opposition to development practices and dependency relations, neoliberal reforms tend to exacerbate interclass differences, pitting Latina/o business elites against workers and other groups that suffer the impact of neoliberal policies. At the same time that neoliberal policies promote interclass [*385] conflict, neoliberal discourse suppresses any recognition of the relationship between the structure of the market and the history of colonialism or the current structure of the interstate system. n57

These points can be illustrated by examining the way neoliberal discourse intervenes in the debate over alternative proposals to link human rights enforcement to international economic law. In this context, our assessments of the human rights linkage are made to depend on how such linkages will impact the operation of the free market. Thus, neoliberal discourse tends to organize opposition to any human rights linkages (whether unilateral or multilateral), arguing that the level of human rights in a country is, and

should be, dependent on the level of wealth and capital accumulation. Put differently, neoliberals argue that Third World countries must achieve a certain level of wealth before they can be reasonably held to international standards of human rights. Efforts to impose human rights on Third World states are attacked as a form of disguised protectionism. n58 Of course, this position generates its own counterposition, namely that respect for human rights is a condition precedent to organizing a viable market economy. n59 Indeed, the argument is that Third World countries will remain susceptible to the cycles of military authoritarian dictatorships, government takeovers, and civil war, all of which destroy the free market, until respect for [*386] basic human rights is secured in these countries.

From a different perspective, the neoliberal ideal can be contested by examining the extent to which it is grounded on the right to property, the scope of that right and the enforcement regimes such a discourse could sustain. In other words, would the steps taken to protect the right to property under the Cuban Liberty and Solidarity Act compare favorably or unfavorably to the steps that might have to be taken to secure adequate compensation for the indigenous communities displaced from their communal lands by World Bank development projects?

The linkage debate implicates issues that need to be debated through a number of theoretical models. Developing a program of action and advocacy depends first on understanding how this debate can promote different alliances and confrontations between different segments of the Latina/o population, depending on the discourse through which alternative linkages are represented. Understanding how to maneuver through these various discourses is thus a first step toward combating the manipulation of Latina/o political identities and alliances. Nevertheless, the ultimate goal must be to confront on a normative and practical basis the question of the political identities through which the LatCrit movement should intervene in developing the intersection of international human rights and international economic law.

FOOTNOTE-1:

n1 See generally Elizabeth M. Iglesias, *La Transformacion Economica y El Movimiento Obrero Estaounidense [Economic Crisis and the United Labor Movement]*, 4 EL OTRO DERECHO 5-29 (1992) (exploring two different accounts of the current economic crisis and the need to promote international labor solidarity focused on the policies and procedures of economic institutions and legal regimes like the GATT and the IMF).

n2 See IN THE BARRIOS: LATINOS AND THE UNDERCLASS DEBATE (Joan Moore & Raquel Pinderhuges eds., 1993) (exploring the impact of economic restructuring on different Latino communities in the United States). See generally Michael Knoll, *Perchance to Dream*, [66 S. CAL. L. REV. 1599 \(1993\)](#) (discussing the effect of economic globalization on domestic income distribution and the disappearance of the middle class). For accounts of the impact of economic restructuring on Latinas/os in Latin America, see Manuel Fuentes Muniz, *The Nafta Labor Side Accord in Mexico and Its Repercussions for Workers*, [10 CONN. J. INT'L L. 379 \(1995\)](#) (examining the impact of U.S. style of industrialization on Mexican workers); Efen Cordova, *The Challenge of Flexibility in Latin America*, [17 COMP. LAB. L.J. 314 \(1996\)](#).

n3 The four models I examine do not exhaust the legal regimes, actual and proposed, through which the enforcement of human rights could be linked to the procedures, substantive norms, and institutional arrangements of international economic law. Nevertheless, these four models do provide a useful point of reference for making some important observations about the need to integrate human rights enforcement into the domain of international economic law and the issues at stake in the different regime structures through which such integration might be

effected. In any event, my comments are offered as reflections on the kind of issues a more systematic analysis will need to elaborate.

n4 See, e.g., Lea Brilmayer, *Trade Policy: The Normative Dimension*, 25 N.Y.U. J. INT'L L. & POL. 211, 216-17 (1993) (noting that free trade may undermine a "particular way of life" and that in some countries there is a "general interest in preserving local culture which extends beyond the narrow economic benefit to certain sectors").

n5 "Essentialism" means different things in different contexts. Here it is a label applied to the claim that a particular perspective reflects the common experiences and interests of a broader group. It is generally deployed by individuals and sub-groups seeking to resist the suppression of intragroup differences. See, e.g., Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and NLRA. Not!*, [28 HARV. C.R.-C.L. L. REV. 395 \(1993\)](#) (challenging the way the class essentialism embedded in American labor laws and the race essentialism embedded in the employment discrimination laws interact to produce a pattern of legal decisions that systematically ignore the collective interests and suppress the transformative agency of women of color in the workplace).

n6 See IN THE BARRIOS, *supra* note 2, at xvi-xx (linking differences among Puerto Rican, Cuban, and Mexican-American communities in the United States to their different positions in the history of American economic and political expansion).

n7 Robert Meister identifies the crucial questions an anti-essentialist scholarship can help to answer: "How [do] certain group identities within a political system provide a perspective from which it is possible to make claims against it? Why do certain social roles form the basis of group identities around which political mobilization becomes possible? How do the conflicts of group interests that are produced by public policy enter into the creation of those group identities that form the basis of political regimes?" ROBERT MEISTER, *POLITICAL IDENTITY: THINKING THROUGH MARX* 220 (1990).

n8 See, e.g., Elizabeth M. Iglesias, *Structures of Subordination*, [28 HARV. C.R.-C.L. L. REV. 395 \(1993\)](#) (showing how the interpretative practices at the intersection of Title VII and the NLRA construct a network of institutional arrangements that fragment women of color across the political identities of race, class, and gender).

n9 See Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 14 THEORY & SOC'Y 723 (1985) (identifying intersectionality of individual identities as a crucial indeterminacy because it creates the space for political realignments).

n10 For an example of a U.S. statute imposing labor rights standards outside the context of preferential trade arrangements, see the Overseas Private Investment Corporation Amendments Act of 1985, § 5, [22 U.S.C. § 2191a](#) (1988)(current version at [22 U.S.C.A. § 2191a](#) (West 1990 & West Supp. 1997)). The Overseas Private Investment Corporation [OPIC] is a federally chartered corporate agency of the U.S. government established to foster development in the Third World by providing insurance and financing to private investors at favorable rates. [22 U.S.C. § 2191](#) (1994). The laws governing OPIC restrict participation in projects to countries whose governments are taking steps to adopt and implement laws that extend internationally recognized workers rights to workers in that country. [22 U.S.C.A. § 2191a](#) (West 1990 & West Supp. 1997). The OPIC statute defines internationally recognized labor rights by reference to the General System of Preferences Renewal Act of 1996, § 1952, [19 U.S.C.A. § 2467](#)(4) (West Supp. 1997). [22 U.S.C.A. § 2191a](#)(a)(1) (West Supp. 1997). See also Section 301 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, as amended by the Omnibus Trade and Competitiveness Act of 1988. Section 301 incorporates the denial of internationally recognized

workers rights into the definition of "unreasonable" acts, policies, or practices that may constitute "unfair trade practices," thus triggering retaliatory action by the United States. *See* WORKERS RIGHTS UNDER THE U.S. TRADE LAWS (Lawyers Committee for Human Rights ed., 1988).

n11 Caribbean Basin Economic Recovery Act of 1983, [19 U.S.C. §§ 2701-7](#) (1988)(current version at [19 U.S.C. §§ 2701-7](#) (1994)). The Act established seven mandatory and eleven discretionary criteria for determining country eligibility. *Id.* § 2702(b)-(c). The labor rights provision was one of the discretionary criteria authorizing the President to take into account "the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the rights to organize and bargain collectively." *Id.* § 2702(c)(8). The 1983 Act was amended by the Caribbean Basin Economic Recovery Expansion Act of 1990, [19 U.S.C. §§ 2701-7](#) (1994). Under the 1990 Act, labor rights conditionality is one of the mandatory criteria for eligibility. *Id.* § 2702(b)(7). The President may not designate any of the 27 countries as a beneficiary country if it does not take adequate steps to afford internationally recognized worker rights. *Id.*

n12 General System of Preferences Renewal Act of 1984, [19 U.S.C. § 2461](#) (current version at [19 U.S.C.A. § 2461](#) (West Supp. 1997)). The General System of Preferences [GSP] program was established by Section 502 of the Trade Act of 1974, Pub. L. No. 93-618, § 1, 88 Stat. 1978 (codified at [19 U.S.C.A. § 2101](#)) (West. Supp. 1996), extended through 1993 by the General System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, tit. 5, 98 Stat. 3018 (1984), and again by the GSP Renewal Act of 1996, Pub. L. No. 104-188, § 1951, 110 Stat. 1917 (1996). Until the Renewal Act of 1984, the GSP contained no labor rights provision.

n13 [19 U.S.C. § 3202](#)(c)(7)(1994).

n14 For example, the CBEREA, like the GSP, conditions country eligibility on presidential certification that the beneficiary country is "taking steps" to afford its workers "internationally recognized worker rights." In defining these rights, the CBEREA refers specifically to internationally recognized worker rights as defined by the GSP. *See* Jorge Perez-Lopez, *The Promotion of International Labor Standards*, [10 CONN. J. INT'L L. 427, 433-34 \(1995\)](#). OPIC similarly tracks the GSP Renewal Act, [22 U.S.C.A. § 2191a](#)(a)(1), while the ATPA tracks the labor provisions of the CBEREA (which in turn tracks the GSP). *Id.* at 433-34.

n15 [19 U.S.C.A. § 2462](#)(b)(2)(G) (West Supp. 1997).

n16 [19 U.S.C.A. § 2467](#)(4) (West Supp. 1997).

n17 *See* Amy E. Belanger, *Internationally Recognized Worker Rights and the Efficacy of the Generalized System of Preferences: A Guatemalan Case Study*, [11 AM. U. J. INT'L L. & POL'Y 101, 114 \(1996\)](#). According to Belanger, the first three GSP labor rights are fundamental as defined by the ILO. *Id.* at 114 n.58 (noting the applicable ILO Conventions concerning the right to organize and bargain collectively and the prohibition against forced labor). The fourth and fifth rights, while not considered fundamental by the ILO, are supported by various ILO Conventions. *Id.* at 114-15 n.59 (noting the applicable ILO conventions concerning occupational safety, minimum wage, and child labor).

n18 Lance A. Compa, *The First Nafta Labor Cases: A New International Labor Rights Regime Takes Shape*, [3 U.S.-MEX. L.J. 159, 161-62 \(1995\)](#). The Caribbean Basin Initiative [hereinafter CBI] differs from the GSP in that it does not provide for periodic review of a beneficiary's labor practices once the initial determination is made by the President that the government accords the enumerated worker rights to laborers within that country. Further, the CBI statute does not provide for interested parties to petition for review of individual cases of worker rights

violations. Thus, the initial designation of a CBI beneficiary lasts for the duration of the preference program. WORKER RIGHTS UNDER U.S. TRADE LAWS, *supra* note 10, at 33-34.

n19 Regulations of the USTR Pertaining to Eligibility of Articles and Countries for the Generalized System of Preference Program, 15 C.F.R. §§ 2007-2007.8 (1994). This phase lasts from June 1 of each year, the deadline for submitting worker rights petitions, through July 15th, when the Subcommittee announces in the Federal Register the petitions accepted for review. Under the USTR's regulation, the Subcommittee must accept any petition concerning worker rights unless: 1) the petition fails to satisfy the informational requirements of [15 C.F.R. § 2007.0\(b\)](#) or fails to state a worker rights violation within the meaning of the Renewal Act; or 2) the country's practices have been the subject of a previous review and the petition fails to present "substantial new information." *Id.*

n20 Compa, *supra* note 18 at 162 n.20. The Subcommittee draws its information from the labor attache at the American Embassy or Consulate in the country at issue, as well as the regional labor expert at the Department of Labor in Washington. The Subcommittee also conducts public hearings. Interested parties may submit written briefs and responses commenting on the country's worker rights practices. *See* 15 C.F.R. §§ 2007 to 2007.8.

n21 There is an appeal procedure if the Trade Policy Staff Committee fails to reach a consensus and decides the case by majority vote. The dissenting agency may appeal to the Trade Policy Review Group, composed of executive department representatives at the under secretary level. If the dissenter is dissatisfied with the Group's decision on the case, the case is then referred to the Economic Policy Council, composed of Cabinet members, which reviews the case and makes a final recommendation to the President. WORKERS RIGHTS UNDER U.S. TRADE LAWS, *supra* note 10, at 23-24.

n22 As of 1995, the United States has removed or suspended nine countries from the GSP program for worker rights violations: Burma, Central African Republic, Chile, Liberia, Mauritania, Nicaragua, Paraguay, Romania, and Sudan.

n23 North American Agreement on Labor Cooperation, Sept. 8, 1993, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

n24 *See, e.g.,* Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA*, [10 CONN. J. INT'L L. 337 \(1995\)](#) (comparing the pros and cons of the unilaterally imposed conditionality of GSP versus multilaterally negotiated rights regime of the NAALC).

n25 Thus, for example, a GSP petition filed against Mexico in 1993 was rejected in part because "the negotiation of the North American Agreement on Labor Cooperation, as a supplement to the NAFTA, demonstrates Mexico's determination to improve its worker rights and provides the United States with a means for ensuring that Mexico continues to improve its labor standards." *Id.* at 350. Indeed, Mexico is no longer a beneficiary under GSP because the GSP is simply irrelevant to Mexico now that its products will enter the U.S. market under the provisions of NAFTA. *Id.* at 351.

n26 NAALC, *supra* note 23, art. 2.

n27 *Id.*

n28 *See, e.g.,* Cuban Democracy Act of 1992, [22 U.S.C.A. §§ 6001-10](#) (West Supp. 1997); Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, [22 U.S.C.A. §§ 6021-91](#) (West Supp. 1997).

n29 Cuban Liberty and Democratic Solidarity Act, [22 U.S.C.A. § 6064](#) (West Supp. 1997).

n30 *Id.* § 6064(e)(1).

n31 *Id.* § 6065(a). According to the Act: a transition government is a government that has (1) legalized all political activity; (2) has released all political prisoners and allowed for investigations of Cuban prisons by appropriate international human rights organizations; (3) has dissolved the present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades; and (4) has made public commitments to organizing free and fair elections for a new government (A) to be held in a timely manner within a period not to exceed 18 months after the transition government assumes power; (B) with the participation of multiple independent political parties that have full access to the media on an equal basis, including (in the case of radio, television, or other telecommunications media) in terms of allotments of time for such access and the times of day such allotments are given; and (C) to be conducted under the supervision of internationally recognized observers, such as the OAS, the UN and other election monitors; (5) has ceased any interference with Radio Marti or Television Marti broadcasts; (6) makes public commitments to and is making demonstrable progress in (A) establishing an independent judiciary, (B) respecting internationally recognized human rights and basic freedoms as set for in the Universal Declaration of Human Rights, to which Cuba is a signatory nation; (C) allowing the establishment of independent trade unions as set forth in conventions 87 and 98 of the ILO, and allowing the establishment of independent social, economic, and political associations; (7) does not include Fidel Castro or Raul Castro; and (8) has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people. *Id.*

n32 *Id.* § 6065(b). The four additional factors the President shall take into account are the extent to which the government: (1) is demonstrably in transition from a communist totalitarian dictatorship to representative democracy; (2) has made public commitments to, and is making demonstrable progress in (A) effectively guaranteeing the rights of free speech and freedom of the press, including granting permits to privately owned media and telecommunications companies to operate in Cuba; (B) permitting the reinstatement of citizenship to Cuban-born persons returning to Cuba; (C) assuring the right to private property; and (D) taking appropriate steps to return to U.S. citizens ... property taken by the Cuban government ... on or after January 1, 1959, or to provide equitable compensation ... for such property; (3) has extradited or otherwise rendered to the U.S. all persons sought by the U.S. State Department of Justice for crimes committed in the U.S.; and (4) has permitted the deployment throughout Cuba of independent and unfettered international human rights monitors. *Id.*

n33 *Id.* § 6066. A democratically elected government is a government which: (1) results from free and fair elections--(A) conducted under the supervision of internationally recognized observers; and (B) in which (i) opposition parties were permitted ample time to organize and campaign for such elections; and (ii) all candidates were permitted full access to the media; (2) is showing respect for the basic civil liberties and human rights of the citizens of Cuba; (3) is substantially moving toward a market-oriented economic system based on the right to own and enjoy property; (4) is committed to making constitutional changes that would ensure regular free and fair elections and the full enjoyment of basic civil liberties and human rights by the citizens of Cuba; (5) has made demonstrable progress in establishing an independent judiciary; and (6) has made demonstrable progress in returning ... property taken by the U.S. government. *Id.*

n34 *Id.* §§ 6021-91. These matters have traditionally been protected from external intervention by the international obligation to respect state sovereignty. *See* U.N. CHARTER, art. 2. Article 2 commands all member nations to respect the sovereignty of all other member nations. *Id.* Paragraph 1 articulates the necessity of sovereign equality of all members. *Id.* Paragraph 4 explicitly states that sovereignty shall not be abridged: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" *Id.*

n35 *See Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, G.A. Res. 48/16, U.N. GAOR, 48th Sess., Agenda Item 30, U.N. Doc. A/Res/48/16 (1993).

n36 Certainly, proponents of the embargo can assert that representative democracy and a market-oriented economy are normatively defensible. There are two responses to this. First, the initial question is not whether the conditionalities imposed are defensible, but whether a world order in which a super-power state can unilaterally impose such conditionalities upon less powerful states, even in the face of universal condemnation, constitutes a defensible model for the future world order. Secondly, the justifiability of competing political and economic structures, like the substantive meaning and enforceable scope of international human rights, are precisely the issues rendered most problematic when we examine competing structures and rights regimes from the critical perspectives constituted by the discourses of development, dependency and neoliberalism.

n37 *Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Agenda Item 101, at 3-6, U.N. Doc. A/Res/41/128 (1986).

n38 James C.N. Paul, *The Human Right to Development: Its Meaning and Importance*, 25 J. MARSHALL L. REV. 235 (1992).

n39 *Id.* at 239, 241.

n40 *Id.* at 245.

n41 As Paul states: Thus, while the Declaration is cast in terms of a "Right to Development," it should *not* be read as an assertion of some kind of "right" of states and peoples to enjoy some undefined kind of "development." Rather, the right declared is the "inalienable human right" of peoples affected by "development processes" to realize existing, universally recognized human rights *in and through "development processes,"* and it is the duty of those who control these processes to protect and promote these rights. In this way the doing of development, like the conduct of other public affairs must be made accountable to people. *Id.* at 248.

n42 ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 11 (1995). Escobar's discursive analysis is an effort to understand how the "Third World" has been produced by practices of representation and intervention that have been organized around the concept of development as well as to understand "the variety of forms with which Third World people resist development interventions and how they struggle to create alternative ways of being and doing." *Id.* at 11. It is an effort to "unveil the foundations of an order of knowledge and discourse about the Third World as underdeveloped." *Id.*

n43 *See* Jose Joaquin Brunner, *Notes on Modernity and Postmodernity in Latin American Culture*, in *THE POSTMODERNISM DEBATE IN LATIN AMERICA* (John Beverley et al. eds., 1995) (criticizing "the traditional Behaviorist idea that culture needs to adapt itself to modernity and to produce the motivations and attitudes required for the optimum performance

of modern systems of production, reproduction, and social rule"). Brunner argues that any such formulation ignores one of the most fundamental debates over the meaning of modernity and modernization, particularly given the abundant evidence that western capitalist model of modernity is currently in crisis. *Id.*

n44 For example, proposals to enhance the scope and enforcement of GSP labor rights conditionality are supported (and opposed) through arguments about the objectives and pre-conditions of development. While opponents argue that labor rights conditionality undermines the development objectives of the preference schemes to which they are attached, proponents reject the notion that development can be achieved through economic activity that ignores social impact. *See, e.g.*, Belanger, *supra* note 17, at n.27 (citing INTERNATIONAL LABOUR OFFICE, *THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 8* (1976) ("Development is not a purely economic concept but that its purpose is fundamentally social and human in character and that economic development cannot automatically ensure social progress")).

n45 Tamara Lothian, *The Democratized Market Economy In Latin America (And Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy*, [28 CORNELL INT'L L.J. 169, 186 \(1995\)](#). According to Lothian:[a] state is hard when it enjoys a substantial capacity to form and implement strategies which impose the cost of public investment upon present consumers and the propertied class, and a corresponding ability to resist influence by powerful factional interests (including interests of its own partners in the government-business partnership)... The hardness of the ... [state] limits the proclivity toward the cannibalization of government policy by private interests. It cannot ensure strategies against illusion, but it can diminish their vulnerability to corruption by narrow self-interest.*Id.*

n46 Arturo Escobar makes the point like this: "It is true that massive poverty in the modern sense appeared only when the spread of the market economy broke down community ties and deprived millions of people from access to land, water, and other resources. With the consolidation of capitalism, systemic pauperization became inevitable." Escobar, *supra* note 42, at 22.

For an account of the authoritarian state as an artifact of the social relations organized through the process of colonialization and decolonialization, see Hamza Alavi, *The State in Post-Colonial Societies*, in *THE POLITICAL ECONOMY OF LAW IN THE THIRD WORLD* 231-9 (Yash Ghai et al. eds., 1987). Alavi writes: before independence members of the bureaucracy and the military were the instruments of the colonial power ... During the freedom struggle, they were on opposite sides of the political barricades from the leadership of the nationalist movement ... After independence, the same political leaders whom it was their task to repress were ensconced in office nominally in authority over them.*Id.* at 233. In this account, the experience of partial transfer of state power from the colonial state to a dependent indigenous government explains the process through which military circumvention of political officials was institutionalized. *Id.*

n47 For alternative visions of "development" see KATHY McAFEE, *STORM SIGNALS: STRUCTURAL ADJUSTMENT AND DEVELOPMENT ALTERNATIVES IN THE CARIBBEAN* (1991); WOMEN, THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: TOWARDS A THEORETICAL SYNTHESIS (Rosi Braidotti et al. eds., 1994).

n48 These links are evidenced, for example, by the differential treatment accorded "economic" and "political" refugees, as well as by the non-recognition of political refugees from "friendly"

nations. See, e.g., Ari Weitzhandler, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, [64 U. COLO. L. REV. 249 \(1993\)](#).

n49 See, e.g., CHRISTOPHER CHASE-DUNN, *GLOBAL FORMATION: STRUCTURES OF THE WORLD-ECONOMY* 107-50 (1989).

n50 From this perspective, not all linkage schemes are the same. Linkage regimes, like my fourth model, that are designed to enforce respect for economic, social, and cultural human rights in the policies of international organizations appear "better" than efforts to link the enforcement of civil/political rights to free trade agreements. This is because the violation of individual human rights is viewed as a consequence of the violation of the sovereignty of poorer states by Bretton Woods institutions and TNCs. A social/economic rights linkage could be used to restrain the extent to which these institutions could impose economic arrangements that prevent Third World states from adopting policies that promote these economic/social rights. See, e.g., Margaret Conklin & Daphne Davidson, *The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-85*, 8 HUM. RTS. Q. 227-69 (1986). By contrast, civil/political rights linkages, like the labor conditionality of the GSP and the U.S. embargo of Cuba, appear to generate a very different dynamic in which international forums and procedures become the vehicle through which First World interests can undermine the power of Third World states.

n51 See Susan Strange, *The Name of the Game*, in *SEA CHANGES: AMERICAN FOREIGN POLICY IN A WORLD TRANSFORMED* 238, 260 (Nicholas X. Rizopoulos ed., 1990). See also CHASE-DUNN, *supra* note 49. Chase-Dunn makes the point like this: "Capital is subjected to some controls by states, but it can still flow from areas where profits are low to areas where profits are higher. This allows capital to escape most of the political claims which exploited classes attempt to impose on it." *Id.* at 141. According to Chase-Dunn, this is true even in the case of a hegemonic core power: when a hegemonic core power begins to lose its competitive edge in production because of the spread of production techniques and differential labor costs, capital is exported from the declining hegemonic core state to areas where profit rates are higher. This reduces the level at which the capitalists within the hegemonic core state will support the "economic nationalism" of their home state. Their interests come to be spread across the core [and peripheral areas where they invest]. *Id.* at 147.

n52 I would go further and argue that as between struggling for greater respect for sovereignty and the reorganization of international law to recognize individual standing and rights, the latter is ultimately a more worthwhile struggle--although both are probably unattainable in the foreseeable future.

n53 G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, [44 DUKE L.J. 829 \(1995\)](#).

n54 For example, the events through which Latin American political parties began to embrace the neoliberal world view prescribing state retrenchment and external opening can be easily read critically through either development or dependency discourses. See, e.g., Rosario Espinal, *Development, Neoliberalism and Electoral Politics in Latin America*, in 23 DEVELOPMENT AND CHANGE 27-48 (1992) (linking the allegiance to neoliberalism among Latin American political parties and movements to the deepening economic crisis and increasing external pressures to deal with the debt problem in the early 1980s).

n55 *Id.* As Espinal explains: the assessment of contemporary Latin American society that lies at the heart of Latin American neoliberalism [is]: first, that the economic crisis [in Latin America] served to unravel the problems inherent in developmentalism, and second, the notion that a

renewed liberalism was a good sign of pragmatism and *modernity* For [neoliberals], the main problem in Latin America was not dependency, but the burden of an inefficient and corrupt state that prevented growth and modernization.*Id.* (emphasis added).

n56 Lothian, *supra* note 45, at 175-79.

n57 For example, some argue that the interstate system of unequal states is a condition precedent and inevitable consequence of international capitalism. *See, e.g.*, CHASE-DUNN, *supra* note 49. Ironically enough, while free markets and free trade may protect domestic economic activity from the corruption and repression of a state apparatus controlled by a domestic elite (e.g. a military-bureaucratic elite or the officials of a populist state), it also increases the likelihood that domestic economic activity will be controlled by a foreign class elite, the multinationals enjoying privileged access to private capital, core state subsidies, and distribution networks in their nations of origin. *Id.*

n58 Jorge F. Perez-Lopez, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, [10 CONN. J. INT'L L. 427, 443 n.68 \(1995\)](#) (describing the opposition with which developing countries responded to the Bush Administration's efforts to include worker rights as an agenda item in the Uruguay Round, viewing it as a means to introduce additional trade restrictions or to suppress their legitimate competitive advantage).

n59 *See, e.g.*, Lothian, *supra* note 45, at 182 (arguing that policies promoting economic equality are both the preconditions for and the consequence of economic progress. Economic equality is a precondition because sustained economic growth depends on reforms such as land redistribution and educational investment. Reduction of economic inequality is also a consequence of economic progress because "the acceleration of economic experimentalism ... provides an opportunity to carry further the campaign against large and rigid inequalities.")