INTRODUCTION TO LAW AND ECONOMIC DEVELOPMENT IN LATIN AMERICA: A COMPARATIVE APPROACH TO LEGAL REFORM

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Sustained economic development in the Latin American region seems forever within reach, only to elude capture again and again in an apparently endless cycle of success and failure. In the post-World War Two era alone, countries as diverse as Argentina, Mexico, Brazil, Venezuela, Chile, and Peru have undergone periods of profound optimism as their economies have grown and their peoples prospered, only then to suffer startling and sudden setbacks in the form of currency crises, political upheaval, corruption scandals and social instability.[1] For example, following the Peso crisis of 1982 and a period of gradual democratization, solid economic growth, and trade liberalization in the early 1990s, Mexico suffered a massive devaluation of its Peso currency in 1994.[2] Given the substantial size of its economy, its close economic ties to the United States and the enormous exposure of American and international banks in Mexico, the crisis there threatened to lead to a massive loss of confidence in emerging markets worldwide.[3] Swift action by then-President Bill Clinton, as well as the In-

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1. PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT 160–61 (3d ed. 2007); D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 236 nn.4–8 (2008); Jeromin Zettelmeyer, *Growth and Reforms in Latin America: A Survey of Facts and Arguments* 3–4 (Int'l Monetary Fund Working Paper, Paper No. 06/210, 2006), *available at* http://www.internationalmonetaryfund.org/external/pubs/ft/wp/2006/wp 06210.pdf; *see* CELSO FURTADO, ECONOMIC DEVELOPMENT OF LATIN AMERICA: HISTORICAL BACKGROUND AND CONTEMPORARY PROBLEMS 126–30, 170–78 (Suzette Macedo trans., 2d ed. 1976).

2. James M. Cypher, *Mexico: Financial Fragility or Structural Crises?*, 30 J. ECON. ISSUES 451, 451–53 (1996); Francisco Gil-Díaz, *The Origin of Mexico's 1994 Financial Crisis*, 17 CATO J. 303, 303 (1998).

3. *See generally* Santiago Bazdresch & Alejandro M. Werner, *Contagion of International Financial Crises: The Case of Mexico*, *in* INTERNATIONAL FINANCIAL CONTAGION 323–26 (Stijn Claessens & Kristin J. Forbes eds., 2001), *available at* http://www1.worldbank.org/economicpolicy/ managing%20volatility/contagion/book.html (scroll down to "Section IV: Case Studies of Contagion" and select "Contagion of International Financial Crises: The Case of Mexico" hyperlink) (discussing the contagion attendant on currency crises); Paolo Pesenti & Cédric Tille, *The Economics of Currency Crises and Contagion: An Introduction*, ECON. POL'Y REV., Sept. 2000, at 3, 3, 8, *available at* http://www.newyorkfed.org/research/epr/00v06n3/0009pese.pdf. For a general discussion of contagions of financial crises in emerging markets grounded in economics theory, see Rodrigo Valés, *Emerging*

ternational Monetary Fund (IMF) and private banks, averted the crisis and helped to restore the international credibility of emerging market debt.[4] To its credit, Mexico went on to justify the international rescue effort and, especially following the gradual but accelerating implementation of the North American Free Trade Agreement (NAFTA)[5] in 1994, the Mexican economy has shown impressive export growth, relative stability in its currency and sustained, if cyclical, economic growth.[6]

A similar pattern can be seen in Argentina. When I worked at the World Bank in the mid-1980s, Argentina was an economic problem child: a massive lack of confidence in its currency, combined with exchange controls, high inflation and high unemployment, led to capital flight, a lack of new foreign investment, and a threatened default of Argentina's international debt obligations.[7] The World Bank and the IMF, together with other international lenders, put together a bailout package; the currency was stabilized (replaced by a new currency), and Argentina went on to a period of sustained economic growth. Alas, it did not last.[8] In 2001, a new crisis of confidence shook Argentina, leading to the restructuring (or seizures, depending on one's point of view) of private property rights referred to in Horacio Spector's contribution to this Symposium.[9] Today, however, Argentina's economy is growing again at impressive rates.[10]

Markets Contagion: Evidence and Theory (Banco Central de Chile Working Paper, Paper No. 007, 1997), *available at* http://www.bcentral.cl/eng/studies/working-papers/007.htm.

4. Bradford De Long, Christopher De Long & Sherman Robinson, *The Case for Mexico's Rescue: The Peso Package Looks Even Better Now*, FOREIGN AFF., May/June 1996, at 8, 8, 12; Sebastian Edwards & Miguel A. Savastano, *The Morning After: The Mexican Peso in the Aftermath of the 1994 Currency Crisis* 26–27 (Nat'l Bureau of Econ. Research, Working Paper No. 6516, 1998).

5. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); North American Free Trade Agreement Implementation Act, 19 U.S.C. §§ 3301–3473 (2000).

6. *See* Econ. Comm'n for Latin Am. & the Caribbean [CEPAL], Mexican Sub-Regional Headquarters, *Mexico: Economic Growth Exports and Industrial Performance After NAFTA* 15–19 CEPAL Estudios y Perspectivas Serie No. 42 (Dec. 2005) (*prepared by* Juan Carlos Moreno-Brid, Juan Carlos Valdivia & Jesús Santamaría), *available at* http://www.wilsoncenter.org/news/docs/Mexico_ after_NAFTA_ECLAC.pdf.

7. J.F. HORNBECK, CONG. RESEARCH SERV., THE ARGENTINE FINANCIAL CRISIS: A CHRONOLOGY OF EVENTS 1–2 (2002) *available at* http://fpc.state.gov/documents/organization/ 8040.pdf; *see* Ana María Cerro & Osvaldo Meloni, *Crises & Crashes: Argentina 1885–2003*, at 3 (EconWPA Econ. History Series, Paper No. 0505001, 2005), *available at* http://ideas.repec.org/p/wpa/wuwpeh/0505 001.html.

8. *See* J.F. HORNBECK, CONG. RESEARCH SERV., THE FINANCIAL CRISIS IN ARGENTINA 3–5 (2003), *available at* http://www.opencrs.com/rpts/RS21072_20030605.pdf; Timothy J. Kehoe, *What Can We Learn from the Current Crisis in Argentina?* 1–2 (Fed. Reserve Bank of Minneapolis Research Dep't Staff Report, No. 318, 2003), *available at* http://www.econ.umn.edu/~tkehoe/papers/argentina .pdf.

9. Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129, 138–44 (2008).

10. ROBERTO FRENKEL & MARTÍN RAPETTI, CTR. FOR ECON. AND POLICY RESEARCH, ARGENTINA'S MONETARY AND EXCHANGE RATE POLICIES AFTER THE CONVERTIBILITY REGIME

Similar tales of ups and downs, swings and gyrations, and dizzying volatilities can be told of other Latin American countries.[11] It is beyond the purpose and scope of this brief *Introduction* to recount them in detail.

To be sure, there are success stories (beyond the recent successes enjoyed by Mexico and Argentina), though perhaps at a price. Chile, for example, has seen steady economic growth since the controversial and damaging foreign investment nationalizations under Salvador Allende and the subsequent coup that brought General Pinochet to power.[12] But, the price was high in terms of political repression, incarceration of the opposition, torture, "disappearings" and killings, erosion of civil liberties, and the systematic undermining of democratic institutions. It is only in approximately the last ten years that Chile has begun to come to terms with this dark side of its economic success.[13] Still, the economy has been on firm ground and democracy has more than gained a foothold: we can be cautiously optimistic that Chile is well on its way to becoming a mature, stable, democratic, and prosperous nation that provides a decent standard of living and fair economic opportunities for most, if not all, its people.[14]

Costa Rica is another success story, at least relatively speaking. Its economy has not grown as rapidly as that of Chile,[15] but, on the other hand, it has not suffered the upheaval of unstable governments, coups, dictatorships, social dislocation, political swings, and repression that Chile and other far less successful countries have experienced.[16]

COLLAPSE 10–15 (2007), *available at* http://www.cepr.net/documents/publications/argentina_2007_04.pdf.

11. For a comprehensive description of Latin American economic history, see sources cited *supra* note 1.

12. SIMON COLLIER & WILLIAM F. SATER, A HISTORY OF CHILE: 1808–2002, at 370–76 (2d ed. 2004); JAVIER MARTÍNEZ & ALVARO DÍAZ, CHILE: THE GREAT TRANSFORMATION 1, 41–74 (1996); Jose De Gregorio, *Economic Growth in Chile: Evidence, Sources and Prospects* 1–2 (Banco Central de Chile, Working Paper No. 298, 2004), *available at* http://www.bcentral.cl/jdegrego/pdf/jdg30112004b.pdf.

13. *See* MARK ENSALACO, CHILE UNDER PINOCHET: RECOVERING THE TRUTH, at ix–xv, (2000); Kirsten Sehnbruch, Prosecuting Pinochet (Apr. 25, 2005) (unpublished article), *available at* http://socrates.berkeley.edu:7001/Events/spring2005/04-25-05-guzman/index.html.

14. Eduardo Aninat, *Chile in the 1990s: Embracing Development Opportunities*, FIN. AND DEV., Mar. 2000, at 19, 19–20; Klaus Schmidt-Hebbel, *Chile's Economic Growth*, 43 CUADERNOS DE ECONOMÍA: LATIN AM. J. OF ECON. 5, 9, 18, 34–35 (2006).

15. ANDRÉS RODRÍGUEZ-CLARE, MANRIQUE SÁENZ & ALBERTO TREJOS, ECONOMIC GROWTH IN COSTA RICA: 1950–2000, at 31–34 (2002), *available at* http://www.econ.psu.edu/~aur10/Papers/EconomicGrowthCR.pdf.

16. Agustín Carstens, Deputy Managing Director, Int'l Monetary Fund, Address at the Academy of Central America, Costa Rica, Seminar on Volatility and Vulnerability: Twenty Years Without a Crisis in Costa Rica: The IMF's View (July 12, 2004), *available at* http://imf.org/external/np/speeches/2004/071204.htm.

The hard data, namely economic statistics and indicators, bear out this largely impressionistic and anecdotal picture of Latin American countries. For example, for the region as a whole, the World Bank measured economic growth at an average of approximately 1.8% for the period from 1980 to 1990; 3.5% for the period from 1990–2000; a negative 0.5% for the period from 2000 to 2002; and 2% for 2003.[17] This is well below the rates measured for the same periods, respectively, for the East Asia and Pacific region (at 8%, 8.1%, 6.6% and 8%), the South Asia region (at 6%, 6%, 5% and 8%), and even somewhat below the growth rates for the Sub-Saharan Africa region (at 2%, 2.5%, 3.5% and 4%).[18] If one looks at a more differentiated picture by examining the economic performance of individual countries in Latin America, it becomes clear that there have been substantial pockets of progress even during times when the region as a whole presents an uneven picture. Volatility remains an issue, however. Brazil, for example, weighs in at an average growth rate of 7% during the so-called "Miracle Years" of the 1970s, but then slipped into a period of decidedly lackluster performance, if not outright stagnation, with growth rates of 0.5% in the 1980s and 0.4% in the 1990s.[19] Mexico, displaying a similarly unhealthy volatility, had a 6.8% GDP growth rate for the period 1970–81, followed by growth rates of 0.3% and 3.66% for the periods 1982–88 and 1988–2000, respectively.[20]

This pattern of economic volatility is typical throughout Latin America. As a senior official of the IMF recently commented:

> [A] striking fact of Latin America's economic history is the frequency and regularity with which growth, once underway, has suffered setbacks. . . . [E]xpansions have often been short-lived, ending with crises or prolonged periods of stagnation. Latin American business cycles have

17. THE WORLD BANK, WORLD DEVELOPMENT INDICATORS 2005, at tbl.4a (2005), *available at* http://devdata.worldbank.org/wdi2005/Section4.htm.

18. *Id.*

19. JUAN S. BLYDE & EDUARDO FERNANDEZ-ARIAS, ECONOMIC GROWTH IN THE SOUTHERN CONE 18 fig.1 (2004), *available at* http://www.iadb.org/regions/re1/econ/RE1-04-004.pdf. For a thorough study of Brazil's economic growth during the entire twentieth century, see also ARMANDO CASTELAR PINHEIRO ET AL., BRAZILIAN ECONOMIC GROWTH, 1900–2000: LESSONS AND POLICY IMPLICATIONS 4 (2004), *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=571242.

20. Eduardo Loría, Ctr. of Modeling and Econ. Forecasting, Presentation at the Conference on Finance and Development in Mexico: Causes of the Slow Rate of Economic Growth in Mexico (June 1–2, 2007), *slides available at* http://usmex.ucsd.edu/programs/documents/E.Loria.pdf. For a study using a different methodology but arriving at similar results, see also Rodrigo Garcia-Verdú, Demographics, Human Capital and Economic Growth in Mexico: 1950–2005, at 6–8 (June 12, 2007) (unpublished paper), *available at* http://www.cepal.org.ar/de/noticias/noticias/5/29015/Rodrigo_Garcia_Verdu.pdf.

> tended to be more volatile than those of advanced countries and developing countries outside the region.[21]

In short, it is not a pretty picture. Economic growth and development in Latin America has had a checkered past and generally lagged behind other developing regions. Although at present many Latin American countries are seeing healthy growth rates, with populist left-leaning regimes gaining power in various countries throughout the region there cannot be a great deal of optimism that the future will be much different than the past.[22]

Moreover, this less-than-encouraging economic history has occurred in a region blessed with natural resources in the form of oil, natural gas, timber, coal, copper, tin, bauxite, hydroelectric energy, and fertile agricultural lands.[23] Likewise, although plagued by repeated rounds of coups and social upheaval, it is fair to say that Latin America is firmly rooted in the Western Judeo-Christian tradition and has not suffered religious strife or extremism—it has a rich cultural heritage stretching back hundreds of years to Spain and Portugal, and, to a lesser extent, England and France.[24] Many of the region's universities are rooted in European traditions dating back to the early nineteenth century[25] and Latin Americans are proud of their artis-

21. Anoop Singh, Director, Western Hemisphere Dep't of the Int'l Monetary Fund, Address at Catholic University, La Paz, Bolivia: Latin America: Building on Recent Trends and Sustaining Rising Prosperity (May 10, 2007) (citations omitted), *available at* http://www.imf.org/external/np/speeches/2007/051007b.htm. *See generally* Andrés Solimano, Regional Advisor, CEPAL, Presentation at the Redima CAN Reunion in Lima, Peru: Economic Growth and Macro Management in Latin America: Past, Present and Future Perspectives (June 21, 2005), *available at* http://www.comunidadandina.org/economia/redima2_cepal1.pdf; Development Gateway Foundation, Country Resources—Knowledge, Collaboration, Information, Partnerships, http://www.developmentgateway.org/cg/country-gateways/dataandstatistics.do (last visited Oct. 31, 2007) (listing information on indications of world development).

22. *See* Juan Forero & Larry Rohter, *Bolivia's Leader Solidifies Region's Leftward Tilt*, N.Y. TIMES, Jan. 22, 2006, at § 1, 1; Juan Forero, *Latin America Looks Leftward Again*, N.Y. TIMES, Dec. 18, 2005, at § 4, 4; Juan Forero, *Populist Movements Wrest Much of Latin America From Old Parties*, N.Y. TIMES, Apr. 20, 2006, at A8.

23. Although economists generally agree that the region enjoys an abundance of natural resources, some question whether this, in fact, hinders economic development in that it leads to income inequality, an excessive reliance on exports of primary products at the expense of manufactured goods, a vulnerability to volatility (for example in commodities prices), and a lack of focus on job creation. Francisco Rodríguez & Jeffrey D. Sachs, *Why Do Resource-Abundant Economies Grow More Slowly?* 4 J. ECON. GROWTH 277, 277–78 (1999); Michael Gavin & Ricardo Hausmann, *Nature, Development and Distribution in Latin America: Evidence on the Role of Geography, Climate and Natural Resources* 1–5 (Inter-Am. Dev. Bank, Working Paper No. 378, 1998), *available at* http://www.iadb.org/IDBDocs.cfm?docnum=788197. *But see* DAVID DE FERRANTI, ET AL., FROM NATURAL RESOURCES TO THE KNOWLEDGE ECONOMY: TRADE AND JOB QUALITY 5–6 (2002).

24. For a wide-ranging work on the many and conflicting roots of contemporary Latin American political traditions, see HOWARD J. WIARDA, THE SOUL OF LATIN AMERICA: THE CULTURAL AND POLITICAL TRADITION, at viii–ix, 9–10 (2001).

25. For a brief overview of university education in Latin America, including an historical summary and suggested policy reform, see Simon Schwartzman, *Policies for Higher Education in Latin America: The Context*, 25 HIGHER EDUC. 9, 9–12, 14–16 (1993).

tic and literary traditions, having produced many great artists, writers, and thinkers.[26] Finally, most of its wars of independence were fought and won nearly 200 years ago in the early nineteenth century.[27] Hence, one cannot easily attribute Latin America's economic woes to post-independence growing pains as one might do, perhaps, with various African countries.[28]

Granted, as mentioned above, Latin America has had more than its share of extreme leftist and rightist political movements, which are often characterized by extraordinary violence and exploitation. But can poor economic performance be attributed to these movements, or are they better characterized as a mere contributing factor, operative only sporadically and regionally? Also, parts of the region are plagued by a burgeoning drug trade and the crime, warfare, economic distortion, and social dislocation that often accompany local economies built upon drugs.[29] But again, the drug trade is limited to certain pockets in certain countries[30] and can thus scarcely account for economic patterns that persist throughout the entire region.

What, then, are the roots and reasons of the dismal economic performance one finds throughout Latin America? And what can be done to remedy or at least improve its economic development?

These and some related questions were among the subjects being pondered at a gathering of academics, practitioners, and policymakers held over two days in April of 2007 at the Chicago-Kent College of Law. The participants included: academics and policymakers from Argentina, Mexico, and Venezuela; American academics with an interest in, or expertise

26. The scholarly literature is too vast to list, but one only need think of such writers as Jorge Luis Borges, Pablo Neruda, Gabriel García Márquez, Octavio Paz, Isabel Allende, Carlos Fuentes, and Mario Vargas Llosa, as well as artists like Diego Rivera, Frida Kahlo, Fernando Botero, David Alfaro Siqueiros, and José Clemente Orozco (with apologies to those omitted from this random list).

27. ROBERT HARVEY, LIBERATORS: LATIN AMERICA'S STRUGGLE FOR INDEPENDENCE 1810–1830, at 1–2 (2000); JOHN C. CHASTEEN, AMERICANOS: LATIN AMERICA'S STRUGGLE FOR INDEPENDENCE (forthcoming 2007).

28. *See* Robert H. Bates, John H. Coatsworth & Jeffrey G. Williamson, *Lost Decades: Lessons from Post-Independence Latin America for Today's Africa* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 12610, 2006), *available at* http://www.nber.org/papers/w12610.pdf (comparing the economic performance of Latin America and Africa in the decades following their independence); Leandro Prados de la Escosura, *Colonial Independence and Economic Backwardness in Latin America* 3, 33–38 (London Sch. of Econ., Working Paper No. 10/05, 2005), *available at* http://www.lse.ac.uk/ collections/economicHistory/GEHN/GEHNPDF/WorkingPaper10LPE.pdf.

29. MARK S. STEINITZ, THE TERRORISM AND DRUG CONNECTION IN LATIN AMERICA'S ANDEAN REGION 1–2 (2002), *available at* http://www.revistainterforum.com/english/pdf_en/pp_steinitz.pdf; Fernando Cepeda Ulloa, *Introduction* to LATIN AMERICA AND THE MULTINATIONAL DRUG TRADE 3–12 (Elizabeth Joyce & Carlos Malamud eds., 1998).

30. *See* U.N. Office on Drugs and Crime, *2007 World Drug Report* 201–08, 217–20 (2007), *available at* http:www.unodc.org/unodc/en/world_drug_report.html (indicating that the only producers in Latin America are Bolivia, Colombia, and Peru).

on, Latin America; a former American ambassador to Mexico; an official from the United Nations Conference on Trade and Development (UNCTAD); and officials from the World Bank and the Inter-American Development Bank.

First, a disclaimer is in order. By its very nature, a symposium is limited in terms of its range of topics, length of contributions, and number of participants. Also, a symposium necessarily must identify some focal point for the participants to "rally 'round," so to speak. In this instance, it was law and economic development. As a consequence, a harsh critic might claim that the Symposium failed to consider such critical issues and possible causes for Latin America's economic malaise as religion and the role of the Roman Catholic Church;[31] history and, in particular, the region's colonial history and the legacies of Spain and Portugal;[32] social, anthropological, and political dynamics;[33] corruption, exploitation, and poor governance;[34] and the role of the military.[35] The list could be continued.

The participants in this Symposium, consistent with its theme, focused on law and legal reform, transplants of laws from other legal systems, the rule of law, corporate social responsibility, sovereign debt and its legal implications, the nature of contracts, ethnic fragmentation, and free trade and competition laws and policies. During the two days of the presentations—and over lunch, dinner, and a glass or two of wine—there was also a great deal of mutual critique, cross-fertilization, and the sometimes surprising discovery of common ground. Professors Gelpern and Spector, from Newark, New Jersey and Buenos Aires, Argentina, respectively, found they covered some common ground in their analysis of Argentina's sovereign debt crisis of 2001, albeit from very different perspectives. Dr. De León found himself, perhaps not surprisingly, in intense and challenging discussions with Dr. Alvarez; he approaching competition law with an unorthodox analysis that challenges the very foundations of traditional competition theory, she from an empirical UNCTAD perspective that looks at competi-

31. For a thorough treatment of the role of the Catholic Church in Latin America, including its impact on social and economic issues, see ANTHONY GILL, RENDERING UNTO CAESAR: THE CATHOLIC CHURCH AND THE STATE IN LATIN AMERICA (1998).

32. *See generally* Prados de la Escosura, *supra* note 28, at 1–2, 29.

33. For a thoughtful study of the impact of Latin American politics on economic development in the region, see FRANCISCO RODRÍGUEZ, THE POLITICAL ECONOMY OF LATIN AMERICAN ECONOMIC GROWTH (2001), *available at* http://www.gdnet.org/middle.php?oid=620 (scroll down to "Political Economy of Growth" section and select "The Political Economy of Latin American Economic Growth").

34. See the compilation of essays in COMBATING CORRUPTION IN LATIN AMERICA (Joseph S. Tulchin & Ralph H. Espach eds., 2000).

35. *See* GLEN BIGLAISER, GUARDIANS OF THE NATION?: ECONOMISTS, GENERALS, AND ECONOMIC REFORM IN LATIN AMERICA 2, 5 (2002).

tion law "on the ground" and aims to provide concrete technical assistance to struggling government regulators. Ambassador Jones and Director General Motta, speaking from the experience they gained from their respective roles in Mexico, traded views on Mexican industrial policy and the concept of the rule of law. Again, the list could go on.

What, then, were some of the specific insights, prescriptions, and ideas developed during the Symposium? In the pages that follow, I endeavor to offer brief summaries, synopses, and digests of the participants' contributions, but, I hasten to add, they are my own summaries, synopses, and digests and are only meant to stimulate and incite the scholar, the student—or even the dilettante—to read the authors' actual words. No *Introduction* and no summary can serve as a substitute for them.

Keeping those disclaimers and caveats in mind, surely one of the highlights of the proceedings was Mr. Vives's impassioned plea for a new strain of corporate social responsibility, one grounded in rationality and what one might call "enlightened self-interest."[36] Mr. Vives begins with the premise that the prevailing methods of business valuation—namely stock market trading prices and standard accounting practices—are misguided in their focus on short-term performance at the expense of a longer-term profit and value time horizon. He then goes on to argue that if company managers follow a longer-term valuation model, it becomes not only easier but actually imperative for managers to incorporate strains of corporate social responsibility into their business strategies and planning. And what is a rational and defensible definition of such corporate responsibility? Mr. Vives makes the case that companies should clearly take responsibility for the social consequences of their actions (for example, environmental consequences); beyond that seemingly obvious proposition, companies have a moral imperative to go further than the law requires of them and, via self-regulation and with a view to their long-term profit and value calculus, they must take social responsibility in areas related to their business activities. In reaching this conclusion, Mr. Vives develops a number of corollary arguments, such as expanding the definition of the "stakeholders" of the firm to include workers, customers, and communities. He also posits the "firm" as an autonomous "actor" in society as opposed to a mere conglomeration of contractual relations. Moreover, he draws a distinction between "hard law" and "soft law," arguing that—at least in the area of corporate social responsibility and at least in developing countries as in Latin America—soft law, such as self-regulation, is often more effective in fashioning opti-

36. Antonio Vives, *Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries*, 83 CHI.-KENT L. REV. 199 (2008).

mal conduct insofar as it is more efficient and more accepted than the "top-down" approach of governmental regulators imposing norms by fiat, which are inevitably resisted by the regulated. Finally, he suggests that there is a "market" for corporate social responsibility, in which, again particularly in Latin America, a number of dynamics and actors ("drivers") come into play to fashion an environment in which corporate social responsibility becomes both a norm and a value.

Professor Okediji, an economist, began with the premise that ethnic fragmentation, i.e., the division of a society's people into a number of distinct and not necessarily harmonious ethnicities, is generally considered one of the key contributors to a lag in economic performance and development. Hence, measuring ethnic fragmentation is a useful tool in analyzing economic development. Professor Okediji, however, argues that the traditional ethnic fragmentation measurement tool, the so-called Ethno-Linguistic Fractionalization (ELF) Index, is a poor measure in that it relies too heavily on different languages as a driver of fragmentation. Instead, Professor Okediji proposes a new index, his "Social Diversity Index" (SDI), to measure ethnic and social fragmentation.[37] Relying on data from Brazil, Professor Okediji demonstrates that there, language is relatively uniform in that Portuguese is used by virtually every ethnic group and social strata of society. Hence, Brazil registers relatively low on the ELF Index, a result that is inconsistent with both the enormous wealth gap between rich and poor in Brazil and the utter lack of educational and career opportunities for certain strata of society. Shifting to the SDI yields an ethnic fragmentation measure more consistent with the economic performance and development of Brazil and provides the tools and data to develop more effective rectification measures and remedies, such as laws and policies targeted at correcting specific identified instances of social and ethnic fragmentation.

Competition law and policy in Latin America, as well as its impact on economic development, was a central theme treated by several participants. The orthodox premise underlying much of the literature on competition law in Latin America—and feeding directly into the making of policy both within the region and by outside actors like development agencies and institutions—is that free (or freer) competition will inevitably foster economic development: it lowers prices, hence benefiting consumers; it forces domestic industry to become more efficient and productive, hence spurring growth at home and making domestic industry more competitive abroad,

37. Tade O. Okediji, *The Color of Brazil: Law, Ethnic Fragmentation, and Economic Growth*, 83 CHI.-KENT L. REV. 185 (2008).

thus boosting domestic employment; it creates a better and more inviting playing field for foreign companies, hence increasing foreign investment; and it renders markets more transparent, hence inhibiting corruption, cronyism, and corporatism.[38]

And yet, does the evidence bear out the orthodox, widely accepted, and seemingly obvious premise? As is so often the case, it depends.

Professor Sokol has conducted an exhaustive survey of the competition chapters (or lack thereof) in bilateral free trade agreements (FTAs) concluded by Latin American countries. His contribution to the Symposium reports on the analytic results of his survey.[39] He reaches several conclusions. First, more often than not, countries treat competition chapters in FTAs very different from all other chapters and clauses. Unlike the clauses on tariffs and non-tariff barriers, competition chapters are rarely binding on the signatories and rarely include a dispute settlement mechanism. This striking fact has a number of consequences. For example, it leads to greater informal cooperation among different countries' competition regulatory and enforcement agencies, instead of the "top-down" (there is that term again) regulation that binding agreements would bring about. This, in turn, leads to a soft law approach to competition issues, as opposed to the hard law that would be mandated by binding commitments. Soft law, in turn, faces less institutional, political, and vested interest resistance, and instead facilitates the emergence of norms and practices built on a "close to the ground" reality. Finally, competition chapters included in FTAs have symbolic value and create expectations that, in turn, foster entry by foreign firms and foreign investment and encourage small scale domestic entrants into any given economic sector.

Still, is this arguably tentative approach to competition laws, via non-binding inclusion in bilateral FTAs, more effective than the alternative of a hard law binding solution? Professor Sokol cautiously suggests a need for additional scholarship to flesh out the question of whether the resources spent on developing and negotiating these tentative soft law agreements outweigh the benefits and, if so, whether these resources might not instead be devoted to improving existing agency capacities. It is a question worth remembering—and pondering—in considering some of the other participants' contributions on competition law.

38. *See* Ignacio De León, *Latin American Competition Policy: From Nirvana Antitrust Policy to Reality-Based Institutional Competition Building*, 83 CHI.-KENT L. REV. 39, 39–42 & nn.1–9 (2008); Sokol, *supra* note 1, at 238 nn.21–57 and accompanying text.

39. Sokol, *supra* note 1.

Ana María Alvarez and Pierre Horna are officers at UNCTAD in Geneva and devote themselves to providing technical assistance to Latin American countries in implementing or strengthening effective competition law and policy. Writing from their perspective of having worked side by side with national policymakers, legislators, and regulators, the authors begin with a survey of some of the particular challenges Latin America faces in the competition law arena: an already overstretched institutional and regulatory infrastructure; an often weak and unpredictable legal system and rule of law; the interface, coexistence, and tension between two inherited legal systems, namely, civil law and common law; a tendency to incorporate non-efficiency goals into competition law policy, such as consumer welfare and social redress and betterment; a set of socio-economic issues ranging from small markets, high barriers to entry, the legacy of state-owned enterprises and rushed privatization; and, last but by no means least, the absence of a competition culture. These and other dynamics create special challenges that any effort to introduce competition law in Latin America must address. Dr. Alvarez and Mr. Horna, armed with the empirical experience of having actually worked together with Latin American lawyers and economists on implementation, offer a cogent and insightful analysis of these challenges in an effort to develop a prescriptive agenda (or at least ideas).[40] This is the Competencia América Latina (COMPAL) Programme, aimed at making competition law and policy part of the national agenda by offering technical assistance and co-management; developing corrective measures and policies; sponsoring opportunities for consultation, dialogue, and cooperation; publicizing and disseminating competition initiatives; and providing tools for institution building and accountability. Dr. Alvarez and Mr. Horna further stress the importance of bilateral and regional agreements, cross-agency initiatives, and channels of cooperation and information-sharing. In particular, given the small size of many Latin American markets and the regional (or even wider) reach of the modern multinational enterprise, regional cooperation between and among competition regulators is crucial, which has the added benefit of mutual learning and sharing of experiences. The authors conclude with a brief foray into the dynamics between trade and competition, stressing the need to incorporate competition principles into trade negotiations in such sectors as telecommunications, transportation, and financial services. Finally, returning to the primary mission of UNCTAD—and the topic of this Symposium—they make a specific recommendation to approach competition law

40. Ana María Alvarez & Pierre Horna, *Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance*, 83 CHI.-KENT L. REV. 91 (2008).

and policy with a pro-development agenda by removing barriers to entry for small entrepreneurs, enhancing consumer welfare by lowering prices and improving quality, and creating an attractive environment for foreign direct investment.

R. Shyam Khemani and Ana Isabel Carrasco work with the World Bank's Financial and Private Sector Development Department. Their article argues that strengthening the development and implementation of competition law and policy in Latin America offers significant benefits in terms of economic efficiency, consumer welfare via lower prices, business competitiveness, and, in general, broad-based economic growth.[41] To support this thesis, Dr. Khemani and Ms. Carrasco have analyzed a number of economic surveys and studies that demonstrate the close links between an effective domestic competition policy on the one hand, and, on the other hand, the ease of doing business, per capita GDP, (low) market dominance, and business competitiveness. Perhaps more significantly, Dr. Khemani and Ms. Carrasco further demonstrate the crucial significance of placing an effective competition policy within a broader context of economic and legal initiatives, i.e., by combining and coordinating competition policy with other specific efforts such as reducing regulatory burdens, improving the physical and business infrastructure for conducting business, liberalizing trade, combating corruption and rent-seeking, and reducing the market concentration and dominance of the handful of elite corporate and business groups that are so prevalent in many Latin American countries.

Dr. De León offers us a contrarian challenge.[42] He argues that orthodox competition law and policy suffers from (at least) two fundamental and related flaws. First, it is utterly devoid of any reliable and accurate tools for measuring its consequences and effectiveness and is thus compelled to invoke a utopian—or "nirvana"—concept of optimal social welfare, that is, of perfect justice and perfect competition never achieved or measurable in real terms. Second, the intellectual premise underlying traditional antitrust theory is fundamentally flawed and internally contradictory. These fundamental flaws, in turn, lead to misguided market analysis and misconceived policy formulation.

Dr. De León begins with a survey of the consequences of recent economic liberalization in Latin America. Focusing on antitrust reform, he points out that the goals of institutional reform designed to promote entrepreneurial activity, innovation, and economic growth conflict with an anti-

41. R. Shyam Khemani & Ana Carrasco-Martin, *The Investment Climate, Competition Policy, and Economic Development in Latin America*, 83 CHI.-KENT L. REV. 67 (2008).

42. De León, *supra* note 38.

trust policy aimed at a particular form of resource allocation, such as, for example, an allocation consistent with Pareto efficiency. Dr. De León goes on to critique such traditional antitrust modes of analysis as determining the "right" size of a market, positing "natural" monopolies, and aiming at "perfect" competition. He concludes this part of his paper by rejecting the normal concomitants of this type of antitrust thinking, concepts like "market concentration," "cartels," mergers and acquisitions control, and "market power" or "dominance." Using mathematical models, Dr. De León demonstrates that the dual polar ends of perfect competition versus the perfect monopoly represent a false dichotomy and are based on mutually inconsistent underlying assumptions, including the assumption that perfect competition depends on perfect information being available to all actors in the market. Such a market of perfect competition, Dr. De León further argues, would actually lead to collective losses that can only be avoided through collective coordination. This internal inconsistency of traditional antitrust thinking then leads to flawed, indeed twisted, policymaking.

Dr. De León makes the case that competition actually *depends* on imperfection—specifically imperfect information, i.e., a market in which different actors have access to different information. The information that is or becomes known is further modulated through prejudices, beliefs, and other filters through which individuals process, assimilate, and internalize knowledge. Moreover, this selective and differentiated ability to access, process, and utilize information, i.e., the "uneven" use of information among market actors, is the very pre-condition that enables the system to function at all.

If one adopts this assumption, diametrically opposed to the nirvana model of perfect competition and perfect information, then the task of the competition policymaker is very different from the orthodox analysis of market concentration and cartel formation. Instead, competition policy must embrace an alternative agenda, one that counteracts restrictions that constrain market growth, mandate any fixed course of market action, exclude new entrants, impede free trade, undermine freedom of private contracting, or grant legal monopoly concessions. In Latin America, Dr. De León concludes, the competition agenda is still mired in the contrived and cumbersome nirvana model, while it remains singularly weak in consistently implementing the elements of the alternative model.

Director General Motta represents a return to the trenches of the actual, day-to-day, concrete reform and implementation of competition pol-

icy, industrial policy, and trade policy.[43] As the Director General of Mexico's Comisión Federal de Competencia, he is charged with the daunting task of fostering free competition across all of Mexico's economic sectors (hence, he calls himself a "horizontal" regulator) amidst the extraordinary forces of entrenched interest groups, political infighting, institutional turf protection, and severe capacity and resources limitations.

Director General Motta provides a short historical overview of the evolution of industrial and competition policy in Mexico. Prior to the 1980s, Mexico essentially followed a policy of import substitution, erecting trade barriers such as *ad valorem* tariffs, fixed import prices, import licenses, and import controls. Domestic industry was largely protected. The economy grew, but at the cost of industrial inefficiency, poor product quality, high prices, and limited product choices. The consumer suffered. In the mid- to late-1980s, and especially after Mexico joined the General Agreement on Tariffs and Trade (GATT) in 1986, efforts were commenced to liberalize trade and promote free competition. The results have been impressive: macro-economic stabilization, a more streamlined regulatory system, and broad horizontal standardization across many sectors of the economy. Still, some sectors remained largely immune to reform and liberalization, specifically energy, finance, transportation, and telecommunications. Director General Motta laments these carve-outs, not only in terms of the overall thrust of any competition and liberalization policy, but also because these sectors represent services that are used by all other industries and, therefore, have a powerful ripple effect on the economy far beyond the narrow confines of their individual sector markets.

Director General Motta, seasoned in the arts of the regulator, further offers a brief survey of the political pressures he faces on a daily basis: Congress and powerful politicians; consumer advocacy groups; a cumbersome and inefficient (if not worse) judiciary; and the interests, such as turf protection, of other horizontal regulators, not to mention the natural resistance of vertical regulators (that is, those responsible for a specific economic or industrial sector) to encroachments from "outside." A related and pervasive problem is the relative absence or paucity of accountability and surveillance mechanisms, particularly in view of the persistent problem of "regulatory capture."[44] The key problems identified by Director General Motta at once suggest some remedial measures: greater coordination

43. Eduardo Pérez Motta, *Industrial and Competition Policies in Mexico*, 83 CHI.-KENT L. REV. 31 (2008).

44. The term "regulatory capture" refers to the problem of governmental regulators coming under excessive and undue influence by industry and other interest groups. *See id.* at 33–35.

among horizontal regulators; better accountability to key institutions such as Congress, consumer groups, and the judiciary; and building a better legal and institutional framework.

If Director General Motta offers a weary but nonetheless cautiously-optimistic perspective from the regulatory trenches, James Jones, Ambassador to Mexico from 1994 to 1998, makes a weighty argument from the perspective of the seasoned American diplomat who was present during Mexico's dramatic "Peso crisis" in 1994.[45] He poses the perhaps-rhetorical question of whether opening the economic system inevitably leads to an opening of the political system. Ambassador Jones concludes that it is more effective to open the economic system first, as this creates popular demand for opening the political system. Mexico, in the end, achieved both. Based on his experience, Ambassador Jones argues that a "third leg" is needed for economic development, namely, an effective rule of law in addition to open economic and political systems. He further offers an unabashedly American critique of the civil law system, which he suggests is burdened by an absence of transparency. This, combined with an inefficient and overbearing government bureaucratic apparatus, powerful vested interests, and endemic corruption, impedes economic development.

What is the meaning of the term "rule of law" and how can a country improve its rule of law? One working definition is a sound judicial system that facilitates every member of society becoming a stakeholder in a common enterprise aimed at collective betterment, bridges the gulf between rich and poor, and provides a means for redress to all strata of society. In terms of some of the measures that can help bring about an improved rule of law, Ambassador Jones identifies four key drivers: (1) a reduction of the perceived risks attendant on seeking judicial redress, (2) a more efficient administration of justice, (3) a simplified regulatory structure, and (4) greater transparency and independence of judicial institutions.

Ambassador Jones concludes with an admonition to the United States: it must become more of a partner, and less of a paternalistic and patronizing superpower with an image of arrogance.

Professors del Granado and Mirow propose nothing short of a sweeping change in the Latin American legal order.[46] Working with and through the Asociación Latino-Americana y del Caribe de Derecho y Economía (ALACDE), they issue a call to all Latin American legal scholars and law-

45. James R. Jones, *Open Markets, Competitive Democracy, and Transparent and Reliable Legal Systems: The Three Legs of Development*, 83 CHI.-KENT L. REV. 25 (2008).

46. Juan Javier del Granado & M.C. Mirow, *The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes*, 83 CHI.-KENT L. REV. 293 (2008).

yers to collectively develop a new model code of private law informed, suffused, and shaped by two powerful strains of legal thought: (1) Roman private law, and (2) the principles of law and economics as developed largely in American legal academic circles in the past few decades. Professors del Granado and Mirow argue that a code of private law built on the foundation of Roman private law and incorporating law and economics in a principled way would contribute powerfully to economic development in Latin America.

Their ambitious program would take years to develop, let alone implement. It would face a myriad of obstacles, ranging across the spectrum from political, social, cultural, economic, and institutional resistance to skeptical academics that wish to undermine the entire project, as well as to the inevitable problems that attend transforming academic ideas into concrete laws. The authors are not naïve. They understand these issues and suggest, in a nod to the limitations of an academic enterprise of this nature, that once their model code is "up and running," so to speak, it will be available for legislators and policymakers (and skeptical academics) to selectively analyze, modify, and adapt it to suit the particular needs and circumstances of each country. Realistic or "pie in the sky," one cannot help but admire the sheer scale of the model code project and, by extension, the (perhaps Don Quixotian) heroism of its originators.

Professor Claire Hill talks about the rule of law in a very different context.[47] In the past, she has analyzed the difference between contracts in civil law and common law countries; she notes that even in advanced legal systems, like that of Germany, American-style contracts, with their endless boilerplate, detailed provisions for every conceivable contingency, and seemingly paranoid protectiveness of the drafting party, are increasingly making inroads in Germany, at least when German companies conduct business with American companies.[48] A similar pattern can be observed in Latin America, where long American-style contracts are increasingly dominating the landscape, displacing traditionally short and to-the-point agreements with their heavy reliance on the logic and refinement of the Civil Code structure.

Why should this be the case? The reasons cited by Professor Hill include such drivers as the superior bargaining power of large American companies and the (arguably) superior experience of their lawyers in com-

47. Claire A. Hill, Commentary, *The Trajectory of Complex Business Contracting in Latin America*, 83 CHI.-KENT L. REV. 179 (2008).

48. Claire A. Hill & Christopher King, *How Do German Contracts Do As Much With Fewer Words?*, 79 CHI.-KENT L. REV. 889 (2004).

plex international business transactions; the inherent power and persuasiveness of contracts with more verbiage; the dominance of the American model of rules of law and contract construction, combined with the perceived need for American companies to use longer contracts for purposes of potential litigation in an American court; and, lastly, a possible "arms race" that tends to produce ever-longer contracts, which are perceived to create ever-stronger legal protections. She also mentions the growing Americanization of law firms as institutions, with the normative influence of their way of practicing law.

Professor Hill then examines some of the implications of this trend towards longer and longer contracts. First, they imply a relative lack or absence of trust. The breadth and sweep of the parties' negotiations, together with the scope of contract coverage, combine to a large extent to obviate the need for mutual trust or reliance on good faith. At least the latter is a cornerstone of civil law jurisprudence in the private sphere (although by no means unimportant in common law). Moreover, the reliance on long contracts replaces a relative lack of transparency, homogeneity, and a reliable system of judicial administration. It also brings about a gradual convergence of legal practice and norms, at least in the contractual and commercial areas and in an age of increasing globalization. Professor Hill poses—but leaves us to ponder—the question of whether these developments also spawn greater efficiency and, by extension, economic development.

Professor Gelpern's topic is sovereign debt, credit derivatives, and the transformation of sovereign debt.[49] She begins with a brief historical survey of the markets in emerging market sovereign debt. In the past, it was nearly impossible for the governments of emerging countries to market sovereign debt in their domestic currency in the so-called "mature" markets, i.e., the major international capital markets in, for example, London and New York. Instead, for the most part, they were relegated to either issuing hard currency debt or offering domestic bonds to domestic investors. This is a pattern Professor Gelpern calls "compartmentalization," a division of debt markets into local and foreign, characterized by an absence of risk transfer.

This pattern gradually evolved into the emergence of a true emerging debt market, in which foreign investors also purchased domestic currency debt, but at the price of interest rates that could approach "junk bond" rates. Today, with the new financial respectability that many emerging countries

49. Anna Gelpern, *Domestic Bonds, Credit Derivatives, and the Next Transformation of Sovereign Debt*, 83 CHI.-KENT L. REV. 147 (2008).

enjoy, sovereign debt markets have evolved to a point of near, but not yet complete, convergence. In other words, the mature sovereign debt market for developed country debt is now also relatively accessible to emerging market debt as the latter has become nearly "mainstream."

These developments are good for those countries' economic development. They deepen their access to capital, afford them greater flexibility on structuring and placing debt, and deepen local capital markets. They also effect a shift from an emerging market transactional debt market to one characterized by mature institutional commitments. Professor Gelpern analyzes the four key drivers of such a market, namely: (1) governing law, in which one observes a trend away from the local law that often facilitated local restructurings by fiat; (2) currency, where one observes the growing trust of investors in a developing country's ability to manage its currency soundly; (3) creditor identity, where one observes an increasing trend away from a fixed set of known creditors to a more differentiated structure marked by layers of intermediaries, offshore markets and obscure residencies, and increasing liquidity, i.e., transfers of debt; and, perhaps most importantly, (4) risk transfer techniques. The latter is reflected in the profusion of complicated credit derivatives instruments, which have become increasingly sophisticated and permit the ever more finely tuned transfer and hedging of highly differentiated slivers of risk.

Examining some recent American case law on sovereign debt, Professor Gelpern concludes with an admonition to courts to eschew a policy-oriented and norm-based crisis resolution approach in favor of a more focused and narrow judicial interpretation of parties' express contract terms, albeit with caveat that with the ever-greater complexity of risk transfer and slicing techniques, those contract terms can become mired in technical jargon and derivatives lingo. Still, with the aid of scholars and experts, judges should be more than able to master derivatives issues. And, with the increasing global financial integration of emerging markets into the mainstream, and the emergence of a new "international financial architecture," opportunities abound for economists and legal scholars to contribute to financial innovation and the further solidification of emerging markets into, if not exactly "safe havens," fully integrated actors in the mainstream. That, of course, will be a powerful driver of their economic development.

Professor Spector's very thoughtful and thought-provoking piece deals with the mutation effect when laws are transplanted from one legal system to another.[50] He begins with an examination of Argentina's adoption of

50. Spector, *supra* note 9.

significant portions of the American Constitution. But, when laws are transplanted the adopting country tends to also adopt some of the origin country's precedents interpreting the adopted text. This, in turn, can lead to a "mutation effect" with surprising results.

In Argentina, a civil law country with a relative lack of training in judicial interpretation and a tendency toward abstractness, the results can be especially jarring. Civil lawyers, with their reliance on the structural, all-encompassing nature of civil codes, often conduct legal analysis without remaining solidly grounded in the facts of a case, whereas in common law jurisprudence, every law student learns that the "holding" of any case is uniquely fact-dependent. The result, Professor Spector argues, is that in Argentina's borrowing of constitutional precedent, its Supreme Court goes far beyond the facts of the borrowed precedent and applies it to justify a heterodox interpretation of the Argentine Constitution.

A powerful example of such mutation has occurred in the context of economic emergency, which has been used to justify the expropriation of bank deposits. Argentina's Constitution from 1860 followed the American model of incorporating a laissez-faire economic approach and safeguarding property rights. Between 1880 and 1930, Argentine courts used American constitutional precedent very successfully to support and sustain a period of unprecedented economic growth.[51] Then, between 1920 and 1930, Argentina borrowed economic emergency analysis from the United States to suspend regular norms and permit the government's impairment of contracts, specifically bank deposits and debt obligations. The Argentine Supreme Court fashioned a four-part test as to when such impairment of contracts is permissible, namely, that (1) an emergency must exist, (2) the impairment measure must have as its purpose the safeguarding of public welfare, (3) the measure must be reasonable, and (4) the measure must be temporary. The latter concept—that the measure must be temporary—is particularly significant because it implies that there must be only a temporary suspension of property rights, not a transformation or, worse, deprivation, of substantive rights.

The 1989 Argentine crisis led to the "mutation effect," insofar as the Supreme Court allowed President Menem to convert time deposits into bonds. Moreover, an additional effect was an alteration in the separation of powers in that Menem was allowed to bring about a fundamental restructuring of the banking sector. In short, what occurred was a true mutation and expansion of an American precedent that had been grounded in narrow

51. *Id.* at 132–134 & n.14.

and exceptional facts with only limited legal consequences. This pattern was replicated in 2001, when a succession of presidents over a very short time period implemented a massive restructuring of all bank deposits, amounting to a confiscation of assets.[52]

From this pattern of the mutation of transplanted laws—laws that in principle are sound and salutary—Professor Spector draws two sobering lessons. First, the borrowing of common law principles will not necessarily afford investors greater protection than civil law principles. Second, while there was a high local (Argentine) demand for the borrowed principles, they nevertheless proved ineffective, in that in the instances described they failed to bring about a healthy and robust banking system.

What then are some of the larger lessons to be extracted from the Symposium? Amazingly, given the diversity of participants and the divergence of their views, a few common themes clearly emerge. One is the perhaps counterintuitive insight that soft law is often more effective than hard law in achieving its objectives. Norms and rules that are black letter law, often imposed from above or, worse, by external actors like the World Bank or the IMF, are by their nature inflexible and often face institutional resistance or a simple institutional lack of implementation capacity. They are also often divorced from reality in that they fail to recognize or make allowance for opposition by powerful entrenched interest groups (whether political or business-driven), which in turn leads to a failure of enforcement or implementation. And hard law, when not enforced, not only withers away but actually undermines the rule of law.

Soft law, by comparison, is non-binding and bends to conditions on the ground, i.e., the real needs of real regulators: needs such as expertise, technical assistance, cooperation, and an exchange of ideas. Soft law, precisely because it is "soft" and merely points to norms rather than imposing them, also invites less criticism and resistance from entrenched interest groups. Soft law sends symbolic signals to stakeholders in the system, as well as to foreign parties who may be swayed to invest directly. Finally, soft law can evolve into hard law and hard norms, and the resulting laws and norms have a much greater chance of actually being accepted and enforced. These messages are conveyed in the contributions of Messrs. Sokol, Alvarez and Horna, and Vives.

An important but by no means obvious corollary of the superiority of soft law over hard law is that effective economic development will require

52. As Professor Spector describes in detail, the judicial decisions are conflicting, but nevertheless collectively stand for a broad expansion of the principle that an economic emergency justifies a fundamental restructuring of property rights. *Id.* at 136–44.

working "close to the ground," that is, working as closely as possible with those most directly affected by regulatory reform, trade liberalization, and freer competition. By working directly and closely with those groups, the political process of give and take will lead to the formulation of realistic norms, will bring about more ready acceptance, and will give all participants a personal stake in success. This is the powerful message conveyed by Director General Motta.

The contributions of academics—including those who participated in this Symposium—should also be given their due. Far from toiling all but forgotten in dusty libraries, they can sort out often obscure and entangled new legal developments and illuminate new paths and fruitful openings. Whether in the realm of actual contracts as actually negotiated (Hill), the complex world of risk transfer and credit derivatives (Gelpern), the idealism of a new private legal order (del Granado and Mirow), the interpretation of legal transplants (Spector), or the illusory certitude of traditional antitrust theory (De León) and conventional social fragmentation indices (Okediji), academics highlight past fallacies, debunk facile or reactionary paranoia, and suggest new and more productive approaches and solutions.

If any reader of any article of this Symposium can take away even one of those lessons—or, better yet, one not discovered or alluded to in these introductory remarks—the Symposium will count as a success, even beyond the immediate benefit of spawning an intense debate and cross-fertilization among the participants themselves.