Protecting Human Rights in a Global Economy

Challenges for the World Trade Organization

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Preface

Over the past decade, trade agreements have come under increased scrutiny from the public. More and more people — peasants, trade unionists, human rights activists, small businesses, environmentalists, farmers, students and others — are expressing concern about how trade agreements are affecting their lives. For all the talk of the benefits of globalization and its presumed contribution to economic growth, the undeniable reality is that globally, and within most countries, the gap between the rich and the poor is widening, and hundreds of millions of people are denied the basic human rights provided for by the United Nations. The creation of the World Trade Organization (WTO), outside the auspices of the UN, has aggravated many of civil society's concerns.

There is no consensus on how trade liberalization affects human rights, nor even a well-developed methodology for determining the human rights impacts of trade agreements. Many people in the mainstream trade policy community see no linkage whatsoever with human rights and consider such concerns outside their realm. Likewise, many human rights groups lack familiarity with trade issues. They are puzzled by the language and suspicious of the entire process : from the negotiations of tariffs to the settlement of disputes. The two communities are so far apart that they do not even use the same vocabulary, let alone share a common philosophy.

Both trade and human rights have been codified in highly developed legal regimes, negotiated by governments since the end of World War II. These two legal regimes have developed however in **Error! Bookmark not defined.** from one another. Both trade law and human rights law narrow the range of policy options that are available to governments. And yet, it seems that the question of whether the two legal regimes are contradictory has rarely been asked.

It is in this context that Rights & Democracy decided to commission a paper by two experts in these two fields of law. We were delighted that Robert Howse and Makau Mutua accepted our invitation to work through some of the challenges posed by human rights instruments to trade law. This paper details a number of instances where the WTO, as it exists today, does have the ability to take human rights into account. While the institutional architecture of the WTO is far from what human rights activists would like it to be, we expect that this paper will lay to rest the argument that the WTO has neither the mandate nor the capacity to consider human rights in making its decisions.

This paper is a product of dialogue—dialogue between the two authors with their respective fields of expertise, and dialogue among 26 participants at a workshop Rights & Democracy hosted in Seattle. While the paper has been enriched by these different perspectives, there is certainly no agreement on the best strategy for ensuring that human rights do indeed have practical, and not just theoretical, influence over trade rules. There are notably major differences over consumer-driven action, the role of sanctions, the proposal to expand the mandate of the WTO, and how best to protect labour rights.

So what is to be done? Some would argue that there is no point in attempting to reform the WTO, that its structure is so flawed it should be scrapped completely. Others would support the institutional reforms suggested in this paper, perhaps assisting the WTO in developing procedures for international agencies, experts and NGOs to intervene in dispute settlement procedures. Civil society organizations are likely to pursue many different avenues in attempting to resolve these critical issues. We at Rights & Democracy hope that this paper will provide assistance and some legal arguments for those trying to convince governments and multilateral institutions that trade and human rights cannot be carved off into separate departments, and that their primary legal obligations lie in the references to human rights in the UN Charter.

Warren Allmand, President
Rights & Democracy

Executive summary

Since the 1980's, we have experienced the acceleration of globalization, a process driven primarily by the rapid integration of the world's economy. Globalization has led to new challenges and opportunities for the protection and promotion of human rights. Although the current trade and human rights regimes are both post-war phenomena, they have developed on parallel, separate and sometimes inconsistent tracks.

As the postwar GATT regime evolved into the World Trade Organization in late 1994, so its rules and those of its accompanying agreements evolved into a detailed legal code, which is interpreted and defined through a dispute settlement process. This process, however, has not been transparent and has not viewed dispute resolution through the lens of human rights impacts. Provisions of WTO Agreements on domestic food safety and other technical standards, as well as on intellectual property directly affect the ability of governments to fulfill their human rights obligations to their citizens. This is especially true in the case of social and economic rights, which should be understood in connection with, not in isolation from, civil and political rights.

This paper argues that trade and human rights regimes need not be in conflict, so long as the trade regime is interpreted and applied in a manner consistent with the human rights obligations of states. This interpretation respects the hierarchy of norms in international law, where human rights, to the extent that they have the status of custom in international law, and certainly where they have the status of preemptory norms, will normally prevail over specific, conflicting provisions of any treaties including trade agreements. The preamble of the WTO Agreement, which establishes the framework for the entire WTO system, does not make free trade an end in itself. Rather, it establishes the objectives of the system as related to the fulfillment of basic human values, including the improvement of living standards for all people and sustainable development. As is widely recognized now, both in development literature as well as in numerous documents of international policy, these objectives cannot be reached without respect for human rights.

The UN Charter states that one of its "purposes" is to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all…"

Although the GATT text —now part of the broader WTO system of treaties— reflects the recognition of non-trade public values, which are meant to prevail in the event of conflict with its free trade rules, institutional isolation has contributed to a very limited interpretation of this principle. Specifically, GATT Article XX, which was designed to be a fundamental pillar of the international trade regime, has often been construed so restrictively as to almost read it out of text, or to marginalize it. Compounding the problems created by institutional isolation is the atmosphere of secrecy and the lack of transparency in the dispute settlement and appellate process within the WTO. The GATT has often been interpreted as creating a general right to free trade; however, as emphasized in a few recent decisions of the WTO Appellate Body, the GATT and the other WTO treaties contain fine balances of rights and obligations. And the provisions that limit or balance trade liberalization, protecting other human interests, are as fundamental a part of the international law of trade, as those that support the globalization of markets. They must not be read out or down.

Enlightened interpretation of the GATT and other WTO agreements, however, will not in and of itself address the needs of under-development, inequality and the corresponding violations of fundamental human rights around the world. Trade rules must be looked at in their relationship to other phenomena connected to globalization, such as free capital movements and the practices of the international financial institutions. We must understand the effects of trade laws and policies in the broadest sense, and evolve new laws and policies in a manner that overcomes the isolation between human rights institutions and economic institutions, including those preoccupied with the trading system.

Highlights

– The relationship of trade law and human rights law: In the event of a conflict between a universally recognized human right and a commitment ensuing from international treaty law such as a trade agreement, the latter must be interpreted to be consistent with the former. When properly interpreted and applied, the trade regime recognizes that human rights are fundamental and prior to free trade itself.

– Labour: It is often claimed that the GATT prohibits members from regulating access of imports based on the manner in which those products have been produced, even if such regulations are applied equally to domestic products. However, this view is inconsistent with a close analysis of the jurisprudence, despite its presence in two

notorious panel rulings, which were not adopted as legally binding by the GATT membership. The correct reading of the GATT text would permit a country to impose conditions on imports related to the labour practices involved in their production.

– Government Procurement: The current negotiation of government procurement rules with respect to services provides the opportunity to develop the position that human rights-based procurement conditions are consistent with WTO law. As well, the existing Government Procurement Agreement, which concerns trade in goods, should be interpreted so as to permit ethical purchasing policies by governments. Not permitting members of the WTO to impose the kind of requirements on foreign suppliers that they routinely impose on domestic suppliers (such as anti-discrimination requirements) would amount to an obligation to favour foreign suppliers, which the GPA could not possibly be read as to entrench. Further, the public order exception in the GPA must be interpreted in light of the international law of human rights.

– Trade Policy Review: WTO member states are currently subject to a review process which examines their policies and practices in relation to their promotion of free trade. This is inconsistent with the actual full objective of the review process, which is to review policies in their relation to the "functioning of the multilateral trading system". The objective of the trading system is not free trade as such, but rather "ensuring full employment", "optimal use of the world's resources" and "sustainable development". National trade policy and practice should be examined in relation to the achievement of these goals.

– Dispute Settlement: Consideration of the human rights impact of dispute settlement rulings would be facilitated by the acceptance of amicus briefs by panel and appellate body members. In the Shrimp/Turtle case, a precedent has been established for the submission of amicus briefs to both the panels and the Appellate Body. Secrecy of pleadings and oral argument in WTO dispute settlement, however, may limit the effectiveness of amicus participation, and these provisions of the Dispute Settlement Understanding should be revisited as soon as possible.

– Global Governance: Interpretation of WTO law has not incorporated the expertise of other institutions governing the various regimes of international law. Nor has there been serious dialogue or interaction between the WTO as an institution and other relevant international institutions. However, the agreement establishing the WTO requires that this be the case. The implementation of this obligation should be the subject of a formal review.

Introduction

Since the late 1980s, the ascendency of market economics coupled with a revolution in information technology has accelerated the process of globalization while institutions of international governance have been unable or unwilling to catch up. Privatization and the related phenomena of deregulation, structural adjustment and a myriad of new bilateral, regional and multilateral trade and investment agreements have proceeded without credible efforts to conceptually and practically address their impacts on legally protected human rights. This paper addresses the tensions and potential synergies between the two legal regimes governing trade and investment and human rights. Trade and investment agreements, as well as the practices of international business, must be held accountable to existing human rights law. The spirit of human rights law must frame the development of trade law if either is to achieve its goals.

The ability of capital to move across borders with increasing ease in the era of globalization has implications for human rights. While human rights violations existed long before this period of rapid economic integration, the growing number of sectors covered by multilateral trade and investment agreements has set the stage for a new variety of human rights abuses which have not yet been suitably addressed. Consider the example of Nigeria where in the last decade foreign oil companies and military governments have laid waste to vast tracts of land in the oil-producing areas and responded with chilling brutality when the Ogoni people sought to protect their fundamental rights. In several Asian countries and other emerging markets, businesses and governments have supported practices which violate the rights of workers with impunity through sweatshops and child, slave, unfree, and bonded labour. At the same time, globalization has served to focus heightened attention on such practices in general, including abuses that existed before globalization but were often ignored.

Global “free” trade and universal human rights regimes are both post-war phenomena. However, they have developed on parallel, separate, and sometimes inconsistent tracks.[1] The contemporary international economic order, which is based on the push for a single global market, has its basis in the Bretton Woods System.[2] The origins of the global trading system were laid with the International Trade Organization (ITO), which was to be an integral part of the blueprint for global peace and security after WWII.[3] A fair international trading regime was thought to be essential to global peace. Beggar-thy-neighbour economic competition among the western countries—with escalating retaliatory tariffs and quotas—was seen as a cause of instability in Europe. Such policies were blamed for the rise of fascism, and ultimately, the outbreak of WWII. Significantly, the Bretton Woods architects were worried about more than beggar-thy-neighbour competition from overt trade barriers. The ITO was designed to address restrictive business practices and fair labour practices.

Several factors, however, changed this vision and resulted in a different multilateral trading order. First, the ITO proposal failed. In its place, a minimal set of rules, concerned mostly with border measures and explicit domestic discriminatory policies against imports, was adopted. The General Agreement on Tarriffs and Trade (GATT) had virtually no institutional framework, and nothing, for example, about concerns such as fair labour practices. Secondly, with the bifurcation of the world by the Cold War, the GATT essentially became an entity for the liberalization of trade among western countries. Without a doubt, it achieved considerable success in the reduction or elimination of a range of trade barriers among these countries. Freer trade became an engine of growth for the project for economic, social and political reconstruction in Europe and Japan. The alliance of governments and private initiative were instrumental in the recovery efforts.

Once developing countries began to join the GATT in significant numbers, they soon felt their needs were not addressed adequately by the post-war regime. Many were caught up in the East-West conflict. However, some minimal amendments to the original GATT agreements allowed developing countries certain exemptions or reduced obligations to liberalize trade. Ironically, developing countries were able to erect very high barriers to many of the most important exports of other developing countries, even as tariffs on products traded among the developed countries fell. The GATT, which was concerned exclusively with the negotiation and monitoring of rules for freer trade, operated in splendid isolation

from the other international institutions of the post-war order. Many in GATT expressed pride and satisfaction that the multilateral trading order had made progress towards rules-based free trade while other international institutions remained paralyzed or anemic because of geopolitics.

By the 1970s, the GATT had become successful as a forum for tariff reductions. As a result, increased attention came to be paid to a wide range of domestic policies. While not obviously discriminatory, some of those policies could amount to cheating on or undermining of negotiated concessions. Thus, issues such as subsidies, dumping, and "technical barriers" to trade became increasing preoccupations of the GATT system. With the creation in 1994 of the World Trade Organization (WTO), many of the areas of normative controversy such as technical barriers, services, intellectual property and subsidies were addressed by explicit new rules.[4]

Unlike the skeletal legal framework of the original GATT text, the new WTO agreements set rules which are not merely general "standards" that an expert bureaucracy can use in crafting dispute-specific solutions. They often have the character of detailed legal code, embodying trade-offs between regulatory autonomy and trade liberalization explicitly negotiated *ex ante*. Moreover, the failure to abide by these new rules—and indeed the old rules as well—as interpreted in dispute settlement triggers a right to retaliation against the offending party, with the level of retaliation subject to determination by arbitration. Under the old GATT, rulings of dispute panels required adoption by the membership of the organization, whereas under the WTO system, the rulings are subject to appeal to a standing Appellate Body, but are effective, as upheld or modified on appeal, unless a consensus of the membership is opposed to adoption.

The WTO, the United Nations and the international financial and economic institutions, have created an institutional base for development of a "global consensus" for lawful and universally agreed-upon behaviour in the political, economic, trade, social and human rights arenas. Celebrating an existing "global consensus", however, is premature as the relationship between these bodies remains undefined. For example, what is to be done when there is a clear conflict between, say, a particular human right and a principle or provision in international trade law? Should human rights "trump" trade law or vice-versa? Will international law develop a body of rules that advances "free" trade while at the same time promoting and protecting human rights? The UN Committee on Economic, Social and Cultural Rights has written that trade liberalization, "must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression".[5]

The challenge before the world today is how to influence the process of globalization in such a way that human suffering, poverty, exploitation, exclusion, and discrimination are eliminated. Since trade is the driving engine of globalization, it is imperative that, at the very least, rules governing it do not violate human rights but rather promote and protect them. The effort to fashion such rules would benefit from a process which is inclusive, transparent, democratic and participatory across all barriers. In such a process, international financial and trade institutions, and the WTO in particular, would engage civil society as well as governments, inter-governmental organizations and businesses in this reformulation. In recent years, the World Bank itself has placed some emphasis on the role of civil society and popular participation as a part of its governance program.[6]

This paper discusses the difficult nexus between trade and human rights and identifies areas of tension and possible reconciliation. It argues that trade and human rights regimes need not be in conflict, so long as the trade regime is applied and evolved in a manner that respects the hierarchy of norms in international law. Human rights, to the extent they are obligations erga omnes, or have the status of custom, or of general principles, will normally prevail over specific, conflicting provisions of treaties such as trade agreements. The WTO laws and processes must be interpreted in a way that advances human rights, transparency, accountability and representivity. It concludes that human rights and trade are fundamentally linked and must be seen as complementary, not oppositional.

Human Rights in International Law

In the last fifty years, the body of international human rights law has achieved a moral plateau rarely associated with any other area of international law. In fact, the power and righteousness of human rights is so great that virtually every modern cause has sought to cloak itself in the language of human rights.[7] Louis Henkin, a leading academic, has described ours as the "age of rights"[8] and human rights as the "only political-moral idea that has received universal acceptance."[9] Philip Alston, another prominent scholar, has argued that the "characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge, and generally endows it with an aura of timelessness, absoluteness and universal validity."[10] Founded on the Universal Declaration of Human Rights (UDHR), which Henry Steiner has described as the "spiritual parent"[11] of other human rights treaties, human rights law is now an indispensable part of the international landscape.

There is today an impressive catalogue of universal and regional human rights treaties and institutions. Whether their mandate is simply to monitor, encourage compliance with, or enforce human rights, this maze of norms and institutions has sharply contracted the traditional international legal concept of state sovereignty, which once granted states impunity with respect to internal misconduct. Human rights do not, of course, negate the sovereignty of states, although they constrain it in important ways. International law does not replace national law; rather, international law instructs sovereign states on internationally accepted human rights and, for the most part, leaves it to states to implement those norms domestically.

Human rights law has modified international law in fundamental ways. Since WWII, it has become an uncontested principle of international law that a state's treatment of its own citizens is not solely a matter of domestic jurisdiction.[12] It is true, of course, that human rights is not the only doctrine of international law that constrains the power of the state. In recent decades, the forces of globalization and the unparalleled predominance of global capitalism in the political and economic choices of states have further undermined the authority of the sovereign state. But ideas and values implicit in human rights have added an entirely new dimension to our understanding of the concept of state sovereignty.

Whereas previously, the state, or the monarch representing it, was the absolute sovereign, human rights norms now vest sovereignty in the people. This concept of sovereignty, which is expressed in the Universal Declaration,[13] the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[14] is termed popular sovereignty. The concept grew out of the liberal tradition,[15] humanitarian law,[16] international labour standards[17] and regimes for the protection of minorities.[18] Such sovereignty derives from the people, not the state. Although powerful states have sometimes used this principle to justify the use of force against less powerful states often resulting in new forms of human rights abuse, the fact that human rights law has controlled and curtailed the reach of sovereignty, the most fundamental construct in international law, is a testament to its centrality in international relations.

Human Rights as Customary International Law

Constitutionally, human rights are based on the United Nations Charter. UN treaty instruments and bodies that address human rights issues are created pursuant to the UN Charter. The Charter specifically charges the UN to promote the entire gamut of human rights. It asks the UN to promote "higher standards of living, full employment, and conditions of economic and social progress and development"[19] and "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[20] To underline the seriousness with which it took human rights, the UN asked the Economic and Social Council to "set up commissions,"[21] including those "for the promotion of human rights."[22] The Charter further requires member states to "take joint and separate action"[23] in cooperation with the UN to promote human rights.

The UN Charter does not resolve the question of hierarchy of law, or, put differently, whether human rights law has primacy over other domains of international law. However, the Preamble reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and

women and of nations large and small."[24] The promotion and protection of human rights is thus one of the "ends" or purposes for the establishment of the United Nations. The Charter states that one of the "purposes" of the UN is to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[25] Although the term "human rights" appears in scattered places in the UN Charter, and is terse and even cryptic, there can be no argument that it is mentioned in vital contexts, a fact that underlines the centrality of human rights to the UN system.[26]

In international law, the status of a rule is determined by its source as law. There are four recognized sources of international law: international conventions or agreements; custom; general principles of law common to the major legal systems of the world; and the judicial decisions and teachings of distinguished writers.[27] Of these, the most relevant for our discussion are the first two, namely, treaty law and customary international law. The status of human rights in international law, therefore, is determined by its location within the sources of international law. All human rights norms do not have the same status in international law. While some may be located in customary international law, most are codified in human rights treaties.

Unlike treaty law, which is based on the consent of states, customary international law binds all states. Customary international law "results from a general and consistent practice of states followed by them out of a sense of legal obligation."[28] Thus customary international law binds all states without exception and irrespective of their consent. In contrast, international treaty law only binds those states which have given their express consent to the treaty or agreement in question. For human rights, this distinction is critical because the location of a human rights norm in either source changes its status in international law and could constitute the difference between an automatically binding obligation and a voluntary commitment. Customary international law, unlike treaty law, must be obeyed by states, their wishes notwithstanding.

The scope and content of the customary international law of human rights, as indeed of all customary law, is a work in progress. While there are certain human rights whose status as custom is generally agreed upon, that list is not necessarily complete or closed. But it is clear from existent international law that a "state violates international law if, as a matter of state policy, it practices, encourages or condones"[29] the following conduct: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination such as apartheid; and consistent patterns of gross violations of internationally recognized human rights.[30] The last category, that of "consistent violations of internationally recognized human rights," has a very broad scope and includes the human rights protected in all the major universal human rights treaties.[31] Such violations infringe customary international law if there is a "consistent pattern of gross violations" as a matter of state policy.[32]

Two vitally important concepts in understanding the status of human rights in international law are those of jus cogens and obligations erga omnes. Rules of *jus cogens,* or preemptory norms of general international law, describe international obligations from which derogation is not permitted under any circumstances, even in cases of emergency. These have been defined by the 1969 Vienna Convention on the Law of Treaties as norms "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[33] Rules of jus cogens trump all other rules of international law, and are therefore in the first rank in the hierarchy of the law of nations.

The Vienna Convention anticipates the emergence of new rules of jus cogens in the future, a point that underscores the fact that jus cogens is an evolving concept, and that the substance and nature of its rules change with the progress and development of international law and morality.[34] Although there is no list, as such, of rules that constitute jus cogens, prohibitions against the slave trade or slavery, genocide, piracy and violations of human rights are regarded as preemptory norms of international law or jus cogens. Additionally, these practices give rise to obligations *erga omnes*, that is, they give all states an interest in their prohibition. This point was emphasized by the International Court of Justice in the Barcelona Traction, Light and Power Company*, Ltd.* In that case, the court's opinion read, in part:

[A]n essential distinction should be made between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another state in the field of diplomatic protection. By their very nature the former concern all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights have entered into the body of general international law...; others are conferred by international instruments of a universal or quasi-universal character.[35]

Views from distinguished international law institutions and scholars give much of international human rights a customary legal character, and some of it the status of jus cogens.[36] The position that human rights are obligations *erga omnes* is increasingly gaining ground. In particular, the International Law Institute has taken one of the most vigorous positions on this issue. It wrote the following in 1989:

This international obligation [to respect human rights]...is *erga omnes*; it is incumbent on every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. This obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.[37]

International law is increasingly treating fundamental basic human rights as a part of customary international law. First, the UDHR itself, that "common standard of achievement for all peoples and all nations,"[38] is now deemed to possess a normative, obligatory character that gives at least portions of it the status of customary international law.[39] Although not a treaty, and therefore not binding, the UDHR is so widely accepted and revered by governments that they invoke it, refer to it, and use it as a guide for fashioning constitutional and other laws as well as for formulating both domestic and foreign policy. Its acceptance by states has been so total and universal that it may now be said to meet the standard of opinio juris sive necessitatis, a practice that states follow out of a sense of legal obligation. Mary Ann Glendon has written that the UDHR "is already showing signs of having achieved the status of holy writ."[40]

A large portion of the body of human rights law has acquired this obligatory character in international law. The universal acceptance in principle of human rights by states of all political stripes and their invocation at the domestic and international levels, coupled with the active involvement of virtually all states, individually and collectively, to promote and protect human rights through the United Nations and regional human rights systems in Africa, the Americas and Europe, has led to a certain belief that states have assumed human rights obligations beyond the mere acceptance of treaty law.

GATT Article XX and WTO Dispute Settlement

Specific conflicts and tensions between trade law and human rights law regimes cannot be understood without looking at the relationship between the WTO and other international legal regimes. Institutionally, the GATT developed in isolation, a fact which produced a single-minded free trade perspective. But the actual text of the GATT reflects the recognition of supervening non-trade public values which were meant to prevail in the event of conflict with the free trade rules in the GATT. GATT Article XX provides that nothing in the GATT "shall be construed to prevent the adoption or enforcement by any contracting party of measures" inter alia, "necessary to protect public morals," "necessary to protect human, animal or plant life or health," "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption," "essential to the acquisition of or distribution of products in general or local short supply" and "relating to the products of prison labour."[41]

It is important to note that international human rights was in its infancy when the provisions of GATT Article XX were negotiated. But the GATT drafters certainly included a very broad range of human interests recognized widely at the time as being fundamental or related to very basic human values.

Unfortunately, the institutional isolation of the GATT has had a negative impact on the interpretation of Article XX in dispute settlement in the Thai Cigarette[42] and Tuna Dolphin[43] cases, certainly the most important opinions prior to the creation of the WTO. The panels in those cases construed Article XX so restrictively as to almost read it out of the GATT, or to marginalize it. Alarmingly, the notion developed that measures might only be justified under Article XX if no less trade restrictive alternative could be *imagined* to achieve the policy objectives in question. Since neo-classical economists can almost always find some policy instrument other than trade restriction that could hypothetically, and without regard to real world costs, achieve a given policy objective, this interpretation amounted to making Article XX largely superfluous. In the original design, however, Article XX was designed to be a fundamental building block of the international trade regime.

The creation of the WTO gives the world a new opportunity to put Article XX in its rightful place in the GATT. Doing so must involve the re-interpretation of Article XX in light of the norms of international human rights law. Contrary to the GATT tradition of isolation and self-containment, it is now a well-established fact in the WTO that its rules and institutions function in the context of the evolving broader framework of international law. Thus the construction of WTO jurisprudence by its dispute settlement organs must not contradict rules of interpretation set forth in the Vienna Convention on the Law of Treaties.[44] This must include "any rules of international law" relevant to the dispute.[45]

The clearest illustration of this approach to WTO legal interpretation is found in the Turtles[46] case. In that case, the Appellate Body of the WTO examined the meaning of the expression "exhaustible natural resources" in an environmental trade dispute. The Appellate Body adopted an interpretation that included endangered species within the meaning of the expression, which is found in a provision of the GATT that allows members to take trade action otherwise not consistent with GATT obligations where the measures are taken in relation to the conservation of such resources. The Appellate Body referred to international environmental law as it had evolved since the negotiation of the original GATT text. It concluded that international environmental law had to be used as an appropriate benchmark for the meaning of exhaustible natural resources.

The Preamble of the WTO Agreement states a number of objectives of the WTO system that may relate to certain human rights obligations, especially labour rights and elements of social and economic rights. Article XX (a) of the original GATT allows members to take otherwise GATT-inconsistent measures necessary for the protection of "public morals". It can be argued that where trade restrictions may be a necessary mechanism for dealing with gross human rights abuses, there is a possibility of invoking the public morals exception. However, this provision has never been interpreted in dispute settlement. It is an open question how strictly such measures would have to be justified, given the use of the term "necessary" in the provision. Moreover, concerns persist that such restrictions could be subject to abuse for protectionist purposes.

In the past, the GATT traditionally gave the term "necessary" in other provisions of Article XX a very restrictive reading. However, because of the new approach under the WTO Appellate Body, the meaning of the necessity test would have to be considered in light of relevant rules of international law, including international agreements on human rights. It would also take into account whether that situation was considered as pressing under international human rights law or recognized as such by international human rights institutions. Article XX(b) of the GATT also allows for trade measures that would otherwise be GATT-inconsistent where necessary for the protection of, among other things, human life or health.

The Preamble of the WTO Agreement and Human Rights in WTO Law

The Appellate Body of the WTO has emphasized on several occasions that Article 31 of the Vienna Convention on the Law of Treaties, which states the basic rules of treaty interpretation, is a fundamental reference point for WTO dispute settlement. It provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." An important "context" for treaty interpretation here is the text of the treaty itself, "including its preamble and annexes."[47] The preamble is therefore an important source of

"context" in the interpretation of any provision of a treaty text. It is as important as any other provision of the treaty for the purposes of resolving a dispute. The preamble to the Agreement of the WTO, however, has a special status. The Marrakesh Agreement is the framework agreement for the entire WTO system, and the preamble is the most comprehensive statement of the objectives or goals of that system. Thus it is probative not only with respect to context, but also purpose and object within the meaning of Article 31 of the Vienna Convention.

This explains the heavy reliance by the Appellate Body on the preamble of the Marrakesh Agreement in the *Turtles* case. In that case, the United States sought to justify trade measures on environmental grounds, in particular the need to protect sea turtles, which it characterized as an endangered species. The Appellate Body held that Article XX of the GATT had to be read in light of the preamble to the Marrakesh Agreement, and especially the commitment to sustainable development as an objective of the multilateral trading system. The phrase "exhaustible natural resources" in Article XX (g) of the GATT, the body said, must be interpreted in light of evolving norms and rules of international environmental law.

Significantly, however, the preamble does not explicitly mention human rights, although it talks about raising "standards of living" and the need for "sustainable development." These values must be read as supervening free trade for its own sake. Nobel laureate economist and philosopher Amartya Sen has recently argued the following:

> Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers—perhaps the majority—of people. . . Freedoms are not only the primary ends of development, they are also among its principal means. In addition to acknowledging, foundationally, the evaluative importance of freedom, we also have to understand the remarkable empirical connection that links freedoms of different kinds with one another. Political freedoms (in the form of free speech and elections) help to promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities for participation in trade and production) can help generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.[48]

Human Rights and the GATT

WTO members undertake a standard set of obligations whose purpose is non-discriminatory treatment of products in each other's markets. To the extent that deviations are permitted from this general script, there are clear provisions governing permissible measures. In addition to the Most-Favoured-Nation Treatment[49] and the National Treatment[50] clauses, states are prohibited from imposing restrictions, other than those permitted under GATT,[51] on imports or exports. The text of the GATT does not, however, explicitly list human rights as grounds for the exclusion of products. It does, however, contain provisions that permit states to protect and promote human rights through trade by taking certain measures against states that violate human rights. The pivotal provision in this respect is Article XX which provides a wide array of exceptions under which a WTO member can promote and protect human rights without being in violation of GATT.[52] The exceptions that would not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade include measures to protect public morals, measures necessary to protect human, animal or plant life or health and measures relating to the products of prison labour.[53]

Article 103 of the UN Charter is also pivotal to the interpretation of the international obligations of member states. It provides that in "the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." It is clear here that a treaty—even one of universal application—would be overridden by the UN Charter in the event of a conflict. The subject matter of the treaty is irrelevant. Thus, for instance, in Aerial Incident Over Lockerbie,[54] the International Court of Justice (ICJ) ruled that member states are required under Article 25 of the UN Charter to carry out UN Security Council resolutions over other international treaty obligations. In that case, the ICJ held

that the Security Council could require Libya to turn over bombing suspects, even though the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation permitted Libya to choose domestic prosecution over extradition.

The significance of Article 103 lies in the construction of the phrase "the obligations of Members of the United Nations under the present Charter." As noted earlier, the references to human rights in the UN Charter are sparse and erratic, though important. Broadly read, those references place obligations on member states to promote and protect human rights. But they do not spell out those rights, preferring to leave their elaboration to the UDHR and to specific human rights treaties. Thus it would appear that in the event of a conflict between a human rights obligation, particularly one that is universally recognized, and a commitment ensuing from international treaty law, the former prevails or the latter must be interpreted to be consistent with the former. The GATT and other WTO agreements are treaties which would be subject to such obligations and interpretations. Human rights norms should always be taken into account when interpreting international trade and investment obligations.

Exclusion and Transparency within the WTO

The negotiation of trade and investment agreement takes place within a culture of secrecy and exclusion. Non-governmental organizations and official inter-governmental organizations concerned with human rights have traditionally been excluded from these processes. Two recent examples underline the absence of "outsider" participation. First, the Uruguay Round of negotiations, which yielded the 1994 GATT and the other WTO agreements, was closed to all but the few industrialized, mostly Northern, states that control the global economy. The process was closed to most of the Third World, where three quarters of the global population lives. Second, the negotiations on the Multilateral Agreement on Investment (MAI) were carried out by the Organization for Economic Cooperation and Development (OECD) in an atmosphere of high-level secrecy.

Opacity and exclusion define many of the processes of the various WTO bodies. What is particularly disturbing is that UN expert human rights bodies, such as the UN Sub-Commission on the Promotion and Protection of Human Rights, which has been concerned with the intersection of trade and human rights, have not been included in the GATT/WTO processes. There is textual basis for involving NGOs and intergovernmental organizations in WTO deliberations. Article XXIII(2) of GATT allows the WTO to permit intergovernmental organizations into its processes.[55] Likewise, Article V(2) of the Agreement Establishing the World Trade Organization makes allowance for the consultation of NGOs.[56] It is the deep-seated culture of secrecy, not the lack of textual authority, that has kept "outsider" groups from participation in WTO structures. Many of these organizations would provide much needed information and insight into the complex problems globalization raises.[57]

The manner in which WTO provisions are interpreted is of fundamental importance to human rights. Most domestic legal systems, and an increasing number of supranational adjudicative bodies, allow public scrutiny of judicial proceedings. Regrettably, written and oral pleadings in the WTO remain secret unless states party to the dispute consent to openness. This secrecy keeps NGOs, including those dealing with human rights issues, from participating in the dispute settlement process. Such secrecy is notably inconsistent with the norms of transparency required by the WTO itself in domestic legal trade-related proceedings.

It is an encouraging sign, however, that the Appellate Body in the Turtles case recently interpreted WTO law as permitting the submission of amicus or intervener briefs in WTO cases. Although there is no explicit provision to that effect, such briefs are now permitted at both the panel and appellate levels of dispute settlement. The WTO legal affairs and Appellate Body secretariats must therefore develop working procedures for the submission of briefs in a timely and effective manner. Pressure will be necessary because neither of these bodies appear eager to make outside interventions a routine practice.

Several issues must be addressed in order to open up the WTO process. A filing system that informs interveners that their briefs will be seen in a timely fashion by panels and the Appellate Body must be instituted. The imbalance of resources must not be allowed to affect the quality and effectiveness of intervener advocacy on behalf of developing countries at the WTO. Consistent with the expansion of legal assistance to governments of developing countries, NGOs from those states must have access to

legal assistance for the preparation of their own amicus briefs. Organizations with human rights mandates, such as the ILO, the UN Commission on Human Rights and the World Health Organization must become aware of and gain the competency necessary to take advantage of amicus intervention in WTO proceedings with human rights implications.

Amicus submissions, like all pleadings, must be accessible and part of the public record. The entire record, including the briefs, should be posted on the WTO website. Finally, the panels and the Appellate Body should be required to evaluate amicus briefs for consideration. The usual practice in domestic and international tribunals is to consider such briefs on the basis of leave, or discretion, of the tribunal. But a WTO panel has a legal duty to make an objective assessment of the facts. This should be understood to mean that the evaluation of briefs for consideration must be based on objective criteria. Such evaluation must consider the relevance of the brief to the dispute and must not be biased or one-sided.

Labour Rights

There has been strong resistance to placing responsibility for the protection of workers' rights within the WTO framework. Developing countries have been one source of such resistance. Developing countries are legitimately concerned that low labour standards could be used by developed countries as a pretext for disguised protectionist measures against them. It is important to note that some developing countries have used this argument to perpetuate and condone slave labour and exploitative forms of child labour. In effect, such manipulative discourse misuses trade language to justify non-compliance with human rights standards.

The International Labour Organization has promulgated 177 conventions on labour standards. These conventions and other related documents address a broad range of basic rights, from the freedom of association to detailed standards in particular industries. The ILO has, however, been subject to criticism. The breadth and diversity of its activities have been blamed for its lack of focus on the essential human rights of workers in the new global economy. Second, the ILO lacks formal, effective mechanisms for dispute settlement and enforcement. Its tripartite structure of decision-making only involves national delegates drawn from business, trade unions, and government. While this makes the ILO more open than other multilateral organizations, it often excludes NGOs and transnational civil society interests.

The reality of today's global economy raises concerns around the representivity of the workers' interests by national trade unions as well as the representivity of business views by national business associations. The representivity of workers' issues is particularly complex as governments in some countries sanction selected trade unions and suppress others. In a Declaration adopted by its membership, the ILO recently articulated a set of core labour rights. It listed these rights as the "freedom of association and recognition of the right to collective bargaining," the "elimination of all forms of forced or compulsory labour," the "effective abolition of child labour," and the "elimination of discrimination in respect of employment and occupation."[58]

It has been argued that low labour standards are a necessary strategy for the economic development of poor countries. In a comprehensive study, however, the OECD found that respect for basic labour standards similar to those in the ILO Declaration supports rather than undermines open trade-oriented growth policies in developing countries.[59] The report noted that "the clearest and most reliable finding [of the study] is in favour of a mutually supportive relationship between successfully sustained trade reforms and improvements in association and bargaining rights."[60] It is true that the definition and interpretation of the right to association is a complex, contextual exercise. This does not mean, however, that such rights are too vague and indeterminate to be effectively enforced internationally. Notice should be taken that many of the key obligations in the WTO agreements were drafted in very general terms, but dispute settlement involving the non-discrimination provisions in Articles I and III of GATT has resulted in highly contextual interpretative exercises.

Ministers of WTO member countries decided in the 1996 Singapore Declaration to "renew [their] commitment to the observance of internationally recognized core labour standards".[61] That Declaration stated that the ILO "is the competent body to set and deal with these standards."[62] The Declaration

rejected the use of labour standards for "protectionist purposes."[63] However, this did not resolve what the WTO should do if a developed state contemplates trade measures, not for protectionist purposes, but as a response to the non-compliance by a developing state with fundamental human rights in labour.

The United States and the European Union have provisions in their domestic laws that allow the withdrawal or modification of preferential trade arrangements with developing countries on many different grounds. These preferences are granted voluntarily and not by virtue of a binding legal obligation under the WTO. It therefore would be WTO-consistent for these countries to condition such preferences on labour rights performance. A serious issue arises, however, when a WTO member seeks to condition the WTO-required market access on labour rights practices in a particular exporting country.

The GATT itself does not create a general right of free access for imports. A member's basic obligation, subject to additional rules in the codes on food safety and on technical barriers, is to provide treatment as favourable to imports as that provided to domestic products. It seems fair to assume that a country that has banned slave labour in domestic production, for instance, could equally ban imports of products from facilities that use slave labour. This would amount to equal treatment of both domestic and imported products, with reference to the requirement that slave labour not be used. Requiring a country to accept imported products produced with slave labour, regardless of the treatment of like domestic products in its law, would in fact amount to demanding more favourable treatment to imports. GATT law does not mandate such a requirement and it is hard to imagine that many countries would agree to it.

In the Tuna/Dolphin cases, which dealt with trade and the environment, two unadopted GATT dispute settlement rulings suggested that equal treatment within the meaning of the National Treatment obligation of the GATT related only to measures based on the physical characteristics of a product. Therefore, irrespective of whether domestic products are treated similarly, there would be a *per se* violation of the GATT provision on import restrictions and prohibitions in the case of measures that distinguished products in their manner of production. This ruling has very questionable legal foundations in the GATT text. Furthermore, it is also inconsistent with previous rulings adopted by the WTO membership. In particular, it departs from a case in which the National Treatment concept was applied to a scheme in which the products were distinguished based on whether their production entailed the violation of intellectual property rights.[64]

It is also appropriate for the WTO dispute settlement organs to determine whether trade measures taken for the protection of public morals or of human life or health are necessary when taken against imports from countries that violate labour rights. It is arguably a violation of the Most Favoured Nation obligation in GATT Article 1 to single out products on the basis of the policies of the government of the country where they are produced. Article 1 requires that imported products be "unconditionally" extended the same rights under the GATT, regardless of the country they come from. However, Article XX allows the justification of otherwise GATT-inconsistent measures, where these measures are defensible on certain public policy rationales, including the protection of public morals and the protection of human life and health.[65]

Fundamental labour rights, recognized by the WTO membership in the 1996 Singapore Declaration, enter into the definition of public morals. Some, like the prohibition against enslavement, are human rights with the status of jus cogens. Human life and safety are clearly implicated in cases of slave labour and particularly extreme forms of child labour. Nevertheless, trade sanctions cannot provide a comprehensive solution to the complex issues that affect the labour rights performance of WTO members. Sanctions should be viewed only as a final strategy when others have been exhausted. Incentives in the form of preferences to developing countries which enforce basic labour rights would be a more effective means of encouraging progressive realization of labour rights. WTO members should provide technical assistance where needed and adequate time to implement corrective measures should be given to those countries which have demonstrated a commitment towards the rights of their workers. The WTO should disfavour punitive sanctions that isolate a particular political regime rather than address particular abusive governmental practices.

WTO Institutions, Transparency, and the Rule of Law

Trade liberalization, even in its narrow conception as a strategy for economic growth and prosperity, depends on the rule of law and transparently impartial and reasonable administrative and judicial procedures in which public officials are accountable. The trade policies of a corrupt, opaque, and arbitrary government that supports lawlessness and corruption in the private sector inevitably lead to a distorted and highly insecure market. In such cases, it matters little even if multilateral trade rules contain provisions that discipline border controls or address overt discrimination. Although GATT Article X contains important transparency provisions, they have rarely been applied or interpreted in dispute settlement.

Despite its long-standing mandate to deal with questions of transparency, the WTO has no institutional expertise in the area. The WTO institutional isolation from human rights institutions, among others, has compounded its inability to address transparency and due process-related provisions in specific agreements of the WTO. These include dumping, subsidies, procurement, technical barriers, and sanitary and phytosanitary agreements. It is absurd to expect a country that systematically violates basic human rights to faithfully execute and implement the processes that the WTO agreements require. It is necessary to draw on human rights expertise and accept the evaluations of international human rights institutions in order to guide the performance of the WTO in these matters.

Government Procurement

Government procurement policies are important in the calculation of human rights. There is a long-standing practice of government procurement conditionalities related to rights or other social objectives in a broad range of countries. Christopher McCrudden, a leading authority on the subject, has written the following:

> The use of public procurement to put such policies into effect has a long history, most notably in pursuit of racial and gender equality… the Canadian government has introduced preferential award of federal contracts to Aboriginal peoples. The South African government currently uses a system of "targeted" procurement as part of its policy on social integration… One of the earliest International Labour Organization conventions (No. 94) requires a linkage between certain fair labour standards and government contracts, and this has been widely ratified. In addition, several European countries have various different types of policies for achieving women's equality attached as requirements in the award of public procurement contracts.[66]

The WTO Agreement on Government Procurement (GPA) provides for National and MFN treatment when foreign suppliers bid for government procurement contracts. It also provides that qualifications that are not essential to ensure the ability to perform the contract may not be imposed on suppliers.[67] While on the face of it the MFN requirement prevents the exclusion of bidders on the grounds that the government of their country of origin violates human rights, Article VIII (b) of the GPA seems to allow the imposition of qualifications based on human rights performance. It appears, however, that the qualifications must be made a condition of the contract itself. That is, they must deal with the practices of the firm in question, and not the government of the country of its origin.

The government procurement policies of the State of Massachusetts in the United States recently gave prominence to procurement disputes. The state's procurement laws require that suppliers have no dealings with Myanmar (Burma). Myanmar's labour rights record has been the subject of censure by a resolution of virtually the entire membership of the ILO. Myanmar is not a party to the GPA but the European Union was concerned that the Massachusetts stipulation would prevent European companies doing business with Myanmar from bidding on government contracts in Massachusetts. The EU then commenced dispute settlement proceedings against the United States at the WTO. Those proceedings were only suspended when the United States Court of Appeals upheld a lower court judgement which found constitutional defects in the Massachusetts statute. However, the Supreme Court of the United States has now agreed to hear a final appeal from the appellate court judgement. If the Supreme Court reverses its decision, it is possible that a new WTO action will be commenced against the Massachusetts scheme.

Even if the Massachusetts law violated some provisions of the GPA, it might still have been justified under the exceptions provision of the Agreement, which allows measures that are, inter alia, necessary for reasons of public order. This concept, which is based on the idea of *ordre publique* in private international law, relates to the fundamental public policies of a society, and not merely order in the sense of civil peace and public security. McCrudden has suggested that public order should be interpreted to include the emerging international public policy of human rights.[68]

The GPA will surely be subject to review by the membership of the WTO in the coming years. In addition, procurement rules with respect to services are being negotiated. These will provide opportunities to further develop the position that human rights-based procurement conditions are consistent with WTO law. It is anomalous and unjustifiable that WTO regulations should force a country to provide better treatment to foreign bidders than to domestic enterprises, prohibiting it from imposing on the former human rights-based requirements that it routinely imposes on the latter.

The Trade Policy Review Mechanism

The Marrakesh Agreement Establishing the World Trade Organization codifies a long standing GATT practice of periodic review of trade policies of member countries.[69] The review, which is done by the WTO Secretariat on the basis of information provided by the WTO member, examines policies and their impact. A government statement of its policies and the Secretariat report are then discussed at a WTO meeting. The "review mechanism enables the regular appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the multilateral trading system."[70] Regrettably, these policies and practices are not evaluated as to their impact on human rights or compliance with other international commitments. Democracy, the rule of law, human rights and the protection of labour rights have generally been overlooked, although there recently have been references to "social stability."

The perspective from which the policies of members are examined needs revision. Currently, the only issue considered in these examinations is whether a member's policies and practices support free trade. It is clear, however, that the perspective through which a member's policies are reviewed should not be only that of free trade but rather of the "functioning of the multilateral trading system."[71] As stated in the Preamble to the WTO Agreement, the objectives of this system are not free trade as such but, *inter alia*, "ensuring full employment and a large and steadily growing volume of real income and effective demand" and "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development."[72] International organizations concerned with human rights, including labour rights and development, should participate in the review process at the WTO. They should be prepared to respond when the reviews do not appropriately reflect the social and developmental goals of the multilateral trading system.

The skills and expertise of the WTO Secretariat responsible for research and report writing must be addressed if the Trade Policy Review Mechanism (TPRM) exercises are to properly examine the impact of trade policy on these other issues. Do the people who evaluate country reports have the requisite expertise in democracy and the rule of law, and the protection of labour rights? The TPRM process can draw on any "information available to it" instead of simply relying on data provided by governments. This would allow the use of information made available by NGOs and other international organizations such as the ILO. It is important to establish guidelines for the provision of information from independent sources relating to trade and its impact on human rights.

Trade-Related Intellectual Property Rights

Intellectual property rights are the first "private rights" to be protected under the WTO framework. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was accepted with great reluctance by many developing countries. They feared that high levels of intellectual property protection would not be appropriate to technology transfer and other social objectives such as the affordability and availability of essential medicines.

Intellectual property can be understood as a form of monopoly right. Implicit in the basic understanding of individual autonomy is some protection of the ability to obtain compensation for an individual's creative work. In this construction, the ability to appropriate the work of others without compensation is an invitation to exploitation. But the kind or level of compensation that is fair and appropriate reflects a balance of values and rights within a society. There can be no absolute or abstract answers. Some intellectual property rights may provide undue power and allow creators the right to determine the price at which they will share their work with the world. However, that would be an extreme understanding of individualism, because in all almost all cases work is only possible in a social context.

Many of the provisions of TRIPs reflect the views and demands of countries with powerful industrial lobbies for high levels of intellectual property protection. Nevertheless there are some important clauses in the TRIPs agreement that do suggest an effort to achieve a more balanced approach. One example is Article 31 which, in certain circumstances, permits compulsory licensing of patents, provided certain conditions are fulfilled, including the provision of "adequate compensation" to the patent holder. In a recent dispute, United States business interests objected to compulsory licensing in South Africa of medication needed to address the AIDS crisis. Instead of suing South Africa under WTO law, the United States exerted pressure in bilateral relations. To avoid a public relations disaster, the United States eventually allowed South Africa the option of compulsory licensing to the extent consistent with TRIPs. Access to medical care is clearly a human rights issue, and it would have been unconscionable for the United States to prevent South Africa from providing needed drugs. The evolution of a balanced approach in the existing legal text should be a precondition for any further elaboration of intellectual property rights in the WTO context.

The Status of Economic, Social and Cultural Rights

The entire human rights corpus is based on the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the trio of documents referred to as the International Bill of Human Rights. In its 30 articles, the UDHR proclaims two broad categories of rights: these are, on the one hand, civil and political rights, and, on the other, economic, social and cultural rights. Although for political and historical reasons the rights in the ICCPR have received more recognition than those in the ICESCR, the UDHR treats the two sets of rights as indivisible, interrelated, and interdependent. It is, however, a fact that civil and political rights are more developed jurisprudentially than economic, social and cultural rights. Critically, however, trade policies and globalization affect economic, social and cultural rights, in particular. Hence the necessity of safeguarding these rights within the context of the GATT/WTO regime.

The civil and political rights that are provided for in Articles 3-21 include the rights to life, liberty and the security of the person; the prohibition against slavery, torture and cruel, inhuman or degrading treatment; freedom from arbitrary arrest and detention; the presumption of innocence and the right to a fair trial; and the freedom of speech, thought, religion, belief, conscience, assembly, movement and association. In Articles 22-27, the UDHR provides for economic, social and cultural rights. These rights include the right to social security, the right to work, the right to equal pay for equal work, the right to education, the right to rest and leisure, the right to security in the event of disability and unemployment, the right to health and the right to take part in the cultural life of the community. The UDHR makes no distinction and creates no hierarchy among the rights that it promulgates.

Briefly, the schism in human rights is a product of the bipolar ideological confrontation between the East and the West immediately following WWII. While the Soviet Union and its socialist allies posed as champions of economic and social rights, the West touted the primacy of civil and political rights. Soon after the adoption of the UDHR in 1948, positions hardened and eventually the UN decided to develop two separate covenants for the two sets of rights, each with different institutional and enforcement mechanisms and strategies. In a reflection of this ideological bias, many governments and human rights groups in the West became unsympathetic and even hostile to the idea of economic and social rights as

"rights." It was argued unsuccessfully by these opponents that economic and social rights were not rights but "equities" or "concerns." Further, it was argued that, unlike civil and political rights, these rights were not justiciable in courts of law.

In reality, the opposition to economic and social rights in the West reflects the ideological divisions in the world that characterized the Cold War era, with social and economic rights being identified, misleadingly, with forms of collectivism and redistribution incompatible with individual liberty and market economics. One result of this fear was the creation within the ICCPR of the Human Rights Committee as its oversight body and the denial of a similar body for the supervision of the implementation of the ICESCR. In 1987, the Committee on Economic, Social and Cultural Rights was specially established by the UN Economic and Social Council to monitor the ICESCR. Importantly, while the ICCPR requires states to realize their obligations under it immediately, the ICESCR resorts to the language of gradualism, asking states to "take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum extent of its available resources, with a view to realizing progressively the full realization" of the rights in the Covenant. This vague and permissive language has only served as an excuse for governments that are all too eager to avoid their obligations under ICESCR.

It has been part of UN doctrine that the entire family of rights—civil and political as well as economic, social and cultural—are indivisible. The conceptual interdependence of the two sets of rights is beyond dispute. At the UN World Conference on Human Rights held in Vienna in 1993, over 180 countries affirmed that all human rights are "universal, indivisible and interdependent and inter-related." The Vienna Declaration and Programme of Action goes on to assert that "while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states regardless of their political, economic and cultural systems to promote all human rights and fundamental freedoms"[73] . Considering the opposition of some states to the notion of universality, the strength and clarity of this wording is significant.

The inter-relation of rights can be illustrated by a few examples. The right to form trade unions, for example, is guaranteed in the ICESCR, while the complementary rights to association and assembly are provided for in the ICCPR. The prohibition against non-discrimination in relation to the provision and access to education can be derived from Article 2 of the ICESCR and Article 26 of the ICCPR. Interpretations of both sets of rights almost always blur their supposed distinctions. In any event, it is now widely recognized and accepted that a society that denies basic social and economic rights cannot be stable and democratic and respect civil and political rights. In this connection, global trade should promote and protect the economic, social and cultural rights of individuals and communities.

Economic and Social Policies: Food Safety, Technical Barriers and Services

GATT originally provided member states—at least in theory—with largely unconstrained legal autonomy to implement domestic economic and social policies. The only condition was that they not discriminate against trading partners. GATT Article XX provided that in the event of a conflict, certain public values, such as the protection of public morals or human health, would trump trade rules. Some recent WTO treaties, however, seek to discipline non-discriminatory policies and threaten to undermine the clear hierarchy of values established by GATT Article XX. One example is the Agreement on Sanitary and Phytosanitary Measures (SPS), which governs domestic food safety regulations, and which has loomed large in the US-EU dispute around hormone-treated beef. Where a WTO member seeks to apply more stringent regulations than what is provided by international standards, its regulations must meet a range of criteria. Such regulation must be based on a scientific assessment of risk and must, even if non-discriminatory, be the least trade-restrictive standard available to achieve the level of risk that the member deems acceptable. Domestic product regulations are also controlled under the Technical Barriers to Trade Agreement (TBT), which requires that such regulations "not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."[74] These legitimate objectives are, inter alia, national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment.[75]

Some trade experts have taken the reference to "taking account of the risks non-fulfilment would create" to mean a balancing or proportionality test. Here, the trade restrictive effects of a regulation are weighed against the social and economic benefits resulting from a given reduction of risk. This interpretation, if adopted in dispute settlement, would constitute a fundamental departure from the hierarchy of norms stated in GATT Article XX. The obligation to implement social and economic rights lies with national governments under the relevant international instruments. However, the ability to do so through national social and economic regulation would be subject to the WTO dispute settlement organs, which would second guess the trade-offs made in such a regulation concerning acceptable risks. The SPS requirement for scientific risk assessment has been said to require that regulations must be based on a cost-benefit analysis. This is the sort of technique that was used ideologically in the 1980s by some developed countries to scale back social, economic and environmental regulations.

In the case of the SPS Agreement, however, the Appellate Body seems to prefer an interpretative approach which recognizes that the social responsibilities of governments should not be lightly interfered with by trade law. In the Hormones [76] case, the Appellate Body found that the European Community had not met a certain minimum threshold of scientific justification for its ban on cattle treated with synthetic hormones. It also said that this threshold should not be set in a way that frustrates the ability of governments to meet their responsibilities to protect their citizens. The Appellate Body held, for example, that governments could act on the basis of views other than mainstream scientific opinions. Ultimately, the decision about which scientific views were sound would rest on government as part of its responsibilities to the people.

The Appellate Body suggested, further, that scientific risk assessments could include real world considerations of enforcement and monitoring that do not arise under laboratory conditions but relate directly to the social responsibilities of governments. It stated as follows:

> It is essential to bear in mind that the risk that is to be evaluated… is not only risk ascertainable in a scientific laboratory under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[77]

These indications of sensitivity to the economic and social responsibilities of governments would be greatly reinforced by an explicit understanding among WTO members that the rights and obligations contained in the SPS and TBT Agreements are subject to the overriding norms already explicit or implicit in Article XX of the GATT.

Other economic and social rights issues emerge in relation to trade in services. Opening up service markets to global competition through multilateral trade rules has been closely linked to the elimination of domestic monopoly provision of many services. Telecommunications and transportation services are examples. However, monopoly provision of certain services has often been done by a state enterprise with specific social and economic goals. These have included universal access to basic services and non-discrimination.

Anti-competitive monopolies or oligopolies have at times led to high prices and poor service for ordinary citizens. It would, however, be wrong to conclude that the shift to competition necessarily enhances access to basic services. The real question is the extent to which WTO rules actually limit, in intent or effect, the ability of governments to impose social obligations on foreign and competitive domestic service providers. Governments are responsible for the implementation of social and economic rights and bear the obligation to make certain services available at an affordable cost.

The General Agreement on Trade in Services (GATS) forecasts new disciplinary measures that would limit even non-discriminatory requirements that governments impose on service providers. These disciplinary measures would ensure that such requirements "do not constitute unnecessary barriers to trade in services."[78] This provision seems to recognize only those requirements that ensure the quality of

a service as legitimate. There is no recognition of the legitimacy of requirements related to human rights. There should be an implicit view that putting requirements on service providers is a legitimate means of achieving redistributive goals. A Working Party on Domestic Regulation is expected to complete work on possible disciplines under GATS Article VI at the end of 2000. The resulting agreement should contain a clear statement of the precedence of human rights, including economic and social rights, over any such disciplines. This will be especially important as efforts intensify to induce members to make specific commitments to market access in more sectors, such as health and education, where policy goals related to human rights are obvious.

Ending the Institutional Isolationism of the WTO

This paper noted at the beginning that GATT evolved in isolation from other multilateral institutions of global governance such as the United Nations and World Bank. However, the approach to treaty interpretation and dispute settlement since the creation of the World Trade Organization in 1994, and developed by the Appellate Body since then, seeks rightly to interpret WTO law in light of the broader framework of international law. This must explicitly and consistently include international human rights law.

So far, however, interpretation has not been profound and has not expanded institutional relationships across the various regimes of international law and global governance. Despite some formal ties with the International Organization for Standardization (ISO), inclusion of IMF views in certain disputes concerning balance of payments-related trade restrictions, and reference to collaboration between the ILO and the WTO in the Singapore Declaration, there has been virtually no serious dialogue or interaction between the WTO as an institution and other relevant international institutions. The only collaborative effort in recent times worthy of note is with the World Bank, on a trade and development website. This record is appalling.

The Marrakesh Agreement Establishing the World Trade Organization states that the "General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO."[79] The word "shall" in this provision means that it is a formal obligation of the treaty for the membership, through the General Council, to make such arrangement for "effective" cooperation. The implementation of this obligation should be a subject of formal review. As an initial step in this review, the views of relevant international organizations and NGOs should be solicited and given considerable weight.

At the end of January 2000, a new initiative of the United Nations was inaugurated — the Global Compact — to link businesses, citizens and certain international agencies in a dialogue concerning labour issues, environmental protection and human rights.[80] The intergovernmental institutions involved in this effort include the International Labour Organization, the United Nations Environmental Programme, and the UN High Commissioner for Human Rights. It is highly regrettable that the World Trade Organization is not involved — indeed the launching of such an initiative without its participation is very discouraging, as it suggests that such a dialogue can legitimately and satisfactorily take place without the WTO participating.

Conclusion

As we consider the evolution of international trade law in its relationship to the existing legal regime governing human rights, we are confronted with a number of dilemmas and few definitive solutions. Trade law is basically treaty law. Its interpretation must be taken into account and be consistent with the hierarchy of norms in international law, reflecting for instance the status of some human rights as preemptory norms, erga omnes. When trade law is interpreted in this manner, there need not be any conflict between trade law and human rights law. This does not mean that the general impact of trade liberalization, when taken in its dynamic relationship to other phenomena connected to globalization, such as free capital movements, and the tendency of the international financial institutions to prescribe

deregulatory answers to basic questions of social and economic development, may not have negative effects on human rights. This is the perspective through which governments and civil society should address the problems of uneven development, particularly in cases and controversies where there is no specific conflict of legal rights and obligations as such.

Trade law itself should be interpreted and evolved in a manner consistent with the hierarchy of norms in international law generally, where many basic human rights have the status of custom, general principles, or erga omnes obligations, which would normally prevail over specific provisions of a trade treaty, assuming an actual conflict. When properly interpreted and applied, the trade regime recognizes that human values related to human rights are fundamental and prior to free trade itself, which is merely an instrument of basic human values. The primacy of human rights over trade liberalization is consistent with the trade regime on its own terms. The institutions that are the official guardians of trade law pose formidable barriers to the proper and full realization of this insight.

Although we find there to be an absence of such legal conflict in the classic sense, there is nevertheless a need for institutional evolution in the international system, a need to understand the effects of trade laws and policies in the broadest sense, and a need to evolve new laws and policies in a manner that overcomes the post-war legacy of isolation between human rights institutions and economic institutions, including those preoccupied with the trading system. We, therefore, offer this paper as a contribution to the growing body of research seeking to respond to those needs.

Notes

1 *See* General Agreement on Tariffs and Trade, 55 UNTS 194 (the original GATT Agreement) [hereinafter GATT]. This was amended by the General Agreement on Tariffs and Trade 1994. *See* also Universal Declaration of Human Rights, GA Resolution 217 A(III), UN Doc. A/810, at 71 (1948) [hereinafter UDHR]. The UDHR is the founding document of the modern international human rights movement.

2 The Bretton Woods System includes the International Bank for Reconstruction and Development, or the World Bank, the International Monetary Fund (IMF), and the GATT. *See* LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT 1 (John H. Jackson, William J. Davey, & Alan O. Sykes, Jr., eds., West Publishing Co., St. Paul, Minneapolis, 1996).

3 The efforts to establish the ITO were dropped when it was opposed by isolationists in the Senate of the United States of America. *Id.*, at 293-95.

4 *See* Agreement Establishing the World Trade Organization, signed in Marrakesh, April 15, 1994.

5 UN Doc. E/C.12/1999/9-26 November 1999.

6 *See*, for example, Caroline M. Robb, CAN THE POOR INFLUENCE POLICY? World Bank: 1998; Stephan Haggard & Steven B. Webb, eds., THE WORLD BANK PARTICIPATION SOURCEBOOK, World Bank: 1996.

7 Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L., 589, 589-90 (1996).

8 Louis Henkin, THE AGE OF RIGHTS ix (1990).

9 *Id*.

10 Philip Alston, *Making Space for New Human Rights: the Case of the Right to Development*, I HARV. HUM. RTS. Y. B. 3, 3 (1988).

11 Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y. B. 77, 79 (1988).

12 Kurt Mills, *Reconstructing Sovereignty: a Human Rights Perspective*, 15 NETH. HUM. RTS. Q. 276 (1997). *See also* Henry J. Steiner & Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 117-165 (1996).

13 The UDHR provides, in part, that the "will of the people shall be the basis of the authority of government." Article 21(3), UDHR, *supra* note 1.

14 Both the ICCPR and the ICESCR buttress the concept of popular sovereignty by their self-determination clause, common Article 1, which can be read as giving citizens their right to "internal" self-determination, that is the right to a democratic state based on the freely expressed will of citizens. Article 1, ICCPR, GA Res. 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), 999 UNTS 171 (entered into force March 23, 1976). Article 1, ICESCR, GA Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 49, UN Doc. A/6316 (1966), 993 UNTS (entered into force January 3, 1976).

15 *See generally* John Locke, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988).

16 E.C. Stowell, INTERVENTION IN INTERNATIONAL LAW (1921).

17 C.W. Jenks, INTERNATIONAL LABOUR STANDARDS (1960).

18 Hurst Hannum, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION (1990).

19 Article 55(a), UN Charter.

20 *Id*., Article 55(c).

21 *Id*., Article 68.

22 *Id*.

23 *Id*., Article 56.

24 *Id*., Preamble.

25 *Id*., Article 1(3).

26 The term "human rights" appears in the UN Charter in the following key important provisions: ¶ 2 of the Preamble, Article 1(3), Article 13(1)(b), Arts. 55 and 56, Article 62(2), and Article 68. UN Charter, *Id*.

27 *See* Article 38, Statute of the International Court of Justice listing sources of international law. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, ¶ 102 (1986).

28 *Id*.

29 Restatement, *supra* note 27, ¶ 702.

30 *Id*.

31 *Id*.

32 *Id*.

33 Article 53, Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, UN Doc. A/CONF.39/27, reprinted in 63 AM. J. INT'L L. 875 (1969).

34 *Id*., Article 64.

35 THE CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (New Application 1962) (Belgium v. Spain), [1970] I.C.J. Rep. 4, at ¶ 33-4.

36 *See*, for example, OPPENHEIM'S INTERNATIONAL LAW 4 (Robert Jennings & Arthur Watts, eds., 1992).

37 *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, 63 INSTITUT DE DROIT INTERNATIONAL ANNUAIRE 338 (1989).

38 Preamble, UDHR, *supra* note 1.

39 *See* Thomas Buergenthal, INTERNATIONAL HUMAN RIGHTS 29-38 (1995).

40 Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998).

41 *See* Article XX, GATT, *supra* note 1.

42 *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, (1990) 37 BISD 200. See http://www.wto.org

43 *United States-Restrictions on Imports of Tuna* (1991) 30 I.L.M. 1594; *United States-Restrictions on Imports of Tuna*, (1994) 33 I.L.M. 936. See also http://www.earthjustice.org

44 Vienna Convention on the Law of Treaties, *supra* note 34. Article 3 of the WTO Dispute Settlement Understanding states that the Dispute Settlement System of the WTO serves "to clarify the existing provisions of the [WTO] Agreements in accordance with the customary rules of interpretation of public international law." In two early cases, the Appellate Body of the WTO held that Article 31 of the Vienna Convention, discussed below, constituted "customary rules of interpretation of public international law" within the meaning of Article 3 of the DSU. *Japan-Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8, 10-11/AB./R (October 4, 1996), AB-1996-2; *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R (May 20, 1996).

45 Article 31(3)(c), Vienna Convention on the Law of Treaties, Id.

46 *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (October 12, 1998).

47 Article 31, Vienna Convention on the Law of Treaties, *supra* note 45.

48 *See* Amartya Sen, DEVELOPMENT AS FREEDOM 3-4, 10-11 (New York: Knopf, 1999).

49 Article 1, GATT, *supra* note 1.

50 *Id*., Article III.

51 Such permissible prohibitions or restrictions include duties, taxes, quotas, import and export licenses or other measures. *Id*., Article XI (1).

52 *Id*., Article XX.

53 *Id*.

54 (1992), ICJ Rep. 3, 15, at ¶ 39.

55 It provides, in part, that the "[c]ontracting parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization in cases where they consider such consultation necessary." Article XXIII(2), GATT, *supra* note 1

56 Article V(2), Agreement Establishing the World Trade Organization provides that the General Council "shall make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."

57 For specific information on public participation in the international trading system, see ACCREDITATION SCHEMES AND OTHER ARRANGEMENTS FOR PUBLIC PARTICIPATION IN INTERNATIONAL FORA, International Centre for Trade and Sustainable Development, 1999.

58 Article 2, ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session, Geneva, 1998.

59 OECD, TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996).

60 *Id*., at 40.

61 Ministerial Conference of the World Trade Organization (December 13, 1996), Singapore Ministerial Declaration, adopted December 13, 1996, 36 I.L.M. 218 (1997).

62 *Id*.

63 *Id*.

64 *United States Section 337 of the Tariff Act of 1930*, January 16, 1989, 36 BISD 345 (1989). *See* R. Howse and D. Regan, *The Product/Process Distinction: An Illusory Basis for Disciplining Unilateralism in Trade Policy*. EUR. J. INT'L L. (forthcoming 2000/2).

65 For the human rights implications of this provision, *see* S. Charnovitz, *The Moral Exception in GATT*, 38 VA. J. INT'L L. 689 (1998). *See also* R. Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 JOURNAL OF SMALL AND EMERGING BUSINESS LAW 131 (1999).

66 C. McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 8 (1999).

67 Article VIII (b), WTO Government Procurement Agreement.

68 *Supra* note 66, at 41-42.

69 Annex 3, WTO Agreement, *supra* note 4.

70 *Id*.

71 *Id*.

72 The WTO Agreement, *supra* note 4.

73 Vienna Declaration and Programme of Action, UN World Conference on Human Rights, June 1993.

74 WTO Technical Barriers to Trade Agreement.

75 *Id*., Article 2(2).

76 *EC-Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R (January 16, 1998).

77 *Id*.

78 Article VI(3), General Agreement on Services.

79 Article V, WTO Agreement, *supra* note 4.

80 For a full description of the Global Compact Initiative, see http://www.unglobalcompact.org