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HUMAN RIGHTS, TERRORISM, AND TRADE

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THE ASIL RESEARCH PROJECT

The American Society of International Law Research Project on Human Rights and International Trade (Project) is designed to identify and analyze the relationship between the institutions and rules governing international human rights and those governing international trade. The objective of the project is to offer recommendations for adjustments that might constructively be made to existing arrangements to encourage the promotion and protection of human rights within an effectively functioning international trading system. The first phase of the project is a planning phase where participants meet twice to refine the research design by particularizing issues that seem to require the most urgent attention. In my role as director of the Project I will take a few minutes to describe the results of the first meeting held in Berne, Switzerland, in August 2001.

This meeting, hosted by one of the institutions cooperating with the Project, the World Trade Forum (directed by Thomas Cottier), was attended by more than sixty-five people representing a wide range of interests and perspectives. In addition to the project's director, Advisory Board members, and researchers, there were representatives of international organizations (including the Office of the UN High Commissioner for Human Rights, the World Trade Organization (WTO), and the World Intellectual Property Organization (WIPO)) and nongovernmental organizations (NGOs) with interests in human rights and trade, senior members of the Swiss government, distinguished academics, and students of international human rights and trade law from many countries.

THE BERNE MEETING

Constitutionalization at the WTO

Perhaps the single most important thread emerging from the concept papers presented in Berne was whether and to what extent constitutionalization of the WTO may be necessary or desirable.[1] The WTO[2] was conceived (like its predecessor, the General Agreement on Tariffs and Trade (GATT[3])) largely from an instrumentalist perspective, to promote the liberalization of trade and ultimately increase aggregate world output of goods and services. The GATT/WTO fit within the general framework of post–World War II institutions evidencing substantial specialization, like the United Nations for peace and security and the International Monetary Fund (IMF) for monetary and financial matters. How WTO rules might affect human rights was not a central concern of its founders.

For most of its history, the GATT (1947–1994) was principally concerned with reducing quotas and otherwise attending to the removal of external barriers to trade. Generally speaking, the removal of tariffs and related external barriers does not have a profound effect on internal regulatory policy, but GATT rules made a deeper penetration into

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[1] *See* meeting papers, Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT'L ECON. L. 111 (2002); John Jackson, *Reflections on the Possible Research Agenda for Exploring the Relationship Between Human Rights Norms and International Trade Rules*; Ernst-Ulrich Petersmann, *Markets, Human Rights and Economic Welfare*, and related themes at the regional level suggested in papers, e.g., Piet Eeckhout, *Trade and Human Rights in EU Law*; Frank J. Garcia, *Trade and Human Rights in the Americas*; Krista Nadakavukaren-Schefer, *The Use of Trade Instruments in the Pursuit of Human Rights: European Foreign Policy* (on file with author).

[2] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round vol. 1, 33 ILM 1125 (1994).

[3] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194.

As the scope of WTO regulation moves deeper into domestic policy, the question of how rules are made takes on increasing importance and the need for constitutional checks and balances may become greater. This raises a host of issues for further inquiry.

In the typical constitutional democracy, checks and balances are established by the individual citizen's voting right and by separation of the powers of domestic institutions. The nation-state constitutional democracy exists in a state of tension among the interests that share power. That type of arrangement is not easily replicated in a multilateral institution, though there are variations on several constitutive themes—for example, the separation of powers at the United Nations (General Assembly, Security Council, Court of Justice) and the tripartite arrangement at the International Labor Organization (ILO). The European Union, Mercosur, and the North American Free Trade Agreement each present a different constitutive arrangement, with the European Union the most closely approximating the typical nation-state constitutional democracy. Although it is quite useful to consider these existing and evolving arrangements as models, the context in which the WTO functions is different enough that it requires its own form of constitutive arrangement. Furthermore, he WTO must take account of perspectives on government that differ from those of the constitutional democracies and western-styled governmental arrangements mentioned, as well as confronting the vexing issue of allocating competence upwards from the sovereign nation state.

Human Rights Norms and WTO Decision-Making Bodies

One possible answer to whether the WTO should be constitutionalized with its own bill of rights is that the institution already has a bill of rights: WTO members are parties to human rights instruments and subject to the rules of customary international law. The issue therefore might be framed not in terms of what new rules the WTO should adopt but in terms of what existing rules the WTO should apply. This question has most generally been framed in the context of the dispute settlement process: when should the WTO Appellate Body consult and apply human rights rules in interpreting the WTO Agreement in cases or controversies between members? That perspective, however, is too limited. The question should also be framed in the context of what human rights rules should be consulted and applied by governing bodies of the WTO, for example, the Ministerial Conference, the General Council, and the Trade Policy Review Mechanism, in their adoption and oversight of WTO rules.

One major topic of discussion at the Berne meeting was the hierarchy of norms relating to human rights and trade and the extent to which the WTO Appellate Body might now or in the future take human rights instruments and customary norms into account in settling disputes.[5] To a certain extent, this raises a long-standing question about the extent to which the GATT/WTO legal order is a self-contained regime.

Some commentators hold the view that the WTO legal order should function in relative isolation from general international law. However, in interpreting WTO texts, the Appellate Body must certainly take into account human rights rules that are part of customary international law and generally accepted human rights rules evidenced in treaty instruments.[6] When it may be appropriate to apply specific human rights rules in the context of a dispute is a difficult question, one not readily answered in the abstract. Nonetheless, it may be stated with some confidence that the Appellate Body and the

[5] This discussion centered on the paper by Gabrielle Marceau, *The WTO Dispute Settlement Procedures and Human Rights* (meeting paper, Dec. 19, 2001) (on file with author).

[6] *See, e.g.*, Petersmann, *supra* note 1; Marceau, *id.*.

decision-making organs of the WTO (e.g., the Ministerial Conference and General Council) are not free to ignore *jus cogens* or peremptory norms of international law on the theory that the WTO is a self-contained legal order.

Current discussions at the WTO on issues relating to public health and to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) highlight that the Ministerial Conference and General Council have the exclusive authority to adopt formal interpretations of WTO legal instruments and that this power depends upon the terms, context, and purpose of each instrument.[7] It is not limited by prior Appellate Body and panel reports (though this leaves open the question whether the Appellate Body has the power to overrule the Ministerial Conference and General Council if they are found to have acted outside the scope of their interpretative powers).[8] It is possible for the Ministerial Conference and General Council to adopt interpretations of the WTO Agreements that stimulate members and the dispute settlement organs to give more attention to human rights instruments and rules.

Imbalanced Development

It is impossible to analyze the role of the WTO without being keenly aware of the tremendous gulf in standards of living between developed and developing countries. While it may be true that most countries participating in the GATT/WTO system have seen improvements in gross domestic product per capita and related economic indicators over the past several decades, the fact that the gap between rich and poor has been growing raises fundamental issues of equity. Moreover, the events of September 11, 2001, provide a reminder that globalization has a potentially profound darker side that, given new technologies, may manifest itself in ways that are extremely threatening to the wealthier states.

Does imbalanced economic development raise human rights issues that are cognizable by the WTO? There are without doubt human rights instruments that are relevant, for example, the International Covenant on Economic, Social and Cultural Rights (ICESCR).[9] It is often suggested, however, that the catalogue of rights enumerated in that convention and related human rights instruments is so extensive as to become impracticable for an organization like the WTO to apply. Part of the response to that suggestion is that because at least some ICESCR rules are intended to be realized progressively, the WTO need not attempt to apply them all immediately.

The WTO today takes into account the phenomenon of imbalanced development in at least two ways. First, a number of its agreements allow differential treatment for developing countries. Second, it has recently adopted programs to encourage capacity building in developing countries, though so far, these have been very limited.

Might a newly constitutionalized WTO take better account of the problem of differential development? Might a WTO bill of rights embody the concept of a socioeconomic safety net? The paper presented in Berne by Alan Sykes helps identify some of the host of issues these questions raise.[10] The preliminary results he presented suggest a strong correlation between states that protect human rights and states with markets

[7] *See* Frederick M. Abbott, *Compulsory Licensing for Public Health Needs: The TRIPS Agenda at the WTO after the Doha Declaration on Public Health*, OCCASIONAL PAPER 9 (Quaker United Nations Office: Geneva, Feb. 2002).

[8] *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 ICJ REP. 114 (April 14) (including separate opinions expressing views on juridical relationship between UN Security Council and International Court of Justice) (considering, but not resolving, the analogy to the relationship between the International Court of Justice and UN Security Council), *available at* <http://www.icj-cij.org>.

[9] International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1996, 993 UNTS 3.

[10] *See* Alan O. Sykes, International Trade and Human Rights: An Economic Perspective, Address at Planning Meeting, ASIL Research Project on Human Rights and International Trade (July 27, 2001).

more open to trade (which also tend to be states at higher stages of economic development). This suggests a prima facie case that open markets enhance economic development, that economic development is important to protecting human rights, and that rules limiting access to markets (even in the name of reducing imbalances in development) could in fact reduce the promotion and protection of human rights.[11] From the Chicago-school economic standpoint, an increased concern with noneconomic issues might undermine the essential function of the WTO: to provide an engine for prosperity. Using human rights concerns as a mask for protectionism might undermine future economic development. By implementing rules to address nontrade interests, WTO members may risk throwing out the baby with the bathwater.

Professor Sykes notes that market-oriented governments tend to address imbalances and safety-net issues with targeted policies, such as tax policies, that are designed to have more limited effects on productivity than broad limitations on economic activity. The problem from the WTO standpoint, of course, is that targeted redistribution policies are typically implemented within a single country (and to some extent within the European Union). To the extent they exist, multilateral redistributive functions are allocated to the World Bank/International Monetary Fund.

There does appear to be fairly wide recognition among those concerned with protecting and promoting human rights that those rights cannot exist in an economic vacuum. So far Project researchers have not detected an interest in destroying the WTO system in favor of an as-yet-unnamed new economic order. There seems to be, at least on the surface, more a concern with refining the institution to better accommodate a wider spectrum of interests.[12] Inquiry into how the WTO might address human rights concerns raised by imbalanced development are still at an early stage.

Human Rights and TRIPS

A significant part of the Berne meeting was devoted to analyzing how TRIPS[13] affects human rights.[14] Simon Walker of the UN High Commissioner's Office prepared for the UN Economic and Social Council a report on ways that human rights instruments and rules might influence interpretation and implementation of TRIPS.[15] That report was presented and discussed at the Berne meeting. Frederick Sisusle (of Kenya), then working with Doctors without Borders/Médecins sans Frontières (MSF) and today working on TRIPS matters for the South Centre in Geneva, provided detailed comments on this subject at the meeting.

The past several years have seen an intense concern with the TRIPS Agreement, in particular its impact on access to medicines and other public health interests in developing countries. The Declaration on TRIPS and Public Health adopted by the WTO Ministers in Doha on November 14, 2001 (Doha Declaration) is evidence of the attention the subject is receiving.[16]

[11] Professor Sykes notes that his preliminary data do not address causality.

[12] This is not intended to ignore the presence of strongly held "anti-WTO" views among at least a fringe of certain NGOs.

[13] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 ILM 81 (1994).

[14] *See* Frederick M. Abbott, *TRIPS and Human Rights: Preliminary Reflections;* Edward Kwakwa, *Intellectual Property and Human Rights;* Simon Walker, *TRIPS, the World Health Organization, the World Intellectual Property Organization, and the Food and Agriculture Organization: The Human Rights Angle* (meeting papers, on file with author).

[15] *See, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights,* UN Economic and Social Council, UN Doc. E/CN.4/Sub.2/2001/13 (2001).

[16] World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)DEC/W/2, Doc. No. 01-570 (2001). *See, e.g.,* Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO,* 5 J. INT'L ECON. L. 469 (2002).

The tension between human rights, often characterized as a right to life or a right to health and related medical care, on one side, and protection of intellectual property, typically patents, on the other, is apparent. Companies seek patent protection so they can establish a protected market position and get higher than competitive market returns. Prices of drugs under patent tend to be higher (often significantly) than prices of drugs off patent. Higher prices, other things being equal, restrict access to drugs. This has an immediate adverse impact in poorer countries (and in rich ones as well).

The justification for patents is that they provide a revenue stream that is necessary to support future research and development (R & D). R & D yields a social good in the form of new and useful medicines.

Both sides to the public health and TRIPS debate assert a conflict with its human rights. On the developing country side, the conflict is that restricting access to medicines impinges fundamental rights to life and health. On the patent holder/vendor side, the conflict is with a company's human—more often perceived as economic—right to the fruits of its intellectual labor. Both positions have at least some support in human rights instruments.

Achieving a balance between private patent holder rights and general public interests has long been an issue at the domestic level. Throughout the industrialized world, patent rights have never been understood as absolute; exceptions exist, for example, with regard to the drug regulatory approval process. Similarly, the rights to life and health have never been understood as absolute. In the United States, we do not provide patented drugs because of a fundamental right to health care to every person who cannot afford them.

But how should the balancing traditionally done at the national level be undertaken at the multilateral level? The tendency of the pharmaceutical industry and the U.S. and EU trade apparatus when TRIPS was first implemented was to take an essentially absolute stand in favor of patent holders. Yet clearly TRIPS as drafted did not require an absolute protection of patent interests. This point was driven home by the U.S.-Canadian response to the anthrax bioterror-related events—an almost immediate threat to grant compulsory licenses on Bayer's ciprofloxacin patent. Developing countries demanded that the WTO approach the subject matter in a more balanced way, and the Doha Declaration is at least the beginning of an acknowledgment that the WTO must do that.

The Project may already have had a practical effect on activities of the WTO. The draft Declaration on the TRIPS Agreement and Public Health presented by a large developing country group to the Council for TRIPS in September 2001 contained a provision recognizing the relevance of human rights instruments to the subject of access to health care and essential medicines.[17] Members of delegations that prepared the draft had participated in meetings on human rights and trade with members of the Project during the summer of 2001 in Geneva, and that interaction spurred attention to human rights at the WTO.

Recognizing that public health and patent rights are in some ways inherently in conflict, and that the rights of different interest groups must be balanced, the question then is whether and how human rights instruments and customary norms may be useful in resolving the tension. Might they perhaps help in establishing a hierarchy of interests

[17] The recitals to the September 19, 2001, draft stated:

> Discharging the obligation to protect and promote the fundamental human rights to life and the enjoyment of the highest attainable standard of physical and mental health, including the prevention, treatment and control of epidemic, endemic, occupational and other diseases and the creation of conditions which would assure to all medical service and medical attention in the event of sickness, as affirmed in the International Covenant on Economic, Social and Cultural Rights . . .

Proposal by the African Group, Bangladesh, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Haiti, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela, draft Ministerial Declaration on the TRIPS Agreement and Public Health, Council for TRIPS, IP/C/W/312, WT/GC/W/450, Oct. 4, 2001, *available at* <http://www.wto.org>.

at the WTO constitutive level? Are human rights treaty norms precise enough to be applied by the WTO Appellate Body? If the treaty norms are themselves in conflict, can and should the Appellate Body sort out the conflict? Is the balancing perhaps better done by the direct action of WTO members in the WTO TRIPS Council and other decision-making bodies on the basis of specific policy analysis? What, in the final analysis, does a reference to human rights add to the picture?

These questions bear further examination. The relationship between human rights norms, TRIPS, and public health is an excellent candidate for a case study.

Synthesis

This brief preliminary report on the Berne meeting is not intended to identify and analyze all the issues raised there. Final papers are being organized in a book that will include a synthesis by the co-editors (Thomas Cottier and I). At this stage, we are confident that substantial progress has been made in refining the work program of the project, which is the objective of this initial planning phase.

I now turn to our distinguished panel members: Professors Lori Damrosch (Columbia University), Frank Garcia (Boston College) and Joel Trachtman (Fletcher School of Law and Diplomacy). Professor Damrosch is on the Advisory Board of the research project, and Professor Garcia is a member of the project research team. Professors Garcia and Trachtman participated in the Berne meeting.

Remarks of Lori Fisler Damrosch*

By putting human rights first and terrorism in the middle, I hope to open up questions about linkages among these regimes and whether measures within one regime can advance objectives of the others.

Universality

The first set of questions has to do with evolution in the direction of universal participation. The human rights regime has always had an aspiration toward universality, as suggested by the title of the Universal Declaration on Human Rights. The trade regime, by contrast, began in 1947 as an exclusive club of twenty-three members in the original General Agreement on Tariffs and Trade (GATT).[1] Only in the last decade has the trade regime evolved to encompass broad multilateral participation, approaching the universality of the most widely-ratified international treaties. Today, the World Trade Organization (WTO) has 144 members; and with the inclusion of the People's Republic of China (PRC) in December 2001 and Taiwan in January 2002, more than a billion people have been added to the sphere in which GATT rules apply. As China has not yet embraced important human rights treaties, the most potent techniques for advancing human rights within China may be found in the law-based disciplines of GATT rules and WTO institutions.

China's quest for acceptance as a full partner in international economic relations stood in uneasy tension with its human rights problems. When the United States normalized relations with the PRC in 1979, most-favored-nation (MFN) treatment could only be conferred within the framework of the Trade Act of 1974 and its Jackson-Vanik

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[1] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194.

Amendment, which were instruments of U.S. policy in the Cold War.[2] Title IV of the 1974 Trade Act set forth detailed specifications to govern the award of MFN status to nonmarket-economy (NME) countries; these were mainly economic conditions to ensure that NMEs (such as China) would play by the rules of the international trading system. Separately, because of the oppression of Soviet Jews and other "refuseniks" of the early 1970s, the Jackson-Vanik Amendment added the human rights criterion of free emigration.[3]

The emigration topic was never really relevant to China's situation—Deng Xiaopeng was supposed to have asked, "How many refugees would you like?"—but the annual review of the Jackson-Vanik waiver provided the opportunity for Congress to inquire probingly into China's human rights performance. Ironically, the coincidence of the renewal cycle with the anniversary of the Tiananmen Square massacre, both of which fell on June 4, made the tone of these annual rituals quite acrimonious. The Clinton administration first emphasized and then abandoned linkage between China's MFN status and human rights performance. The new framework for "permanent normal trading relations" with China under the legislation adopted by Congress last year marks the end of the Jackson-Vanik era for China.[4]

Meanwhile, not only China but scores of other countries have jumped on the GATT/WTO bandwagon. Only the NMEs were ever subject to the Jackson-Vanik criteria under U.S. law, so most relatively new GATT/WTO entrants were admitted through the typical processes of negotiated trade concessions rather than through a human rights screen.

Among the current 144 WTO members are quite a few with abysmal human rights performance. Some of the worst are Cuba, an original GATT signatory—it had a rather different political economy at the time of the 1947 draft Havana Charter; Congo, which signed the GATT under its previous name of Zaire in 1971, and was admitted to the WTO in early 1997; Kuwait, in the GATT since 1963; and Myanmar, in the original GATT since 1948, under its former name of Burma. The list could go on and on.

Most current members got into the WTO with little or no attention to their human rights performance as a condition of membership; most of them are under little apprehension that the WTO could be the forum in which deficits in their human rights performance would be addressed. As the WTO continues to move toward universality, it is not clear whether human rights conditions comparable to those in the background of China's admissions negotiations will be relevant to other potential entrants.

Who is still outside the GATT/WTO system? The most substantial missing pieces are the Russian Federation and most of the rest of the ex-Soviet Union (Armenia, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Ukraine, and Uzbekistan—all of which are WTO observers); the Federal Republic of Yugoslavia, Bosnia-Herzegovina, and Macedonia; and most of the oil-producing nations of the Middle East. Nonmembers with WTO observer status include Algeria, Saudi Arabia, and Yemen. Nonmembers without observer status include most of the seven "state sponsors of terrorism"—namely Iran, Iraq, Libya, North Korea, and Syria. (Of the other two state sponsors, Cuba has been in the GATT from the beginning; Sudan is an observer.)

The case of Saudi Arabia illustrates some of the issues related to linkage among the interconnecting regimes of human rights, terrorism, and trade. Though it has only observer status with the WTO, Saudi Arabia's economy and stability are critical for Western

[2] Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. ch. 12) (1994 & Supp. III 1997).

[3] *Id.* §402.

[4] Permanent Normal Trade Relations for China Act, Pub. L. No. 106–286, 114 Stat. 880 (2000) (to be codified at 19 U.S.C. §2431).

prosperity. What if Saudi Arabia's admission to GATT/WTO could be negotiated on economically satisfactory terms? Could WTO admission, without more, yield benefits from the human rights point of view? There is a case to be made that it could. Thomas Friedman recently noted in the *New York Times* a parallel between the situations of China and Saudi Arabia in that certain key domestic figures have perceived WTO participation as potentially helpful to internal reform. Friedman wrote:

> In particular, like [China's prime minister, Zhu Rongji], [Crown Prince] Abdullah is trying to push Saudi Arabia into the World Trade Organization to create external pressure for more rule of law and transparency—but this move is resisted by more corrupt elements of the elite who benefit from the status quo.[5]

Should human rights supporters endorse Abdullah's view, on the theory that WTO admission and participation would set up a kind of tutorial in rule-of-law values, with potential dividends not just for Saudi Arabia's internal economy and politics but for all of us who have a stake in its future? If so, WTO involvement could be seen as a rights-promoting course of action.

Is a WTO admission negotiation the right opportunity to push a potential entrant (Saudi Arabia or any other of some fifty states not yet members) not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights and opportunities of women and other disadvantaged groups, and so on? The arguments for doing so could proceed by analogy to the transformations that have been and are being required of candidates for admission into the European Union (EU). This incentive has worked well, given the tangible benefits of EU membership and the concrete benchmarks of integration into the European human rights system and other overlapping regional institutions.

It is not clear that similar incentives would operate at the point of entry into the WTO for any of the states still outside that system. The case of China had special features that are not necessarily transferable to other potential members like Saudi Arabia. China sought GATT/WTO membership for more than two decades, for a combination of economic, political and psychological reasons—not least of which was the fact that the Republic of China had been a founding member of GATT in 1947, before the Communist revolution, and PRC authorities craved the legitimacy of being accepted back into that club. Also, the Chinese authorities had chafed under the humiliation of the annual Jackson-Vanik waiver procedure, which did not apply to the overwhelming majority of countries enjoying MFN treatment and was applied to China only as an obsolete artifact of Cold War legislation. Most other WTO members have been admitted without arduous human rights conditionality.

Human Rights Sanctions in a Near-Universal Trade Regime

When GATT had only twenty-three (or even one hundred) parties, states were not very severely constrained if they chose to apply economic sanctions in aid of human rights objectives. U.S. practice includes a variety of examples of trade restrictions imposed for nontrade and nonprotectionist reasons but rather to exert pressure against a human rights violator. Hufbauer, Schott and Elliott's standard reference work lists about twenty episodes in which the United States applied economic sanctions principally for human rights reasons in the 1970s and 1980s.[6] (The list is non-exclusive; other sanctions had mixed motivations, including at least a partial human rights rationale, and some episodes are not addressed in the book.) Not all of these were trade sanctions, because the

[5] Thomas L. Friedman, *1 Country, 2 Futures*, N.Y. TIMES, Feb. 27, 2002, at A21.

[6] GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED (2d ed., 1990).

main human rights legislation of that period focused on military assistance, foreign aid, and the U.S. voice and vote in international financial institutions. Nonetheless, some episodes did entail one version or another of import or export restrictions, and in several cases a wide-ranging boycott was imposed. In general, these measures avoided scrutiny under GATT rules either because the target country was not a GATT member or because it did not choose to invoke GATT procedures to challenge the legality of the measures. (The exception is Nicaragua, which brought two GATT complaints, the first in 1984 complaining of the reduction in its sugar import quota and the second in 1985 complaining of the complete export and import embargo imposed by the Reagan administration.)

Connections Among Human Rights, Terrorism, and Trade

I conclude on the relationships among human rights, terrorism and trade with reference to two main themes: universality, and the movement from state-centered conceptions to the more complex reality that states are not the only centers of power—nor even necessarily the most important actors—and that borders between states are porous, artificial, and perhaps even irrelevant.

As we have seen, the human rights regime aspires to universality, and the trade regime is on the way toward universality by virtue of the expansion in WTO membership. The antiterror regime is likewise on a trajectory toward universality, by virtue of widespread participation in multilateral treaties such as the Tokyo,[7] Hague,[8] and Montreal[9] Conventions and more recently by UN Security Council Resolution 1373,[10] which mandates universal participation in the struggle to eradicate terrorism, including by cutting off material resources of terrorist groups.

We can observe the transition away from state-centered conceptions of international law with respect to all three topics. The traditional view of human rights has been that rights are claims of individuals against the state, not against nonstate actors. Yet much of the energy of the human rights movement in recent years has been addressed to nonstate actors. Secretary-General Kofi Annan in his Global Compact has called on business enterprises to take a pledge to advance human rights in their own operations.[11] The world trade system has assumed that states are in control of their own borders; trade liberalization is an ongoing process to break down barriers, not borders. The WTO's intergovernmental paradigm is one of the roots of the frustrations of some anti-WTO activists. Efforts to cure the perception or reality of a "democratic deficit" in the WTO could be beneficial and consistent with human rights objectives. Finally, the Al Qaeda brand of terrorism fundamentally unsettles paradigms with respect to both human rights and trade. One consequence of September 11th is some curtailment of civil liberties as well as of the flow of persons and goods across national boundaries.

The human rights movement demands that we keep the spotlight on the human rights practices of our allies of convenience in the war on terrorism. To be sure, stability is necessary for economic well-being and for welfare gains from free trade. But stability is not the same as security, and real security may not be found without basic guarantees of human rights.

[7] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 UST 2941, 704 UNTS 219.

[8] Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 UST 1641, TIAS 7192.

[9] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 565, 974 UNTS 197.

[10] SC Res. 1373 (Sept. 28, 2001).

[11] *At* <http://www.unglobalcompact.org>.

TRADE, CONSTITUTIONALISM, AND HUMAN RIGHTS: AN OVERVIEW

by Frank J. Garcia[*]

Frederick Abbot asks a question: "If the WTO is a trade constitution, what should its bill of rights look like?" My remarks address a preliminary question: Why *should* the World Trade Organization (WTO) have a bill of rights?

The "constitutionalism critique" claims that the WTO lacks legitimacy because its exercise of state power at the international level is not the direct result of a participatory interest-balancing political process and is not adequately subjected to fundamental rights-based restraints and guarantees. The matter is further complicated by our current "functional specialization" model of international governance. In domestic governance a single integrated legislative/executive/judicial system resolves matters of economic policy, human rights, and their interrelationships. For international governance, states create separate legal–institutional regimes specialized according to function and lacking a central coordinated approach to the problems of multiple overlapping jurisdiction—such as the many current "trade and _____" problems. Constitutionalism is one way of demanding more comprehensive consideration of such issues than the current functional specialization approach permits. Constitutional modifications could incorporate human rights more fully into the WTO system, both in terms of substantive policy-making and as a constraint on the WTO-based exercise of state power. Hence, the question of a WTO bill of rights.

Turning now to the question of human rights and the WTO, it is useful to distinguish between internal and external challenges. Internal human rights issues are raised by the WTO system itself: trade law as the problem. One can ask, for example, whether the operation of particular trade rules infringes upon or threatens human rights, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the right to health or Generalized System of Preferences implementation and the right to development. Here, human rights discourse has been adopted as the vehicle through which to express disagreement with the balance struck in particular cases between producer interests and consumer/public interests.

External human rights challenges highlight the role trade law could have in addressing human rights problems that arise outside of trade law itself. There are several sources of external challenge, among them unilateral state human rights activism, multilateral treaty-based human rights activism, and the prospect of human rights-based trade conditionality.

When states employ trade sanctions unilaterally to protect human rights in other jurisdictions, a WTO issue is raised. An example would be the U.S. ban on imports manufactured through indentured child labor. Under the WTO doctrinal structure, such a measure would not easily survive legal challenge: There is no explicit human rights exception in Article XX of GATT, and applying existing exceptions in such cases raises interpretive difficulties. Moreover, the approach taken by WTO doctrine to such a challenge (balancing trade liberalization against human rights protection) could be considered inappropriate where human rights are concerned. Thus, the WTO could be an obstacle to human rights protection.

A second, related problem is posed by multilateral human rights activism if trade sanctions against a member for human rights violations were to be organized by a regional or multilateral human rights or collective security mechanism such as the Organization of

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American States, the United Nations, or the Council of Europe. This would also be vulnerable to a WTO legal challenge because there is no general mechanism in WTO law to defer to, recognize, or incorporate collective human rights sanctions. The only exception, found in GATT XXI(c), is limited to actions taken pursuant to UN obligations to maintain international peace and security.[1]

The third way external human rights issues come into trade law involves conditionality: to what extent should human rights compliance be a precondition to WTO trade benefits? Conditionality is an attractive mechanism for human rights advocates, and the European Union, Mercosur, and other trade regimes already require adherence to basic human rights as a condition for membership. However, the WTO does not—and therein lies either an embarrassment or an opportunity depending on your viewpoint.

The simplest WTO response to all these challenges is to do nothing. Inaction would imply ratification by the international community of the following propositions:

— Current WTO agreements reflect the appropriate balance between economic values and human rights values.

— Any trade sanction short of a UN sanction will be rejected if challenged in WTO.

— There need be no baseline human rights commitments for WTO membership.

Such implicit ratification could cause a WTO legitimacy crisis, at least for liberal states.

Another possible WTO response could be to address internal challenges only, either in a limited or a broad way. A limited approach would be to modify specific agreements (e.g., TRIPS) to address human rights concerns on an ad hoc political basis. A broader approach would be to draft a statement of human rights principles that all WTO agreements must comply with. This starts to look like a WTO bill of rights. If this approach is taken, should states be permitted to challenge nationally implemented WTO rules on grounds that how they are implemented violates WTO human rights rules, thus creating a new, independent ground for WTO complaints? Should states be permitted to challenge provisions in the WTO Dispute Settlement Body as violating WTO human rights rules, like using a court-based constitutionality review? Not easy questions.

Even this type of response, complicated as it is, does not address any of the external human rights challenges facing the WTO. These challenges pose perhaps the most difficult question of all: Is the WTO to serve as a vehicle to facilitate, or even organize, human rights trade sanctions? If not, the status quo is unchanged. If so, then WTO doctrine must be reformed to create room for human rights sanctions, whether unilateral or multilateral. This would require an amendment, because judicial implementation arguably exceeds the WTO Appellate Body's current competence. Options include a new across-the-board human rights exception like the Article XXI national security exception; a hierarchy of norms provision like North American Free Trade Agreement Article 104,[2] to defer to certain treaty-based human rights sanctions; or amending Article XX to add a human rights exception. The literature is rich with discussions of the many substantive, normative, and political issues raised by all these approaches.

Finally, WTO members may decide human rights conditionality delivers the greatest benefit with the least political cost. WTO members are already subject to the Universal Declaration of Human Rights and other customary human rights laws, and the majority are parties to the main human rights treaties. Amending the WTO Charter to condition membership on adherence to such instruments, or drawing a list of core human rights

[1] General Agreement on Tariffs and Trade—Multilateral Trade Negotiations, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, art. XXI(c), 33 ILM 1125 (1984).

[2] North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 104, 32 ILM 296, 297 (1993).

from such instruments which current and aspiring WTO members would have to respect, establishes an important precedent. In both cases, however, the difficult question is enforcement: should the WTO permit or require trade sanctions if members fail to honor their commitments?

Any human rights modifications of the WTO regime would need to address the following issues:

- Institutional culture: Can WTO institutions adequately deal with human rights concerns?
- Participation: Would WTO human rights activism intensify calls for increased civil society participation?
- Cultural Relativism: What about claims of regional differences in human rights cultures within the WTO membership?
- Trade and Development: Are different regulatory standards (for labor rights, for example) a valid responses to development needs?
- Jurisdiction: Will the WTO regulate investment and corporate conduct human rights issues?
- Sanctions: How should the WTO respond to challenges to the morality and efficacy of sanctions?
- Subsidiarity: Will states remain the primary agents of human rights protection, or will multilateral institutions like the WTO take over?

Such conflicts require the sort of interest-balancing political process that constitutional systems create, subject to the sort of fundamental safeguards that rights-based constitutions safeguard. The current architecture limiting the constitutional process to the member state level and funneling its outputs into functionally specialized treaty bodies is inadequate to legitimately, and effectively, address the many human rights issues raised internally and externally by trade law. Adding a bill of rights to the WTO deals with some problems, but not this one.

The trade and human rights debate is thus another area of international life posing the difficult question—if the functional specialization model is inadequate, what will replace it? In this sense, the trade and human rights discussion is part of global society's ongoing constitutional convention.