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Mainstreaming the right to development into international trade law and policy at the World Trade Organization

Note by the Secretariat

In paragraph 2 of its resolution 2003/83, the Commission on Human Rights requested the Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document establishing options for the implementation of the right to development and their feasibility, inter alia, an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership, based on the Declaration on the Right to Development, including issues which any such instrument might address, for submission to the Commission at its sixty-first session for its consideration and determination of the feasibility of those options. In paragraph 5 of the resolution, the Commission requested the High Commissioner to convene a two-day high-level seminar immediately prior to the next session of the Working Group and within its 10 working days, inviting all the relevant actors from the human rights, trade, financial and development fields to review and identify effective strategies for mainstreaming the right to development in the policies and operational activities of the major international organizations/institutions, and as a contribution to the Sub-Commission's work on the proposed concept document. In the same resolution (para. 8) it asked the Office of the High Commissioner to provide all necessary support to the Sub-Commission on its work on the said concept document.

In accordance with this resolution, the Office commissioned the study "Mainstreaming the right to development into international trade law and policy at the World Trade Organization", which is transmitted herewith for the consideration by the Sub-Commission.

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MAINSTREAMING THE RIGHT TO DEVELOPMENT INTO INTERNATIONAL TRADE LAW AND POLICY AT THE WORLD TRADE ORGANIZATION

Summary

In the context of trade liberalization, this paper addresses the issue of how the right to development conveys a set of definite and powerful normative messages and that mainstreaming the right into the World Trade Organization (WTO) actually yields a very concrete agenda for transformation of practice and structure.

After briefly recollecting the history of the right to development, the paper analyses the normative content of the right and its implications for the conceptualization of trade law and policy. It points out that the right to development entails an exploration of policies that allow the realization of human rights and economic growth in a mutually reinforcing manner. It requires that the goals and outcomes of development-related laws and policies be stipulated and assessed in terms of the enhancement of human capacities and the meeting of human needs, as reflected in the range of civil and political, economic, social and cultural rights. Thus, the gains from a policy such as trade liberalization have to be assessed in terms of its contribution to human opportunities for self-realization and not just in terms of whether trade is expanded or it contributes to aggregate increases in national wealth or income. The paper argues that the right to development includes an uncontested, procedural participatory dimension and that it stipulates the interconnection of all internationally recognized human rights in the formulation and execution of development-related laws and policies. It goes on to examine how the right to development could be mainstreamed into legal and institutional practice at WTO. In particular, it assesses trade rules and policies, the issue of technical assistance in WTO, the issue of reform in WTO architecture and governance and how the interpretation of WTO law could benefit from the right-to-development perspective.

The paper concludes that the right to development, in linking development to the entire human rights framework, with its strong global legitimacy, evokes the possibility of the reorientation of WTO towards a kind of normative unity that it possessed around the conclusion of the Uruguay Round.

Introduction*

1. After the fall of communism, two main projects came to dominate the international community, providing normative foundations for transnational and supranational action. These were the projects of human rights and of global markets without borders ("globalization"). Historically the institutions and legal frameworks applicable to these projects developed in isolation in the post-war world. While the United Nations human rights institutions and the World Trade Organization (WTO) were situated but a short cab ride (or a pleasant invigorating bike ride) from each other, they simply didn't interact.

2. One should not overemphasize the degree of normative consensus or convergence in policy strategies surrounding each of these two projects (as would Francis Fukuyama, in his *End of History* to take an extreme example). Yet each appeared compelling in its own right to the global opinion-makers of the early 1990s, in some version or other. Ten years later they have met very different fates. If anything, the mass human rights violations that happened as fall-out from the end of communism (Bosnia and Kosovo) have strengthened the sense that human rights are essential to human dignity and even survival. The idea of human rights has come to so dominate the normativity of international law that prominent international lawyers of my generation view military intervention and its proper legal regulation more in terms of the morality of human rights than that of State sovereignty.

3. The project of globalization, on the other hand, is in disarray, at least understood as a project of free markets without borders. The required "liberalization" - strengthening of intellectual property rights, removal of capital controls, dismantling of trade barriers, deregulation and privatization of network industries - has had very mixed and complex consequences, especially for developing countries. Poverty has actually increased in some, in the wake of such reforms, and in others problems such as ethnic tensions have been seriously exacerbated.[1] The defection of Nobel laureate economist Joseph Stiglitz to the camp of doubters and critics powerfully symbolizes the change in climate. The upshot has been well articulated by Dani Rodrik: the evidence suggests that there is no ideal pre-given mix of interventionist and liberalizing policies that guarantees growth, development and an ultimate end to poverty. Economics offers a tool kit, but no general formula or blueprint for development, much less one based on "liberalization", *pur et dur*.[2] Instead of being driven by a grand normative vision of a free-market road to riches, or out of poverty, development policies (and this includes development policies that address problems in countries that as a general matter could be called "developed"), must be determined contextually, with considerable experimentation, and the best analysis possible of the likely or actual effects of particular policy mixes in each domestic context.

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4. Faced with these difficulties, there is the interesting option of turning to the normativity of human rights as a source of guidance for the evolution of international institutions and legal frameworks for development. In many respects the intellectual groundwork was prepared for this move, not by some anti-globalization radical, but by a Nobel Prize-winning economist/philosopher, Amartya Sen, who had sought to understand development and freedom together, in terms of the empowerment and maximization of human capacity. Sen's book *Development and Freedom* summarized his approach in a lucid and persuasive fashion, accessible to intelligent general readers. Drawing, in part, on Sen's work, Makau Matua (a human rights lawyer) and I presented a paper to an audience of NGOs, academics, and some government and international organizations officials at the Seattle ministerial meeting in November 1998.[3] Our intent was to show how trade liberalization at the WTO could be guided by the norms of human rights in a wide range of areas, from intellectual property to services to labour and adjustment dimensions. Around this same time (quite independently of our work, as far as I know), Mary Robinson, the United Nations High Commissioner for Human Rights, became interested in the potential for human rights to guide globalization, as did the Committee on Economic, Social and Cultural Rights.[4]

5. Economic and social rights, such as the right to food or the right to health, had a legacy of being regarded by many in the West as either empty pious wishes or simplistic Third World/neo-Marxist ideological posturing - "make the rich pay!"[5] But the challenge of providing normative guidance to the evolution of institutions and legal frameworks for development (trade, finance, intellectual property, and so forth), suggested a more meaningful role for social and economic rights: the "mainstreaming" of the general normativity of human rights into the making and administrating of global economic and social regulation and policy.

6. This saga is a wonderful introduction to the complexity, contextuality and subtlety that surrounds the normative functionality of international human rights.[6] It also suggests a so far underexploited agenda for scholarship, expanding the inquiry into how international human rights norms become "internalized" to include the interaction of such norms with other international regimes, not just with domestic institutions and laws. I shall argue that in the context of trade liberalization the right to development conveys a set of quite definite, and powerful normative messages, and that mainstreaming the right into the WTO actually yields a very concrete agenda for transformation of practice and even structure.

History and content of the right to development

7. The concept of the right to development was adopted by the United Nations General Assembly in 1986 in the Declaration on the Right to Development.[7] The Declaration, which unequivocally states that the right to development is a human right, was the result of an extensive process of international deliberation, which sought to integrate and recognize the interdependence of all human rights - civil, political, economic, social and cultural. In an effort to give such rights the sanction of an international treaty, negotiations towards preparing a single covenant had been ongoing since 1948, with the adoption of the Universal Declaration of Human Rights.[8] The Universal Declaration reflected the post-war consensus about the unity of civil and political rights and economic, social and cultural rights.[9] However, with the cold war, the idea of the unity of rights became a tool of communist regimes aiming to establish their moral equivalency or superiority to Western democracies by claiming that the realization of economic and social rights justified restrictions on, or a different interpretation of, civil and political rights.

8. Consequently, the rights were eventually codified into two separate covenants - one on civil and political rights and another on economic, social and cultural rights.[10] However, this split between different packages of rights was contested. For example, in 1968, the Proclamation of Tehran proclaimed by the International Conference on Human Rights stated that "since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible".[11] In 1969, the Declaration on Social Progress and Development adopted in General Assembly resolution 2542 (XXIV) further emphasized the interdependence of these two sets of rights.[12] As a result, by the 1970s, the original conception of integrated and indivisible human rights was revived again and the international community, including international institutions, NGOs and academics began to extensively debate the different aspects of the right to development. In 1979, following various reports and discussions in the Commission and General Assembly, a draft declaration on the right to development was produced; the Declaration on the Right to Development was officially adopted in December 1986.[13]

9. Despite the Declaration's adoption, the United States of America cast the one dissenting vote (although eight countries, including the United Kingdom, abstained),[14] and the process of realizing the right to development was delayed. In that time, there was much debate about the foundational basis of this right, its legitimacy, justiciability, and coherence.[15] In addition, the divide between those groups that denied that economic, social and cultural rights could be human rights and those that believed that they were essential human rights, continued. However, a consensus emerged at the World Conference on Human Rights held in Vienna in 1993 where the right to development was recognized "as a universal and inalienable right and integral part of fundamental human rights", in the Vienna Declaration and Programme of Action.[16]

10. The Declaration on the Right to Development has four main propositions.[17] First, the right to development is a human right. As such, "it obligates the authorities, both nationally and internationally, to fulfil their duties in delivering that right in a country"[18] as opposed to allowing development to depend on the "spontaneous play of market forces"[19] and voluntary, ad hoc development assistance. Second, the right to development is a right to a particular process of development in which all fundamental freedoms and human rights (economic, social, cultural, civil and political) can be realized. Third, issues of equity and justice are central to the development process. This means that the process of development must involve the free, effective and full participation of all individuals concerned and that individuals must have equal opportunity of access to the resources of development and receive fair distribution of the benefits of development and income.[20] This point is further emphasized by the Declaration's emphasis on people's right to self-determination.[21] Besides reaffirming the independence and equality of nations, the concept of self-determination in the Declaration has been interpreted as strengthening the rights of minority and indigenous peoples in order to ensure that they are also participants and beneficiaries of the country's development process.[22] Finally, the right to development places obligations on three main groups: individuals in the community, nation States operating at the national level, and nation States operating at the international level, including international organizations and NGOs. Particular emphasis is placed on the increased responsibility of the international community, such as that of the industrialized nations, in helping to promote the process of development. "Internationally, States other than where the rights-claimants reside, if they are party to the international agreement recognizing those rights, would also have the obligation to do everything possible to help in delivering those rights."[23]

The normative content of the right to development and its implications for the conceptualization of trade law and policy

11. Insofar as international law lacks centralized coercive authority, and since lawmakers can only control or determine to a limited extent the existence of sanctions and incentives as a substitute for centralized coercion, one would predict that the substance of international law will be more likely to contain rules, rights and standards (and other juridical material) capable of influencing behaviour without centralized coercion, i.e. through the norm-shaping process. It would also be more likely to contain juridical material that, for various reasons, would be largely unsuitable to being enforced directly or immediately through centralized coercion. This would be the case with the right to development. Ultimately, the realization of the right to development, on its own terms, requires a wide range of domestic and international public policies and actions, which are highly unlikely to be achieved through judicial (or any other kind of centralized) enforcement.

12. As a threshold question, it is appropriate to ask: In what way might the right to development shape or reshape the norms of the diverse agents who are responsible for development-related policies and actions? This leads to the question of how such shaping or reshaping would affect development-related policies and actions, so as to advance towards the full realization of the right to development. There are at least six ways in which the content of the right to development has implications for the normative horizon of the agents that it obligates.

13. First, the right to development, in requiring that development be pursued through and along with the respect and furthering of all internationally recognized human rights, stipulates the categorical rejection of one of the most prominent narratives about the nature of development and growth. This is the notion, common to old Marxist and neo-liberal thinking about development, that "you cannot make an omelette without breaking a few eggs". Development entails the sacrifice of human rights, a period of ruthless Stalinist modernization in the Marxist narrative (collectivization, forced labour, population displacement), or a period of humanly devastating industrial capitalism in the neo-liberal one (exploitative child labour, subsistence wages, unsafe and environmentally disastrous workplaces). Only once income levels have been raised through this growth process, can one think about the luxury goods of human rights (including environmental rights).

14. This manner of understanding development remains influential in the official trade policy community; it often underlies the rejection of linkage of environmental and labour standards to trade policies. Just as poor countries are thought not to be able to afford core labour rights, for instance, it is often suggested that such rights will naturally emerge as incomes rise and citizens demand them as "extras".[24] The same goes for the social welfare State generally, and environmental protection. To the extent that it is believed to lead necessarily to growth and higher incomes, free trade itself is viewed as the policy best suited to bring about, in the end, the realization of rights (especially social rights), even if developing countries must be expected to put aside such rights in order to adequately exploit the opportunities for growth that free, or freer trade provides. The right to development implies the requirement that such thinking not determine the shape and interpretation of development-related trade laws and policies. Instead, the right to development entails the exploration of policies that allow the realization of human rights and economic growth to be mutually reinforcing. As Dani Rodrik and Amartya Sen

(independently) have noted, a number of Asian developing countries in the 1980s successfully pursued export-led high growth policies (that were supported by government aid to industry) simultaneously with significant improvements in the social welfare State (health care and public education), as well as greater political openness. The right to development requires that these kinds of synergistic rights-enhancing development strategies be facilitated, encouraged, and at a minimum, permitted by international trade rules and policies, and through their interpretation.

15. Second, the right to development requires that the goals and outcomes of development-related laws and policies be stipulated and assessed in terms of the enhancement of human capacities and the meeting of human needs as reflected in the range of civil and political, and economic, social and cultural rights. Thus, the gains from a policy such as trade liberalization are not to be assessed in terms of whether trade is expanded, nor (at least for the most part) by the contribution of trade liberalization to aggregate increases in national wealth or income, but rather by their effects on human opportunities for self-realization. In the trade policy community, the conventional manner in which the gains from trade liberalization are defined and assessed is either in terms of the expansion of trade (often viewed as an end in itself, despite the economic irrationality of such a perspective as well as its rejection in the preamble to the WTO Agreement)[25] or in terms of aggregate increases in wealth or income. Such definitions and assessments influence what issues and proposals are promoted by the trade policy community, which has considerable epistemic, i.e. agenda-setting influence. They also determine in large measure the "report cards" that individual WTO members receive when their policies are scrutinized in the Trade Policy Review Mechanism (TPRM). The right to development entails, obviously, quite a different methodology for determining what policies and laws ought to be on the negotiating agenda, how they might be crafted, what goals they are to be interpreted as aiming at, and how their effects might be predicted ex ante, as well as evaluated ex post.

16. Third, the right to development explicitly applies to States and their agents as they act at the international or transnational level itself. States and their agents have duties to citizens when they assume the guise of international or transnational actors, including through intergovernmental international institutions. They are responsible for policies, agendas, ideas and actions, at every stage of their formulation and articulation, whether domestic or transnational. The traditional view within the WTO is that the WTO is a "member-driven" organization. Any accountability or responsibility to citizens is purely that of individual member States to their domestic polities, depending on the institutions of those polities. At the same time, many Governments present WTO rules and policies (including agendas, etc.) as something determined through collective inter-State action, which the domestic polity must take or leave (with leaving it usually being said to have catastrophic consequences for a polity's place within the global economy).

17. The right to development implies that WTO (along with other international intergovernmental organizations) must take into account the rights, and the views, of citizens, not just Governments, in the formulation of proposed rules and policies. This suggests much more open consultation and deliberation processes with civil society, parliamentarians, and other actors. It may suggest other innovations, to be discussed later in this paper, including the creation of a WTO ombudsperson, and citizen's advisory board.

18. Fourth, the right to development includes an uncontested procedural, participatory dimension. Closely related to the observations just made, on implication of the right to development is direct citizen access to the process of international policy-making, and also a process of domestic policy-making that is open to all groups, including disadvantaged groups and minorities. The meaningful participation of diverse social actors in the making of WTO laws and policies entails a variety of measures at both the domestic level and the international level, which will be discussed in the next section of the paper. The vastness of the undertaking is indicated by the fact that, in the last round of WTO negotiations, citizens in many parts of the world did not even have access to the proposed treaty texts in their native languages.

19. Fifth, the right to development stipulates the interconnection of all internationally recognized human rights in formulation and execution of development-related laws and policies. Law and policy makers are under a responsibility to pursue development in light of this interconnectedness. The right to development therefore represents a rejection of the "watertight compartments" view that development is best achieved through different institutions sticking to one aspect of the matter that purportedly corresponds to their respective expertise and authority, and operating in an autonomous and largely uncoordinated fashion. Cooperation between relevant international institutions in the realization of the right to development has been a major dimension of the efforts of the Office of the United Nations High Commissioner on Human Rights in the implementation of this right.

20. By contrast the "watertight compartments" view of the WTO remains influential in trade policy circles. One former GATT Director-General, Peter Sutherland, wrote in the *Financial Times*, after the failure of the Fifth WTO Ministerial Conference, held in 2003 in Cancun, Mexico (as if lecturing to developing countries who thought otherwise), "the WTO is not an aid agency". Or, as the WTO Singapore Ministerial Declaration of 1996 suggested, the ILO is the competent body for labour issues. Human rights impacts of trade laws and policies are something to be addressed outside the WTO - "we" do the "trade", they do the "human rights". Interpretations of trade rules are owned by the trade people; so whatever might be done to deal with the human rights impacts of trade law and policies doesn't mean changing or affecting those policies, but instead a different unconnected set of policies, which in any case must not threaten the meanings of trade law and policy developed by the trade people (as WHO soon found out when it tried to collaborate with WTO in a joint study on WTO rules and policies and public health).

21. In the delivery of technical assistance, however, WTO has developed relationships with other organizations and agencies that reflect in a positive way the notion of interconnectedness in development. Also, the Appellate Body of WTO has shown itself to be sensitive to the range of normative sources in international law and policy relevant to the elaboration of meanings of trade rules. While the Appellate Body has not drawn directly on human rights norms, it has invoked related norms of "sustainable development" (the Rio regime). Unfortunately, as we shall see in the next section of the paper, the Appellate Body's interpretation of "development" has tended to privilege some normative sources (IMF policies and determinations) to the exclusion of others (the India balance of payments case). However, the basic interpretative technique of the Appellate Body is one that rejects the notion of WTO as a self-contained regime (a view most prominently advocated in legal academia by Joel Trachtman)[26] and is in principle open to interconnectedness in the interpretation of "development".

22. It should be emphasized that the right to development implies not only the interconnectedness but also the parity of rights, none to be sacrificed or hegemonized by others. Thus, it would be undermined not just by separatist, autonomist thinking ("watertight compartments") but also the appropriation and rank ordering of rights in light of the pre-established institutional and ideological agenda of the WTO as has been proposed, at the doctrinal and conceptual level, by Ernst-Ulrich Petersmann.[27] In Petersmann's scheme, liberal trade norms themselves become "rights" (rather than instruments for the fulfilment of all rights through the enhancement of human capacities and opportunities), and interconnectedness is understood instead as the possibility that other rights might limit or constrain free trade rights, but only when such limits or constraints are shown to be strictly "necessary" to the realization of the other rights.[28] "Free trade" rights prevail, unless this burden of proof is met.

23. At the institutional reform level, appropriation and hegemonization of rights as a WTO response to the challenge of interconnectedness is implied in the approach of Andrew Guzman, who would create departments or fiefdoms (some might think them ghettoes) for different human interests within the WTO (a department of labour, a department of environment, etc.).[29] Like Petersmann's thought at the conceptual level, Guzman's at the institutional level inclines towards the redefinition and reordering of diverse human interests or rights in light of trade liberalization. This is "mainstreaming" done backwards.

24. Sixth, the right to development implies that development is not a mechanistic or pseudo-natural process autonomous from individual agency and choice - the march of history in Marxist narratives, the magic of the marketplace and the iron logic of globalization, in neo-liberal ones. Such deterministic perspectives on development are at odds with the emphasis on participation as a core ingredient of the right to development. This is related, as mentioned above, to the rejection of "sacrifices" at the altar of progress. The notion of development as guided by freely chosen fundamental human norms, and as the *autopoesis* (or self-making) of citizens, is also a rejection of the notion of development as a formula or a technique, to be applied wherever "development" is needed. This is a technocratic perspective that predominated until recently in international economic institutions such as the IMF and the World Bank and which, while now in many respects discredited, nevertheless shapes the world view and professional ethos of those who toil in the official trade policy community.

Mainstreaming the right to development in the practice of WTO

25. In light of the above presentation of the significance of the right to development for the conceptualization of trade law and policy in WTO, we now examine how the right could be mainstreamed into legal and institutional practice at WTO. We look at a select set of current practices and structures in WTO and suggest how those might be re-examined in light of the right to development.

The assessment of trade rules and policies

26. States, whether acting domestically and individually, or collectively through international institutions, cannot assure that development-related trade policies are consistent with the interconnected realization of human rights, unless the effects of those policies on human rights can be assessed and understood. Ex-post assessment of the application of WTO rules and policies in WTO member States is a formalized process, the Trade Policy Review Mechanism

(TPRM). From the perspective of the right to development, however, the analytical inquiry and method entailed in this review, and the procedures followed, may not be appropriate for gaining insight into the human rights impact of trade rules and policies.

27. The treaty text that sets out the requirements of TPRM (annex 3 to the WTO Agreement) emphasizes the "inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system", (para. B). While transparency is not linked explicitly to the fulfilment of human rights obligations, the phrase "inherent value" suggests some understanding that transparency has a non-instrumental foundation.

28. The function of TPRM is to assess the "impact of a Member's trade policies and practices on the multilateral trading system". As already noted, the WTO Agreement defines the goal of the multilateral trading system in terms of the principle that "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development".

29. The references to "raising standards of living" and "sustainable development", as well as "full employment" suggest that the mandate of TPRM, while not explicitly stated in human rights terms, would include analyses of the affect of trade rules and policies on human capacities, the protection and enhancement of which is a fundamental dimension of human rights as related to development. Similarly, the focus on transparency would apparently suggest the participation of a wide range of domestic and international actors in the process of assessing the effects of trade policies under TPRM. Neither turns out to be the case. Consider the WTO secretariat report in a recent trade policy review of Senegal. While mentioning in passing the inadequacy of social services in most of the country, the secretariat report largely focuses on determining the extent to which Senegal has liberalized trade and the economy (e.g. through privatization). The report praises such liberalization efforts as have been made, while noting "The continued existence of protection measures for certain activities is to be regretted, particularly when they decrease household purchasing power, as well as the systematic use of subsidization policies for investment, exports and targeted sectors" (p. xiii). However, the report never tries to analyse the actual effects of liberal as opposed to more interventionist policies on human interests, and especially on the poor. It merely presumes that interventionist policies will not contribute to higher living standards - a neo-liberal article of faith, as it were. At the same time, the secretariat report does not address in any way initiatives taken in Senegal to eliminate child labour that is in contravention of ILO core labour rights, and to enhance educational and workforce opportunities for women,[30] and how Senegal's trade and related policies, such as privatization may either enhance or threaten such initiatives, which have obvious relevance to the right to development.

30. Despite the reference to the "inherent value" of transparency in the legal instrument establishing TPRM, the entire process of trade policy review is typically dominated by the WTO secretariat and the particular Government whose policies are under review. There are no explicit avenues for civil society participation, and no accountability to citizens for the judgements made in the reports on the basis of which the trade policy review operates. If the right to development were to be mainstreamed into the practice of TPRM, this would obviously need to change, given the emphasis on individuals and social groups as the makers not simply

the takers of “development”. Evers has argued that such a change in the way that TPRM operates - in particular the institution of a transparent, inclusive participatory process of domestic trade policy review as a basis for review at the WTO, would assist in bringing a “pro-poor” perspective into the TPRM.[31]

Technical assistance

31. The notion that technical assistance is to be provided to assist developing countries in implementing and taking advantage of the benefits conferred by WTO rights and obligations is contained in the WTO treaties themselves, and has been reaffirmed in the Doha Declaration. Such technical assistance has come from WTO itself, funded by various donors, and from other organizations, such as OECD and the World Bank (including within the “integrated framework” that applies to least developed countries). The issue is whether technical assistance as it is currently defined and implemented in WTO reflects the normative concerns that underlie the right to development? One emphasis has been on training government officials in WTO law, including advice on how to implement such law in domestic regulations. Knowledge of the law is of course important to attaining the goal, entailed in the right to development, of equal participation in the institutions and processes that affect the realization of development in a manner consistent with the fulfilment of all internationally recognized human rights. A number of questions deserve to be asked, however, about the nature of the technical assistance in question.

32. First of all, how widely is knowledge of the law being disseminated? Is technical assistance being targeted at trade officials, or is it being used to provide individuals and social groups with knowledge of WTO rules and policies, and how those affect their interests? Secondly, is the emphasis on “training” officials to implement the “law” in its maximally trade-liberalizing version or interpretation? Or is the emphasis on their equal or greater emphasis on interpretations and legal strategies that would maximize the flexibilities and limiting dimensions of trade-liberalizing obligations, where necessary to insure that domestic regulators have sufficient scope to address developed needs (services, TRIPs, etc.). Who are the experts communicating the meaning of the law? Do they represent diverse perspectives, rather than belonging to an epistemic community that still tends to regard trade liberalization (rather than improving standards of living for all and achieving sustainable development) as the *telos*, or end, in light of which the law is to be understood? Thirdly, from the perspective of the right to development, should technical assistance not entail advice on the kinds of governmental policies as well as policies of other countries and international organizations (such as debt forgiveness) that would allow the maximization of opportunities afforded by WTO rules and policies across individuals and social groups? With respect to these various questions, some answers are supplied by the WTO Technical Assistance and Training Plan 2004.

33. While some technical assistance activities, such as intensive trade policy and law courses held in Geneva, seem almost exclusively oriented towards government officials, others are explicitly geared at a broader audience, including some regional seminars, and activities for parliamentarians. There is also a conscious effort to emphasize programmes that lead to permanent empowerment, for example, through developing local academic expertise and creating local reference centres on WTO. The plan explicitly acknowledges as a goal (in the academic context) “to enhance a broader public access to WTO-related information”. At the same time, there is language in the plan that raises concerns about the inclusiveness of the

constituencies at which technical assistance is aimed. For instance, in the case of the reference centres, the only two non-governmental groups mentioned as in need of enhanced access to WTO knowledge and information are “the business and academic communities” (p. 16). What of trade unions, NGOs, the non-profit sector, opposition politicians, and so forth?

34. With respect to the second series of questions, the plan also reveals mixed results. Clearly, in Geneva, much of the training is done by officials in the secretariat, who are assumed to “know” what the law means. Outside consultants and professors are also used in specialized dispute settlement courses, and in these and other courses, experts from other international organizations may be involved. It is far from clear that much diversity of perspective on the law is ensured in this way. On the other hand, the Joint Integrated Technical Assistance Programme (JITAP) initiated last year with respect to 16 African countries, illustrates a more inclusive and interconnected approach in technical assistance to the relationship of WTO law to development. In this programme, delivered in cooperation with other agencies (the United Nations Conference on Trade and Development and the WTO Institute for Training and Technical Cooperation), the intent is to utilize the skills of a wide variety of actors in the delivery of technical assistance. Further, there is the goal of “mainstreaming of trade as an engine for poverty reduction” (p. 6) and paying “particular attention to gender issues and poverty reduction” (p. 6). In the case of technical assistance to least developed countries under the integrated framework, there is participation of the other agencies involved in the integrated framework, such as UNCTAD and UNDP. These agencies have already gone some distance in recognizing the importance of human rights in development to trade policy.

35. A logical extension would be the inclusion of United Nations human rights institutions in the delivery of technical assistance, as well perhaps as partnering with human rights-concerned NGOs in the context of WTO training programmes for developing countries.

The reform of WTO architecture and governance

36. Within the United Nations human rights institutions, a significant beginning has been made in understanding the impact of specific WTO laws and policies, actual or proposed, on the realization of particular rights (trade-related aspects of intellectual property rights (TRIPs) and services, most notably). Understanding the right to health as a basic human right undoubtedly played some role in addressing the question of access to essential medicines under TRIPs in the Doha Declaration on that subject, and the subsequent implementing instrument.

37. Mainstreaming the right to development, with its focus on values such as inclusiveness, participation and interconnectedness of rights in development, requires considerable attention to what might be called the “meta-structures” of WTO, some formal and explicitly stated in WTO rules and some informal but nevertheless with revealed normative influence.[32] These determine in some measure which issues get on the negotiating table, how they are negotiated and with what degree of inclusive participation, how legal rights and obligations are structured - especially in relation to exceptions, limitations, and reservations - and how they are applied to particular countries. The Uruguay Round of trade negotiations brought into being WTO as a structure known as the “Single Undertaking”. The main features of this structure as exemplified by the WTO Agreement and the Covered Agreements under its umbrella are as follows:

(a) All WTO members must participate in (almost all) WTO treaty regimes (the Single Undertaking concept of the Uruguay Round). Thus, a WTO member that would gain from participating in liberalization of trade in goods under the GATT must in order to do so also adhere to the obligations of, for instance, the TRIPs Agreement or the Agreement on Sanitary and Phytosanitary Measures, even if that member believes that adhering to those agreements would be disadvantageous to its development;

(b) As a default, all WTO rules apply to all members; again, as a general rule, no reservations are permitted (see WTO Agreement, article XVI: 5). Some flexibilities do exist in the unique structure of the General Agreement on Trade in Services (GATS) Agreement for individual WTO members to choose what policies they wish to subject to discipline in particular economic sectors, but subject to general rules on technical standards and domestic regulation;

(c) Individual WTO members may not reverse or adjust their obligations, except, in certain instances, through entering into negotiations with other members and offering compensation, or seeking a waiver that would depend on acceptance by most or all of the WTO membership. While the GATT safeguards regime allows for temporary adjustment of certain GATT commitments, GATS has no equivalent safeguards (despite a promise to negotiate on them and conclude an agreement by 1998!), nor does TRIPs, for instance;

(d) Though not formalized, an implicit structural norm is that, despite significant doubts that have been raised about the effects of for example TRIPs and GATS on development, the substantive rights and obligations in the Agreements in the Single Undertaking are not to be revisited with a view to explicit amendment, and certainly not between "rounds" of negotiations, where such changes might be linked to demands in other areas. Thus, the access-to-medicines issue was handled by the creation of two new instruments that purport to operate within the four corners of the TRIPs Agreement as it now stands or, at most, to provisionally waive, as opposed to amend, problematic provisions of TRIPs. Of course, this may reflect as well the (arguably correct) legal judgement that the various exceptions and balancing provisions in the existing TRIPs Agreement, allow the needed flexibility, if rightly interpreted;

(e) There is a practice of WTO rules being adopted by consensus; there has also been a practice of marginalizing smaller countries in negotiations on particular issues; they may have little or no influence on the shape of the rules, and be faced with a virtual fait accompli. These "green room" tactics and the attempt by developing countries to remove them from the set of acceptable, legitimate WTO meta-structures had an important impact on the "failure" of The Third WTO Ministerial Conference, held in Seattle in 1999 and more recently Cancun.

38. Understood in terms of the right to development, many of the meta-structures leave much to be desired. They narrow the possibilities for individual WTO members to shape and reshape their trade rights and obligations in order to pursue development through and within the fulfilment of all internationally recognized human rights. They also may limit the kind of voice that smaller or poorer countries have in collectively shaping or reshaping the rules. As a general matter, these meta-structures are the product of the mindset that trade liberalization is an end in itself, not a means, and that WTO rules and structures should favour linear progress in that direction, even if tolerating some straggling by countries that are in any case on the margins of the global economy.

39. It is noteworthy that the Doha Development Agenda as reflected in the Doha Declaration and the accompanying instrument on implementation, do not include a review of these meta-structures from a development perspective. To the extent that "flexibility" is included as of importance to development, the focus is on specific deviations from the defaults, not putting in question the default structures themselves. (For example, the Doha Declaration does contemplate that an Agreement on Investment, if it were to be negotiated, should permit participation by individual countries depending on their needs and capacities.) The main exception is special and differential treatment for developing countries, where the Doha Declaration does contemplate a comprehensive review of all existing provisions on special and differential treatment, and the possibility of strengthening their effectiveness. However, the Director-General of WTO has apparently assigned the consideration of these cross-cutting meta-structural or architectural issues to a little-known group of "wise men" with no mandate to consult with individuals and social groups. This treatment of the meta-structural or architectural issues - that, as noted, may have a major impact on the right to development - is itself at variance with the right to development, which entails the notion of broad participation in the making of policies which affect development.

40. There is a further set of issues concerning the governance and accountability of WTO as an organization that bears on the right to development. The fact that WTO is based on consensus decision-making by delegates of member Governments has been invoked to suggest that there is no need for further accountability of the activities of WTO as an institution. This ignores the considerable role of its secretariat as well as particular delegates assigned, for example, as chairs of negotiating or other committees in the WTO to set agendas, "spin" the way that issues are discussed, make judgements that have normative impact about the meaning of WTO rules, and even (for example, the case of secretariat reports with respect to the TPRM or technical assistance) to judge and advise the policy makers of individual WTO members. As the recent Mexican telecommunications dispute illustrates, secretariat documents may influence the interpretation of legal rights and obligations by WTO tribunals.

41. The right to development, as discussed above, implies accountability to individuals concerning how these activities are conducted and by whom, inasmuch as they affect the realization of human rights in and through development. Accountability with respect to the secretariat means, first of all, a public process defining among other things:

(a) The diversity of perspectives and knowledge areas that is appropriate for the professional staff of WTO;

(b) The set of conceptual tools that ought to be used by the professional staff in their analysis of development-related trade issues (arguably including human rights instruments), especially in trade policy review functions and technical assistance functions; and

(c) Rules and guidelines to ensure that staff in particular divisions of WTO do not become consciously or unconsciously beholden to particular interests or lobbies (service industries or intellectual property-holders, for instance) and, collectively, are oriented towards the holistic, development-oriented thinking about policy and law that is required by the right to development.

42. With respect to the procedures of accountability, consideration should be given to the formation of a citizen's advisory board, comparable in some ways to the board of directors in a private corporation, which would evaluate the performance of the secretariat and leadership of WTO in light of the kinds of rules and guidelines discussed above, on the basis of consultation with Governments, civil society and other intergovernmental organizations. The inclusive and participatory dimensions of the right to development also suggest the importance of facilitating the involvement of the broadest range of social actors in the deliberations and negotiations of WTO, as well as deliberations within individual polities concerning the choice of negotiating positions and decisions as to whether or not to consent to given proposed rules. Here, the trend at WTO is generally a positive one, despite the continued need to change the mindset that the organization is a Governments' "club".[33] There is now a default rule that negotiating proposals are public; they have generally been made accessible, so that they can be subject to broad citizen scrutiny before being cast in stone in packages of rules that must be either accepted or rejected en masse. An enormous amount of WTO documentation in areas most relevant to development and human rights is unclassified and accessible electronically to the general public. In the area of trade in services, for example, publicity of the basic proposals allowed civil society and international institutions to provide useful input and observations, including on the implications of various proposed disciplines and approaches for aspects of development. Civil society was able to play a functional role at the Fifth WTO Ministerial Meeting in Cancun, despite limited observer rights, and accreditation of civil society groups has generally respected the notion of inclusiveness. Moreover, some WTO members have included representatives of broad social interests on their actual delegations, although these do not participate typically in all negotiating activities.

43. At the same time, there are instances where inclusive participation has been rejected or undermined. To use the example of services again, while the general negotiating proposals have been published, members' offers for sectoral commitments - which contain the proposed specific disciplines on government policies - have remained confidential in many instances, limiting the ability to provoke broad public debate and scrutiny of the implications, including human rights implications, of the proposed undertakings; much to the consternation of some civil society groups, even polities apparently committed as a constitutional matter to democratic openness, like the European Union, have resisted publicity with respect to what is being proposed in regard to specific commitments.

44. Another case in point is the Doha-mandated negotiations on the relationship of Multilateral Environmental Agreements (MEAs) to WTO treaties. Those involved in the MEA regimes in question, even at the official level, have had difficulty in being admitted to these discussions, even as observers! At least tentatively this matter appears to be now resolved in the direction of openness, but the difficulty in question suggests there remain real limits to the extent to which the values of inclusive participation have been mainstreamed into WTO.

45. With respect to facilitating inclusive domestic deliberation on proposed trade rules, partly this is a question of ensuring that technical assistance is targeted broadly enough (see above) and partly the strengthening of domestic political processes as they relate to trade policy. WTO has made a number of efforts to engage with parliamentarians in member countries; such efforts at engagement with domestic political structures must, however, from the perspective of inclusive participation, take into account the limits of official structures in the representation of

marginalized or disadvantaged groups, and therefore extend further, in civil society itself. Sylvia Ostry has concluded that “WTO is an outlier in its rejection of the conception of participatory decision-making” because of its failure to reach out to civil society in this context.[34]

The right to development in the interpretation of WTO law

46. As noted in the previous section of the paper, the appropriateness of the WTO dispute settlement organs - the panels (tribunals of first instance) and the Appellate Body - utilizing non-WTO international legal material is now well established in practice. In the Shrimp/Turtle dispute, for instance, the Appellate Body recourse to various international instruments concerning biodiversity and sustainable development in order to determine the meaning of the expression “exhaustible natural resources”.[35] Mainstreaming the right to development into WTO dispute settlement therefore entails, mostly, understanding where the right to development might relevantly affect the interpretation and application of the WTO Agreements. In this paper, we confine ourselves to a case study of one dispute and ask how the legal interpretation of the Appellate Body would have been, or could have been affected, had the right to development been considered.

47. In the India balance-of-payments case, the United States challenged India’s decision to maintain imports restrictions on balance-of-payments grounds.[36] The relevant exceptions provision in the GATT allowed such restrictions but required that they be removed as soon as the crisis conditions to which they were addressed had passed, unless the removal were likely to provoke the return of those conditions. But a further proviso was that, in any case, a developing country should not be required to remove balance-of-payments import restrictions, if doing so could require a change in that country’s development policies. India’s reliance on this provision required the Appellate Body to determine what a development policy is and whether if India were to remove its balance-of-payments restrictions it would be required to change those policies. What the Appellate Body did was to rely entirely on a judgement of the IMF that India did not need to change its development policies because it could address the consequences of removing its balance-of-payments-based import restrictions through “macroeconomic” policies.

48. Had the Appellate Body considered the right to development in relation to this dispute, it would have analysed the legal issue quite differently, I would argue. First of all, the Appellate Body would not have accepted that one institution, and particularly, the technocrats in that institution have “ownership” of the meaning of a “development” policy. Secondly, the Appellate Body could not have embraced the stark contrast between “development policy” and macroeconomic policy. This implies that development policy is restricted to a series of techniques that “experts” view as formulas for “development”, rather than including all those policies that people - in this case, at a minimum, India and Indians - see as affecting the fulfilment of the right to development. Under a right-to-development approach, it would be obvious that macroeconomic policies, which affect revenues available for government programmes to fulfil social and economic rights, as well as the cost of imported goods and services needed to fulfil such rights and the reserves of currency with which to pay for them, are “development policies”. Thirdly, and relatedly, on the question of whether India would be required to change its development policy in order to be able to remove the balance-of-payments restrictions without a return to the crisis conditions that led to their imposition, the Appellate Body would have held that the panel should have considered and indeed solicited the views of a broader range of institutions and social actors - at a minimum the international organizations

with express mandates on development, such as UNCTAD and UNDP. Finally, the Appellate Body might have considered that the provision in question is largely a matter of self-declaration - that it empowers India and above all Indians to chart their own course in development policy, and therefore that the provision is not intended to invite the dispute settlement organs to examine *de novo* India's judgement that if it removed the restrictions, it would have to change its development policy.

49. In fairness to the Appellate Body, the right to development was not apparently invoked before the dispute settlement organs by lawyers representing India in the case, nor by any third party in the dispute. This suggests that the major challenge with respect to mainstreaming the right to development into WTO dispute settlement may be in sensitizing Governments and civil society (which may submit amicus curiae briefs in WTO proceedings, both at the first instance and the Appellate level) about the possibilities for invoking the right to development in dispute settlement, in relation of course to other human rights. In the short term, at least, the Office of the United Nations High Commissioner might consider submitting communications itself to the dispute settlement organs on the right to development, where appropriate to the dispute in question.[37]

Conclusions

50. **Development is supposed to be the big guiding idea of the current Millennium Round of WTO negotiations. But the relationship of development to trade liberalization and other policies affected by it is highly contested. Thus, "development" has tended to be the backdrop to a sharpening of divisions rather than playing the expected normatively unifying role. The concept of the right to development, in linking development to the entire human rights framework, with its strong global legitimacy, evokes the possibility of the reorientation of the WTO project such that it may once again regain a kind of normative unity, which it possessed around the conclusion of the Uruguay Round through the neo-liberal ideology of globalization, development and growth that prevailed at the time, but which is certainly not a basis for consensus, but rather the opposite, today.**

51. **Some might ask why such a normative vision or normative unity is even needed for successful trade negotiations - isn't it enough to have reciprocity, the possibility of mutual gains? The answer to that question belongs to another paper, but in part it has to do with the need to motivate adequately a community of leaders that can produce meaningful agendas, suggest principled compromises and trade-offs, and inspires politicians and opinion-makers to put their reputation behind a complex deal. In a word, the problem of "epistemic community" (to return to constructivism). As anyone could see at Cancun (and some could see already at Seattle) the old epistemic community, based on the technocracy of neo-liberal economics, has largely broken down as a viable force for coherence and leadership of the multilateral trading system into the future (even if its "resistances" - some of which are discussed above - still prove a formidable obstacle to the reformation of an epistemic community true to the current situation and its challenges). A human rights sensibility and understanding, especially in relation to development is likely to be, and is already becoming, a constituent element in the ethos of this new or reformed epistemic community.**

Notes

[1] Amy Chua, *World on Fire* (New York, Doubleday, 2002).

[2] D. Rodrik, *The Global Governance of Trade as if Development Really Mattered*, United Nations Development Programme, 2001.

[3] The paper was eventually published in 2000 as *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Montreal: Rights and Democracy, 2000).

[4] See, for example, “Liberalization of trade in services and human rights”, report of the High Commissioner for Human Rights (E/CN.4/Sub.2/2002/9); “Globalization and its impact on the full enjoyment of human rights”, report of the High Commissioner (E/CN.4/2002/54); “Human rights, trade and investment”, report of the High Commissioner (E/CN.4/Sub.2/2003/9); “Impact of the Agreement on trade-related aspects of intellectual property rights on the enjoyment of all human rights”, report of the High Commissioner (E/CN.4/Sub.2/2001/13).

[5] Of course, human rights experts fully understood that State responsibility with respect to these rights was one of progressive realization, with the level of obligation being contextualized to the economic and general development situation of each State.

[6] See H. Koh, “How is International Law Enforced?”, *Indiana Law Journal* (1999).

[7] The Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 December 1986 (http://www.unhchr.ch/html/menu3/b/74.htm).

[8] The Universal Declaration of Human Rights, adopted by General Assembly resolution 217 (A) III of 10 December 1948.

[9] Sengupta, Arjun, “The Right to Development as a Human Right”, François-Xavier Bagnoud Center for Health and Human Rights, Havard School of Public Health, December 1999.

[10] The International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976; the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976 (see www.unhchr.ch).

[11] Quoted in E/CN.4/1999/WG.18/2, 27 July 1999, para. 11.

[12] Ibid.

[13] See note 7 above.

[14] Piron, Laure-Hélène, “The right to development: a review of the current state of the debate for the Department for International Development”, report of the Department for International Development, United Kingdom, April 2002.

[15] See note 9 above.

[16] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993 (A/CONF.157/23).

[17] See note 9 above.

[18] Ibid.

[19] Ibid.

[20] "The Declaration on the Right to Development is, without question, founded on the notion that the right to development implies a claim for a social order based on equity". See Sengupta, Arjun, ibid.

[21] Article 1, paragraph 2, of the Declaration on the Right to Development states: "The human right to development also implies the full realization of the right of peoples to self-determination, which includes, … the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."

[22] Piron, Laure-Hélène, see note 14 above.

[23] See note 9 above.

[24] See, for example, Srinivasan, "International trade and labour standards", *Report of the Conference*: *Challenges to the New World Trade Organization*, 1995.

[25] As will be further discussed below, the preamble states the objectives of the trading system in terms of raising of standards of living for all and optimal use of the world's resources so as to achieve sustainable development.

[26] "The Domain of WTO Dispute Resolution", *Harvard Journal of International Law*, 1999.

[27] E.U. Petersmann, "Time for a United Nations 'global compact' for integrating human rights into the law of worldwide organizations: lessons from European integration", *European Journal of International Law* (*EJIL*), June 2002.

[28] See R. Howse, "Human rights in the WTO: whose rights, what humanity? Comment on Petersmann", *EJIL*, 2002.

[29] A. Guzman, "Global governance and the WTO", University of California at Berkeley Public Law Research Paper 89, August 2002.

[30] See International Confederation of Free Trade Unions, "Internationally recognized core labour standards in Niger and Senegal", Geneva, 22-24 September 2003.

[31] B. Evers, "Linking trade and poverty: reinventing the Trade Policy Review Mechanism", Development Studies Programme, University of Manchester, June 2003.

[32] John Jackson captures the spectrum of formal to informal by grouping many of these under the label "Mantras". See J.H. Jackson, "The WTO 'Constitution' and proposed reforms: seven 'Mantras' revisited", *Journal of International Economic Law*, 2001.

[33] See R. Keohane, "The club model of multilateral cooperation and the World Trade Organization: problems of democratic legitimacy", in R. Porter et al., eds., *Efficiency, Equity, and Legitimacy, The Multilateral Trading System at the Millennium* (Washington, D.C., Brookings, 2001).

[34] S. Ostry, "Civil society: consultation in negotiations and implementation of trade liberalization and integrated agreements: an overview of the issue", in *Good Practices on Social Inclusion: A Dialogue Between Europe and the Caribbean and Latin America*", Milan, March 2003, p. 4. Robert Howse is grateful to Ostry for discussions of these issues on various occasions.

[35] See R. Howse, "The Appellate Body rulings in the *Shrimp/Turtle* case: a new legal baseline for the trade and environment debate", *Columbia Journal of Environmental Law*, 2002, pp. 491-521.

[36] "India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products", report of the Appellate Body, *AB 1999 3* (WT/DS90/AB/R), 23 August 1999, paras. 125-130.

[37] In the *Sardines* case, the Appellate Body held that it had the discretion to consider amicus submissions from official as well as private, non-governmental entities. Communications from other international organizations (such as WIPO) have been considered and used in dispute settlement.

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