

Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence

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The theme of today's discussion is coherence and co-ordination between the activities of international organizations dealing with economic and human rights issues. I will address this issue from my perspective as Director of an NGO (3D -> Trade - HR - Equitable Economy, whose activities centre on human rights and trade issues) whose mandate is to promote collaboration amongst trade, development and human rights professionals. We seek to achieve such collaboration because we believe this can really contribute to ensuring that trade rules are developed and applied in ways that promote an equitable economy.

My presentation this morning has three parts. I will consider, first, the question of coherence between human rights standards and trade rules in the negotiation of international trade rules, and second, coherence in the domestic application of international legal rules. Thirdly, I will flag some steps that could be taken to improve coherence of human rights and trade rules, and coordination between those who work on these two issues. Whilst this presentation focuses on the WTO, it is also relevant to other trade agreements and trade bodies, including the bilateral trade arrangements the US is currently negotiating with trading partners around the world.

By way of preface, it is important to remind ourselves that trade is a means to an end – to borrow the words of the Preamble to the WTO Agreement – of raising standards of living.¹ It follows that the aim of promoting and regulating trade is to ensure human well-being, to promote development. The regulation of trade therefore starts out with the same objectives as the promotion of human rights. In the same vein, States have human rights obligations concurrent with their commitments in the area of international trade. Indeed, of the WTO's 147 Members, 118 have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and 121 have ratified the International Covenant on Civil and Political Rights (ICCPR). Even those States that have not ratified these two key human rights instruments are bound by other international human rights norms.

This is one of the reasons that it is impossible to argue that human rights are not in the WTO. When countries' delegates walk into trade negotiations, they bring their countries' human rights obligations with them and should uphold these obligations in their trade negotiations – this is a universally recognized legal principle, known as good faith.²

This leads me to my first point, i.e. how to promote coherence between human rights standards and trade rules, when new trade rules are being negotiated. Regarding new rules negotiated in the WTO context, would it help, as some have suggested, to seek adoption by WTO Members of a

¹ WTO, (1994) *Marrakesh Agreement Establishing the World Trade Organization*, Preamble.

² See *Vienna Convention on the Law of Treaties* (1969) Preamble.

statement or declaration of human rights? I would strongly argue not: such a declaration would be at best tautological, and at worst contain a watered-down, non-representative presentation of human rights.³

The main way new trade rules risk hindering the enjoyment of human rights is by limiting States 'policy space.' In other words, trade-related rules can constrain a State's ability to take the steps it is required to take to protect human rights. One area where this risks occurring is through the commitments States make in the area of services trade liberalization through the WTO Agreement on Trade in Services (GATS). Human rights law requires governments to take steps to ensure enjoyment by particularly vulnerable groups of their human rights. But if a State has agreed, through GATS, to open a particular service sector to foreign providers, it is then precluded from introducing new measures that might affect those foreign providers, such as measures requiring that the service providers respect certain new environmental or social standards.

If the State had already indicated an exemption for such measures when it made its GATS commitments, the measures will be allowable. New Zealand for instance, exempts from its GATS obligations 'current or future measures at the central and sub-central levels according more favourable treatment to any Maori person or organization in relation to the acquisition, establishment or operation of any commercial or industrial undertaking.' The human rights risk arises from two sources: first, those States that had not indicated exemptions will find themselves in a legal conflict if their human rights obligations to take measures certain measures to, say, protect vulnerable groups, conflict with their GATS obligations, which preclude them from taking those measures. As Professor Howse has pointed out, this risk is all the more heightened in today's world of rapid technological, social and economic change, where the public policies of today may be completely outdated or inadequate tomorrow:⁴ States may not be able to foresee, at the time of making GATS commitments, what kind of future measures they might need to implement.

The other source of human rights risk comes from the fact that new GATS negotiations are currently underway in the WTO, as are negotiations on liberalizing trade in services in bilateral and regional trade agreements. In these negotiations, States are being asked to open new services sectors to foreign competition, and reduce any exemptions they had made previously. But any new commitments to liberalizing risk limiting States' policy space, and reducing the number of possibilities open to them to implement the policies required them by human rights law. This illustrates one way of ensuring coherence between human rights and trade rules: by encouraging States to not enter into trade or trade-related rules that constrain their future policy options.

A process issue starkly highlights the lack of coherence between trade rule-making practice and human rights rules: trade negotiations tend to take place in secret, or with little public consultation, whilst human rights law requires participation, information, assessment and accountability. The Committee on the Rights of the Child is one of the several human rights bodies that has recalled the relevant human rights law, saying that States must 'undertake assessments of the potential impact of global trade policies concerning the liberalization of trade in services on the enjoyment of human rights.' 'In particular, the Committee recommends that these assessments should be undertaken prior to making commitments to liberalize services within the context of WTO or

³ Recent instances where attempts to reformulate human rights standards by non-human rights bodies have resulted in a weakening of the standards include negotiations at the UN Food and Agriculture Organization on Guidelines on the Right to Food (see <www.fao.org/righttofood> (visited 30 July 2004)). At a presentation to the first of this series of Conferences, Philip Alston and James Heenan have noted a similar 'loss of breadth and depth of labour standards' as new actors attempt to establish such regimes. See Philip Alston and James Heenan (2001) *The Role of International Labor Standards within the Trade Debate: The Need to Return to Fundamentals*.

⁴ See Professor Robert Howse (2001) 'Unfair to label criticism as being anti-globalisation,' Letter to the editor, *Financial Times*, 21 March 2001.

regional trade agreements.⁵ Human rights law also requires that information be available and that people be offered the opportunity to participate in decision-making that affects them. The ICCPR for instance, provides for freedom of access to information, and the right to participate in public affairs.⁶

If human rights law were applied in the trade negotiation process, it would require there to be broader public consultation about proposed agreements, and there would be more prior assessment of the likely impacts of new rules, with particular attention to the effects of new trade rules on the poorest and most vulnerable sectors of a population. Some might complain that this might slow down the speed of trade negotiations, but it would increase the robustness, the fairness and the legitimacy of any new agreements entered into.

It would also help ensure coherence of international policies. The WTO professes to seek to achieve 'greater coherence in global economic policymaking,' in a decision that acknowledges that trade liberalization often entails social costs, and that difficulties the origins of which lie outside the trade field cannot be redressed through measures taken in the trade field alone.⁷ However, it has so far focused its efforts regarding coherence on relations with the International Monetary Fund and the International Bank for Reconstruction and Development and the relevant ministries at the national level. To achieve real international policy coherence, the WTO should broaden the way it looks at economic coherence broaden its focus on this matter to a broader range of actors, including those concerned with broader economic and social issues. If this project continues I would recommend this as a focus of future research papers.

Importantly, broadening notion of coherence, as well as widening participation and undertaking regular assessments of the likely effects planned trade rules might result in quite different, more human rights-compatible outcomes. As Professor Petersmann reminded us in his presentation yesterday, the corporate voice was very present in the negotiation of the North American Free Trade Agreement (NAFTA) and other trade negotiations, and as a result we have agreements that are more favourable to private, short-term corporate interests than to the public interest.

Prior assessment, and taking account of the needs of the poorest and most vulnerable in this is not just a hare-brained idea: it finds support in the work of economists such as Dani Rodrik and Amartya Sen. Rodrik, for instance, suggested that in designing its anti-corruption strategy, a government should target the petty corruption in the police and judicial systems that affects ordinary citizen, rather than the large-scale corruption that foreign investors complain about.⁸ And to quote Amartya Sen, the poor face the greatest hurdles to being able to lead the kind of life they value and are therefore the most deserving of urgent policy attention.⁹

This is also an opportune moment to respond to a point that arose yesterday, about whether human rights is able to balance and make choices between competing policy options. It does, and its primary focus on the most vulnerable and disadvantaged sectors of society is the yardstick that enables it to do so. One key difference between the human rights and the trade regimes is that the former will base its judgment of whether a chosen policy promotes well-being on disaggregated, and often non-monetary, measures. It will assess the effects of a particular policy on the most vulnerable people within a country and will rule against choices that involve discrimination.

⁵ UN, Committee on the Rights of the Child (2002) *The Private Sector as Service Provider and its Role in Implementing Child Rights*, Report of CRC Day of General Discussion. available at <www.unhchr.ch/html/menu2/6/crc/doc/days/service.pdf> (visited 30 July 2004).

⁶ See ICCPR Articles 19 and 25.

⁷ WTO (1994) *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking*.

⁸ Dani Rodrik (2001) *The Global Governance of Trade as if Development Mattered*, paper prepared for the UNDP Trade and Sustainable Human Development Project.

⁹ Amartya Sen (1999) *Development as Freedom*, Oxford: Oxford University Press.

When considering consistency between human rights and trade rules at the domestic level, one can apply a similar reasoning to that regarding international negotiations. Indeed, States commonly implement trade rules in a way that limits their policy space more than WTO rules require them to, and thus constrain their own ability to respect their human rights obligations. One example is the case of Uganda, a country which is allowed under WTO rules to wait until 2006 to implement the WTO's Agreement on Trade-Related Intellectual Property Rights (TRIPS). In addition, the Doha Declaration on TRIPS and Public Health (Doha Declaration) allows LDCs, of which Uganda is one, to postpone enforcement of patent rights affecting medicines until 2016. Uganda is currently revising its intellectual property law and may not take advantage of these flexibilities that TRIPS offers. This will make it much harder for Uganda to make low-cost medicines available to its citizens, contrary to its human rights obligations.¹⁰

As pointed out in the background paper for this panel prepared by the Rapporteur, Victor Mosoti, policy and law making in international law is fragmented, reflecting departmental structures in government. Of course, better communication and coordination between the relevant ministries at national level is an important step for promoting coherence. A prime focus of work on trade and the environment over the last dozen years has been at the national and regional level, bringing together governmental officials with environmental responsibilities with their trade counterparts. This has demonstrated how better communication can improve understanding and reduce tensions between the policy objectives of different ministries.

Often, the reason trade officials agree to rules that will prevent their human rights colleagues from doing their job, is simply lack of information. A small and simple step, then, to improve coherence of human rights and trade rules is to improve information about human rights to trade officials, whether they are working at the national or international level. But to whom should the role of ensuring information-provision fall? And who should step in when States fail to ensure coherence?

At the international level, it is the High Commissioner for Human Rights who is the custodian of human rights treaties, and who should therefore be more vocal on the need for States to respect – or at the least, not to undermine – their human rights obligations through the trade agreements they enter into. It is worth noting here the 'advantage' the human rights movement has over the environmental movement, in that human rights law has one, common secretariat – the Office of the High Commissioner for Human Rights (OHCHR) – and can be clear and consistent in its defence of human rights standards. This contrasts with the situation regarding international environmental law, responsibility for which is scattered amongst a variety of secretariats and institutions spread all over the world.

Yet despite having issued some high quality and timely papers on trade and human rights,¹¹ the OHCHR has been regrettably timid in pointing out to States their need to respect human rights standards in their trade dealings, and in speaking out in cases where human rights are threatened. It has been timid in coming up with concrete policy recommendations or offers of technical assistance to countries wishing to ensure that trade policy is developed and applied in a way that is respectful of human rights. Even more regrettably, misunderstandings about the nature of human rights abound, which sometimes hold back policy makers and others who would like to improve respect for human rights in the trade context. There is a lack of clear, concise and simple information on the nature and content of human rights obligations. Making such information available in trade circles could go quite some way to dispelling some of the common

¹⁰ 3D -> Trade - Human Rights - Equitable Economy (2004) *Uganda: Trade-related intellectual property rights, access to HIV/AIDS medicines and the fulfilment of civil and political rights*, available at <www.3dthree.org/en/page.php?IDpage=23&IDcat=5> (visited 30 July 2004.)

¹¹ See for instance UN, OHCHR (2003) *Human Rights and Trade – Paper prepared for the 5th WTO Ministerial Conference in Cancún*, <www.unhchr.ch/html/menu2/trade/index.htm> (visited 30 July 2004.)

misunderstandings about human rights, and thus contribute to ensuring trade rules are not developed and applied in a way that is inconsistent with human rights.

One common misunderstanding already alluded to above is that a human rights approach is incapable of making policy choices. Another is that implementation of human rights requires money. That the latter view is inaccurate is evidenced in the case of agriculture subsidies. Evidence shows that in some cases, rich country subsidies to their agriculture producers result in dumping of agricultural products on developing country markets. This in turn often results in displacing local producers who can no longer compete with the cheap, dumped imports, depriving the small-scale producers of their livelihoods. International human rights law recognizes *inter alia* the right to an adequate standard of living, and the right to food. Reducing agricultural subsidies that lead to dumping would be one easy – and money-saving – way to improve enjoyment of human rights by the affected small-scale producers.

To conclude, I would like to make two pleas. First, to human rights advocates and particularly the OHCHR, that they make information on human rights more easily and widely available, and dare speak out on matters of trade policy where human rights may be affected.

Secondly, to trade professionals to make the trade-offs involved in trade policy decisions more explicit. Indeed, one of the reasons trade lacks legitimacy today, and even the unavoidable policy adjustments related to trade are harshly criticized is because of the lack of information or public discussion of the risks and benefits of trade liberalization. The discussion tends to be polarized and often based on incomplete or inaccurate information. In fact, it is well-known that unfettered free trade is not good for everyone. And trade liberalization is not all bad. If trade professionals were more candid about who a particular policy choice serves, about who was involved in developing a particular trade policy it would increase their accountability and their legitimacy. If they were more willing to acknowledge the risks and benefits involved in trade liberalization, it would help reduce the polarization of the discussion about trade, and permit a new discussion, in which different constituencies, including human rights advocates, can join forces to seek a form of trade that brings long-term benefits to all.