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The WTO, international trade, and human rights

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Introduction

Until recently, human rights advocates thought little about how trade policy could affect their work, just as those responsible for international trade policy went about their business without reflecting much on human rights. A few specialists tried to address the impacts of trade liberalization on labour standards, but mostly human rights professionals and their trade policy counterparts ignored each other.

In 1998, this changed. A coalition of labour and environmental groups had publicized the fact that trade negotiators were discussing a multilateral agreement on investment (MAI) at the Organisation for Economic Co-operation and Development (OECD), which would have given priority to the rights of foreign investors (usually large corporations) over public interest concerns such as workers' health and safety or environmental protection. MAI negotiations were suspended in early 1998 following civil society criticisms and protests that turned public opinion against the proposed agreement. Although the MAI talks ground to a complete halt a few months later, several countries, including Canada and members of the European Union, suggested the World Trade Organization (WTO) as an appropriate forum in which to adopt multilateral rules on investment.

The MAI scare alerted civil society that international trade policy could harm human rights, for instance through restricting governments' ability to protect the public interest. It brought to light the scary truth that international trade policy was essentially developed amongst rich countries, and in secret, regardless of its impact on developing countries or the public interest. At the same time, the MAI debacle revealed the influence that civil society groups could exercise on public opinion through publicly exposing trade policy worldwide. Civil society activities around the MAI established the power of email and the Internet as tools for coalition-building, communication and effective international campaigning.

The emergence of the anti-MAI coalition marked the beginning of a broad and visible anti-free trade movement, whose attention soon turned to the WTO as principal potential assailant on democracy and the public interest. In May 1998, as Ministers gathered in Geneva for the WTO's second Ministerial Conference, thousands of protesters, including grassroots activists from all continents, took to the streets to protest against the MAI, free trade and the WTO. The criticisms were not framed in human rights terms, but some human rights voices joined in. In May 1998, the Committee on Economic, Social and Cultural Rights (CESCR) adopted a statement which called on the WTO to consider the human rights impact of trade and investment policies.² In August 1998,

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² *Globalization and Economic, Social and Cultural Rights* <<http://www.unhcr.ch/html/menu2/6/cescrnote.htm#note18th>> (visited 15 Jan. 2004).

the UN's Sub-Commission on Promotion and Protection of Human Rights adopted a resolution calling for human rights to be recognized as the primary objective of trade, investment and financial policy.³

Since then, claims about whether or not the WTO protects – or undermines – human rights, and about whether the WTO should do more – or nothing – to promote human rights have come from all directions. Yet the debate has hardly progressed since it started, even though the terms ‘human rights’ and ‘WTO’ are more and more frequently juxtaposed, and the number of participants in the discussion is rising.

Human rights are far from mainstreamed in the WTO. This chapter will illustrate this by looking at two dimensions of how the WTO is associated with human rights-inconsistent action: (1) the process of WTO negotiations, and (2) the application of WTO rules. It will describe some approaches to human rights mainstreaming in international trade that are useful, and others that are less useful.

This chapter contains an appeal to human rights advocates to look beyond the WTO itself and broaden their focus to include national trade policy-making processes and regional and bilateral trade negotiations. It also appeals to human rights advocates to apply human rights rules and mechanisms to ensure a human rights-friendly international trading system. This chapter concludes that an effective way to achieve human rights mainstreaming in the WTO – and in international trade more broadly – is through raising human rights concerns with the trade policy-makers of the States that make up the WTO's membership, particularly through showing the positive role a human rights contribution can play in ensuring a fair and democratic international trading system.

Lack of Transparency, Narrow Participation: Human Rights Inconsistent

The WTO is infamous for its untransparent and undemocratic decision-making processes. Lack of transparency and participation do not in themselves necessarily lead to human rights-harmful outcomes. But they do stand in direct contrast to human rights principles, such as the right of everyone to take part in the government of their country embodied in Article 21 of the Universal Declaration of Human Rights.

External transparency and lack of representation of the public interest

The transparency and participation issue in the WTO has two dimensions: ‘external’ and ‘internal.’ External transparency refers to the fact that non-governmental organizations (NGOs) have practically no access to its work. The WTO is the only international organization that has no formal relations with NGOs. The Secretariat does have an NGO liaison unit, which organizes briefings and other public events for NGOs, provides information, and arranges for NGO attendance at Ministerial meetings. Nevertheless, the WTO's arrangements for NGOs remain *ad hoc* and could be reversed at any time.

Public access to WTO documents has been made easier in recent years, as more documents are made available sooner.⁴ But still, many key documents are not made public until they cease to be relevant, if they are made public at all. Other issues in discussions about external transparency include whether some WTO Committee and Council meetings should be open to the public, on an

³ Sub-Commission resolution 1998/12

⁴ <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1998.12.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1998.12.En?Opendocument)> (visited 15 Jan. 2004).

⁴ Documents are available via the WTO's website <www.wto.org/english/docs_e/docs_e.htm> (visited 3 Jan. 2004).

experimental basis at least, and whether the WTO's dispute settlement mechanism should be able to receive and consider input from civil society groups.

The United States has over the last four years been the most consistent in pushing for increased openness of WTO processes and accessibility of documents, but its proposals have generally been met unenthusiastically. Many WTO Members still view NGOs with suspicion. Other Members are reluctant to make documents or meetings public given that this could provide indications of current or future negotiating positions, contending that the character of the WTO as a negotiating forum necessarily makes it different from other, more open, international organizations. Many WTO Members argue that rather than open up the WTO to outside scrutiny, countries should make arrangements at the domestic level for providing information to and consulting with NGOs.

This argument is also taken up by many NGOs – but as an additional avenue for public participation in trade-policy formulation rather than a substitute for WTO-level input. European civil society groups, for instance, recently called for the European Commission, European Parliament, as well as on governments and parliaments to take steps to improve transparency and democratic accountability of the EU trade policy formulation process.⁵

Another highly criticisable aspect of the lack of civil society participation is that the WTO's definition of 'NGO' includes groups representing business interests. Of the 961 NGOs that the WTO accredited to the WTO's Fifth Ministerial Conference, in Cancún in September 2003, at least a third were corporate groups or otherwise represented private business. The NGO list, for instance, includes the Aerospace Industries Association (AIA) alongside ActionAid Kenya and the Canada Beef Export Federation (CBEF) alongside the Center for Economic and Social Rights (CESR).⁶

Business thus gets a double look-in: WTO Members openly represent their large business interests. A clear illustration of this is the name of an early WTO dispute known as the 'Kodak-Fuji case,' which 'pitted photographic giants Kodak and Fuji against one another along with their respective governments, the U.S. and Japan.'⁷ More recently – in late 2002 – the rights of the pharmaceutical industry were presented on an equal footing to those of many countries. At that time, the US was alone in blocking consensus over a decision to implement the 2001 WTO Ministerial Conference mandate on Trade-Related Intellectual Property Rights (TRIPs) and public health, a key aim of which is to facilitate access to medicines.⁸ In a bid to unblock the situation, WTO Director-General Supachai Panitchpakdi called a meeting of ambassadors during which he is reported to have pressured several developing countries to agree to weaken the TRIPs and public health mandate in order to 'give comfort and accommodate' the United States and the Pharmaceutical Research and Manufacturers of America (PhRMA).⁹

Given the power of some large companies, the fact that they can dedicate more resources than public interest non-governmental groups to lobbying governments to adopt trade policy options that suit them, and that the options that suit them are more likely to promote short-term private interests than the broad public interest, this imbalance in participation in trade policy is, from a human rights perspective, particularly worrying.

⁵ *Transparency in European Trade Policy-Making – Joint statement by members of European civil society*, available on the web at <www.germanwatch.org> (visited 30 Dec. 2003).

⁶ The full list is available on the web via <www.wto.org/english/thewto_e/minist_e/min03_e/min03_ngo_e.htm> (visited 30 Dec. 2003).

⁷ Doug Daniels, *US-Japan Fairness Issues in the Kodak-Fuji Case*, FAIR TRADE PAGE (Jan. 1998), available at <www.internationalecon.com/fairtrade/fairpapers/ddaniels.html> (visited 30 Dec. 2003).

⁸ At the WTO's Fourth Ministerial Conference, in November 2001, Members adopted a *Declaration on the TRIPs Agreement and Public Health* which *inter alia* acknowledges that the TRIPs Agreement does not and should not prevent Members from taking measures to protect public health, and recognizes Members' right to protect public health and to promote access to medicines for all. For the text of the Declaration, see <www.wto.org/english/tratop_e/trips_e/public_health_e.htm> (visited 30 Dec. 2003).

⁹ Chakravarthi Raghavan (2002) *Trade: Scrooge's gift from rich nations to Third World at WTO*, South-North Development Monitor (SUNS), 22 December.

Internal transparency and lack of participation of WTO Members

As important as the lack of participation of public interest groups is the lack of internal transparency of the WTO, which excludes Member governments themselves from key WTO decision-making. The WTO is in theory democratic as each Member has an equal vote. But in reality, developing countries have difficulty in participating as equals in the WTO.¹⁰ One reason for this is lack of capacity. Many of the poorest countries are not even able to have WTO representatives in Geneva. Others only have one part-time delegate to cover the whole breadth of WTO issues, and only a handful of trade policy staff in their capital. In contrast, Japan has 23 WTO delegates in its Geneva mission, and the USA has 14,¹¹ as well as large and well-resourced trade offices in Tokyo and Washington DC respectively.

Added to this, poor countries are obliged to make concessions in order to trade with richer countries. When reluctant to do so, they are subject to arm-twisting and bullying on the part of the economically powerful. This means that in practice, WTO rules are weighted in favour of the rich, and do not necessarily reflect the long-term interests of the poorest countries and their inhabitants. Even staunch WTO supporters agree that, during the negotiations creating the WTO, developing countries agreed to substantially more obligations than developed countries did.¹² Subsequently, developed countries have demonstrated little political will to address issues dear to developing countries, while pushing to include new issues in the WTO – new issues that developing countries oppose, such as rules on investment in 2003, or labour standards in 1999.

In the lead-up to the WTO's Third (Seattle) Ministerial Conference in 1999, developing countries' complaints about the WTO's lack of transparency, inattentiveness to their concerns, and their unequal participation in the system grew louder. The Seattle Ministerial collapsed because the large economies disregarded developing country concerns to such an extent that developing countries refused to agree to the draft Ministerial Declaration. Four years on, the situation is little changed: the Cancún Ministerial Conference ended inconclusively largely because developing countries stood their ground and refused to be railroaded into signing on to an agreement that ignored their concerns.

Developing countries have improved their collective strength in the WTO in recent years, and have enjoyed some successes, both in terms of substance and of process. They have for instance succeeded in obtaining agreements on TRIPs and access to medicines in the face of industrialized country reluctance, in succeeding in moving development issues higher up on the WTO agenda,¹³ and opposing the inclusion of new issues on the WTO's agenda.

The flip side of this is that as developing countries have participated more meaningfully in the WTO's work and succeeded in having their concerns taken into account for instance, they are accused of blocking or of slowing down the system. This has led to a move of WTO decision-making away from Geneva, such as to 'mini-ministerials,' unofficial meetings hosted by a WTO Member, to which only selected countries' Ministers are invited. While not part of the WTO's formal decision-making process, mini-ministerials play a crucial role in determining the outcome of negotiations.

And the larger economic powers, unable to attain their trade objectives through the WTO, are shifting their attention to bilateral or regional agreements for trade liberalization. US Trade

¹⁰ A 1998 study showed that of the 97 developing countries that were then members of the WTO, 56 do not participate effectively in its work. Constantine Michalopoulos (1998) *The Participation of the Developing Countries in the WTO*, World Bank Policy Research Paper.

¹¹ Fatoumata Jawara & Aileen Kwa (2003).

¹² Jeffrey Schott (1998) *WTO 2000: Setting the Course for World Trade*.

¹³ Although many criticize the WTO development agenda, agreed to at the Fourth Ministerial Conference in Doha in 2001, as lip-service to development that makes little tangible difference. The UK Catholic Agency for Overseas Development, for instance, compared the 'Doha Development Agenda' to a desert mirage <www.cafod.org.uk/archive/tradejustice/doha20021112.shtml> (visited 3 Jan. 2004) and Fatoumata Jawara & Aileen Kwa entitled the relevant chapter in their book 'Doha Development Agenda – Everything but Development.'

Representative Robert Zoellick said at a press conference before leaving Cancún that bilateral agreements would receive Washington's priority after the failure of the Cancún Ministerial. Subsequently the US announced that Washington would launch negotiations for bilateral trade pacts with countries including the Dominican Republic, Panama, Bolivia, Colombia, Ecuador, and Peru. From an equity and human rights point of view, this is a troublesome development as bilateral trade negotiations offer far more scope for arm-twisting, bullying and lack of transparency than the WTO. On key issues of concern to human rights advocates, such as transparency or intellectual property protection for medicines, bilateral agreements have made the WTO look positively rosy.

Lack of transparency, participation and democracy in the WTO is in clear contrast to human rights principles which require participation, protection of the most vulnerable and accountability. The WTO's lack of democracy facilitates outcomes that pay little heed to public interest concerns and go against the right to a social and international order in which human rights can be fully realized.

Whilst it is important to address these problems and seek to mainstream human rights in the WTO, it is important to note that the WTO is a better guarantor of human rights- and public interest-consistent outcomes than the absence of international trade rules, or than bilateral trade agreements. Human rights advocates should bear this in mind as evidence of the importance of maintaining scrutiny of trade policy-making at the national, bilateral and regional levels just as much as of the WTO as a forum.

WTO Rules Nationally: Limiting Policy Space

It is clear that the processes by which trade policy is formulated are inconsistent with human rights. But what of the actual content of those rules?

Whilst it is difficult to find trade rules that *per se* infringe human rights law,¹⁴ the way in which these rules are applied do raise real human rights concerns. The most common way that rules developed in the WTO affect human rights is through limiting governments' ability to regulate or to take other measures to promote or protect human rights at the national level. Indeed, in promoting 'free trade' the WTO seeks to do away with possible regulatory interferences with the free flow of goods and services, thus limiting governments' ability to regulate in favour of development, environmental protection, or to defend vulnerable groups. This has given cause for particular concern regarding essential elements of livelihood such as food or health, and provision of basic services such as education, health care or water.¹⁵

The list of cases where WTO rules have hindered enjoyment of the rights to food, health, education, housing or others would be long. Also, many of these cases do not come to public light or are linked in complex ways to other aspects of economic policy, making it hard to distinguish the WTO's role. This chapter will look at two issue areas where WTO-related rules could limit countries' ability to take measures that favour human rights: intellectual property protection for pharmaceuticals, and WTO rules on trade in services.

Intellectual property protection and access to medicines

Argentina's government developed its intellectual property (IP) laws in a way that facilitated access to cheaper, generic medicines than the patented versions of the same medicines. However, in June 2002, in response to US demands and subsequent to a complaint brought by the US to the WTO

¹⁴ See Gabrielle Marceau (2002). Marceau says that though conceptually possible, pure conflicts between WTO law and human rights would be very rare. She also suggests that a good faith interpretation of the relevant WTO and human rights provisions would lead to a human rights-consistent reading of WTO law.

¹⁵ For further discussion of these concerns, see Caroline Dommen (2002) and OHCHR (2003) *Human Rights and Trade*.

dispute settlement mechanism, Argentina revised its IP legislation in such a way as to curtail national production of generic medicines.¹⁶ The threat of trade sanctions made Argentina cave in precisely at a moment when its people most needed low-cost medicines, following the severe economic crisis that started in late 2001.

Two high profile cases raised similar issues in 2001. The first was a challenge in South African national courts by 39 pharmaceutical companies, against South Africa's IP laws. In the second, the US challenged Brazil's IP legislation before the WTO dispute settlement mechanism. Both the South African and Brazilian laws at stake were designed to facilitate access to generic medicines. Competition from generic medicines is the only factor that has resulted in sustainable price reductions for essential medicines. The outcry about both the Brazilian and South African cases was so intense that the cases became public relations disasters for the defenders of pharmaceutical interests, who eventually backed down.

These cases provided the impetus for the adoption, at the WTO's Fourth Ministerial Conference in Doha in late 2001, of the Declaration on the TRIPs Agreement and Public Health (Doha Declaration). Amongst other things, the Doha Declaration acknowledges that the TRIPs Agreement does not and should not prevent Members from taking measures to protect public health, and recognizes Members' right to protect public health and to promote access to medicines for all.¹⁷ In August 2003, WTO Members adopted an agreement about how the Declaration should be implemented.

These successes do not mask the fact that stringent IP laws are still being implemented around the world in a way that makes it harder for the needy to access medicines, i.e. in a way that is inconsistent with human rights.

One way this is happening is through bilateral and regional trade agreements. The US and its pharmaceutical industry have, for instance, made access to antiretroviral therapy for HIV/AIDS harder by pushing for more stringent IP requirements in regional trade agreements like the Free Trade Area of the Americas (FTAA) and the US-Central American Free Trade Agreement (CAFTA), which would restrict competition from generic medicines. Similar agreements pursued by the US with Morocco, Thailand, five southern African states, and other countries are likely to include similar restrictions, threatening to trade away the lives of millions for commercial profit and put lifesaving treatment out of reach of all but the wealthy.¹⁸ This would undermine the 2001 Doha Declaration, and is inconsistent with human rights.

Some countries are even forced through the WTO itself to accept high IP standards. For instance, as a price for being allowed to join the WTO in 2003, Cambodia had to agree to immediately halt use of affordable generic versions of new medicines, even though the Doha Declaration allows Least Developed Countries (LDCs) to wait until 2016 to do so. In negotiating the country's accession to the WTO, Cambodia's delegates had asked for a 2009 deadline for TRIPs compliance but were bargained down to January 1st 2007. The Cambodian government and the public would pay the cost of an earlier TRIPs deadline in the form of higher prices for drugs, depriving many people of access to medicines they need. This led one major development NGO to question whether Cambodia will really benefit from entering the WTO.¹⁹ The criticism of Cambodia's bad WTO accession deal was such that when WTO Members formally accepted its membership – during the Cancún Ministerial – a WTO Deputy Director-General specified that "the terms of this

¹⁶ Julien Reinhard (2003) 'Santé en Argentine – Dépression locale et pressions globales,' 169 *Solidaire*. For similar cases, see Sarah Joseph (2003) 'Pharmaceutical Corporations and Access to Drugs,' 25 *Human Rights Quarterly*.

¹⁷ See note 8 above.

¹⁸ Médecins sans frontières (2004) *Top ten list of the year's most underreported humanitarian stories*, Media release, 6 January 2004.

¹⁹ Oxfam International (2003) *Cambodia's Accession to the WTO - How the law of the jungle is applied to one of the world's poorest countries*.

accession do not preclude access to the benefits under the Doha Declaration to Cambodia as an LDC," suggesting that Cambodia could maintain its 2016 deadline in its patent law.²⁰

Nevertheless, the basic concern about pressure to adopt stringent IP requirements remains. Nepal, another LDC which completed its WTO accession negotiations in 2003, also had to agree to implement the TRIPs agreement by January 1st 2007. Most of the 25 other countries currently negotiating to join the WTO are also being asked to make stringent IP commitments and thus negatively affect a range of human rights including the rights to health and to life of their inhabitants.

Another aspect of concern regarding rapid implementation of the TRIPs agreement is that such implementation is costly. At around \$100 million dollars – according to available estimates – it is extremely burdensome for countries like Cambodia and Nepal where the national budget is under stress and already unable to cover essential social expenditures in the areas of health and education. One might wonder whether using scarce resources for the implementation of WTO agreements is a reasonable use of public funds in such poor countries at all.²¹ From a human rights perspective we should also question *whom* the expenditure of these funds benefit (the answer is usually foreign investors and foreign traders) and therefore seek explicit accountability about what the developmental and social trade-offs are. Does the diversion of these funds from other, social priorities constitute discrimination against vulnerable groups? And does this constitute violation of States' obligations to allocate 'maximum available resources' to the respect, protection and fulfilment of human rights, contrary to human rights requirements?

Liberalization of trade in services and governments' duty to regulate

The realisation of human rights requires effective national policies. The policies required will differ from country to country: one-size-fits-all solutions do not exist. Governments will need the regulatory space and flexibility to tailor domestic regulatory policies to the needs and particularities of the country, society and human right in question. As we have seen, WTO rules on IP may limit this policy space and regulatory flexibility. WTO rules and negotiations on liberalization of trade in services also risk curtailing governments' policy space and flexibility.

A service is a result of human activity which is not a tangible good. Liberalization of trade in services means that foreign and domestic service providers can compete to provide services. The scope of services trade liberalization through the WTO is vast, ranging from accounting and advertising to telecommunications, tourism or transport. Liberalization can have – and has had – implications for access to basic services and thus for human rights in areas such as education, health care, job security or access to water.

Privatisation and deregulation are not required by the WTO, advocates of liberalization point out. Nor does the WTO require any country to open up any particular service sector to international competition, they accurately add. So what has the WTO got to do with difficulty of access to essential services by the most poor and vulnerable sectors of a country's population? Let us examine some human rights dimensions of these three points – privatisation, deregulation, services covered – in turn.

With regard to privatisation, liberalization does not explicitly require privatisation of any particular service sector. In practice, however, allowing competition in a service sector has implies the elimination of a monopoly, including public monopolies. This process is frequently tantamount to privatization. In the real world, therefore, the links between liberalization and privatization, but

²⁰ However it appears that the obligation to provide data exclusivity immediately remains, rendering the waiver of the obligation to provide patents on drugs meaningless: it does not mean much in practice if a country cannot register generic versions for use.

²¹ Oxfam International (2003), note 19 *supra*.

international trade agreements including the WTO's, shy away from explicitly expressing any preference for private over public provision of services.

Services were first introduced into the multilateral trading system in the late 1980s, resulting in the adoption of the General Agreement on Trade in Services (GATS) in 1995, as an integral part of the WTO Agreement. WTO efforts to liberalize trade in services are part of a broader global trend towards increasing private sector participation (and increasingly, participation of large and powerful multinational corporations) in the provision of state-like functions, provoking competition in areas that were once under the responsibility of government as service supplier.

In some sectors, such as telecommunications in Asia, services have greatly improved after privatisation and liberalization: quality and availability increased and prices dropped. In others, though, a two-tiered service supply has emerged, with a high-quality segment available to the wealthy, and an underfinanced government-provided segment for the poor. In some cases, privatisation has put services out of reach of poor people altogether: in Ghana for instance, even water prices which the government and the World Bank considered to be below the market rate are beyond the means of most families. Indeed, the private sector being driven by commercial, profit-oriented objectives, private competition in basic service provision is not the most effective means of ensuring universal access to services which are essential but not necessarily lucrative.

Human rights law does not oblige States to be the sole provider of essential services. However, it does require States to guarantee essential service supply, especially to the poor, vulnerable and marginalized. The increasing frequency of two-tiered availability of services *de facto* discriminates against the most vulnerable or marginalized sectors of a population, contrary to human rights. Indeed, the non-discrimination principle, central to human rights law, prohibits discrimination on the basis of the ability to pay for basic services.

In addition to making access to essential services harder, privatisation and liberalization can make it harder for governments to regulate. The World Bank, the World Health Organization (WHO) and many others involved in the debate about essential services view appropriate regulation as necessary. In human rights terms regulation is not only a need but also a *duty*. Indeed, human rights law requires States to take appropriate legislative, administrative, budgetary, judicial and other measures to fulfil human rights.

In practical terms, it is harder for a government to impose conditions on a foreign company providing services in its country. Governments' difficulty in fulfilling their role as primary duty bearer of human rights is exacerbated when faced with an increasingly large and powerful private sector. In the health sector, for instance, the WHO has indicated that private companies can subvert health systems through political pressure and 'regulatory capture,' namely the co-opting of regulators to make regulations more favourable to private companies.

As well as posing practical difficulties, WTO rules on services trade liberalization may limit governments' flexibility to regulate in the public interest. Like other trade rules, those on services aim to eliminate obstacles to trade, including possible regulatory interferences. Whilst barriers to trade in goods are usually imposed at national borders (for example through tariffs), barriers to trade in services are far more diverse. In addition, barriers to trade in services frequently affect core areas of domestic regulation, such as setting licensing standards (such as facilities licensing for clinics and laboratories, or waste disposal permits), minimum professional standards or social objectives that foreign investors and service providers must meet. WTO rules limiting regulations in these areas therefore challenge national regulatory prerogatives.

GATS does recognize the right of WTO Members '*to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives,*' and recognizes the particular need of developing countries to exercise this right. In practice, however,

the legal value of this preambular recognition is uncertain: not only is it weak when confronted with economic and political realities, but also many of the obligations of GATS lack clarity. The scope of GATS in relation to public services – which because of their social role are of particular concern to human rights advocates – is especially uncertain, as the following instances show.

One is that national regulations, including those designed to promote the realization of human rights, are subject to GATS' general obligations, including the prohibition on discrimination between different countries' service providers. Take, for instance, the case of country A, a WTO member which has not made any commitments to liberalize trade in health services. The government of country A runs many of the national hospitals, although private companies also provide hospital services and run some hospitals. Faced with a shortage of medical practitioners in government hospitals, and the adverse impact of this shortage on the right to health, country A enters into a bilateral agreement with country B allowing medical practitioners from B special derogations from immigration requirements so that they can supply health services in country A. In spite of the fact that country A has not made commitments to liberalize trade in health services in its schedules, the agreement with country B might be found to violate the most-favoured-nation principle as it gives preferential treatment to service suppliers from one WTO member over others. However, in this scenario, if health services do not come within the scope of GATS, there would be no violation.

The reason why it is unclear whether health services come under GATS is that the agreement does not apply to services 'supplied in the exercise of governmental authority.' GATS defines this as 'any service which is applied neither on a commercial basis nor in competition with one or more service suppliers' – but the actual scope of this provision is clear to no one, even the world's leading GATS experts. Indeed, the increasing supply of government services on a commercial basis has challenged the clear distinctions between governmental and non-governmental service provision.

Another way GATS might reduce a country's flexibility to regulate in the public interest is through limiting a governments' ability to provide economic measures in favour of disadvantaged groups. Human rights law requires governments to take steps to ensure enjoyment by particularly vulnerable groups of their human rights. Some governments protect steps they take to this end in their GATS commitments. 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,' and Australia does much the same for its indigenous peoples. Malaysia has also exempted the special economic policies it instituted from the 1970s to advance the interests of the disadvantaged ethnic Malay Bumiputera population from GATS.

Pro-GATS advocates might rely on these examples to argue that GATS does not circumscribe a government's ability to pursue public interest objectives, since countries choose which commercial sectors to commit to GATS reach and which exemptions to make. Countries who need social policy exemptions, they argue, can carve out the policy space they need to pursue them. However, a country that has taken a policy to facilitate access of a disadvantaged to a particular service, but omitted to exempt it from GATS may find itself in contravention of GATS, as might a country that introduces such a policy in the future. In addition, the political dynamics and power imbalances of trade negotiating processes sometimes lead countries to make commitments in areas in which liberalization or deregulation go against their national interests.

This points to another key concern about GATS, which is its 'lock-in' effect. Once a country has made a GATS commitment, it is virtually impossible to change, even if later circumstances require such change. Reversing GATS commitments is technically permitted, but governments can only do so by negotiating 'compensation' for all affected trading partners, which can be prohibitively costly. This means that if subsequent events reveal negative social or economic effects, it may be too late to take corrective action, and that a government may be curtailed from taking steps to

address a social problem that only becomes manifest after the government has made GATS commitments.

In short, it would appear that governments retain their freedom to regulate only to the extent that the regulations they adopt are compatible with the commitments they have undertaken in context of GATS. The threat of being brought before a WTO dispute settlement panel because of a new regulation affecting foreign service providers could have a chilling effect on governments' inclination to regulate to promote human rights or in the public interest. From a democracy and accountability perspective there is an additional concern: in the final instance the judgment as to whether a domestic regulation is GATS-compatible will be made not by governments but by WTO dispute settlement panels. And the panels' mandate is to apply trade law - not to ensure the protection of the public interest in WTO Member countries.

As mentioned above, countries can choose which service sectors they will subject to GATS liberalization obligations. They are therefore under no formal obligation to open basic services up to competition. Yet many countries already have made extensive commitments to liberalize hospital and other medical and dental services, health insurance and higher education. Negotiations to further liberalize services are currently underway in the WTO, and many countries are coming under considerable pressure to liberalize more service sectors, or to eliminate limitations on their existing commitments.

The GATS agreement specifically states that the negotiations shall take place '*with due respect for national policy objectives and the level of development of individual Members.*' The pace and extent of these negotiations are supposed to be set by the WTO's Members themselves, according to their different national policy priorities. But like in the case of TRIPs, which theoretically allows governments a good deal of regulatory flexibility, bilateral pressures mean that the reality is different. The current GATS negotiations give cause for concern as they take place in bilateral settings with little public scrutiny. Developing countries encounter particular difficulties in bilateral negotiations as this setting does not provide them with the strength in numbers that they have been able to use in multilateral trade negotiations. They have thus been particularly vulnerable to pressures from industrialized countries seeking access to their services markets to make new GATS commitments.

Moreover, developing countries are being asked to make GATS liberalization commitments across such a broad range of service sectors that they are unable to analyze what the potential losses of benefits of such liberalization would be, let alone request access to industrialized countries' service markets. GATS itself provided that a comprehensive assessment of the impacts of services trade liberalization should be undertaken before 2000, but this obligation remains unfulfilled, much to the dissatisfaction of developing countries. African trade ministers, for instance, noted in June 2003 that the 'Services Council has not satisfactorily met the requirement of carrying out the assessment of trade in services as stipulated in the GATS'. Representatives of Latin American countries and NGOs around the world have voiced similar concerns.

Human rights advocates have constructively added their voices to calls for assessment of the potential and actual impact of services policies, on the grounds that these are fundamental to ensure the most appropriate policies and regulations for development, and for human rights. The High Commissioner for Human Rights has for instance recognized that States have the responsibility to ensure that commitments they make in other areas, including trade, does not reduce their capacity to set and implement national development policy. In a detailed study of services trade liberalization and human rights, the High Commissioner has concluded that human rights require a constant examination of trade law and policy as it affects the enjoyment of human rights, and that assessment is a major means of avoiding the implementation of any retrogressive measure that reduces the enjoyment of human rights.

Rights In: Mainstreaming Human Rights in the WTO

Human rights advocates thus have an important task ahead of them to ensure that trade and trade rules respect, promote and fulfil human rights. This section will indicate some points worth bearing in mind to ensure that efforts to mainstream human rights in the WTO are successful.

First, it is essential to be clear about what we really want when we talk of human rights mainstreaming in the WTO. This chapter assumes that what human rights advocates want is that international trade and trade rules, including those developed and applied through the WTO, support rather than threaten human rights. How best then to achieve this?

Some human rights advocates call to abolish the WTO as the solution to human rights-inconsistent trade policies. Others call for adding the words 'human rights' in WTO texts. This section will argue that these calls are misguided, and that the best way to ensure that trade and trade rules promote human rights is to broaden the focus of the human rights lens from the WTO, to integrate the human rights concerns of non-discrimination, monitoring, democratic participation and accountability at each step of the process of making and applying trade policy. This section will point out some effective ways in which human rights advocates can bring their experience to support efforts to promote a fairer and more human rights consistent international trading regime.

The WTO is often accused of being the cause of economic injustices; there no shortage of examples of unfair WTO rules and processes. But even amongst critics of trade liberalization and the WTO, views differ sharply as to whether abolishing the WTO would be the solution to the problem. Some argue that the WTO is so deeply flawed that it is beyond reform and should therefore be abolished.

Others however, point out the importance of a multilateral framework for international trade, as only a multilateral framework can help insulate the small economies from the strong. Indeed, the process and content of regional and bilateral trade agreements that have recently been adopted, as well as those currently under negotiation, have provided a glimpse of how trade rules developed outside the non-multilateral framework are a far worse threat to global economic equity and enjoyment of human rights than the WTO system. The way these agreements are negotiated is not only more secretive than WTO in terms of external transparency, but imbalances of power are more extreme and the outcomes even less balanced and harmful to the public interest than what comes out of the WTO. As George Monbiot, a vocal critic of liberalization has recently said, the 'only thing worse than a world with the wrong international trade rules is a world with no trade rules at all.'²² He thus makes a plea not to scrap the World Trade Organisation, 'but to transform it into a Fair Trade Organisation, whose purpose is to restrain the rich while emancipating the poor.'

Some human rights advocates have called for inclusion of the words 'human rights' in WTO texts, including Ministerial Declarations.²³ This is a dangerous route for human rights, for three main reasons. First, the 'no explicit reference' starting point in the WTO/human rights debate has been used to support fundamentally opposing views. Those who do not want to see human rights discussed in the WTO declare that since the legal texts are silent on the issue, the WTO has no human rights-related mandate or obligations. Those who want to see the WTO held accountable to human rights standards say that explicit rights language should be brought into its text. Both seem to assume that the only way that the WTO could be held accountable to human rights standards would be if human rights were explicitly mentioned. The implication is that until the words 'human rights' are explicitly included in WTO texts, the WTO will have no human rights mandate.

²² George Monbiot (2003) 'I Was Wrong About Trade,' *The Guardian (UK)* 24 June 2003, <www.monbiot.com> (visited 3 Jan. 2004).

²³ See for instance International Federation for Human Rights FIDH (1999) <www.fidh.org/ecosoc/rapport/1999pdf/angl/omcnov.pdf>

Given the difficulty that WTO members have of agreeing on even the simplest matters,²⁴ changing the WTO legal texts might take a long time, and be extremely time-consuming. This is particularly the case given that many WTO professionals still equate the term 'human rights' with 'labour standards' and strongly resist expanding the WTO's mandate to either. The time involved is the second reason why seeking to insert the words 'human rights' into WTO texts would be a perilous undertaking. Because the ultimate – and real – objective of work on human rights in the WTO is to ensure that economic actors go beyond lip service to human rights, and effectively promote and protect these rights in their trade dealings, a change in WTO wording is unlikely to be the best use of human rights advocates' time.

A third reason why including human rights wording in WTO texts may not be a satisfactory outcome can be drawn from the experience of the environmental movement. Environmental issues began being discussed in earnest by the international trade community since the early 1990s; so environmental activists have a ten-year trade policy head start on their human rights advocates. References to the environment were already present, if somewhat timid in the 1995 Marrakesh Agreement that established the WTO. By the time of the Doha Ministerial Conference such references were frequent: the Doha Ministerial Declaration contains many references to the environment.

Yet almost no environmentalists are happy with the mandate crafted by trade officials, nor with the way that negotiations on the environment have been going in the WTO. Importantly, many environmentalists are now lamenting that bringing environmental issues formally into the WTO's ambit has given the WTO a large role in developing the issues. Based on this experience, experts on trade and the environment advise human rights advocates to ensure that any recognition of human rights and related values in the WTO insulates those values from the trade regime, in order to avoid giving the WTO too much competence on human rights-related issues.²⁵ In a similar vein, other public interest groups are seeking to reduce the WTO's reach, and limit its activities strictly to regulating the technical aspects of trade.²⁶

Assuming that when asking that human rights be mainstreamed in trade, human rights advocates want international trade and trade rules, including those developed and applied through the WTO, support rather than threaten human rights, the discussion in this section so far points to the fact that mainstreaming would best be achieved by applying human rights tools to trade policy at the points at which it is made and applied, rather than bringing human rights into the WTO.

As the previous sections have shown, the processes through which policy space for public interest regulation is reduced take place not just in the WTO but also through bilateral agreements, and the way in which trade agreements are implemented at the national level. We have also seen that when the economic powers – whether countries or private business – are unable to attain their aims through the WTO, they move away from the multilateral forum to bilateral or regional trade negotiations, where they can exert more pressure, and often do so more privately. This pleads in favour of maintaining the spotlight on the national level, as this is where trade policy is formulated and applied, whether the rules are established in the WTO or elsewhere.

Also, whilst devoting their attention to the WTO, human rights advocates concerned about trade have tended to let the human rights machinery languish in the background. Yet human rights rules and implementation mechanisms are a forceful basis for ensuring that trade and trade rules are equitable, work in the public interest and support rather than threaten human rights.

²⁴ See Caroline Dommen (2002) *The WTO Today*, <<http://209.238.219.111/The-WTO-Today.htm>> (visited 9 Jan. 2004).

²⁵ 3D→ Trade - Human Rights - Equitable Economy and Rights & Democracy (2003).

²⁶ See International Gender and Trade Network (2003) *IGTN at Cancún*, calling for reduction of the scope of the WTO to specific trade issues. <www.igt.org/wto/cancun.pdf> (visited 15 Jan. 2004).

Paul Hunt, UN Special Rapporteur on the Right to Health, has for instance pointed to ways that human rights can play a positive role in defining national trade policies that are equitable, pay attention to the particular needs of the most vulnerable, and respectful of human rights. He has demonstrated how a right to health-based analysis can, in relation to essential drugs, help to identify practical and precise policy interventions to ensure enjoyment of the medicines element of the right to health. This includes ensuring that an essential drug is *available* in a particular country. To this end, a developing country should use available TRIPS flexibilities to ensure availability of low-cost versions of the drug. The drug must be *accessible* to all within the country, especially those living in poverty. This might call for creative thinking about delivery mechanisms such as mopeds for nurses, and could also require a country to avoid imposing import duties that make that drug inaccessible to the poor. Finally, an essential drug should be of *good quality*, which also implies that a country must have a system for monitoring and checking essential drug quality.²⁷

The High Commissioner for Human Rights has also drawn attention to ways human rights can be applied in the trade context. The 2002 report on trade in services, for example, says that the human rights approach to assessment of services trade liberalization introduces a methodology for assessments that promotes popular participation and consultation of those affected by liberalization - the poor, people dependent on public services, small businesses, industry groups, as well as social, trade and finance Ministries. The report adds that a human rights approach to assessments emphasizes transparency and accountability so that the outcomes of assessments and negotiation processes in trade fora are open to public scrutiny.²⁸

Human rights advocates can further demonstrate the positive role they can play by participating in the development and formulation of trade policy at the domestic level. In some countries, coalitions of civil society groups already intervene in the formulation of trade policies, but – not counting trade unions – human rights groups rarely participate. Participation of human rights groups in these processes would not only broaden the range of stakeholders represented, but would improve understanding amongst human rights advocates of trade policy issues.

Even when the trade issues at hand are complex, an approach based on human rights can make a significant contribution through very simple steps. One such step would involve asking the trade ministry what steps it is taking, in its trade negotiations, to ensure that it is not reducing its policy space and flexibility to adopt measures for the protection of human rights. In the area of health, for instance, human rights advocates could ask the government trade officials whether they have ensured that proposals in areas such as intellectual property or services do not threaten enjoyment of the right to health.

If the information is not public, or if the response from government officials is that they do not know, human rights advocates can remind them of the human rights obligation to permit people to participate in decision-making on issues that concern them, and of the human rights obligation to monitor the human rights situation in their country in order to ensure that policies adopted promote human rights. Human rights advocates should also remind those responsible for governmental trade policy of the duty to ensure non-discrimination in the enjoyment of human rights. This implies that if a particular trade liberalization policy discriminates against a particular sector of the population – and there is considerable evidence demonstrating that trade liberalization frequently has adverse effects on women²⁹ - it will be inconsistent with human rights law. As the High Commissioner for Human Rights has pointed out, respecting the human rights requirement to avoid discrimination means not only protecting individuals and groups against overt discrimination, but also not leaving certain individuals and groups out of the trade picture.³⁰

²⁷ For a more detailed analysis, see 3D→Trade - Human Rights - Equitable Economy and Rights & Democracy (2003).

²⁸ OHCHR (2002).

²⁹ Mariama Williams (2003).

³⁰ OHCHR (2003) *Trade and Human Rights*.

Reminding trade policy-makers of the obligation to refrain from discrimination is also a way of making trade-offs explicit. Public acknowledgment of who is being favoured by a particular trade policy choice is an essential prerequisite for holding economic actors, including actors from the private sector, accountable for their actions and for possible adverse social effects of the private benefits they might derive from a particular trade policy.

As Mary Robinson, former High Commissioner for Human Rights has pointed out, increased participation by those affected contributes to trade policy that is more transparent, accountable and responsive to the needs of the people it is said to serve, as well as being more sustainable and more legitimate.³¹ Experience in many countries confirms this. Uganda, for instance, has a process for civil society participation in national trade policy formulation, and an official from the government Trade Ministry recently said that 'disadvantaged groups in this country like small farmers are ultimately affected by the economic and trade policies that are formulated. It is through the continuous engagement of civil society in this process, through shaping national positions and backing government officials that go to the negotiations, that the voice of these groups will be heard.'³²

Several countries also acknowledge that broader stakeholder participation at the national level strengthens developing countries' voices in international trade negotiations and can improve their capacity to resist pressures from larger economies to make commitments in the area of trade that go against development or public interests. Experience in Kenya, for instance, demonstrated that civil society input to the Ministry of Trade resulted in Kenya being able to submit timely negotiating proposals to the WTO and thus participate in those negotiations in a meaningful way.

The human rights framework can provide an additional tool for resisting pressures to agree to trade rules that would reduce flexibility and policy space to protect the public interest and human rights. Indeed, developing countries could, in trade negotiations, use their human rights obligations as a shield to protect them from engaging in liberalization commitments that would reduce their ability to protect human rights. Brazil did this from 2001, through introducing a series of resolutions on access to medicines in the UN Commission on Human Rights. These resolutions were part of a successful global strategy that Brazil spearheaded to achieve recognition of access to medicines as a human right, and which supported developing countries' efforts in the WTO to ensure recognition of their right to make low-cost generic drugs available to their populations.³³

Human rights advocates could make better use of international human rights mechanisms such as the UN human rights treaty bodies in support of national work to ensure that countries' policies on international trade support human rights. Treaty body members occasionally raise trade-related issues³⁴ but not in a concerted way, and rarely as part of a strategy to address a specific trade-related human rights concern.

Human rights concerns about lack of transparency and participation in trade policy are shared by development groups such as Focus on the Global South and Oxfam, with environmental groups such as the Center for International Environmental Law (CIEL) and with women's groups such as the International Gender and Trade Network. Yet, although these groups occasionally refer to human rights, few actually apply the human rights framework in support of their advocacy work on trade. Human rights advocates could significantly move the public interest agenda in trade forwards by demonstrating the unique usefulness of international human rights monitoring and accountability mechanisms to other public interest advocates.

³¹ Towards Development: Human Rights and the WTO Agenda, Cancun, Mexico, September 12, 2003, on the web via <www.3dthree.org>

³² Quoted in David Ddamilura & Halima Noor Abdi (2003) *Civil society and the WTO: Participation in national trade policy design in Uganda and Kenya*, London: Cafod Tradejustice campaign.

³³ See Caroline Dommen (2003) 'WTO and Human Rights Bodies Reach Out to Each Other,' 7 (3) *Bridges Between Trade and Sustainable Development*, April <<http://www.ictsd.org/monthly/archive.htm>> (visited 15 Jan. 2004)

³⁴ See <www.3dthree.org> for a full list of trade-related issues considered by UN human rights treaty bodies.

Indeed, given that human rights advocates share many concerns with other public interest advocates, the best way to ensure human rights are truly mainstreamed in international trade policy is for human rights groups to make their energy and expertise known to other public interest advocates and join forces with them to achieve international trade and trade rules, including those developed and applied through the WTO, that support rather than threaten human rights.

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References:

3D→Trade - Human Rights - Equitable Economy and Rights & Democracy (2003) *Towards Development: Human Rights and the WTO Agenda*, report of a panel discussion held during the WTO Ministerial Conference in Cancún, September 2003, <www.3dthree.org>.

Caroline Dommen (2002) 'Raising human rights concerns in the World Trade Organization - actors, processes and possible strategies,' *Human Rights Quarterly*, Vol. 24, p. 1-50.

John Hilary (2000) *The Wrong Model: GATS, trade liberalization and children's right to health*, London: Save the Children UK.

Fatoumata Jawara & Aileen Kwa (2003) *Behind the Scenes at the WTO – the real world of international trade negotiations*, London & New York: Zed Books.

Gabrielle Marceau (2002) 'WTO Dispute Settlement and Human Rights,' *European Journal of International Law*, Vol. 13, No. 4, <http://ejil.org/forum_tradehumanrights> (visited 3 Jan. 2004).

Roger Normand (2000) *Separate and Unequal: trade and human rights regimes*, Background Paper for the Human Development Report, New York: UNDP, <<http://hdr.undp.org/publications/papers.cfm>> (visited 6 Jan. 2004).

OHCHR (Office of the High Commissioner for Human Rights) (2002) *Liberalization of trade in services and human rights – Report of the High Commissioner*, E/CN.4/Sub.2/2002/9, <[www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2002.9.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2002.9.En?Opendocument)> (visited 6 Jan. 2004).

OHCHR (2003) *Human Rights and Trade – Paper prepared for the 5th WTO Ministerial Conference in Cancún*, <www.unhcr.ch/html/menu2/trade/index.htm> (visited 9 Jan. 2004).

Dani Rodrik (2001) *The Global Governance of Trade as if Development Really Mattered*, New York: UNDP, <<http://ksghome.harvard.edu/~drodrik.academic.ksg/UNDPtrade.PDF>>.

Michael Trebilcock & Robert Howse (1999) *The Regulation of International Trade*, 2nd ed., London and New York: Routledge.

Elisabeth Türk & Markus Krajewski (2003) *The right to water and trade in services: Assessing the impact of GATS negotiations on water regulation*, <<http://www.ciel.org/Publications/pubtae.html>> (visited 9 Jan. 2004).

Mariama Williams (2003) *Gender Mainstreaming in the Multilateral Trading System – A handbook for policy-makers and other stakeholders*, London: Commonwealth Secretariat.