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Poverty Reduction, Trade, and Rights

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POVERTY REDUCTION, TRADE, AND RIGHTS

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INTRODUCTION

With the World Trade Organization's ("WTO") "Development Round" of negotiations in full swing, trade liberalization as a mechanism for poverty reduction has resumed a central place in international policy analysis. Developing-country governments are pressing for the removal of trade barriers from developed-country markets, arguing that such barriers not only contravene the spirit of a

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liberal international trade order, but stand as devastating obstacles to the developing-country pursuit of economic growth and modernization.

These negotiations unfold against a backdrop of emphasis within contemporary international economic discourse on trade liberalization as a critical tool of growth in poor countries. While the WTO's Members are right to address development in the current negotiations, the relationship between trade and development bears investigation. This investigation resonates with the more general inquiry into globalization and its relationship to global poverty.

The questions of whether trade and globalization are either beneficial or harmful are too often over-simplified. While the claim for greater complexity hardly seems radical, too often more strident claims supercede it. This essay stakes a claim for attentiveness to the complexities of globalization in the contemporary, and of trade as a solution to poverty. In the context of current negotiations over trade and development, such attentiveness is of critical importance.

The first part of this essay recounts the debate over whether globalization has exacerbated global poverty.¹ It concludes that while some fears are overstated, even advocates of globalization have found that the poorest countries have not fared well in this era. The second part of the essay turns to the question of trade liberalization as an engine for development.²

This essay examines some of the concepts that seem to underpin the premise that an increase in trade will lead to a decrease in poverty, and finds them often oversimplified.³ Trade *does* harbor massive potential for growth – but if poor countries are to harness this massive growth potential, however, that potential often must be yoked to other dynamics: economic and political “building blocks”

1. See *infra* Section I (outlining the debate over poverty and globalization).

2. See *infra* Sections II & III (discussing trade liberalization and methods of development).

3. An outcrop of recent scholarship has sought to complicate the relationship between trade and growth. This scholarship goes beyond the question of the impact of trade on poor countries specifically, to argue that trade liberalization in general is a “neutral” factor – that is, it neither guarantees nor prevents growth. Joel Paul has argued that trade always creates winners and losers, preventing the ability to predict definitively that trade will increase overall welfare.

that may be prerequisites for trade success, and a strong regional orientation.

Could human rights, and particularly “social, cultural and economic rights,”⁴ provide a means of addressing poverty reduction goals? International human rights law and international economic law have evolved more or less separately for most of the postwar era. The longstanding divisions between the two spheres have only now begun to break down. The potential of human rights as tools of poverty reduction, particularly in the international trade context, appears still largely untapped.⁵

I. POVERTY AND GLOBALIZATION

If export orientation does not by itself reduce poverty, does it *cause* poverty? In the contemporary political frame, some elements of an “anti-globalization” movement have suggested that a focus on international integration harms local economies; particularly poor ones.⁶ Studies examining the relationship between poverty and outwardly oriented trade policy, however, have found it to be more complex.⁷

A. RELATIVE POVERTY AND GLOBALIZATION

In 1999, the United Nations Human Development Report of 1999 (“HDR”), undertook a massive study of globalization, and linked inequality with globalization in both the nineteenth and twentieth centuries. The HDR challenged the notion that globalization creates a

4. The title of the panel for which this paper was submitted was “Trade and Social, Cultural and Economic Rights.”

5. See *infra* Section IV.

6. See, e.g., Sylvia Ostry, *Why Has “Globalization” Become a Bad Word?*, The Alcoa-Intalco Works Distinguished Lecture, Western Washington University 16, (October 25, 2001) (noting that the current trend tends to impact developing countries more seriously than developed countries), available at <http://www.cbe.wvu.edu/cib/papers/ostry.pdf> (last visited September 9, 2003).

7. See U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999, 2-3 (Oxford Univ. Press 1999) [hereinafter HDR] (examining the relationship between globalization and poverty), available at http://hdr.undp.org/reports/global/1999/en/pdf/hdr_1999_full.pdf (last visited August 1, 2003).

rising tide that lifts all boats, arguing that instead of convergence, the most recent era of globalization “has shown increasing concentration of income, resources and wealth.”⁸ Such concentration manifests itself in the gap between the richest and poorest nations rising from three to one in 1820 to seventy-four to one in 1997.⁹ The HDR is replete with statistics evincing the stark disparities between rich and poor in global opportunity, including the striking statistic showing that the richest twenty percent of the world account for eighty-six percent of global GDP, while the poorest twenty percent account for only one percent.¹⁰

It is worth noting that the HDR’s analysis was not universally accepted. An October 2000 study by the Norwegian government, for example, disputed the HDR’s conclusions.¹¹ The study argued that the HDR’s own data indicate that inequality across countries has decreased since 1993.¹² Moreover, the study challenged the HDR methodology¹³ and argued that, according to its own data adjusted for purchasing power parity, “international income inequality has decreased continuously from the last part of the 1960s until 1997.”¹⁴

Even if aggregate global inequality has decreased, however, there seems to be general agreement that the aggregate improvement

8. *Id.* at 3.

9. *See id.* (stating that “the income gap between the fifth of the world’s people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960 . . . [Moreover,] the income gap between the top and bottom countries increased from 3 to 1 in 1820 to 7 to 1 in 1870 and 11 to 1 in 1913.”).

10. *See id.* at 2 (finding that the wealthiest twenty percent make up eighty-six percent of the world’s GDP, while the poorest twenty percent make only one percent of the world’s GDP).

11. *See* ARNE MELCHIOR ET AL., GLOBALIZATION AND INEQUALITY: WORLD INCOME DISTRIBUTION AND LIVING STANDARDS, 1960-1998, 1 (Royal Norwegian Ministry of Foreign Affairs 2000) (concluding that global inequality as a whole has decreased since the 1960s), at http://odin.dep.no/archive/udvedlegg/01/01/rev_016.pdf (last visited July 18, 2003).

12. *See id.* at 2 (maintaining that the HDR’s data shows a decrease in income inequality in the 1990s).

13. *See id.* (explaining that the HDR data was not adjusted to reflect the differences in purchasing power of income in different countries).

14. *Id.*

conceals more disturbing trends within groupings of countries. The Norwegian government report, for example, conceded that although world inequality decreased between the top and bottom third of the world population, inequality *increased* between the top and bottom ten percent.¹⁵ As a WTO-sponsored report observed: “[i]t is an empirical fact that the income gap between poor and rich countries has increased in recent decades.”¹⁶

B. ABSOLUTE POVERTY AND GLOBALIZATION

It might be the case that the increase in inequality arises because, while globalization has made everyone better off, globalization has made the rich even better off than the poor. The concerns arising out of this scenario would differ from one in which the increase in inequality has arisen in part because the poor are worse off than before. If globalization is a rising tide lifting all boats but some more than others, we are less concerned than if globalization pushes some boats under water.

As observed above, there is general agreement that, on average, world income has increased over time, even if the gap in relative income – that is income inequality – has also grown between the top and bottom of the spectrum.¹⁷ But the same countries have experienced not only a relative decrease in income, but also an absolute decrease.¹⁸ When one looks at certain groupings of countries

15. See Melchior et al., *supra* note 11, at 12 (remarking that a comparison between the top and bottom third of countries shows a decrease in inequality, but a comparison between the top and bottom ten percent of countries shows an increase in income inequality, and the lowest ten percent of the world population had a higher share of world income in 1965 than in 1997).

16. HAKAN NORDSTROM, TRADE, INCOME DISPARITY AND POVERTY: AN OVERVIEW, WTO SPECIAL STUDIES SERIES #5 3 (Dan Ben-David et al. eds., 2000) [hereinafter WTO Report].

17. See HDR, *supra* note 7, at 22 (“During 1990-97 real per capita GDP increased at an average annual rate of more than 1%.”); see also Melchior, *supra* note 11, at 17 (noting that for the “poorest part of the world population . . . [a]lthough their *share of world income* declined . . . *income* increased on average”) (emphasis in original). Although most countries experienced a substantial income increase, the regions of Sub-Saharan Africa, and Eastern Europe experienced a reduction in income. *Id.*

18. See HDR, *supra* note 7, at 22 (“During 1990-97 real per capita GDP increased at an average annual rate of more than 1%.”); see also Melchior, *supra*

in particular Eastern Europe and Sub-Saharan Africa - income has decreased.¹⁹ Moreover, whereas the Eastern European countries started out at relatively high levels of income, in many Sub-Saharan African countries' pre-existing desperation has simply intensified.²⁰ Not only have many of these countries experienced a decline in income, but they have also experienced starkly downward trends in life expectancy,²¹ due in part to HIV epidemics.²² Thus, it appears that although average income has increased, the poorest are worse off now than ever before:

[w]hile convergence at the top end of the spectrum is of the catching-up variety - where the poorer group members catch-up with the wealthier group members - the convergence at the bottom end of the income spectrum is one of negative growth by the initially better-off members of the poorest range.²³

II. POVERTY AND TRADE: QUALIFICATIONS TO EXPORT ORIENTATION AS A GROWTH STRATEGY

If the world's poorest countries have not fared well under globalization, might increased emphasis on growth through trade pull

note 11, at 17 (noting that the average income in the poorest parts of the world actually *increased*, although their share of the world's income *decreased*).

19. See *id.* at 154 (listing declining GDP per capita income figures for Sub-Saharan Africa and Eastern Europe from 1985-1997).

20. See *id.* at 151, 154 (explaining that Eastern Europe declined on average from 2,913 to 1,989 US \$1987, whereas the average medium-income 1997 GDP per capita was \$935). Sub-Saharan African income declined from an average of 542 to 518, and the income of the least-developed countries, most of which are in sub-Saharan Africa, declined from 277 to 245 dollars. *Id.* at 154.

21. See *id.* at 165-66 (showing the negative movement of life expectancy in Eastern Europe and Sub-Saharan Africa).

22. See Dr. Rene Loewenson, HIV/AIDS Implications for Poverty Reduction, U.N. Development Programme (prepared for the U.N. General Assembly Special Session on HIV/AIDS, 25-27 June 2001) (providing a study of countries worst affected by HIV/AIDS, the vast majority of which were located in Sub-Saharan Africa), *available at* <http://www.undp.org/dpa/frontpagearchive/2001/june/22june01/hiv-aids.pdf> (last visited July 31, 2003).

23. WTO Report, *supra* note 16, at 18.

them towards the “catching-up” convergence that typifies the better-off countries? The conviction that trade is an engine of growth finds subscribers across the political spectrum and across the geographical divide. It is this conviction that animates many of the negotiations – and controversies – within the WTO.

While trade *can* spark economic growth, however, the relationship is not an unqualified one. This section examines some of the familiar tenets of policy discourse on trade and development, notes some shortcomings, and highlights factors that are important co-dynamics in the link between trade on the one hand and economic growth on the other.

The classical economic theory of comparative advantage counsels countries to export in their sectors of relative economic strength.²⁴ Comparative advantage provides the theoretical foundation for “export-oriented” trade policy and its promise to spark economic growth and improve national welfare.²⁵ Within development discourse, it is widely accepted that the countries that have achieved industrialization in the post-World War II have done so through export orientation.²⁶ Japan and the Southeast Asian “tigers” in particular, exemplify the path of industrialization through export led growth.²⁷ The export successes of these countries have served as confirmation of the comparative advantage principle, and translated into a directive for other countries to focus on export orientation.²⁸

24. See Alice O'Brien, *Countervailing Low Wage Subsidies: A Counter to the Leveling of Labor Conditions*, 4 TRANSNAT'L L & CONTEMP. PROBS. 825, 869 (1994) (finding that, “[b]y allowing countries to concentrate their efforts in their most efficient sectors, trade enhances global and domestic economic well-being”).

25. See J.M. Migai Akech, *The African Growth and Opportunity Act: Implications for Kenya's Trade and Development*, 33 N.Y.U. J. Int'l L. & Pol. 651, 657-58 (2001) (noting that the comparative advantage theory promotes exports which benefits developing countries by employment and production creation).

26. See Alan S. Gutterman, *Japan and Korea: Contrasts and Comparisons in Regulatory Policies of Cooperative Growth Economies*, 8 INT'L TAX & BUS. LAW. 267, 283 (1991) (explaining that the classical model for economic development advocates for developing countries to adopt a policy of export orientation).

27. See *id.* at 285 (noting that early Japanese and Korean economic success seemed to be a result of export-oriented policies).

28. See *id.* (observing the early Japanese and Korean economic successes that resulted from export-oriented policies).

Preliminarily, it is worth noting that the success enjoyed by the export-led industrializing countries did not fit squarely with the classical theoretical account. These countries all experienced significant periods of "inward-looking" growth prior to the turn outwards. Moreover, their export-led growth often occurred not through the "invisible hand" of the market isolating sectors of comparative advantage, but instead through directed industrialization policies.²⁹ With these qualifications, however, it is nonetheless clear that the primary engine for growth indeed resided in export-oriented trade.

The puzzle is that, if one looks at the countries that are currently the world's poorest, it becomes clear that many of them have *also* been highly dependent on export revenues as a source of income. If export orientation is defined as the extent to which a national economy is dependent on exports, many Sub-Saharan African nations are more export-oriented than export-led growth success stories. Sierra Leone, which ranked 174th out of 174 countries in the 1999 HDR, earns more from exports as a percentage of its GDP than does Hong Kong.³⁰ Guinea-Bissau (168th) is more export-oriented in this fashion than South Korea.³¹ Indeed, overall exports as a percentage of GDP approach thirty percent in Sub-Saharan Africa, compared with nineteen percent for the Organization for Economic Cooperation and Development ("OECD") countries.³² If exporting is so key to development, how can the most export-dependent countries be so poor?

29. See *id.* at 285-86 (illustrating that Japan and Korea based their regulatory framework on "the pursuit of strategic industrial objectives" in lieu of a comparative advantage approach); see also STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALIZING COUNTRIES* 26-27 (Peter J. Katzenstein ed., Cornell University Press 1990) (stating that, although "the government might rely on market signals of changing comparative advantage, it might also anticipate or lead changes in the industrial sector by targeting particular industries.").

30. See HDR, *supra* note 7, at 45 & 48 (showing the export percentage of GDP index for Hong Kong's index of 218 compared to Sierra Leone as 273).

31. See *id.* at 48 (comparing the index of Guinea-Bissau of 384 to the Republic of Korea's index of 185).

32. See *id.* at 2 (commenting that countries in Sub-Saharan Africa are highly globally integrated with exports accounting for thirty percent of GDP compared to OECD countries' exports nineteen percent).

Successful export-oriented countries benefited from a number of factors that do not feature as prominently elsewhere in the developing world. First, benefited from very stable political regimes. Second, they benefited from relatively egalitarian income distributions *predating* the export orientation strategies. Third, they profited from a significant level of infrastructural development as well as capital infusions on relatively generous terms. Fourth, they benefited from a high degree of regional integration. Finally, they participated in a particular *kind* of export – manufactured goods as opposed to agriculture.

To compare the East Asian with the Sub-Saharan African states on these factors is to see telling contrasts. The Sub-Saharan African states suffered from, and continue to suffer from, high intra-country inequality. Many suffer, or have suffered, from debilitating political turmoil, which in turn has bred parasitic corruption.³³ Infrastructural development remains low, as does low-cost capital infusion. Regional integration remains the lowest on the globe. And finally, the exports in question are primarily agricultural, and thus subject to much more volatility - and fiercer competition - than manufactured exports.

Assessing the comparative histories of high-growth and low-growth regions in the developing world, it is possible to fashion an equation that, though necessarily rough and generalized, nonetheless captures a greater level of complexity in the relationship between trade strategy on the one hand and growth on the other. In this equation, it is possible to see that the level of growth may depend not only on the *type* of trade, but on a host of political and economic factors that create an *environment* in which trade can flourish.

33. See International Finance Corporation, *Sub-Saharan Africa: Building Local Capacity and Regional Businesses* (2002) (describing political conflict as a factor that constrains economic development in Africa), at <http://www.ifc.org/ar2002/regional/africa.html> (last visited July 17, 2003).

THE DEVELOPMENT EQUATION

GROWTH	AVAILABLE CAPITAL		POLITICAL STABILITY		EXPORTS
	Foreign aid	Indigenous capital	Basic territorial stability	Government capacity to direct economic activity	
LOW	Relatively low	Low	Low	Low	Commodities
MEDIUM	Relatively low	Medium	Medium to High	Low to Medium	Commodities; Manufactures
HIGH	Relatively high	Medium to High	High	High	Manufactures; Services

If this equation is correct, a singular focus on export orientation or liberalization or global integration obscures the importance of other factors, both domestic and international, that may determine the extent to which a strategy of growth through international trade, whether imported or exported, will be beneficial.³⁴

A. TRADE "PREREQUISITES"

Domestically, a host of conditions appear to increase the likelihood that exporting will lead to economic growth. These include: infrastructure and basic social services, capital of all kinds (physical, financial, and human), and political stability.³⁵ Leaving these other factors out of the equation significantly distorts the real importance of trade.³⁶

Dani Rodrik, for example, has warned against focusing on international economic integration as a policy goal, at the expense of

34. See Melchior et al., *supra* note 11, at 32 (explaining that other important events occur simultaneously with globalization, and may affect the extent of inequality between countries). Political and technical changes in Eastern Europe and Sub-Saharan Africa strongly affect the countries' economies. See *id.*

35. See *id.* at 32 (maintaining that other factors such as political stability, and technological change strongly affect global competition and income disparity between different countries).

36. See *id.* (concluding that one must take these other factors into account in order to derive causal links between globalization and inequality).

infrastructural development.³⁷ Two recent Nobel laureates, Amartya Sen and Joseph Stiglitz, have each urged a development policy perspective that better integrates the goal of economic liberalization with a broader array of goals related to social progress. Even leading proponents of free trade have affirmed this need. Jagdish Bhagwati, for example, has observed the importance of suitable policy intervention to correct market failures that otherwise obstruct gains from trade.³⁸

B. REGIONAL TRADE

In addition to these domestic factors, it is worth pointing out the very strong correlation between *regional* trade and economic growth. As one study has noted, “[i]f ‘globalization’ is taken to imply relatively more trade with other regions of the world economy, it paradoxically looks as if Africa is the most ‘globalized’ - and increasingly so.”³⁹ In 1990, trade with other regions constituted ninety percent of foreign trade in Africa, as compared with fifty percent and less than thirty percent for Asia and Western Europe respectively.⁴⁰

37. See Dani Rodrik, *Trading in Illusions*, FOREIGN POLICY, March/April 2001, at 55 (stating that the trend of integration, in place of development, is “bad news for the world’s poor”). Rodrik argues that when governments focus on international integration, “governments in poor nations divert human resources, administrative capabilities, and political capital” away from more important areas of development, such as education, health, and industrial capacity. *Id.*

38. See Jagdish Bhagwati, *Free Trade: What Now?*, Address delivered at the University of St. Gallen, Switzerland International Management Symposium, (May 25, 1998) (advocating that gains from trade are possible when market failures are fixed through suitable policy intervention), available at http://www.columbia.edu/~jb38/papers/freedom_speech.pdf (last visited June 26, 2003); see also Jagdish Bhagwati, *The Demands to Reduce Domestic Diversity Among Trading Nations*, in 1 FAIR TRADE AND HARMONIZATION 9, 24 (Jagdish Bhagwati & Robert E. Hudec, eds., 1996) (explaining “[i]f markets do not function adequately because of specific domestic institutions . . . or the entire domestic economic system . . . then free trade rules as contemplated by the GATT system would fail to produce the desired gains from trade”).

39. *Id.* at 33.

40. See *id.* (charting the percentage of trade with countries outside the region as a share of foreign trade).

III. EXPANDING THE SCOPE OF POLICY PRESCRIPTIONS FOR GROWTH

If these conclusions are true, what response might the international trade order posit? On the surface, this claim for complexity might appear to deflate the urgency around current negotiations within the WTO on lowering trade barriers in developed-country markets to agricultural exports from developing countries. This article is certainly not intended to suggest that such negotiations are not appropriate or are irrelevant. They deal with markets of enormous economic significance, and also with bedrock principles of the international trade order.

This article does suggest, however, that even if developing country governments succeed in gaining all the market access concessions they desire, without gaining more, these concessions may not yield meaningful economic and social progress.

Regionalization of trade factors heavily into sustainable economic growth. To what extent should the trade order take responsibility for fostering regional economic integration? The General Agreement on Tariffs and Trade ("GATT") already has a special rule allowing for regional agreements.⁴¹ The GATT also adopted a special waiver for trade preferences accorded between developing countries.⁴² In fact, this led to the signing of many regional agreements. African regional and sub-regional agreements include the African Economic Community, the Economic Community of West African States, the Economic Community of Central African States, and the South African Customs Union.⁴³ Regional organizations elsewhere in the developing world include the Caribbean Community, the Central

41. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIV, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT] (explaining that the provisions of the Agreement shall not prevent the formation of a customs union or of a free-trade area).

42. See Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 191 (1980) [hereinafter Differential and More Favourable Treatment] (declaring that parties may accord differential treatment to developing countries).

43. See Joseph L. Brand, *The New World Order of Regional Trading Blocs*, 8 AM. U. J. INT'L L. & POL'Y 155, 173-76 (1992) (listing the regional trading organizations and member countries).

American Common Market, the Common Market of the South, and the Andean Common Market.⁴⁴ The same factors that hinder growth through trade generally, unfortunately, also seem to have prevented many of these agreements from bearing fruit. The time may therefore have come for a renewed emphasis on the importance of regional trade.

Such an emphasis would require confronting the tension between the goals of a global trading regime and the significance of regional trade. Many commentators have worried that regional trade blocs could trigger protectionism not seen since World War II.⁴⁵ The irrefutable significance of regional trade for economic development, however, forecloses the possibility of escaping this tension.

If regional trade presents a tricky issue for the WTO, the proper relationship between trade law and trade “prerequisites” seems to do so infinitely more. To what extent should the trade order take responsibility for infrastructure and basic social services, capital of all kinds (physical, financial, and human), and political stability? Such domestic development goals could be seen as falling outside the purview of the WTO and belonging more to institutions such as the International Monetary Fund (“IMF”), the World Bank, and the regional development banks.

Domestic development is, however, a stated goal of the WTO. It is recognized by the General Agreement on Tariffs and Trade,⁴⁶ and

44. See *id.* at 177, 179-81 (listing the regional trading organizations and member countries).

45. See Robert L. McGeorge, An Introduction and Commentary: Revisiting the Role of Liberal Trade Policy in Promoting Idealistic Objectives of the International Legal Order, 14 N. ILL. U. L. REV. 305, 314 (1994) (asserting that a system consisting of highly regionalized trading blocs would create a situation “that that would look hauntingly familiar to the architects of the post-World War II international order.”); see also Bruce J. Janigian, *Global and Regional Trade Developments*, 15 TRANSNAT’L LAW. 99, 100 (2002) (stating that many countries would rather see emphasis placed on reduction of global trade barriers rather regional barriers to “break the threat of growing protectionism and regionalism”).

46. See GATT, *supra* note 41, art. XVIII (stating that “[t]he contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies”).

emerges in the aspirational language of the new agreements within the WTO.⁴⁷

It is quite clear that many occasions exist in which the application of a trade rule will differ depending on whether such domestic goals are taken into account. One example of this is the proper scope of the WTO Agreement on Trade-Related Intellectual Property Rights ("TRIPS Agreement"). In the area of patent law, for example, the TRIPS Agreement recognizes the principle in a longer implementation period for developing countries, essentially imposing an outlying deadline of 2005 for developing countries, as opposed to 1996 for developed countries.⁴⁸ The longer transition period, however, does not sufficiently reflect the socioeconomic disparities between developed and developing countries, so that the resulting regime still strongly falls in favor of developed-country pharmaceutical industries.⁴⁹

The building global resistance to patent monopolies over HIV-related medicines in the context of HIV epidemics in the poorest

47. See Decision on Measures in Favour of Least-Developed Countries (Dec. 15, 1993) (recognizing the WTO's commitment to special and differential measures for least-developed countries), *available at* http://www.wto.org/english/docs_e/legal_e/31-dlldc.pdf (last visited August 1, 2003); *see also* Preferential Tariff Treatment for Least-Developed Countries, June 15, 1999, WT/L/304 (allowing preferential tariff treatment to products of least-developed countries), *available at* http://www.wto.org/english/docs_e/legal_e/waiver1999_e.htm (last visited August 1, 2003).

48. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 66, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL.31, 33 I.L.M. 81 (1994) [hereinafter TRIPS] (granting developing-country WTO Members ten years to comply with the Agreement's patent rules). The TRIPS Agreement essentially imposes a deadline of 2005 for developing countries as opposed to 1996 for developed countries. *Id.*

49. As Jagdish Bhagwati has observed, intellectual property rights seek to "trade-off between gains from more innovation under IPR and gains from diffusion of given innovation without IPR. But . . . few believe that the optimum IPR . . . extends as high as the 20-year patent rule that was forced into the World Trade Organization by the business lobbies!" Jagdish Bhagwati, Economic Freedom: Prosperity and Social Progress, Keynote Speech at the Conference on Economic Freedom and Development in Tokyo (June 17-18 1999), *at* http://www.columbia.edu/~jb38/freedom_tokyo.pdf (last visited June 26, 2003).

countries only serves to underscore this point.⁵⁰ After a lengthy struggle, the connection between public health policy and WTO law, in the form of decisions by the WTO Membership explicitly recognizing the right of developing-country governments to relax patent rights when necessary to address public health crises.⁵¹

The interrelatedness of social progress and trade expressed in this set of decisions could be applied elsewhere in intellectual property law. Some commentators have suggested a context-specific approach to international intellectual property rights. Dru Brenner-Beck, for example, has proposed a “threshold” approach that would require developing countries to comply fully with international intellectual property law only if they had reached the threshold socioeconomic levels requisite to their domestic economic actors to benefit from it.⁵² The administrability challenge posed by determining such a threshold is certainly not inconsiderable, but the concept may be both more efficient in maximizing gains from the law and more just.

These intellectual property issues present just one category of a wide array of issues on which development policy might affect the application of a WTO rule. I have discussed elsewhere the balance-of-payments exception for developing countries.⁵³ Balance-of-payments crises occur when severe downward pressure on a

50. See, e.g., Sheryl Gay Stolberg, *AIDS Drugs in Africa: If Cedes to When*, N.Y. TIMES, Mar. 10, 2001 (noting that pharmaceutical companies are in negotiations over patent rights and the price of AIDS medicines), available at <http://www.nytimes.com/2001/03/10/health/10AIDS.html?ei=5070&en=25b30ce80b365963&ei=5070> (last visited June 26, 2003).

51. See WTO Ministerial Decision of 20 November 2001 (WT/MIN(01)/DEC/2), Declaration on the TRIPs Agreement and public health; Council for TRIPS, Decision of 30 August 2003 (WT/L/540), Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health; see also James T. Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable Aids Drugs to Low-End Consumers*, 53 FLA. L. REV. 727 (2001).

52. See Dru Brenner-Beck, *Do As I Say, Not As I Did*, 11 UCLA PAC. BASIN L.J. 84, 103-04 (1992) (providing a detailed analysis of the “threshold level” approach intellectual property laws and economic development in least-developing countries).

53. See Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT’L. L. REV. 1249, 1251 (2000) (describing a balance-of-payments problem as a result of downward pressure on a country’s currency value).

country's currency combines with a deficit in that country's trade balance.⁵⁴ The GATT/WTO exception allows a developing-country government to impose trade restrictions in order to stave off a debilitating fall in its currency value.⁵⁵ Although the GATT/WTO exception for developing countries recognizes the special vulnerability of such countries' economies to balance-of-payments crises and is intended to provide such countries with relatively greater leeway to impose trade restrictions, the exception is more narrowly construed now, in the WTO-era trade regime, than previously.⁵⁶ While the purpose of such narrow construction is to prevent abuse of the exception, it may also deprive developing-country governments of needed protection in today's volatile international capital markets, as well as appropriate autonomy in progressing towards liberalization.⁵⁷

The balance-of-payments case usefully demonstrates that the WTO organs has the capacity to work closely with international institutions more focused on domestic development policy, such as the IMF.⁵⁸ Rather than limiting consideration of domestic

54. *Id.*

55. See GATT, *supra* note 41, art. XVIII, para. 9 (explaining that a country may impose restrictions on quantity or value of imports in order to protect its external financial position). See generally Thomas, *supra* note 53, at 1255-58 (discussing the GATT exceptions to quantitative restrictions on trade and balance-of-payment exceptions).

56. See *id.* at 1275 (noting that the Uruguay Round created a movement away from pragmatism and resulted in a more legalistic approach to trade).

57. See *id.* at 1277 (recognizing the importance of construing exceptions narrowly but also recognizing social and political costs of narrow construction in volatile capital markets).

58. With respect to financial capital, there is certainly a need for greater international cooperation - a need which countries are increasingly coming to recognize. For those countries industrialized enough to boast significant securities-market activity, the threat of capital flight as seen in the Mexico peso crisis and the Asian financial crises looms large—many, among them Nobel laureate James Tobin and Jagdish Bhagwati, view increased regulation of international capital flows in these markets as desirable. For poorer countries bearing heavy direct-debt obligations to private and institutional lenders, the international coordination on debt forgiveness has also been widely exhorted and is increasingly being operationalized. See Joseph Kahn, *Wealthy Nations Plan a Doubling of Debt Relief*, N.Y. TIMES, Sept. 17, 2000 (discussing the debt-relief initiative), available at

<http://query.nytimes.com/gst/abstract.html?res=F00817F9345C0C748DDDA0089>

development policy to assessment of disputed trade practices, the trade regime could only benefit from a more in-depth consideration of the interrelatedness of trade goals and domestic social objectives. While gestures have been made in this direction, much more attention is required to even begin to reach a sustainable balance.

IV. THE IMPORT (IN BOTH SENSES) OF HUMAN RIGHTS

Can human rights law provide the bridge to gain that balance? Up to this point in the article, there has been very little discussion on human rights. The exclusion of human rights considerations thus far reflects the real-world exclusion of human rights from international trade law.

In recent years, however, the global community has devoted increasing attention to examining the relationship between human rights and trade.⁵⁹ In particular, the “social, cultural and economic rights” emerging in international law might provide just and effective

4D8404482 (last visited Aug. 3, 2003). And finally, some commentators have noted that the IMF Articles of Agreement “explicitly empower the IMF to place adjustment burdens on countries in chronic trade and payments surplus[,] . . . [which] encourage such countries to transfer their surpluses through foreign aid like the Marshall Plan grants that recycled the U.S. surplus to rebuild Western Europe after the Second World War.” Timothy A. Canova, *Globalization or Global Subordination?: How Latcrit Links the Local to Global and the Global to the Local: Global Finance and the International Monetary Fund's Neoliberal Agenda; The Threat to the Employment Ethic Identity, and Cultural Pluralism of Latina/o Communities*, 33 U.C. DAVIS L. REV. 1547, 1556 (2000). The notion of a Marshall Plan-like response to capital scarcity in poor countries is also reflected in Thomas Pogge's proposal for a Global Resources Dividend. See generally Thomas W. Pogge, *A Global Resources Dividend*, in *ETHICS OF CONSUMPTION: THE GOOD LIFE, JUSTICE, AND GLOBAL STEWARDSHIP* 501 (David A. Crocker & Toby Linden eds., 1998).

59. See generally Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000), available at <http://www.ichrdd.ca/frame2.iphtml?langue=0&menu=m07&urlpage=store/> (last visited September 9, 2003). For discussion of the larger question of “linkage” between trade and “non-trade” issues, see Jose Alvarez (ed.), *Symposium: The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002); Andrew Guzman, *Global Governance and the WTO* (manuscript on file with author); Chantal Thomas, *Trade-Related Labor and Environment Agreements?*, 5 J. INT'L ECON. L. 791 (2002).

controls on trade that would dovetail with many of the "trade prerequisites" discussed above.

This section first discusses the laudable aspects of incorporating human rights into international trade law. It then discusses three concerns that this incorporation can raise: First, what human rights are implicated? Second, what is the status of human rights in the existing trade regime? And finally, what *should* the status of human rights be?

A. THE BENEFITS OF INCORPORATING HUMAN RIGHTS INTO INTERNATIONAL TRADE LAW

At the very least, incorporation of human rights into trade law would reduce its curious isolation from the larger body of public international law.⁶⁰ But the designs of incorporation are much bolder; they seek nothing less than to develop a language within international trade law for discussing justice.

More than any other scholar, Amartya Sen has pioneered this new language. Sen conceptualized respect for human rights as an essential building block of domestic capacity to generate and sustain economic growth.⁶¹ Human rights law also provides a framework for measurement and assessment that fit well with the emphasis of international development institutions on government accountability. The rights framework thus created a widely respected and acknowledged platform on which to discuss questions of social justice. The World Bank thus declared on the 50th Anniversary of the Universal Declaration of Human Rights: "The world now accepts that sustainable development is impossible without human rights."⁶²

60. See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 538-39 (2001) (noting that the WTO, while generally under the guidance of many public international law rules, has specifically contracted out some general principles of public international laws). By re-incorporating human rights back into trade law, we will bring one area previously "contracted" out back into the fold. *Id.* at 540.

61. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 148 (Alfred A. Knopf, Inc. 1999) (stating that political and liberal rights play a constructive role in the conceptualization of economic needs).

62. World Bank, *Development and Human Rights: The Role of the World Bank* (1998), available at: <http://www.worldbank.org/html/extdr/rights/>.

Moving beyond these analytical advantages to the broadest normative level, a formally delineated relationship between human rights and trade would emphasize the centrality of human dignity and well-being to the international order. Article 1 of the Universal Declaration of Human Rights (“UDHR”) provides that “[a]ll human beings are born free and equal in dignity and rights.”⁶³ Article 28 adds that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”⁶⁴ The explicit incorporation of such principles could help to keep the human face of globalization, to use a current phrase, clearly in view.

Finally, a “negative” argument for incorporation is that without it, the international trade order may directly or indirectly erode a government’s ability to recognize human rights. To the extent that the pressures and/or opportunities arising from trade liberalization, which in turn flows at least in part from international trade law, may cause a government to reduce its attention to political, social, economic, or cultural goods which international human rights norms assure, there is a clear conflict between the two regimes that might governments might best address by building more direct relationships between them. (To wit, see the below discussion of human rights and trade in Myanmar).⁶⁵ Incorporation of human rights may not only prevent declines in human rights enforcement, but may also achieve gains through access to the relatively rigorous enforcement mechanisms of international trade organizations.

Finally, the need to build links in order to prevent conflicts between human rights and trade is a narrow expression of a broader aspiration towards a more fully integrated global order. After all, the international economic organizations were initially meant to be much more closely related to the United Nations system. After half a century of progressive development along separate tracks, perhaps the time has come to begin again to connect the two.

63. Universal Declaration of Human Rights, Dec. 10, 1948, art. 1 [hereinafter UDHR], available at <http://www.un.org/Overview/rights.html> (last visited July 11, 2003).

64. *Id.* art. 28.

65. See discussion *infra* Section IV.B. (discussing the attempt of the State of Massachusetts to impose trade sanctions on Myanmar).

B. CONCERNS ABOUT HUMAN RIGHTS

Potentially all human rights are implicated in an agenda of global economic justice, or, more narrowly, poverty reduction, and many might be implicated in contradictory ways. As noted above, human rights are often classified into first, second, and third generations: the first referring to civil and political rights; the second referring to social, economic, and cultural rights; and the third referring to more diffuse rights such as the right to development (which simply restates the question) and the right to a sustainable environment. Leaving to one side the broader notion of human development and its relationship to political rights, one might draw links between political rights and poverty reduction insofar as political rights help to provide political stability. On the other hand, to the extent that political rights, particularly of expression and participation, destabilize economic policies that governments otherwise view as favorable to economic growth, such rights might actually stall poverty reduction.⁶⁶

The relationship between social, economic, and cultural rights seems more straightforward. The right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment would seem directly to support a poverty reduction agenda.⁶⁷ Again, however, one could view such a right as contradictory in that it might require interventionist policies that would be viewed as inimical to economic growth, and therefore poverty reduction. One might say the same of third generation rights such as the right to a sustainable environment.

Virtually no one now espouses the view that there is an absolute trade-off in the allocation of government resources towards achieving economic growth on the one hand, and fulfilling political and social goods on the other. As discussed above, public provision of certain kinds of such goods is often cited as a necessary prerequisite to effective competition in the international marketplace.

66. See Chantal Thomas, *Does the "Good Governance" Policy of the International Financial Institutions Privilege Markets at the Expense of Democracy?*, 14 CONN. J. INT'L L. 551, 557-62 (1999) (discussing the extent to which "democratic politics in developing countries are seen as defying, rather than accepting, the liberal international economic order").

67. UDHR, *supra* note 63, art. 23(1).

Indeed, discourse on sustainable development now emphasizes the “indivisibility” of human rights.⁶⁸

This discussion, however, does show how governments *might* resist pressure to do so on the grounds that doing so will retard economic growth and therefore poverty reduction. Moreover, even if the general relationship between effective trade and trade prerequisites is widely accepted, the relationship in particular instances will undoubtedly be disputed. Where, for example, would a generous unemployment scheme fall? Would it be viewed as necessary to correct a market failure and therefore necessary to effective participation in free trade? Or would it be viewed as creating a market distortion, and therefore inimical to effective participation in free trade? Does the right to protection against unemployment include generous unemployment schemes, or only minimal ones?

The relationship between social rights-related regulations and trade is significant not only as a policy matter, but also as a legal matter. The WTO regime abhors “disguised protectionism.” Opponents of incorporating human rights fear that they would furnish a veil for protectionist trade strategies that would otherwise violate WTO principles. The WTO dispute settlement body and trade scholars are only beginning to delineate the contours of this question, but the guiding principle must be in balance. While trade liberalization lies at the center of the WTO’s mission, its agreements also articulate sustainable development as a goal. Because WTO law provides a balance of rights and obligations, the way through the thicket of “incorporation” or “linkage” questions is not to raze human rights law.

If the WTO and international scholars could resolve the larger substantive relationship between trade and human rights, it would still leave a host of institutional concerns.⁶⁹ First, there is the not-inconsiderable question of determining *which* human rights should

68. CENTER FOR INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW, INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICE & PROSPECTS (2002).

69. Cf. Thomas, *supra* note 59, at 791 (noting that even if the relationship between trade and environmental rights were resolved, the “real difficulties of legal form would arise”).

be candidates for incorporation, were one to view incorporation as desirable. Although not completely satisfactory, one approach to this problem would be to limit incorporated human rights to those that can be narrowly or strictly construed, and which resist expansion. The right to just and favorable conditions of work cited above would be eschewed in favor of, for example, the right to protection against forced labor.

Assuming one could resolve this question of content, an additional challenge arises from the fact, as noted above, that state sovereignty binds the international trade law much more than international human rights law. As such, concern has arisen about the propriety of a multilateral trade regime intervening in member states' human rights practices. This concern seems spurious, however, since the regime clearly already regulates a wide array of members' domestic practices affecting international trade.

A potentially more powerful version of this concern is that incorporating human rights into international trade law will create institutional overload and meltdown. The idea is that because member states have only limited tolerance, and the international trade order accordingly has only limited institutional capital, nations must expend such capital sparingly. Directly linking trade to human rights would require too great an expenditure. One could bolster the argument with the point that unfettered economic growth will enable a society to realize all human rights than any other strategy, so that the trade-off is only temporary. This is the nub of the U.S. executive branch's policy of "de-linking" trade and human rights.

In addition to these familiar concerns, there are a set of concerns that go less to institutional workability of human rights and more to the underlying discursive structure. Setting aside the question of "cultural bias" in human rights discourse,⁷⁰ these objections to human rights that are simply versions of common rights critiques - objections to rights talk. One central such critique is the tendency of rights to monopolize and reify policy discussion. Once the international community introduces the language of rights, it is

70. See generally, e.g., Catherine Powell, *Introduction: Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 205-06 (1999) (noting that many non-Western countries use cultural differences as a reason for non-compliance).

difficult to express those concerns that we cannot voice as rights claims and thus these concerns tend to become marginalized. Consequently, in order to avoid marginalization, all policy concerns must be retooled into rights concerns. One explanation for the increasingly multiplex array of emerging human rights, therefore, is that once human rights became the only game in town for talking about justice, the only way to keep justice claims afloat was to try to convert them into claims specifically for human rights enforcement.

This phenomenon might not be worrisome,⁷¹ the critique goes, if the discursive structure of a “right” was substantively neutral, an empty vessel into which a government could inject any content with the requisite (moral, political, or otherwise) backing. However, the structure of a right lends itself more to certain kinds of claims - not surprisingly, the traditional civil and political claims - than to others - the relatively recent second and third generation claims.

The right to development is a good example. Development as a policy matter, though nebulous, is viewed as universally desirable. Once translated into a right, however, it becomes subject to all kinds of objections: by whom is the right exercised? For whom? Against whom? In short, the right, it has been argued, is non-justiciable.

Such non-justiciability has implications both for desirable policies and for rights discourse. Desirable policies may get marginalized, and especially aspects of policy obligations that fall outside the limits of the right. In the international context in particular, the potential obligations of governments *other than* the government whose territory the rights claimant inhabits may be obscured by rights discourse. Consider the right to “just and favorable conditions of work”⁷² in the UDHR as a potential example of this dynamic.

The right highlights the obligations of, for example, India to provide its citizens with just and favorable conditions of work. At the same time, it *obscures* any obligation which accrues to the United States - or citizens therein - to aid India in obtaining just and favorable conditions of work. Thus, such a right, even if perfectly implemented, would at most provide WTO authorization of U.S.

71. Leaving aside here questions of the actual and/or appropriate role of instrumentalism in rights discourse.

72. UDHR, *supra* note 63, art. 23(1).

trade sanctions on India for non-compliance with this right; India could not (unless some dramatic overhaul of the traditional structure of rights occurred) impose trade sanctions on the United States for failing to *aid* India in fulfilling this right. Thus, the reconstruction of poverty-reduction policies as rights might dramatically affect the principle of global responsibility for poverty reduction. Do such rights *require* obstruction of the principle of global responsibility? Not at all - but they may nevertheless tend to cause it.

Perhaps for all of these reasons, human rights discourse has foundered in free trade agreements (as opposed to customs unions such as the European Union). The North American Free Trade Agreement ("NAFTA"), for example, obliges member governments to apply their labor and environmental laws, but does not provide any real enforcement mechanism, nor does it require that those laws accord with any recognized international rights norms.⁷³ While many governments have made certain WTO-related privileges, such as market access, partially dependent on compliance with internationally recognized worker rights, such incorporation is not required by the WTO.⁷⁴

The WTO is not without language relevant to incorporation of human rights. The GATT contains two "social clause" provisions – that exempt a WTO Member for restricting trade (subject to certain conditions) in order to protect "public morals" or "human, animal, or plant life or health."⁷⁵ These provisions would seem to offer a basis for exempting Members from WTO liability for trade sanctions imposed in connection with human rights abuses. A third "social

73. *See generally* North American Free Trade Agreement, Dec. 8-17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289.

74. Recently, however, India initiated a complaint (now suspended) against the EC charging that these conditions were discriminatory and violated WTO law. *See* WTO Dispute Settlement Body, Complaint by India on conditions for the granting of tariff preferences to developing countries (WT/DS246) (May 3, 2002). Robert Howse's paper in this volume takes up that case in detail. *See generally* Robert Howse, *Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exception in the European Union's Generalized System of Preferences*, 18 AM. U. INT'L L. REV. 1333 (2003).

75. GATT, *supra* note 41, art. XX.

clause” provision - relating to products of “prison labor” - also seems applicable.⁷⁶

Earlier GATT decisions suggested that some of these provisions applied only to a government’s attempts to protect social rights *within* its own territory, and did not apply extraterritorially.⁷⁷ The WTO Dispute Settlement Body has since rejected that approach, but only for global environmental resources.⁷⁸ WTO Members have yet to truly test the connection between international trade law and human rights. In 1998, a law enacted by Massachusetts, enabling it to impose government procurement restrictions on companies doing business with Myanmar (formerly Burma), presented itself as a potential test case when the European Union and Japan initiated complaint proceedings in the WTO against the United States. The issue was rendered moot, and the complainants suspended the proceedings, when the law was rendered invalid on domestic constitutional grounds.

In considering the relationship between international trade law and international human rights law, then, it seems necessary to challenge two, potentially countervailing, assumptions at once. The first is the assumption that trade and human rights regimes should remain separate. The second, however, is the assumption that human rights should be the primary discourse for talking about global justice, economic or otherwise.

CONCLUSION

In Section I, I investigated the links between global trade and global poverty, and concluded that export orientation/liberalization

76. *See id.*

77. For fuller discussion of this quite nuanced question of legal interpretation, see the sources listed in note 59 above; *see also* Maki Tanaka, *Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO under the Rio Principles*, 30 *ECOLOGY L.Q.* 113, 126 (2003) (noting that states lack authority to control environmentally harmful activities in states outside their jurisdiction).

78. *See* Gregory Schaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 *HARV. ENVTL. L. REV.* 1, 80 (finding that following the Appellate Body decision in the Shrimp-Turtle case, countries have increasingly adopted environmental standards which affect international trade).

do not guarantee poverty reduction. In Sections II and III, I suggested changes to the international trade regime that might reflect the complex, rather than unidirectional, relationship between global trade and global poverty. Such suggestions included emphasis on regional trade development, and intensifying work to secure the basic socioeconomic conditions necessary for international trade competitiveness.

Finally, in Section IV, I contemplated the potential significance of human rights in relation to these goals and legal constructs. I concluded that connecting human rights and trade can serve to highlight the ultimately emancipatory objectives of trade liberalization as well as to achieve desirable integration in international law. I also observed the importance of foregrounding the substantive goals of poverty reduction in relation to human rights. More specifically, initiatives to obtain global justice should not depend upon, although they can certainly include, a showing that specific human rights require such.