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## **Human Rights, Environment and the WTO**

*By Jorge Daniel Taillant, Center for Human Rights and Environment (CEDHA)*

As its foundational charter states, the World Trade Organization (WTO), created in 1994 as the heir to the General Agreement on Tariffs and Trade (GATT), is the only intergovernmental organization dedicated to providing a common institutional framework for the conduct of trade relations among countries.

Trade relations and the very nature of trade between countries have been largely transformed by the GATT and the WTO agreements. In a world that has adopted global trade as the driving force for economic and social development, the impacts of trade on societies is more than ever, of enormous consequence to human development. Trade inevitably leads to economic growth and social development, argue the most fervent proponents of the liberal trade policy promoted by the WTO. The question which is of fundamental importance, however, is how does liberalized trade as promoted by the WTO relate to world commitments to sustainable development, especially to the sustainable use of natural resources and the protection and promotion of basic human rights? Does everybody benefit equitably from more free trade, particularly from increased and more stringent patent protection, from greater access to markets, and from reduced tariff barriers and subsidies, all key issues on the WTO negotiating table? What are the guarantees of the WTO to ensure that free-trade led development is equitable and sustainable?

This paper outlines some of the key environmental and human rights issues on the negotiating table at the time of the Fourth Ministerial Meeting of Ministers of the WTO in Doha, Qatar while suggesting some ways that the WTO can ensure equitable and sustainable development.

### **Sustainable Development and the WTO**

The Marrakech Agreement establishing the World Trade Organization in 1995 states in its first preamble paragraph that Parties to this agreement recognize, “that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, [and] ensuring full employment, ... *while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so* in a manner consistent with their respective needs and concerns at different levels of economic development”. [emphasis added]

The text on the Decision on Trade and Environment of the same agreement underlines that, “there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, *and acting for the protection of the environment, and the promotion of sustainable development on the other,*” and that members should “coordinate ... policies in the field of trade and environment, ... without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members.” [emphasis added]

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Further, the declaration states that members should strive to make “international trade and environmental policies mutually supportive”.

In subsequent declarations, including the Singapore Declaration in 1996, in paragraph 6, the members reaffirm their pursuit of “*the goal of sustainable growth and development for the common good*”. Then paragraph 16 states, “Full implementation of the WTO Agreements will make an important contribution to *achieving the objectives of sustainable development*”. [emphasis added]

The Geneva Declaration of 1998 Paragraph 1 reaffirms, “the objectives embodied in the Preambles to the General Agreement on Tariffs and Trade and the World Trade Organization Agreement”, which as shown above, reflects member commitment to sustainable development.

In reviewing the WTO’s preambular foundational statement, as well as subsequent declarations, one might guess that the WTO places goals of sustainable development at the forefront of its agenda. The member countries’ commitment to such principles, namely to sustainable development and the protection and preservation of the environment sounds perfectly clear. In what has followed, in practice and in more recent negotiations, however, the commitment to these principles are less than convincing. In fact, negotiations and deals between nations in the WTO forum, today are largely contingent on the relaxation of such commitments.

## **Participation**

Civil society participation is treated in Article V P2 of the Marrakech Agreement. The paragraph reads, “The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.” The wording of the language is such that the GC has discretion rather than obligation to provide access to the general public to the WTO forum. Nevertheless, general worldwide acceptance that civil society participation is now a sine qua non step in the formulation of development policy, is forcing the GC to open its doors to NGOs.

Subsequent WTO declarations and documents have reinforced this idea, including the Geneva Declaration of 1998 which in paragraph 5 recognizes “the importance of enhancing public understanding of the benefits of the multilateral trading system in order to build support for it.”

Paragraph 10 of the Draft Doha Declaration states the need to “promote better public understanding of the WTO ... through more effective dissemination of information and improved dialogue with the public”.

The key issue respect to public participation in the WTO, and especially NGO participation, is that participation thus far has been inequitable, favoring private sector organizations, has lacked effective and transparent mechanisms, and has not allowed for organizations to access government delegations. The violent public uprising at the failed Seattle Ministerial was a direct result of the unwillingness of WTO officials to give access to public consultation, especially to NGOs. The decision to hold the 2001

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Ministerial in Qatar, a rich, calm and authoritarian arab state with little tolerance for public display of opinion, is a clear intention of the organizers to quell and contain international public opinion during the Ministerial.

But more subtle ways to exclude NGOs are also practiced. The administrative difficulties of attending the Doha Ministerial is a key example. Of the 600 plus organizations which were purportedly authorized to attend the Ministerial, about 200 finally attended. From Latin America, for example, less than a handful were present, and these were mostly affiliates of large, developed nation international groups including organizations such as Greenpeace. No NGO representation attended from the most impoverished countries of the American hemisphere. Why? One answer may lie in the secretive and controlling aspects of the registration process. The one organization from Argentina which attended was not advised of its application approval to attend the Doha Ministerial, which included visa confirmation and hotel confirmation, until two days before scheduled departure. If one considers the logistics of airline reservation, hotel accommodation, and budget constraints for and NGO, the administrative process to attend Qatar made participation highly unlikely. Given that Qatar would not allow entrance to the country without visa approval which was linked to hotel accommodations (at US\$200 per night), and that airline tickets normally need to be reserved and paid for several weeks in advance, what low-income NGO could commit to purchasing an airline ticket and making a hotel deposit for a conference it does not know for sure it will be able to attend?

The possibility NGOs not authorized by the WTO to attend the conference in Qatar were nil, since they would not be granted a visa to enter the country, which meant that civil society generally could not protest, even peacefully. Civil society unconformity was hence reduced to registered, wealthy, and risk-taking NGOs. The only other group to arrive in Doha for the Ministerial was the Greenpeace's Rainbow Warrior, which had to commit to strict limits on the type of protest it would conduct from the docks of the Doha port.

Perhaps of even greater concern at the WTO Doha Ministerial for those few NGOs that were able to make it to Doha, was that not only were the main meeting rooms closed to civil society, but that even the hallways and coffee break areas of the Sheraton Hotel where the conference has held, were off limits to NGOs and to the press. Anyone who has lobbied or worked for an NGO at such an event knows that the most important, and influential moments occur in-between sessions, when civil society groups and mingle with state delegates, discuss positions, and seek allies. Limiting this opportunity for civil society is like taking the walking cane away from a blind person in the middle of traffic.

Resistance from the WTO and its member state delegates to more effective civil society participation is surely a result of their fear that NGOs will derail negotiations as they did in Seattle in 1998. It is apparent that if public outcry remains so strong against the organization and its policy, something will need to be done to appease this growing counter-force. The policy of withholding information and obstructing opinion contradicts the global tendencies and commitments made to fostering public participation in important international agreements. It goes against the position of many societies and intergovernmental organizations. The WTO will have to come

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around to a better participatory policy if it is to be effective in coordinating global trade policy.

Real participation at the WTO will only come from meaningful participation in the WTO forum, access to documentation, and access to state delegates at meetings. The WTO should commit member states to **foster increased and meaningful civil society participation establishing a clear and effective framework for dialogue**. NGOs should be given formal *consultative status* and be given clear and timely signals as to how they can and will participate in WTO fora.

### **TRIPs and Public Health**

Intellectual property is a deal-breaker issue in the WTO forum. Many bilateral and multilateral negotiations have heated the Trade Related Aspects of Intellectual Property Rights (TRIPs) debate. From a Human Rights perspective, one of the key issues on TRIPs has to do with human health.

The WTO TRIPs agreement states in Article 7:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 states,

Members may, in formulating or amending their laws and regulations, *adopt measures necessary to protect public health and nutrition*, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. [emphasis added]

Evelyne Herfkens, Minister for Development Co-operation of the Netherlands, summarizes these two paragraphs by suggesting that “On the one hand, we want to provide incentives for innovation and research, and on the other hand we want to make [health] products widely accessible”.

The problem over TRIPs and health is clearly manifest in the debate over pharmaceutical products and patenting of drugs important for developing countries. The principal contention between developed and developing countries in this debate lies with the interests of large multinational pharmaceutical companies that invest large sums of money in research to develop drugs to treat widespread disease such as AIDS and cancer. When drugs are finally developed as a result of these mega-investments, their prices are often set out of reach of the most needy sick populations. In many cases, peoples' lives depend on accessing these drugs at affordable prices. These pharmaceuticals price some drugs at nearly 100 times production cost. And

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while some prices may reflect investment and risk costs, other investments can be recuperated in merely a few weeks of sales.

Elen t'Hoën of Doctors Without Borders noted that the "AIDS problem in some regions of Africa, where over 25% of the population lives with AIDS, is desperate. Drug cocktails can cost upwards of US\$2300 for already highly subsidized drugs, an inaccessible amount for some of the world's poorest communities."

Cecilia Oh of Third World Network expressed that "TRIPs must be flexible with the poorest nations. Fifty two developing countries submitted an alternative draft document on TRIPs at the Doha Ministerial, which would take into account the inequities and injustices promoted by TRIPs. It was entirely ignored by the WTO."

The TRIPs agreement is largely controversial and questioned by developing countries. Article 8 is vitally important however, as it allows for exceptions to the patent rules established by TRIPs, as long as they are for health reasons. These exceptions can be granted and are implementable by the use of compulsory licenses (forced licenses granted to countries to issue local producers rights to copy drugs in health crisis situations). A far more controversial issue surrounds countries that *do not* have the capacity to produce alternative or generic medicines. These are forced to import such drugs from third countries selling the drugs at a discount, in what is referred to as "parallel imports". The issue of parallel import rights is of great controversy in the TRIPs debate.

One important question and issue which is unclear with respect to patents for drugs is whether poor nations (and particularly patients) will be at all able to pay for licensing if mandatory. If we assume that they cannot, and will not, which is the likely answer, then what do we accomplish by barring sick people from accessing the drugs they need to save their lives. Another solution is needed. One proposal which has circulated is the creation of a health fund for financing or subsidizing pharmaceuticals for price and patent relaxation in specific countries.

At Doha, a separate declaration on TRIPs and Health was prepared.  
[INFO??/RESULTS??]

From Singapore Declaration: P18. Taking note that a number of Members have agreed on a Declaration on Trade in Information Technology Products, we welcome the initiative taken by a number of WTO Members and other States or separate customs territories which have applied to accede to the WTO, who have agreed to tariff elimination for trade in information technology products on an MFN basis as well as the addition by a number of Members of over 400 products to their lists of tariff-free products in pharmaceuticals.

### **Human Rights**

The UN High Commissioner for Human Rights has recently released a report, which maintains that most WTO members are bound to implement the Agreement in the light of their human rights obligations as 111 out of the WTO's 141 members have

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also ratified the International Convention on Economic, Social and Cultural Rights.  
[CAN WE FIND THIS REPORT AND QUOTE IT PROPERLY?]

## **Dispute Settlement Mechanism**

### **Precautionary Principle**

The Precautionary Approach, or Precautionary Principle, in the trade debate, depending from which angle you view is, either an insurance against eventual harm done by trade, to an easy excuse (tantamount to protectionism) aimed at limiting trade through legally justifiable trade barriers. In international and national law, precaution is fundamental to basic protection against harm. It boils down to taking immediate measures in order to avoid imminent harm. The precautionary principle, in practice, is a strong legal tool to step into to an urgent situation, and take action before harm is done. In the trade debate, such a tool is feared by most countries who see it as an easy excuse to block their trade. The question which remains unclear is, Who determines the gravity of the “urgent” situation? Who determines when the precautionary principle applies? And based on what criteria (which law applies, WTO?, other treaties?)

The precautionary approach has become key to environmental and human rights protection, especially since delays in accessing justice can result in irreversible human rights violations and environmental degradation. It would seem logical that if trade is impacting the environment, and/or resulting in human rights violations, the precautionary principle should be evoked and action should be taken. Prospects for including the precautionary principle in the WTO framework are slim, especially considering member resistance to have such a strong tool available to countries to potentially constrain their trade.

The precautionary principle is in fact already in the WTO in the form of General Exception Article XX of the Agreements. Countries are allowed to adopt or enforce measures,

- (a) Necessary to protect public morals
- (b) Necessary to protect human, animal, or plant life or health, ...
- (g) relating to the conservation of exhaustible natural resources ...

That is, countries are able to take what are in effect, precautionary measures bypassing WTO trade policy obligations in order to protect against certain risks. Article XXI further states that certain security exceptions may also apply, specifically in reference to:

- (iii) actions which [the country] considers necessary for the protection of its essential security interests.

Article XII of the GATT Agreements also makes reference to safeguarding Balance of Payments,

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1. ... any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, ...

Paragraph 2 then makes reference to precautionary action for monetary concerns:

2. Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:
  - (i) to forestall the imminent threat of, or to stop, serious decline in its monetary reserves, or ...

The precautionary approach is nothing new to the WTO. It has existed in the GATT Agreements since its inception.

The Article then proceeds to enumerate all of the subsequent actions that must be taken by the country to gradually remove or reverse the actions taken on the basis of the precautionary approach. Similarly, in other WTO aspects similar procedures could be established delineating what are appropriate conditions under which to take environmental or social precautionary steps with their relevant corresponding reverse actions to remove such restrictions.

### **Biodiversity and Biopiracy**

What of the relationship between biological organisms and trade? Much concern on behalf of developing countries has reached the WTO with respect to what has been dubbed biopiracy. Biopiracy is the another key issue on the table disproportionately affecting rural low-income farmers in developing countries. The more visible problem lies with large international agricultural and biotech companies which systematically patent local agricultural methods and seed types, becoming the owners of what was once cultural heritage, and then obligating farmers to buy the companies alternative biologically modified seeds which loose their reproductive character, forcing farmers into a dependent relationship with their seed supplier.

This problem is affecting fundamental rural rights to food and local livelihoods, since the TRIPs terms effectively creates seed monopolies, making seeds not only more expensive but also limiting or ending traditional seed availability. There are some 900 patents on staple food crops with half of them belonging to 4 multinational corporations, many of these have evolved over many centuries of local experimentation, trial and error in search of the most ideal seed for cultivation.

GATs and the Environment

China, Environment and Human Rights

## **MEAs and other International Agreements**

By Article V P1 of the Marrakech Agreement, “The General Council shall make appropriate arrangements for effective cooperation with other inter-governmental organizations that have responsibilities related to those of the WTO.”

The Declaration of the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking states in its first paragraph that Parties “recognize that the globalization of the world economy has led to ever-growing interactions between ... individual countries, ... including development aspects of economic policy making, ... [and that] their coherence internationally is an important and valuable element in increasing the effectiveness of these policies ...”. In paragraph 5 the declaration states, “The WTO should ... pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions.”

Part of the problem underlying the difficulty of harmonizing WTO policy with other internationally accepted Multilateral Agreements, in particular Multilateral Environmental Agreements (MEAs) but also and perhaps more importantly human rights agreements, is that one framework seeks to relax policy, while the others tend to restrict it. If one examines the environmental language of the WTO agreements, for example, the focus is on eliminating environmental barriers resulting in trade restrictions; or avoiding the use of environmental policy as a trade-limiting mechanism. MEAs and MAs, conversely, generally use a precautionary or restrictive approach to the environment and to social issues, with the ultimate objective of protecting the environment and society. The trade liberalization focused language of the WTO on environment is also reflected in some regional trade agreements such as the MERCOSUR, which also is based on the spirit of *removing* rather than establishing environmental limits to trade. This divergence of approach, in fact, is the root of the conflict that presently exists in the WTO forum on incorporating environmental concerns as well as social concerns in the WTO’s mandate.

In this respect, WTO priorities seem at odds and contradictory at times. We already examined the references in the WTO Charter and declarations to member state commitment to the principle of sustainable development. This commitment spearheads the Marrakech Agreement in its preamble. Yet in subsequent text, actions, and policy emanating from the WTO, commitments to the environment and to social sustainability fade in favor of tariff reduction and lowering of non-trade tariff barriers. The adherence to principles of environmental and social protection by member states, as stipulated by the treaties and conventions they have signed, it would seem, would not, at first glance, lead to conflict. Yet, why then do so many governments retract from including such language committing themselves to what they have already committed to elsewhere?

The answer to this contradiction lies in the fear of trade negotiators and governments, to place themselves directly in the path of potential trade sanctions for non-

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compliance of other treaties *which in the context of the WTO can and would have binding obligations*, binding not merely because they've signed the bottom line, but rather that through WTO law, unlike through other treaty law, complaining countries can have direct and immediate impact on the pockets of violators by cutting the import faucet and sanctioning trade measures based on environmental and social concerns. The WTO in this respect is a far more powerful treaty, with respect to forcing compliance, than any other international treaty signed to date.

What can be done, hence to address this apparent incompatibility or resistance of countries to harmonize between treaties?

Firstly, it should be noted, that sustainable development and liberalized free trade need not be contradictory. In fact, free trade merely for free trade's sake can be most unsustainable. It is not surprising that the preamble of the Marrakech agreement commits member states to sustainable development, since this reflects world enlightenment at the time on the precarious nature of environmental exploitation in the name of economic development. No matter what industry or business venture we consider, if it is not sustainable in time, it places our very existence at risk, including the future wealth of other industries and businesses. Trade and sustainable development should go hand in hand. Whatever our trade policy is, it should be based on a well thought out and evaluated sustainability assessment of its impact on the environment and on society. In this respect, it is to everyone's best interest to insure sustainable trade. We cannot base our trade policy on anything less than the sustainability question, since we would be otherwise undermining any long term continuity of our economic and social development. In this respect, unsustainable business must not be either prized, tolerated or protected by an international economic or trading policy. This is the real incongruity of the system.

Secondly, with respect to how to integrate other treaties into the WTO framework. Trade policy is not removeable or extractable from other government policy. It does not stand alone, but rather is a part of a greater whole that must function in harmony with other social and economic policy. Further, trade is not a sector, resource, or living organism. It is merely an activity influenced and regulated by policy. In and of itself, it has no inherent moral, spiritual or existential value. Trade should not be thought of as parallel or separate from existing international law, which protects such values. Trade should be considered as falling under the jurisdiction of international law upholding more elemental and principled issues such as the rights of individuals and the sustainability of the environment as well as the sustainable use of natural resources, since the latter ultimately has infinitely more vital importance as *sine qua non* elements of life itself. The commitment of the WTO members to sustainable development in the very first preamble paragraph of the WTO charter reflects this value judgment. Trade must ultimately strive for this objective, and hence, trade policy of the member states need necessarily be in harmony with the high and vital values they have placed on human rights and environmental protection through their international treaty obligations.

The issue of harmony with MEAs and other MAs becomes of crucial importance when trade disputes arise. In this event, the Dispute Mechanism (DSM) of the WTO must evaluate member compliance with WTO rules. The question which naturally surfaces is to what degree can and should the WTO DSM refer to rights and

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obligations established by other treaties and conventions? That the DSM should base its decisions on such commitments seems logical albeit complicated. It lends itself to many complications of conflicting treaty laws, which few organizations have ever addressed. Nevertheless, to decide on trade vs. environment and/or social concerns in a vacuum of international law, is to ignore the very spirit of the Marrakech agreement, of the prior commitments of governments, as well as to go against common sense. In this respect, the WTO needs to establish criteria to address multi-treaty commitments. It would seem unreasonable to assume that the WTO could be in a position to determine if a member complies or not with other treaties in its trade policy. However, by establishing formal ties with other treaty implementation bodies, and inviting outside treaty representatives as expert advisors in trade disputes, this lack of expertise can be overcome, and the vacuum filled.

Whether outside expertise will resolve this dispute or not, what *is* certain is that a formal position on the relation of the WTO treaty to other international law and obligations is urgently necessary.

### **Labor Standards (International Labor Organization)**

Following the previous section on MEAs and MAs, the case of labor standards in the context of the WTO poses an example of where institutional mandate, treaty conflict, and eventual collaboration and harmonization can play a crucial role. To what degree do member states have to ensure that their trade sector is functioning based on universally accepted labor standards. One can easily argue, *to the utmost degree*.

Labor conditions and standards are a fundamental issue in every society. The respect for internationally accepted labor standards is becoming a fundamental pillar of sustainable development. Reacting in the face of civil society as well as international organization pressure to take a stance on labor, the WTO has made several attempts to approach itself to the ILO, the generally accepted source delineating universal labor norms.

The Singapore Declaration of 1996 refers to member commitments on this initiative, paragraph 4 reads,

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

Subsequent texts of declaration have been progressively eliminating the “commitments to the observance of internationally recognized core labor standards”,

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leaving a weaker and less clear relationship not only between the WTO and the ILO, but also eliminating reference of the commitment to basic labor rights. The Draft Doha declaration of 2001, for instance, states,

We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization. The ILO provides the appropriate forum for a substantive dialogue on various aspects of this issue.

This failure to reiterate commitment to labor codes weakens the agreement alienating it from the basic principles of sustainable development. The ILO should clearly establish formal ties with the WTO, and *specifically state* that the WTO will strive to harmonize member country trade policy, in the spirit of, and with a commitment to, core labor standards emanating from the ILO.

**Development Box**