

Mainstreaming Human Rights Norm in International Trade Policy: A Critical Assessment with particular reference to current Financial Crisis.

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Abstract: Developing countries are struggling for years to have their trade related concerns recognized by the developed countries. At the same time a concern has been raised to find out ways through which international trade policy can go counter to development and sustainability. The current financial crisis reveals structural problems with the global economic system. Governments have reduced their regulatory role leaving many elements of the system to private actors. While some people have certainly benefited from the new trading opportunities, others have suffered. Moreover the financial crisis has disproportionate impact on the most vulnerable and already marginalized groups of society. The current financial crisis is undermining access to work, affordability of food, housing, water, education and health care. For many countries the problem is not so much with the bursting of financial bubble but the decline in trade and employment in all countries. Today, probable more than ever, the multilateral trading system is needed to ensure that governments do not retreat into short sighted, nationally focused protectionism. Whilst the multilateral trading system needs to be strengthened it is also necessary to ensure that the trading system does respond to the needs of the people at large, whether poor or rich. The criticism the multilateral trading system mostly faces is its failure to take into consideration the humanitarian aspects of trade issues. Though human rights have direct connection with the UN Millennium Development Goals (MDGs) and can guide the international trading system towards better integration of development and social goals. However, integrating human rights issues in the multilateral trading system is often criticized due to its protectionist's aspects. Developing countries also express same concern. With this backdrop this article claims mainstreaming human rights issues in the World Trading System maintaining the interests of all the parties to the agreement can ensure a better standard of living for all. This article will focus on the impact of the WTO Agreements on the people of developing countries, the main concerns of the developing countries regarding the integration process, the trend of using human rights issues for protectionism purposes and finally will try to sort out how the WTO can be made human rights friendly to ensure the basic rights of the people of the world generally and developing countries specifically.

Introduction

The global economic crisis is devastating lives and livelihoods across the world. And it is rapidly turning into a human rights crisis. From an economic perspective, the harmful impacts of the crisis on human lives tend to be seen as tragic but inevitable consequences of unpredictable and uncontrolled market forces. Human rights perspective challenges this conclusion and argues that these devastating consequences are not inevitable, nor should they be acceptable. The causes of the crisis can be clearly located in human decisions and actions of governments and economic actors. A human rights approach demands accountability for these human decisions. It requires that negative effects be avoided. This article explores the human rights dimension of the crisis, its causes and consequences. It further argues that a human rights responsive global multilateral trading system can better help in upholding human rights situation.

Economic crisis and Human rights situation: Impacts and causes

The financial crisis we are facing was not unpredictable. It began as the ‘sub-prime crisis in the United States in August 2007 and then turned into a global credit crisis in September 2008. In response to this crisis trillions of dollars were spent but could not prevent the global economic downturn. As a result, the economic crisis emerged not only in developed countries, but across the world having devastating effects on the lives and livelihoods of the people at large. It threatens the full range of human rights including economic, social and cultural rights, that is, the rights to an adequate standard of living and the rights to health, housing, food and education. The World Bank estimates that up to 90 million more men, women and children may be pushed into poverty, in addition to the estimated 160 to 200 million people who fell into poverty as a result of the food crisis between 2005 and 2008. FAO (2009) predicted

world hunger to reach an historic high in 2009 with more than one billion people going hungry everyday. Economic retrenchments also results in global unemployment, poverty, homeless people and social welfare programs. The impact of the crisis is more devastating in the poorest countries. 'While people in developed countries are feeling the impacts on their standards of living, their jobs and their homes, people in developing countries are bearing the burnt of the crisis, with few safety nets to protect them from severe poverty and deprivation, and without the fiscal capacity and space to soften the blow'(ESCR Net, 2009). In its annual report the Amnesty International states the global financial crisis has aggravated abuses of basic human rights in many parts of the world.¹

However, economic crisis is a human rights issue not because of its enormous impact on the overall human rights condition rather on the causes of crisis which are related with the failure to comply with the human rights obligation. Along with political and civil rights, economic and social rights are recognized under international law. Even though human rights norms have been internationalized, their implementation remains largely national. However, the advance of globalization that has been supported ideologically by neo-liberalism that emphasizes the idea of unregulated private markets, it is alleged has eroded the regulatory authority and capacity of the state. The structural problem thus revealed by the economic crisis not only reduced the regulatory role but also effectively enabled governments to abdicate many of their responsibilities towards their citizens especially regarding economic, social and cultural rights. The Secretary General of the Amnesty International urged governments not only to reinvest in the economy, but also to invest in human rights

¹ <http://www.abc.net.au/news/stories/2009/05/28/2583855.htm> at 3/11/2009.

because; otherwise the economic package will not be sustainable. It will not be sustainable if millions of people are living conditions of utter despair'.²

Economic crisis, trade liberalization and human rights

Economic development through globalization of trade liberalization is closely linked with economic globalization through better economic/financial management. Both global trade liberalization and economic/financial management have impacted, perhaps more than ever before, on the realization of internationally recognized human rights. The current financial crisis reveals structural problems with the global economic system. While many people have benefited from the new global economic structure, e.g. new trading opportunities opened by technological advances and by liberalization profiles, others have suffered. Rather financial crisis and new economic system have a disproportionate impact on the most vulnerable and already marginalized groups of sector. For many countries and many people, the main problem is not so much the bursting of the financial bubble but decline in trade and employment in all countries.³ And today, more than ever, the multilateral trading system is needed to ensure that governments do not retreat into short-sighted, nationally-focused protectionism.

Nexus between trade and human rights

Historically trade and its humanitarian aspects have been considered as completely separate agenda within the broader paradigm of development though both trade and human rights aspire in their own ways after human welfare. International trade is considered the most effective vehicle for economic growth and development as a whole. However increasing poverty, unemployment, hunger and unequal economy

² ibid

³ Human Rights Council, The Impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human rights, Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights, February 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/special session/10/index.htm>.

have challenged the traditional notion that free trade is the solution of every single problem of humanity. Instead the recent trend is towards building an effective nexus between trade and human rights. It is widely acknowledged that trade has enormous effect on human rights and expediting trade without considering its human aspects is not sufficient to ensure sustainable development.⁴

General view is that trade leads to economic growth and social development; that it ensures economic development, better life and a positive attitude towards human rights and human values. But the current trading system is criticized for being dominated by systems that are only continuing to re-enforce inequities and further broaden the gap between the richest and poorest countries. This present situation necessitates the promotion of a more favourable yet fair international trade regime where economic, social and cultural rights of the citizens of all countries will be respected and protected.

The WTO agreements do not explicitly mention about human rights. In GATT provisions are included to protect human lives or health in Article XX as an exception and a scant reference of some aspects of human rights in the preamble of the WTO Agreement.

The WTO expanded its area beyond trade in good and included agriculture, services, intellectual property, investment and dumping anti-dumping issues which have human rights impact. The TRIPs agreement talks about protecting the intellectual property rights without emphasizing the danger that the consumer of the developing countries may face from patenting of medicines. The countries with insufficient or no manufacturing capacity have not been able to make use of TRIPs flexibilities to access affordable medicines. The preservation of human life is of paramount

⁴ 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' The Brundtland Report, WCED, Our Common Future, p.19.

importance in countries with life threatening contagious epidemics like AIDS/HIV, and what they need most is access to drugs which the current patent system is likely to hinder. The Doha Declaration on Public Health and the generic drug waiver in 2003 put forward some positive steps upholding the rights of countries to take measures to protect their public health and promote access to life-saving drugs over and above their TRIPs obligations but qualified and needs further reform.⁵ While the developed world have patented a great portion of basic necessities needed for running livelihood activities of the marginalized sections, including inputs for the production and orchestrated gradual dependence on these such as seed, there has hardly been protection of indigenous knowledge system in developing and least developing countries.⁶

The WTO Agreement on Trade in Services (GATS) has failed to deal with the huge number of unskilled workers of developing and least developing countries, whereas opening of employment opportunities for these workers in developed countries may help developing countries in building their economies. Yet, temporary movements of natural persons is insignificant, accounting just over 1 per cent of the world services trade whereas commercial presence accounts for more than half of world trade in services.⁷ A comprehensive framework on movement of natural persons may raise the share of developing and least developing countries in the global services trade.

The implementation of agricultural trade liberalization measures under the WTO Agreement on Agriculture (AOA) has produced a situation that is unbalanced and

⁵ see Rafiqul Islam, 'The Generic Drug deal of the WTO from Doha to Cancun a Peripheral Response to a Perennial Conundrum'(2004) 7(5) The Journal of World Intellectual Property 675.

⁶ Rashed Al Mahmu Titumir, M Iqbal Ahmed and Md. Golam Sarwar, Dodging Development Doha Round and Least Developed countries, Unnayan Onneshan. <<http://www.unnayan.org>>

⁷ See Ananya Raihan, 'Liberalisation Trade in Services: Negotiating Strategy for Bangladesh' (Working Paper #47, Centre for Policy Dialogue, CPD, March (2005). <www.cpd-bangladesh.org>

unfair to developing countries. Many developing countries, especially least developed countries have liberalized beyond the WTO commitments while developed countries still heavily protect their agriculture through subsidies and tariff structures. Unilateral liberalization can result in increasing food insecurity and poverty. When 60-80 percent population in developing and least developing countries is dependant on agriculture the AOA in present structure may have a dramatic impact on the right to food of the majority of the world population.

So far the enforcement mechanism is considered the WTO obligation is mandatory and the member states are bound to bring changes in the domestic law to make it consistent with their WTO obligation. But the obligations under the international human rights instruments are not mandatory. As a result in case of conflict between the WTO and other human rights instrument it is the WTO obligations which prevail. The WTO neither takes into consideration of the humanitarian implications of its different agreements nor suggests any acceptable measure to preserve and protect human rights.

These unavoidable impact of the WTO has changed the traditional discourse that trade and human rights are independent agenda and very much separated from each other. Rather it is being considered that free trade regime without considering its social dimension can negatively affect the enjoyment of human rights. The UNHCHR has also been very much critical of the WTO Agreement's impact on human rights situation and levelled the WTO as 'veritable nightmare'⁸ for developing countries. Through its various reports it has appealed to the WTO to respect human rights in trade negotiations. This appeal rests on that the WTO members have ratified at least

⁸ UN Document A/55/342, Globalization and its Impact on the Full Enjoyment of all Human Rights: Preliminary Report of the Secretary-General, Fifty-fifth session of the General Assembly, UN, p.4.

one international human rights instrument that obliges them to respect the human rights principles.

Human Rights Obligation of the WTO Members:

The words 'human rights' have different meaning for different people around the world. Generally, each country is free to set its own human rights objectives, policies and strategies. The Encyclopaedia Britannica defines human rights as "rights that belong to an individual as a consequence of being human." The human rights scholar Louis Henkin⁹ emphasizes the importance of four aspects with regard to human rights: (1) "Human rights are rights of individuals in society"; (2) Human rights are universal; they belong to every human being in every human society; (3) Human rights are rights and (4) Human rights are claims upon society.

However, the most important statements of the norms of the international human rights regime are the Universal Declaration of Human Rights, adopted on 10 December 1948 by the UN General Assembly, and the International Human Rights Covenants, which were opened for signature and ratification in 1966 and came into force in 1976.¹⁰ The rights proclaimed in the Universal Declaration are usually divided into civil and political rights and economic, social and cultural rights.¹¹ This list is further elaborated in two International Human Rights Covenants and a variety of single issue treaties and declarations on topic such as genocide, political rights of women, racial discrimination, and torture. Although these later documents occasionally deviate from the Declaration for the most part they elaborate or extend rights proclaimed in the Universal Declaration. It is generally agreed that these rights

⁹ Henkin, L. (1990); *The Age of Rights*, New York: Columbia University Press.

¹⁰ UN resolutions 217A (III), 2200 (XXI).

¹¹ The principles of UDHR are supplemented by a vast number of more specific instruments e.g. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Covenant on the Elimination of all Forms of Discrimination against Women; the Convention on the Rights of Child etc.

form an interdependent and synergistically interactive system of guarantees. This code of human rights (UDHR) responsibilities is universal in nature. It applies to all regardless of whether or not individual government has formally accepted its principles or ratified the covenants.

The human rights covenants were created to give binding effect to some of the human rights enumerated in the UDHR.¹² The binding nature of the covenants changed the scope of human rights objectives and subsequent laws continued to evolve reflecting changes in human rights understanding.¹³ And most of the 153 WTO members have ratified the International Covenant on Economic, social and cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). Even those states that have not ratified these two key human rights instruments are bound by other international human rights norms. These covenants and all other international human rights norms require the countries either to take or not to take certain steps to promote, protect and respect human rights generally and specifically.

A critical analysis will show that there are a number of rights which have direct relation with trade agreements. For example Articles 22-24 deal with economic rights which include the rights to work, rest and leisure, and social security; Article 25 deals with subsistence rights, particularly the rights to food and a standard of living adequate for the health and well-being of oneself and one's family; and Articles 26, 27 addresses social and cultural rights, especially rights to education and to participate in the cultural life of the community.

In the International Covenant on Economic, Social and Cultural Rights, enacted in 1976, Article 11 says: "The States Parties to the present Covenant recognize the right

¹² The Universal Declaration of Human Rights (UDHR) is not legally binding upon countries. See Susan Ariel Aaronson, 'Seeping in slowly: how human rights concerns are penetrating the WTO', *World Trade Review* (2007), 6:3, 1-37.

¹³ The covenants are legally binding only on those states that have accepted them by ratification or accession.

of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement in living conditions.” The United Nations Committee on Economic, Social and Cultural Rights in its General Comments has elaborated on the meaning of the right to housing, food, health and water.

In addition to the pre existing list of human rights, in 1986, the UN declared the right to development to be an inalienable human right. Implementation of the declaration is now a priority for the UN, which seeks to mainstream the right into its policies and operational activities. The 1986 United Nations Declaration on the Right to Development was a major step forward in defining development from a human rights perspective. It recognizes that ‘development is a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from’.¹⁴

This new right is not embodied in the covenants and in general is not binding upon countries. But efforts are also underway to reformulate the right within an internationally-binding legal instrument.

So it is very clear, as a member of the United Nations, the countries are morally obligated to respect the rights enumerated in the UDHR and, as member of the covenants legally bound to comply with the rights described therein. Human rights law does not speak directly about trade. However, it clearly implies that no Governments may agree to international trade agreements that destroy anyone’s basic

¹⁴ Marry Robinson, Globalization and human rights’ (Speech delivered at the 21st Century Trust Seminar on Globalization: rhetoric, reality and international politics, Congress, Washington DC,31. October 2003).

livelihood as Article 28 of the Universal Declaration of Human Rights states: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

The obligation of the WTO Members to respect human rights is also clear from the calling of the UN Members. In 1989, the UN Members emphasised on the need to ensure that the international organizations do collaborate with individual governments to protect human rights.¹⁵ They further recognized that they must act to ensure that the activities of the international organizations do not hinder the promotion and protection of human rights at home or abroad.¹⁶

Trade-Human Rights Interface and Concerns of developing countries

Despite the enormous human rights implication of the WTO agreements the integration of human rights in the WTO is frequently opposed. The most common ground for opposition are: 1) that there fusion would dilute the WTO’s core business and weaken its authority;¹⁷ 2) that linkage has the potential to open the floodgates of protectionism;¹⁸ 3) that linking trade issues with non trade issues will not only create additional burden to the already complicated negotiations process but also jeopardize the ultimate goal of establishing a freer global trading environment and it is detrimental to the promotion of welfare enhancing free trade; 4) that linkage may result in abused use of human rights to legalize liberalization or to achieve the objectives of the liberalized markets; 5) that enforcement of human rights are the prime responsibility of the United Nations; 6) that integration of human rights will restrain the individual country to introduce human rights measures in its territory; 7)

¹⁵ Susan Ariel Aaronson, ‘Seeping in slowly: how human rights concerns are penetrating the WTO’, (2007) 6(3) World trade Review, 1-37.

¹⁶ Ibid.

¹⁷ Alice ES Tay and Hamish Redd, ‘China: Trade, Law and Human Rights’ (2002) 7 *International Trade and Business Law Annual* 30.

¹⁸ See generally Steven Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, (1987) 126 *International Labour Review* 565.

that connecting trade would deprive the south of its key comparative advantage, namely the ability to use cheap labour;¹⁹ and most importantly it will affect the interests of developing and least developing countries.

Developing countries, free trade economists, and many private enterprises in developed countries are the primary opponents to the linkage between international trade and human rights.²⁰ Developing countries denial is not related to their interest of protecting and promoting human rights. From decision making to implementation process most developed countries play the major role in the WTO. The lack of economic stability and increasing dependency on developed countries for trade concessions restrict developing and least developed countries to take a firm stand against developed countries. As a result the existence of the rule of majority decision is often proved to be meaningless. And importantly developing countries are not in a situation to make developed countries bound on any issues. Thus they fear that developed countries may use the human rights issues to sanction trade barriers against them if it be an integral part of trade agreements. The realization of human rights may become difficult due to the socio economic infrastructure of developing countries. In such a situation human rights aspect of trade may turn into a bar for free trade. Developing countries also fear for loosing their 'comparative advantage' benefit and also of so called 'protectionism' principle.

Advocates of a link between free trade and human rights oppose this concerns and state that the export of products produced under low standards results is unfair

¹⁹ See Rebert Howse & Makua Mutua, Protecting Human Rights in a Global Economy, Rights & Democracy, at <http://www.ichrdd.ca/111/english/commdoc/publications/globalization/wtoRightsGlob.html> visited Oct. 23, 2008.

²⁰ See id.

competition which negatively affects working conditions in countries with higher labour standards²¹ resulting in a 'race to bottom'²²

Conclusion

In the midst of this controversy, the WTO needs to understand that implementation of its trade agenda ignoring its impact on overall human rights issue may become a threat for itself. However, whilst the multilateral system needs to be strengthened and supported in order to play this role, it is also the time to adjust and improve it to address the criticisms it faces. The challenges will be to ensure that the trading system really does respond to the needs of the world's people, whether rich or poor, and whether in developed or developing countries.

It is important to clarify some misunderstandings about human rights so far linkage issue is considered. Human rights are not necessarily a trade conditionality tool. Using trade sanctions to enforce human rights without taking into consideration of the particular condition of a country is not a best approach. Similarly using human rights to restrict trade is not even acceptable. Human rights approach is not anti liberalization or any other economic approach. It simply requires that any and every economic policy respects human rights and do not undermine human rights.

²¹ J.M. Servais, 'The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?' (1989) 128 *International Labour Review*, 423.

²² If a country is allowed to maintain lower labour standards it can export its produce at a lower cost comparing to the product of countries with higher labour standards. This creates disparity and countries not interested in losing their export capacity might react by lowering their high labour standards. Thus, the 'race to bottom' would be obvious.