

GLOBALIZATION AND HUMAN RIGHTS: LOOKING OUT FOR THE WELFARE OF THE WORST OFF

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I. INTRODUCTION

I write this essay looking in from the outside. My expertise lies not in the field of human rights but in the field of another would-be partner with trade. I offer the modest insights of an outsider who thinks about possibilities for a sometimes promising, but sometimes unholy, partnership. Six points seem to me significant.

First, the important question is how the trading system impacts human beings and human dignity. In this light, the debate as to whether social rights are human rights evaporates. The welfare and dignity of the human being—including a right or interest of the least well-off not to be pushed into deeper poverty and to get a fair share of the gains of trade—take center stage.

Second, the observation that trade may trample human rights is at once very important and often overstated. Proponents of this view frequently underplay the positive effects that freer trade brings to people who are economically the worst off. On the other hand, ardent supporters of free trade often ignore both the negative distributional impacts of unbridled trade and the “cores of hypocrisy”—the condoned protective tariffs, duties, and subsidies of the industrial nations, removal of which could specially help the least well-off.

Third, there may be a need for more room within the trading system for states to derogate from free-trade obligations to exonerate human rights, and there may be a need for more room to counteract trade protections (and now intellec-

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tual property protections) that harm vital human rights and human welfare.

Fourth, an enterprise to bring human rights into the trading system as a full-blown competence holds many hazards. Before doing so, we should be confident of the superior value of the WTO (largely, its promise as an enforcement system) as a home for robust protections of human rights. We need to be assured that the trade values will not be systematically the preferred values.

Fifth, the processes and procedures of the trading system need basic rights protections. If one calls these protections human rights, then human rights can enrich many procedures and processes and legitimize others.

Sixth, freer trade may shift to a higher-than-national level regulation of activity that impacts people's lives. Supranational regulation can drain the meaning of the right of exit and diminish the voice especially of marginal players, and it can have significant distributional consequences. The lack of mandate or mode in the trading system to take account of distributional concerns (other than what can be secured in bargaining among nations), in my view, should be counteracted. A vision of human rights that includes human economic welfare, in addition to the neoclassical economic view of aggregate economic welfare, is therefore necessary.

II. TRADE AND . . .

There is a multifaced debate on trade and human rights. The linkage may lead down many paths: Does trade, or does globalization, harm human rights? Should the WTO include a regime for the enforcement of human rights? Should it include broader or more specified space for member states to trump trade obligations to advance human rights? Should more protections of human rights be incorporated into procedures of the WTO institutions?

This essay examines, first, the relationship of the human rights debate to the other "trade and . . ." debates. Second, it considers the definitional debate (what *is* a human right?) as a means to contemplate human rights of greatest concern in the "trade and . . ." world. Third, it considers how human rights or human welfare might be incorporated into, or linked with, the WTO.

Linkages are made between “trade and . . .” subjects for one of two reasons. First, the linked subject may be in tension with freer trade, and one fears that considering freer trade alone and not in context with the values or objectives on which it may impinge (e.g., a cleaner environment and the protection of dwindling species) will produce unacceptable law and policy. The protests of antiglobalists evidence these fears. To the extent that human rights is about values—and indeed about cherished, nonmonetary, universal values—and trade is about efficiency and money (more wealth especially for those who already have it), then indeed we might observe a dramatic clash between trade and human rights, and we might need a manager of the interface to be certain that “real” values trump “mere” profits.¹

Second, the linked subject may be synergistic with freer trade, and the linkage may help realize the synergies. Investment and the free-competition side of antitrust law (freedom to invest, freedom to compete) are examples of synergistic subjects. The prohibitory side of antitrust may be necessary to catch restraints, such as cartels, that freer trade facilitates, thus offering an example of the tension between freer trade and linked subjects.²

Human or basic rights, including critical human economic welfare concerns, may be of both orders. In the first category (tension), for example, it is claimed that freer trade may undermine workers’ rights; or it may exacerbate poverty; or instruments of the WTO (e.g., the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS))³ may trample on the right to health of HIV-infected individuals in South Africa and elsewhere. Accordingly, some

1. See Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT’L L. 51 (1999) (arguing that globalization is trading away human rights); see also Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT’L ECON. L. 111, 124-31 (2002) (questioning from various perspectives the mutual intricacies of the traditions of human rights and international trade, and calling for a research agenda).

2. See David W. Leebron, *Linkages*, 96 AM. J. INT’L L. 5, 11-12 (2002) (distinguishing between coherence-based and consequentialist-based claims).

3. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND

suggest that trade and its instruments may need to be modulated to protect the rights of harmed individuals.

In the second category (synergy), trade may improve human rights and human welfare.⁴ Open markets and increased trade may confer more economic opportunity—including opportunity for those individuals who are worse off,⁵ even though, to take advantage of the opportunity, they may need education and other assets necessary to participate in economic life—and people as consumers are made better off by freer trade that lowers prices of products, including necessities of life. Moreover, the nondiscrimination principle embedded in the trading system tends to protect the basic right of dignity. The question is whether the linkage can improve or deepen the synergies.

For basic rights, a third consideration of a different order comes into play. The WTO involves rulemaking and decision making. Basic rights are necessarily involved in legal process, including access to documents, rights to be heard, the right to reasoned opinions, equality before the law, impartial judges, and the right to challenge decisions. Moreover, rights of democratic participation are relevant to rulemaking. In fact, the early human rights jurisprudence of the European Union grew largely from the insistence on procedural and process rights.

An investigation of the trade and human rights connection might examine all three facets of the linkage.

III. WHAT IS A HUMAN RIGHT? HOW SHALL WE REGARD IT FOR PURPOSES OF “TRADE AND HUMAN RIGHTS”?

Human rights are catalogued in the Universal Declaration of Human Rights (1948),⁶ the International Covenant on Civil

OF MULTILATERAL TRADE NEGOTIATIONS, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

4. Also, guarantees of human rights may improve the trading system, in the sense “that social and economic rights enjoyed effectively operate as long-term stabilizers of a predictable multilateral trading system.” Cottier, *supra* note 1, at 129.

5. See NICHOLAS D. KRISTOF & SHERYL WUDUNN, THUNDER FROM THE EAST: PORTRAIT OF A RISING ASIA 129-30 (2000).

6. Universal Declaration of Human Rights, G.A. Res. 217(A), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

and Political Rights (1976),⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976).⁸ Taken together, these documents are referred to as the International Bill of Rights.⁹ They recognize, among others, the right to life, liberty, and security of one's person; the right to freedom from torture and inhuman or degrading treatment; equality before the law; freedom from discrimination; freedom of expression and assembly; the right to work, to education, to health care, to self-determination; free choice of employment; just and favorable remuneration for work; the right to join trade unions; and the right to have fair and public hearings for adjudication of rights and obligations. Moreover, contracting states must assure, among the other rights above, the fundamental right of everyone to be free from hunger and of workers to receive fair remuneration and to have safe and healthful working conditions.

The Universal Declaration of Human Rights treats negative and positive rights as interdependent and integral.¹⁰ Some analysts would limit the concept "human rights" to civil and political rights—freedom *from* oppressive government.¹¹ This has been a dominant U.S. view, privileging the negative rights and treating social and economic rights (education, health care, a decent standard of living) as vital concerns but not human rights.

The tensions and differences between the categories are highlighted in an essay written by Professor Cass Sunstein in 1993 in which he argued that, although a decent society *should* provide food, shelter, medical care, education, jobs, and a clean environment, the new democracies of Eastern Europe

7. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. EXEC. DOC. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

8. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); *see also* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 136 (2d ed. 2000).

9. STEINER & ALSTON, *supra* note 8, at 136.

10. *See id.* at 237.

11. *Cf. id.* at 181 ("At the start of the human rights movement, much weight was given to a distinction between the so-called 'negative' and 'positive' rights. The negative rights basically imposed a duty of 'hands-off', a duty of a state's non-interference with, say, an individual's physical security.").

should not include positive rights in their constitutions for three reasons: First, “[g]overnments should not be compelled to interfere with free markets For countries trying to create market economies, [compelled intervention to protect against the vicissitudes of the market] is perverse.”¹² Second, guaranteeing social and economic rights can have “corrosive effects on individual enterprise and initiative.”¹³ Third, positive rights are normally unenforceable, and courts do not have the tools to create the government programs that their protection entails.¹⁴

A long and expanding list of human rights may seem to deepen problems of privileging positive rights. A catalogue that includes noncritical welfare benefits may detract from the sanctity of the most critical rights in a world in which governments cannot satisfy all monetary claims.¹⁵

Positive versus negative rights is not, however, a helpful point of distinction in the “trade and human rights” dialogue. The right of the most desperately poor to be free from hunger is surely at least as important as the right of an individual to be free to trade. Conversely, freer trade sometimes can promise more benefits to human beings than guaranteed four-week vacations.

My approach, therefore, is to unbundle the cluster expansively called human rights and to focus on particular aspects of human welfare that either (we may argue) should not be sacrificed to trade or that otherwise should be protected in the world-trading regime.

12. Cass Sunstein, *Against Positive Rights*, E. EUR. CONST. REV., Winter 1993, at 35, 36.

13. *Id.* at 37.

14. *Id.* *But see* STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 43-48 (1999) (arguing that all rights have costs of enforcement and therefore all rights are positive); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 236-37 (2001) (reconsidering the notion that judicial enforcement of social rights is untenable, in light of the success of the South African Constitutional Court in providing limited protection for socioeconomic constitutional rights).

15. *See* Cottier, *supra* note 1, at 112 (arguing that “[t]he different normative levels of human rights will have to be taken into account in defining the relationship of human rights and trade rules”).

IV. THE GATT/WTO AND ITS LIMITS: HUMAN RIGHTS ABOVE TRADE?

GATT developed quite independently from nontrade values.¹⁶ Nonetheless, it preserves its member states' rights to protect objectives other than trade, largely through Article XX, which provides that nothing

shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect public morals[,] . . . health[,] . . . conservation of exhaustible natural resources[,] . . . [and measures] essential to the . . . distribution of products in . . . short supply, . . . [or] relating to the products of prison labor.¹⁷

Most of the specific proposals regarding human rights and the WTO relate to the breadth and possible expansion of Article XX.¹⁸

This essay begins on a conceptually higher plane. First, it considers global questions about the interaction between human rights/human welfare and world trade. Then, it considers member states' rights of derogation to privilege rights above trade, with labor and health taken as examples of such rights. Finally, it considers procedural rights that usefully could be built into the system.

To start at the beginning, does increasingly liberal trade harm the worst off? A dominant point of protest by antiglobalists may be stated as follows: Liberalization and globalization, carried out through the world trading system, make the rich states richer and the poor states poorer; globalization harms and even kills; it pushes the poorest into deeper poverty.

This is a theme of the work of Professor Thomas Pogge. Professor Pogge presents the dire figures on world poverty and argues that globalization and the neoliberal institutional order

16. Human rights and trade "evolved in splendid isolation." *Id.*

17. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(a), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 188, 262 [hereinafter GATT].

18. See, e.g., Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133, 157-81 (2002); Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 WORLD TRADE 353, 354-58 (2002); Hoe Lim, *Trade and Human Rights: What's at Issue?*, 35 WORLD TRADE 275, 280 (2001).

not only passively perpetuate, but also affirmatively aggravate, the conditions of the world's poorest.¹⁹ Thus:

About one-quarter of all human beings alive today, 1.5 billion, subsist below the international poverty line, "that income or expenditure level below which a minimum, nutritionally adequate diet plus essential non-food requirements are not affordable." . . . [H]ouseholds in the poorest quartile cannot afford, per person per year, whatever basic necessities can be bought for \$581 in the United States or for \$145 in the average poor country. Such severe poverty has consequences: 790 million persons are not adequately nourished, while one billion are without safe water and 2.4 billion without basic sanitation; more than 880 million lack access to basic health services; about one billion are without adequate shelter and two billion without electricity. Two out of five children in the developing world are stunted, one in three is underweight and one in ten is wasted. . . . Starvation and preventable diseases . . . caus[e] about one-third of all human deaths.²⁰

Pogge argues that liberalization without removal of the conditions of desperate poverty will not attract or sustain significant private investment in developing countries. The disregarding behavior of the developed states entrenches poverty, and these states have a responsibility to bring (for example) the poorest quartile to the point where they can benefit from globalization. The duty to do so arises not on grounds of beneficence but on grounds of causation.

This charge and analysis, if correct, has deep implications. It may suggest a responsibility to stop liberalizing. At least it suggests the responsibility of the class of winners from trade to stop blocking (e.g., by trade barriers) the path of the least well-off and to compensate the losers.

Another reading of the evidence runs to the contrary: Trade increases economic welfare—even of the poorest

19. See generally Thomas Pogge, *Priorities of Global Justice*, 32 *METAPHILOSOPHY* 6 (2001).

20. *Id.* at 7-9 (citations omitted).

states—and globalization reduces disparities and increases living standards.²¹

Even if the second reading is more accurate than the first, however, freer trade benefits some segments of society significantly more than others.²² It especially benefits “footloose” capital that can move seamlessly to new profit opportunities, and it particularly benefits skilled and mobile managers and workers. Nation-states compete for businesses by offering lower taxes. The competition drives down the tax moneys attainable from the business firms that are the objects of the competition, lest they move to competitor jurisdictions. As a result, big businesses in the industrialized countries pay a lower level of taxes than they did in the preglobal world. Accordingly, they provide less of a contribution to the local welfare net. The less mobile workers bear more of the burden, and jobless individuals get less welfare, even while the size of the pie is growing.²³

As part of the same phenomenon, however, less developed countries attract more business establishments and thus create more jobs. Even while firms newly established in less developed countries may pay wages so low that they appear exploitative to the Western eye, these firms may pay their workers more than the host nation’s preglobal going wage and may introduce better working conditions.²⁴

21. See L. Alan Winters, *Trade Policies for Poverty Alleviation*, in WORLD BANK, DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK (Bernard Hoehman et al. eds., 2002); JEFFREY D. SACHS & ANDREW M. WARNER, ECONOMIC CONVERGENCE AND ECONOMIC POLICIES (Nat’l Bureau of Econ. Research, Working Paper No. 5039, 1995). *But cf.* DAVID WOODWARD, GLOBALIZATION, UNEVEN DEVELOPMENT AND POVERTY: RECENT TRENDS AND POLICY IMPLICATIONS (U.N. Dev. Programme, Working Paper No. 4, 1998) (arguing that globalization to date has increased income inequality and that changes in the institutional architecture of world trade are needed to limit this effect and maximize benefits to the poor).

22. See generally DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? (1997).

23. *Id.* at 73.

24. See Paul Fireman, Editorial, *Steps We Must Take on Third-World Labor*, WASH. POST, Oct. 17, 1999, at B7 (proposing that companies submit to monitoring); Leslie Kaufman & David Gonzalez, *Labor Standards Clash with Global Reality*, N.Y. TIMES, Apr. 24, 2001, at A1 (detailing the difficulties of maintaining reforms in the fast-moving global economy).

This modified story is a prettier picture than the Pogge hypothesis,²⁵ but still, it admits that the gains from globalization are poorly distributed. Poor nations may gain, or not lose, aggregate wealth, but the relative winners get much more than do the less mobile, less privileged. Moreover, some individuals suffer severe dislocations: Their jobs—indeed, their whole sectors of work—may disappear. One may say that these are the “mere” dislocations of life that any market-based society must bear, but the dislocations affect real people. The plight of the losers is high among globalization’s discontents.²⁶ If the home state of the individuals who bear the brunt of globalization cannot or will not ease their burdens enough to restore their dignity and subsistence, one may argue that this is a responsibility of the “winning” side of the world.

If the raw Pogge picture or even the modified gloss is correct, is it not a problem that the WTO—the greatest engine enabling globalization—has no eyes or ears to see or hear of liberalization’s impacts?

The minimal proposition of this essay is the following: A world trade organization of the twenty-first century must be sufficiently copious or porous to take account of the values on which it treads—or on which critical masses believe it treads. Isolation of trade from its impacts is not an appropriate option for the world.

V. SORTING OUT THE MOST IMPORTANT: WHAT CAN WE DO THAT MATTERS?

Trade impacts economic welfare and human welfare. It generally increases aggregate economic welfare but disproportionately advantages the best off. We worry about social and economic rights and their relationship to trade, because individuals of virtually no wealth may be negatively impacted by trade, or because there are available positive measures connected with the trading system that can make those individuals better off.

25. See generally Pogge, *supra* note 19.

26. See generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (particularly chs. 2, 3, & 9).

Are there available trade measures consistent with the norms of the trading system that in particular will advantage the least well-off?

The answer is, yes. The industrialized countries' tariffs, antidumping duties, and subsidies on products that are specialties of less developed countries (e.g., agriculture, textiles, and clothing) deeply undermine development and economic welfare of people in less developed countries. They block the markets that the developing countries need to root their own economies. Moreover, combined with GATT open-market obligations, the subsidies enable the rich countries to flood the markets of the developing countries, preventing workers and entrepreneurs in the developing countries from selling on competitive merits even at home. Oxfam reports that barriers of this sort cost developing countries "over US\$100bn [per year], or more than double the total sum of development assistance":²⁷

The human costs of unfair trade are immense. If Africa, East Asia, South Asia, and Latin America were each to increase their share of world exports by one per cent, the resulting gains in income could lift 128 million people out of poverty. Reduced poverty would contribute to improvements in other areas, such as child health and education.²⁸

If the nations of the WTO were to adopt one and only one human welfare measure, elimination of just such artificial barriers should be the measure. It is fair, and it is efficient. It would help the least well-off to help themselves on the merits. While benefiting the least well-off, both absolutely and relatively, it also would benefit the industrialized world in absolute terms. Indeed, apart from private interest politics, it is difficult to justify the subsidies and trade barriers that cause such continuing harm to the developing world.²⁹

27. OXFAM INT'L, RIGGED RULES AND DOUBLE STANDARDS: TRADE GLOBALIZATION, AND THE FIGHT AGAINST POVERTY 96 (2002), http://www.maketrade.fair.com/assets/english/Report_English.pdf.

28. *Id.* at 5.

29. This is not to say that, for example, U.S. farmers, textile workers, and steel makers are unworthy, but rather that savings from efficient reforms could more than pay dislocation and retraining costs to harmed individuals and also could set the economy on a more dynamic and responsive course.

VI. MEMBER STATES' RIGHTS TO DEROGATE FROM TRADE
OBLIGATIONS TO PRIVILEGE HUMAN RIGHTS/
HUMAN WELFARE

A. *Labor Rights*

The most extensive consideration of the relationship between trade and human rights concerns not the privileging of human rights in the trading system but the right of member states to take trade-restraining measures against goods that are products of human rights abuses.³⁰

Infamously, in certain nations, particularly East Asian nations, ten- to fifteen-year-olds work in sweat shops for twenty-

30. It has been proposed that the WTO should include minimum labor standards. At the WTO Singapore Ministerial Conference in December 1996, however, the nations declared that the International Labor Organization (ILO) is "the competent body to set and deal with these standards," and the WTO expressed its support for the work of the ILO. *Singapore Ministerial Declaration*, WTO Ministerial Conf., ¶ 4, WT/MIN(96)/DEC (Dec. 18, 1996), www.wto.org. Still, debate continues as to whether minimum labor standards should be incorporated into the WTO.

Four core labor standards were identified in a 1996 OECD study. See Organisation for Economic Co-Operation and Development, Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade 26 (1996). These are: (1) freedom of association and the right of collective bargaining; (2) prohibition of forced labor; (3) prohibition of discrimination in employment; and (4) prohibition of exploiting child labor. See *id.*

All four core standards are embodied in ILO conventions. See Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, in 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1919-1951), at 639 (Int'l Labour Org. ed., 1996); Convention No. 29 Concerning Forced or Compulsory Labour, in 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1919-1951), *supra*, at 143; Convention No. 105 Concerning the Abolition of Forced Labour, in 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1952-1976), at 88 (Int'l Labour Org. ed., 1996); Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, in 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1952-1976), *supra*, at 176; Convention No. 182 Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, 38 I.L.M. 1207 (1999). As to child labor, an ILO convention contains specific regulatory restrictions. For example, it states a minimum age for employment. For work outside of the family and outside of small business, the worker must be not less than fifteen years old and not less than the age of completing compulsory schooling. See Convention No. 138 Concerning Minimum Age for Admission to Employment, in 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1952-1976), *supra*, at 525.

two cents an hour, nine hours a day.³¹ Multinationals locate plants in these countries or outsource from them to take advantage of the low cost inputs; industrialized countries' workers, as well as labor-rights advocates, complain about Indonesia's, or Malaysia's, or Vietnam's violations of the human rights of children and other workers. Under GATT Article XX,³² can industrialized countries bar the products of these exploited young workers? In any event, should the industrialized countries be able to do so, in the face of the exporting country's wish to maintain its competitive advantage and its claim that it needs its (low) level of regulation to develop its economy and, through development, to make its people better off? And if so, who decides what is the right minimum standard below which human rights are violated?

These issues are much debated. Some argue that a nation's choice to leave working conditions to the market, even to a cruel market, is no business of the trading regime.³³ Others urge that GATT Article XX(a), which provides an exception from free trade obligations for protection of public morals,³⁴ is sufficient to authorize trade sanctions against nations that allow egregious human exploitation.³⁵ Yet others urge that the WTO must be reformed to embrace fundamental values, at least those values subscribed to elsewhere by all WTO members, including prohibition of child labor.³⁶

The challenge is to protect against the exploitation of workers that civilized peoples do not and should not tolerate, while not raising too high the bar for developing countries to choose regulatory standards amenable to their task and state of development. The voices of human rights advocates of the developing countries themselves seem entitled to highest regard. Incorporation of the ILO standards could be a fair start.

31. See, e.g., KRISTOF & WUDUNN, *supra* note 5, at 130.

32. GATT art. XX.

33. See Kyle Bagwell et al., *It's a Question of Market Access*, 96 AM. J. INT'L L. 56 (2002).

34. GATT art. XX(a).

35. See Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998).

36. Debra P. Steger, *Afterword: The "Trade and . . ." Conundrum—A Commentary*, 96 AM. J. INT'L L. 135, 144 (2002).

B. *Health*

The right to health is said to be a universal human right. Literally, the promise is more than human beings can deliver. The ICESCR, Article 12, gives substance to a qualified right. It provides that the state parties to the Covenant “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³⁷ It mandates that the contracting states take steps to achieve the full realization of this right, including:

- (c) [T]he prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) [T]he creation of conditions which would assure to all medical service and medical attention in the event of sickness.³⁸

Even as qualified, the Covenant reflects a heroic ambition of ambiguous dimensions. What is the “highest attainable standard”? How does a state balance its own priorities? May a state not build infrastructure and have a defense and even a culture budget without violating human rights?

These questions underline the difficult task of nations in articulating the dimensions of the protected human right and in fulfilling their obligations to protect it. But the challenge can be met. The South African Constitutional Court is the world leader in demonstrating that this is so; its experience shows that enforcement of a constitutional right to health and a constitutional right to shelter can be effectuated in a principled way.³⁹

37. International Covenant on Economic, Social and Cultural Rights, *supra* note 8, art. 12, at 8.

38. *Id.* art. 12(c)-(d), at 8.

39. *See* Minister of Health v. Treatment Action Center, 2002 (5) SALR 721 (CC) (holding that, under the Constitution of the Republic of South Africa, “the government [must] devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV”); Republic of South Africa v. Grootboom, 2000 (1) SALR 46 (CC) (holding that the constitutional right to shelter requires the government to provide temporary, emergency shelter to those citizens most desperately in need where it reasonably can do so); Soobramoney v. Minister of Health (Kwazulu-Natal), 1998 (1) SALR 765 (CC) (holding that the government constitutionally may allocate its scarce resources to preventative and emer-

Let us accept (for skeptics, arguendo) a human right to health when provision of vital medical treatment is in one sense available but in another sense beyond reach, when access to care will save lives, and when the persons in need make a special claim that distinguishes their case.

South Africans suffering from HIV/AIDS and South African babies at risk highlight the problem. Multinational enterprises such as GlaxoSmithKline hold patents on AIDS drugs, but the necessary cocktails of the patented medicine cost \$10,000 per person per year,⁴⁰ a sum that neither the individuals nor the South African government can afford to pay.

Before TRIPS, the agreement within the WTO to protect intellectual property, South African companies or their designees simply could make the drugs without a license. TRIPS, however, requires the signatory countries to respect and protect intellectual property rights: thus, not to make patented products without a license from the patent holder.⁴¹ TRIPS generally prohibits nations from undercutting or evading patent rights to products including pharmaceuticals. It allows use without authorization, however, in “the case of a national emergency or other circumstances of extreme urgency.”⁴² The developing countries signed TRIPS not because they thought the agreement was good for them but because they got, in return, certain market access concessions that were important to them.

South Africa has been devastated by AIDS, and millions of the affected population are in poverty. In 1997, South Africa passed the Medicines and Related Substances Control Act, authorizing the government to buy and import patented

gency treatment rather than to chronic care for terminally ill patients in need of kidney dialysis).

40. See Rachel L. Swarns, *AIDS Drug Battle Deepens in Africa: An Indian Producer of Generics Stakes Its Claim to Market*, N.Y. TIMES, Mar. 8, 2001, at A1.

41. The industrialized nations advocated the TRIPS Agreement. It is premised on the notions that intellectual property protection, and the right to charge the prices the market will bear, is vital to reward the research and development necessary to produce new drugs and new cures and that, without this protected return on investment, the research that produces new cures will not occur, and progress will be chilled. See generally TRIPS Agreement art. 7.

42. TRIPS Agreement art. 31(b).

medicines at the lowest price available in the world.⁴³ When government officials set about to import the drugs at the lowest price they could find, the pharmaceutical manufacturers' association protested because the lowest prices would be charged by patent evaders, and it sued the South African government under South African law for violation of members' property rights.⁴⁴ Meanwhile, the United States brought proceedings against Brazil in the WTO for violating TRIPS by failing to permit the patenting of medicines.⁴⁵

Public outcry followed the pharmaceutical manufacturers' stance to enforce their patent rights, and in the wake of this reputational damage, the pharmaceutical association retreated. It settled its case against South Africa and withdrew its complaint in April 2001, allowing South Africa access to the lower-priced drugs.⁴⁶ The United States, meanwhile, withdrew its WTO complaint against Brazil.⁴⁷

Health had a second victory over trade in Doha, Qatar, at the WTO Ministerial Conference in November 2001. The nations, including the United States, agreed to the following points in the Doha Declaration, which set forth points for negotiation in the next trade round:

(b) Each Member has the right to grant compulsory licences [for pharmaceutical patents] and the freedom to determine the grounds upon which such licences are granted.

(c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/

43. See Medicines and Related Substances Control Act 101 of 1965 (as amended by the Medicines and Related Substances Control Act 90 of 1997), JSRSA § 15C (1997).

44. Apparently, the pharmaceutical companies were not sufficiently confident of their rights under TRIPS to mount their protest in the WTO. TRIPS contains ambiguities (e.g., as to what is "extreme urgency"). See TRIPS Agreement art. 31(b); see also Johanna Kiehl, *TRIPS Article 31(b) and the HIV/AIDS Epidemic*, 10 J. INTEL. PROP. L. 143, 143 (2002), (suggesting the possibility that health interests sometimes could trump intellectual property rights).

45. See Mark Heywood, *Drug Access, Patents and Global Health: "Chaffed and Waxed Sufficient,"* 23 THIRD WORLD Q. 217, 231 n.31 (2002).

46. See *id.* at 226.

47. *Id.*

AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.⁴⁸

To be sure, ambiguities and questions of balance remain. How do we know, for example, how much “regulatory taking” of the property of the patent owners will tip the scales too far against incentives to innovate? And who decides the right balance between incentives to find new cures and dispersion of existing cures to those in need?

The questions are hard, but it would be a mistake—and against the tide of the twenty-first-century world order—to deduce from their existence that the right course is a return to neoliberal principles of inviolable property rights.

TRIPS can be given an uncompromising interpretation in favor of holders of intellectual property, or it can be given an interpretation sympathetic to considerations of dire health needs.⁴⁹ The latter is both the more challenging and the more humane.⁵⁰

VII. BUILDING BASIC PROCESS RIGHTS INTO THE WTO

Professor Ernst-Ulrich Petersmann has made an ambitious proposal for constitutionalizing the WTO. Professor Petersmann proposes that it is “Time for ‘Mainstreaming Human Rights’ into WTO Law.” “[T]he global integration law of the World Trade Organization must take into account the universal recognition of human rights in modern interna-

48. *Declaration on the TRIPS Agreement and Public Health*, WTO Ministerial Conf., 4th Sess., ¶ 5(b)-(c), WT/MIN(01)/DEC/2 (Nov. 20, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf.

49. See Patrick L. Wojahn, *A Conflict of Rights: Intellectual Property Under TRIPS, the Right to Health, and AIDS Drugs*, 6 UCLA J. INT'L L. & FOR. AFF. 463 (2001-02).

50. The challenge for the future is, as explained by Thomas Cottier, to develop

a framework which allows equality of legitimate interests to be taken into account, brings about practical co-ordination of differing policy goals, and allows for balancing of the fundamental interests involved. . . . The constitutional discourse thus needs to develop . . . coherent integration of different policy goals in international relations.

Cottier, *supra* note 1, at 129.

tional law.”⁵¹ Further, “the globalization of production, trade and economic markets cannot remain effective without a corresponding globalization of legal and institutional guarantees of individual freedom, non-discrimination, rule of law, access to courts and democratic government.”⁵²

Professor Petersmann reconceptualizes utilitarian notions of trade as individual human rights to trade. He recognizes consumers’ rights (to be beneficiaries of free, nondiscriminatory trade) and traders’ rights to nondiscrimination.⁵³ He would introduce procedural and process guarantees, including transparency and due process, and would make WTO rights self-enforcing by according beneficiaries private rights of action.⁵⁴

A major claim of antiglobalists is that the WTO lacks democracy, transparency, and due process.⁵⁵ Professor Petersmann meets their critique by showing how basic democratic procedural and process rights can be incorporated into the institution.

Procedure and process rights are not obviously human rights. They might be better described as democratic, good governance, and process principles. Professor Petersmann overclaims his enterprise by labeling it “mainstreaming human rights.” Most human rights are not involved in the project of constitutionalizing the WTO, and the interests involved are

51. Ernst-Ulrich Petersmann, *From “Negative” to “Positive” Integration into the WTO: Time for “Mainstreaming Human Rights” into WTO Law?*, 37 COMMON MKT. L. REV. 1363, 1363 (2000) [hereinafter Petersmann, *Time for “Mainstreaming Human Rights” into WTO Law?*]; see also Ernst-Ulrich Petersmann, *Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT’L L. 621, 643-47 (2002) [hereinafter Petersmann, *Lessons from European Integration*].

52. Petersmann, *Time for “Mainstreaming Human Rights” into WTO Law?*, *supra* note 51, at 1375.

53. See *id.* at 1377.

54. See Petersmann, *Lessons from European Integration*, *supra* note 51, at 646-50.

55. See, e.g., PUBLIC CITIZEN’S GLOBAL TRADE WATCH, A CITIZEN’S GUIDE TO THE WORLD TRADE ORGANIZATION: EVERYTHING YOU NEED TO KNOW TO FIGHT FOR FREE TRADE 4-5 (July 1999), <http://www.citizen.org/documents/wto-book.pdf>; Moisés Naím, *Lori’s War*, FOREIGN POL’Y, Spring 2000, at 29, 34-41; Joseph S. Nye, Jr., *Globalization’s Democratic Deficit: How to Make International Institutions More Accountable*, FOREIGN AFF., July–Aug. 2001, at 2, 3-6.

not coextensive with human rights.⁵⁶ Nonetheless, the WTO lacks certain basic procedural and process rights. Particularly if the WTO expands in competence, the need for recognition and protection of these procedure and process rights will become palpable. Democratic access, good governance, and due process are vital elements of a more credible WTO.

VIII. CONCLUSION

Thus far, trade law and policy have particularly enriched the industrialized countries and the peoples who are better off. The time has come, as recognized in the Doha Declaration,⁵⁷ to think more seriously about how trade measures and derogations from them can be used to empower those who are worse off and, as well, to consider how to bring democratic principles and process rights more firmly into the institution of the WTO.

In this spirit, this essay has addressed the overall question of freer trade and its impacts on the most impoverished. It has proposed that nations remove the barriers to developing countries' trade where removal most effectively will help them help themselves, and it has suggested more flexibility on the part of the WTO to engage questions of human rights/human welfare

56. As noted, in addition to the governance and process rights, Professor Petersmann elevates entrepreneurs' rights to trade and consumers' rights to receive its benefits to the cathedral of human rights. But these rights and interests are largely utilitarian, and one cannot—as Professor Petersmann purports to do—remove these subjects from the utilitarian realm by calling them rights instead of elements of microeconomic analysis. The entrepreneurial right to trade is not sacrosanct, nor are consumers' rights to the lowest price competition will produce. Producers' and consumers' rights are limited by schemes of regulation deeply informed by economics. Economics and assumptions about markets and regulation, not human rights law, can help tell us how far, for example, Netscape has a “right” to place its browser on the Windows desktop and how far Microsoft has a right for its own browser to appear as an icon on the first Windows screen. See Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 384-91 (2002); see also Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 826 (2002) (arguing that economic liberties are fundamentally different from human rights since they are granted to individuals for instrumentalist reasons, not for dignity reasons).

57. See *Doha Ministerial Declaration*, WTO Ministerial Conf., 4th Sess., ¶¶ 2-3, WT/MIN(01)/DEC/1 (Nov. 20, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

where it matters the most. A WTO isolated from the issues and values that interact with trade is an organization not fit for the twenty-first century.⁵⁸

58. See Steger, *supra* note 36; Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002).