New Global Contract

A Framework for Rebalancing Global Norms

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By John Foster

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The Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems.

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Acronyms

ACP	African, Caribbean and Pacific Group of Countries
BITs	Bilateral investment treaties
CBD	Convention on Biological Diversity
CESCR	Committee on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CONGO	Conference of NGOs in Consultative Relationship with the United Nations
ECOSOC	United Nations Economic and Social Council
EPAs	Economic Partnership Agreements
EU	European Union
FTAA	Free Trade Area of the Americas
GEF	Global Environment Facility
GMOs	Genetically modified organisms
ICSID	International Centre for Settlement of Investment
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore
IUCN	World Conservation Union
MAI	Multilateral Agreement on Investment
MEAs	Multilateral Environmental Agreements
Mercosur	Mercado Común del Sur
NAFTA	North American Free Trade Agreement
NGOs	Non-governmental organizations
OECD	Organization for Economic Cooperation and Development
POPs	Persistent Organic Pollutants
TEPAC	Trade and Environment Policy Advisory Committee
TRIPs	Agreement on Trade-related Aspects of Intellectual Property Rights
UN	United Nations
UNEP	United Nations Environment Program
UNESCO	United Nations Education, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Foreword

This paper is a contribution to an initiative looking at how to change the paradigm that dominates government negotiations on trade, finance and intellectual property. The organizations involved in this work are committed to bringing trade and investment rules into conformity with multilateral social and environmental obligations, including to the realization of human rights conventions. This struggle goes on in myriad ways around the world every day. It is our contention that we are winning, but that progress is too slow, with too much human suffering as a result. Moreover, the planet is running out of time: natural resources are being depleted at unsustainable rates. If governments cannot be persuaded, and soon, to take challenges such as climate change and water wastage more seriously, then we will face significant social, economic and physical disruption to life as we have known it in our lifetime.

This paper is one of several to be produced by the initiative. It is written to lay the groundwork for further research and advocacy. The paper is focused on some of the ways that civil society organizations have successfully made the case to governments that commercial interests have to be subordinated to social and environmental norms. The examples here illustrate ways in which civil society has been able to move the outcome of multilateral negotiations in favor of better—fairer and more sustainable—outcomes.[1]

I. Introduction

Thousands of people around the world are engaged in policy advocacy related to multilateral issues, moved by a vision that a better world is possible. Their chosen concerns range from human rights to climate change to access-to-knowledge issues, through dozens of affiliations that range from trade unions to small peasant, consumer and environmental groups, churches, universities and many more. In their quest to secure respect for human rights and protection of the environment, these diverse actors find themselves confronted by the claims of trade, investment and intellectual property agreements, which consistently conflict with these aspirations. Some examples include:

- The global effort to provide accessible and affordable medicines for people who suffer from HIV/AIDS, malaria, TB and a range of neglected diseases has been limited by the protections provided to giant pharmaceutical firms in the World Trade Organization's Trade Related Intellectual Property Rights (TRIPS) agreement and allied régimes.

- The efforts to protect the environment at both the local and global levels have been blocked by the guarantees provided by governments to foreign investors through regional and bilateral trade and investment treaties.

- The struggle to build a sustainable food system and to reduce global hunger undermined by deregulation and corporate concentration in agriculture.

- The defense of biological diversity and the precautionary principle in the face of corporate and sometimes governments' aggressive promotion of questionable biotechnology.

- The struggle to guarantee workers' rights, including the right to a safe workplace, without support in bilateral, regional or global trade and investment agreements.

Many civil society responses to these challenges are focused on one or two issue areas and their related institutions: trade law and the WTO, conditionalities and the Bretton Woods Institutions, investor protections and privileges, and bilateral, regional and multilateral trade and investment agreements.

Yet the struggles have much in common—not least including opposing a free trade ideology that celebrates deregulated trade and investment over all other goals. There is thus considerable scope to improve information sharing, publicize innovative approaches and to think collectively about some of the common problems the world is facing today. Toward a New Global Contract is a project to strengthen our collective understanding of the dilemmas that lie before us, and to strengthen advocacy for transformative change. This project reasserts the priority of human rights and environmental norms over trade and investment rules. To do this, a new "meta-narrative" is needed—a new framework for thinking about globalization that prioritizes the public good over commercial gain.

This project is grounded in universal norms embodied in the Universal Declaration of Human Rights and the binding conventions (International Covenant on Economic, Social and Cultural Rights—ICESCR, International Covenant on Civil and Political Rights—ICCPR) that include legally binding treaties, as well as other covenants and conventions that extend human rights protections. It is also grounded in the environmental treaties and relevant agricultural agreements that extend and implement protection of the public interest. This paper provides a context to reflect on the norms in conflict, as well as a sample of some strategic responses from civil society organizations to protect the common good.

II. Norms in Conflict

The last decades of the 20th century set the stage for a series of contests and conflicts over norms and their application. The context for these conflicts dates back to 1945, when governments laid the groundwork for the Bretton Woods Institutions (BWIs) in support of human rights and development.

Governments considered a three-pronged approach for the management of international economics: the World Bank (WB), the International Monetary Fund (IMF) and the International Trade Organization (ITO), all of which were to operate under the leadership of the United Nations (UN). However, this vision of three BWIs never came to fruition.

Instead, the different organizations developed quite separately from the UN. The WB and the IMF were established without the oversight of the UN, while the ITO was never established at all. The General Agreement on Tariffs and Trade (GATT), which only found a formal institutional home when the WTO was established in 1995, replaced plans for the ITO. The WTO operates as an autonomous institution apart from the United Nations. Member governments at the WTO negotiate legally binding trade rules that are not developed or reviewed in light of existing inter-governmental commitments that have been made at the UN. The WTO has considerable and expanding reach, both in terms of the substance of international agreements and their enforcement.

In the 1980s and 1990s, at the same time that governments were negotiating to create the WTO, the United Nations convened a series of world conferences on social development, housing, population, human rights, women and the environment that both expanded the international conventional framework of human rights and made a great number of inter-governmental commitments of "soft-law" (law that is non-binding and difficult to enforce) that touched on most areas of public policy. These conferences brought together a diverse group of civil society actors and advocates who were increasingly concerned about the implications of international trade and investment rules. They began to highlight the fact that political gains to strengthen multilateral environmental regimes and implementation of the Universal Declaration of Human Rights were being undermined by macro-economic rules.

The late 20th century has often been described as a period characterized by the deliberate retreat of the state in favor of private entities, accompanied by a dispersal of regulatory authority to semi-public and wholly private organizations. In truth, the era is better described as a period of reregulation that brought new authorities into play, such as the WTO and certain international private associations and commissions. The period was also marked by a redefinition of the role of the state, with a strong emphasis on military security and guarantees of a positive environment for private capital investment.

Corporate interests have expanded their influence under this redefinition, which in turn has undermined the capacity of states to respect, protect and fulfill their human rights obligations and to meet their commitments to environmental protection. In his work on business and human rights, Harvard scholar and UN Special Representative John Ruggie has noted that global business has considerable sway in defining the rules of the game internationally. But national laws, applied by often weak or timid administrations, bind their national level affiliates. "In short, we see an emerging trend whereby business as rule maker increasingly operates in a single global economic space; but business as rule taker largely continues to operate in the world of separate national jurisdictions, with only a thin overlay of relatively weak international institutions and legal instruments."[2]

Treaties and agreements are negotiated and signed exclusively by the executive power, although in many countries, parliamentary bodies' approval may be required for ratification and implementation. Executives have been quite willing to defer to significant economic interests, often meaning that elected parliamentary bodies, not to mention civil society organizations and citizens-at-large, are marginalized. The aggressive expansion of trade liberalization in goods and services as well as investment and intellectual property protections, characterized by active and often successful corporate influence over the last decade, has allowed companies to become more powerful than nation states, often operating with impunity because there are no national or international mechanisms to hold them accountable.

Can this tendency in the development of international law be curbed? Can the rights of people and the protection of the environment be made the pre-eminent objective of multilateral laws? When civil society activists build on the normative work that gave the world the "International Bill of Human Rights," their challenge is both to defend what exists and to extend and modify its application to deal with new problems. The result is a diverse and often highly contested field of political, legal and jurisdictional issues.

Civil society advocates are in part dealing with the reshaping and evolution of international law and practice. It is often assumed that the prime movers in the complex development of this law and its associated jurisprudence are large transnational corporations, using nation states, multilateral organizations, and new agreements and instruments to expand and protect their interests. Whether described as the "Washington Consensus," "liberalization" or "reform," governments have been pressed to alter their laws, regulations and practices to assure a positive climate for investment," and to remove any restriction on the movement of capital or goods that might trouble international traders and investors.

However, since the late 1990s, diverse forces, largely but not entirely outside government, have risen to challenge this vision for global trade and investment. Some examples of this challenge include:

- The international campaign that led to the Doha Declaration on TRIPs and Public Health at the fourth WTO Ministerial Conference;

- The Thai (public) Human Rights Commission and the Peruvian Ministry of Health, which both challenged the potential affects on public health and access to medicines of the proposed bilateral trade, investment and intellectual property agreements being negotiated with the United States;

- The Canadian Labour Congress challenge of the Trade, Investment and Mobility Agreement (TILMA) between British Colombia and Alberta, Canada, through public education and advocacy with provincial authorities; and

- The legal challenge brought by a coalition of the Kenya Human Rights Commission and small farmers in late 2007 against the Kenyan government's process (and by implication the content) of negotiations for an Economic Partnership Agreement (EPA) with the EU. The plaintiffs feared the loss of their livelihoods from the likely terms of the agreement. Using the Covenant on Economic, Social and Cultural Rights, the plaintiffs challenged the lack of transparency, and the scant parliamentary and public participation in the negotiations. The use of inter national law could give the case far-reaching implications, well beyond Kenya's borders.

The project organizers of *Toward a New Global Contract* have compiled some 15 case studies that further illustrate civil society's push back against globalization for private gain. In each case, the coalition of forces is different, as are the strategies they use. The

case studies highlight unmet needs, including better methodologies for monitoring trade and investment agreements; a more precise definition of human rights obligations and indicators; greater clarity regarding the nature of [trade] rules where there may be conflicts with social and environmental norms; and proposals on what further changes are needed in international and domestic institutional structures, decision-making and participatory mechanisms.[3]

Challenging the Rationale

Advocates of trade and investment liberalization claim they are serving human rights objectives because liberal markets lead to greater economic growth, which in turn enhances human welfare.[4] These advocates have argued that there is a positive correlation between trade, growth and poverty: trade promotes growth and growth reduces poverty. This ideology has dominated international political debates for several decades. Despite the growing critique of the simplistic causation between trade, growth and poverty alleviation, attempts to further expand trade liberalization continue. The pressure to liberalize, in terms acceptable to leading countries, is not restricted to trade processes by any means but is often part of the overt or covert conditionalities required by the WB and the IMF in administering their aid and financial loans.

Yet this pressure is facing growing resistance from a number of quarters. The simplistic assumption that trade will alleviate poverty has come under increasing analytic challenge from prominent economists such as Dani Rodrik and Amartya Sen, as well as countless civil society organizations. At the same time, new frameworks are being developed to evaluate trade, investment and intellectual property agreements from a number of perspectives, among them process, as well as substantive conflict with other laws in content, impact, enforcement provisions and outcomes.

Civil society activists and academics challenge the process and procedures for arriving at international agreements on the grounds of their secrecy and the frequently partial openings to exclusively business interests to shape outcomes. Critics also point to the lack of national democratic accountability, looking at the consultative processes or lack thereof during negotiation, the measures for ratification, and any guarantees of monitoring and potential revision. The actual negotiating processes in the WTO have come under harsh attack in terms of the relative voice, power and capacity of differing national delegations (the biggest trading powers wield undue power), and the manipulation of debate by small groups of relatively rich nations, who are able to use threats of trade sanctions and promises of development assistance to get their way.

The conflict in substantive content between an agreement resulting from trade, investment or intellectual property negotiations and existing or potential human rights obligations is important from both legal and sovereignty perspectives.

The more direct human rights impact of negotiations and agreements is coming under increased scrutiny on a sectoral, national and international basis. The importance of different impacts relating to the development status of particular societies also informs critiques. The whole range of human rights can be affected, but can be particularly severe in areas such as access to health, education and other social services.

The enforcement of the terms of an agreement may also have diverse and negative human rights impacts. The dispute panels are usually obscure, secretive and remote. The jurists involved are asked to confine themselves to a narrow range of rules and issues, usually explicitly leaving out multilateral obligations to human rights or environmental objectives if they are not invoked in the trade and investment agreement in question. Yet the potential power, reach or implications of such enforcement can affect whole communities, who find themselves without recourse if they disagree with the results.

The outcomes of an agreement may be quite negative to the continued enjoyment of particular rights. One of the encouraging developments in the current decade is the development, by diverse

groups and agencies, of human rights impact evaluations applied to trade, investment and human rights negotiations and agreements. As James Harrison points out, "A human rights methodology is of added value because it focuses on those distributive social justice issues that are not easy to identify utilizing a welfare economics model."[5]

Democracy Under Siege

Globalization processes as they affect the evolution of norms are clearly a sharply double-edged affair. On the one hand, during the 20th century there has been the development of several generations of human rights agreements, which lift up the protection of the individual vis-à-vis the state. Simultaneously, of course, there has been the elaboration and expansion of privileges for holders of private property, coinciding with the growth in scale, scope and power of corporations, and with the rapid expansion of their financing, lobbying and even role-swapping with politicians and government bureaucrats.[6]

There are analysts who argue that civil society organizations should concentrate on attempting to modify specific aspects of the behavior of corporate actors. Suggested action includes raising standards of corporate social responsibility (CSR), and attempting to modify trade and investment regimes so that they incorporate human rights or environmental standards. In short, their advice to civil society activists is to climb on the tiger's back and attempt to affect its direction, using its powerful drive.[7]

This approach, while relevant in some cases, sidesteps the comprehensive change in governance needed to put the public interest first. It also underestimates the threat to democracy implicit in the current extension of investor privilege through investment, intellectual property and trade agreements.

One dimension of this threat is the assertion of hierarchy vis-à-vis agreements in other fields, particularly those that might be defined as public interest accords. The Canadian Environmental Law Association drew attention to an internal Federal Government directive regarding regulation across departments. This directive instructs civil servants, when drafting regulations for the daily operation of government in Canada, to keep in mind existing obligations under trade treaties the government has signed—NAFTA, CUFTA, the Uruguay Round Agreements and certain maritime agreements. Other treaties and covenants that the government has signed and ratified, and their relevant obligations on Canadian behavior, whether in human rights, environment, gender or the conventions of the International Labour Organization, are not mentioned.[8]

A more general dimension is the restriction on democratic sovereignty and choice that emerges from investment agreements and chapters of agreements, like the path-breaking Chapter 11 (investor-state) of NAFTA. This provision permits foreign investors, who have all the privileges of national treatment and most favored nation treatment via other portions of the agreement, to sue host governments in the cases where their present, or prospect of future, profits are alleged to have been injured by actions of that government. This provision has been the model for a number of similar clauses in other U.S. bilateral agreements. A number of cases in Mexico, Canada and the U.S. have been undertaken. The leading, but not only, victim of such suits has been the ability of governments to regulate solutions to environmental problems. It should also be noted that the investor-state provisions privilege foreign investors over local and national investors who must operate within domestic laws and court procedures.

An extension of these privileges to other levels of jurisdiction is the Trade, Investment and Labour Mobility Agreement (TILMA)—a partnership between the Canadian provinces of British Columbia and Alberta. TILMA essentially brings the NAFTA investor-state regime down to the municipal level and makes it possible for an

investor to invoke arbitration to challenge government measures alleged to interfere with investment and/or business, including a right to claim up to $5 million per case in damages. With the exception of named exemptions, these provisions open local/municipal health, environment, purchasing and other initiatives vulnerable to corporate action vis-à-vis the provincial jurisdiction in which they are located. The potential reach of the instrument is indicated by the groups listed as "stakeholders" for consultation during a transitional period before TILMA applies at the local level: municipalities, academic institutions, school jurisdictions and health authorities.[9]

A similar exertion of trade law "privilege" is expressed in the application of TRIPs (trade related intellectual property provisions) and of so-called "TRIPs plus" clauses in regional and bilateral agreements, and their effect on the ability of states to act in favor of the right to health of their citizens. The UN Special Rapporteur on the Right to Health has made the implications quite clear in a number of communications. He is currently engaged in consultations with regard to draft Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines.[10] The threat posed by the aggressive extension of intellectual property provisions in favor of major pharmaceutical multinationals provoked a civil society campaign to modify the interpretation and application of the existing TRIPs provisions (see below) and is the subject of several key current battles:

- The assessment of the potential impact on health and related matters of the proposed US-Thailand FTA by the Thai Human Rights Commission;
- A similar assessment of the impact of the proposed US-Peru FTA by the Peruvian Ministry of Health; and
- The suit of Novartis against the application of Indian patent law with regard to Gleevic, a cancer treatment.

The challenge to the right to health and access to affordable medicines by the rather relentless extension of TRIPS provisions puts in play thousands of cases of otherwise preventable illness and death.

The attack on democratic regulatory capacity continues in a variety of forms. In the case of North America, NAFTA is being extended in the Security and Prosperity Partnership (SPP). This is a process mandated by the three political heads of government, which has constituted a single advisory group of the 30 top corporate CEOs in North America (10 from each country). There is currently no Congressional oversight of the closed door negotiations. The SPP sets in motion an extensive process of regulatory and policy "harmonization" that goes further than NAFTA in key areas such as the extraction of natural resources, transport, energy and security, yet has no review process.

The mechanisms for dispute resolution that inevitably arise under trade and investment regimes are a further dimension of concern. These mechanisms may be WTO panels, three-member NAFTA bodies or the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), which arbitrates disputes for most bilateral investment agreements (BITs). Anthony dePalma commented about these processes in the New York Times:

"Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged."[11]

Multilateral trade rules have "reconstituted the global economic order with a vast set of wide-ranging and deeply intrusive rules designed both to deregulate national markets and to reregulate them globally."[12] National constitutions provide the rule book for political systems, including norms that dictate how governments should

behave, but are beyond the reach of parliaments to alter. They set limits on the roles of key elements of government, sanction certain rights and establish the judiciary that settles disputes over the meaning of the rights.

This composite external constitution creates the same order of matters that the domestic constitution does, but benefits private corporate actors rather than individual citizens. They are constitutional in that they are irreversible. An external constitution limits government; provides rights, particularly expanded property rights for corporations (specifically foreign corporations), intellectual property rights, investor-state procedures, etc.; and creates an equivalent to the judiciary tribunals like the NAFTA investor-state tribunals and the WTO's dispute settlement mechanisms.

Laws that were perfectly legal according to old domestic constitutions turn out to be "illegal" according to new external constitutions that are being defined by restrictive macroeconomic policy.[13] Yet, national constitutions serve the greater power of the principle state involved in their creation. They have great effect to shape or strike down regulation.

According to some, there is potential to explore the integration of universally recognized human rights into the law and practice of existing intergovernmental organizations, including the World Trade Organization. Ernst-Ulrich Petersmann advocates for inter-governmental organizations to submit annual "human rights impact statements" to the UN human rights bodies, as part of a process of legal "integration." He argues that the WTO could become a mechanism of enforcement, as it is in the case of trade and investment law. "As a corollary, economic, legal and political integration are also a function of human rights protecting personal autonomy, legal and social security, peaceful change, individual savings, investments, production and mutually beneficial transactions across frontiers."[14]

This proposed expansion of the WTO to take account of human rights law is controversial. The former Chair of the Committee on Economic, Social and Cultural Rights, Philip Alston, challenges Petersmann's approach. Alston writes, [his] "proposal for the enforcement of human rights through the WTO is presented as though it were simply a logical development of existing policies, rather than representing a radical break with them. In a form of epistemological misappropriation he takes the discourse of international human rights law and uses it to describe something which is in between a Hayekian and an ordo-liberal agenda. It is one which has a fundamentally different ideological underpinning from human rights law and would have extremely negative consequences for that body of law. Many of his characterizations of the existing state of the law—whether at the national, EU or international levels—are questionable."[15]

Sectoral Analysis

While recognizing the interrelated nature both of the norms in play and the challenges to them, this paper reviews selected sectors where human rights and trade and investment agreements are in debate and/or conflict. Each of these embody established and innovative challenges related to "hard" and "soft" law. These are starting places for examination, not a closed list. These zones of contention may overlap and inter-relate.[16]

Agriculture

The right to "adequate food" is recognized in Article 11 of the ICESCR as integral to an adequate standard of living for any individual and his/her family. States are therefore instructed to recognize "the fundamental right of everyone to be free from hunger" and to take appropriate measures to ensure that production, conservation and distribution of food and related technical

and scientific knowledge is brought into line. The ultimate objective is "to ensure an equitable distribution of world food supplies in relation to need."[17]

The history of the UN Food and Agriculture Organization (FAO) is a history of debate around these issues. The International Committee on Economic, Social and Cultural Rights has elaborated the content of the right to food in General Comment 12 (1999) and the relevant right to water, in General Comment 15 (2002).

However, international debate over food, the right to food and the rights of those who produce it, has been dominated for a decade by the WTO through the Uruguay Round Agreement on Agriculture, the Agreements on Sanitary and Phytosanitary Standards and TRIPs. The power of transnational agribusiness has been to overwhelm concerns like the right to food and the broader concept of food security. The preservation of biodiversity has been threatened by mono-cultural practices, prompting court cases in several countries.

The implications of growing demand for and state encouragement of the use of biofuels is threatening established land use practices, crop variety preferences and access to and pricing of food for consumption. The ambition on the part of many actors to expand energy resources can have direct and deleterious effects on access to food, the right to food and to an adequate standard of living.

The Office of the High Commissioner for Human Rights sponsored a study regarding the advisability of express reference to human rights in the WTO Agreement on Agriculture, without specifying where it should be located in the text. Efforts to achieve such a clause have not proceeded for a number of reasons, including that should there be a lack of political support for such a proposal, it could be more damaging than no clause at all.

Environment

Normative development in diverse areas affecting the environment has been an important characteristic of the last 15 years.[18] Academics and practitioners have extensively reviewed the relationship between these international agreements and trade law.There has been extensive documentation of conflicts between these normative instruments and the expanding claims of WTO and other trade, investment and intellectual property rules.

Among instances of contention have been:

- A state that applies environmental regulations related to production methods and applies the regulations to imports may come into conflict with the GATT principle of most-favored nation (MFN), which prohibits discrimination among goods on the basis of production methods.

- Investor-state suits claiming injury from environmental regulation (see below).

- Bilateral and regional trade, investment and IP agreements that allow stronger countries to offset attempts at regulation by weaker countries, including in such fields as toxic waste, coming in conflict with the Basel Convention.

- Practices of International Financial Institutions, which lead dependent countries to alter policies in ways that come into conflict with international environmental or social norms.

Other concerns include restrictions in dispute settlement procedures on the range and depth of environmental expertise that can be brought to bear in the treatment of cases, the lack of attention to environmental dimensions and integration of environmental policies in current Aid for Trade programs, and the inadequate priority given to dealing with climate change and policies that feed or reduce it.

The overall emphasis of the global trading regime is based on trade-led growth and the assumption that open markets ensure the most efficient and sustainable use of resources. Needless to say, these assumptions are very much in question in today's debates over global environmental, employment and related policies. Viewed from an environmental perspective, the trade-growth-reduced poverty assumption is subject to quite another critique, which continues to develop. In broad terms this has to do with the extent to which growth in trade itself (dependent on the energy costs of often long-distance transport of goods) is pressing against environmental limits, whether more domestically and regionally bound strategies would be less environmentally harmful and the extent to which growth, rather than equitable participation and distribution, is the most effective way to reduce and eliminate poverty. The onset of international concern about climate change has quickened attention to these issues.

The Human Right to Health

Recognized in the UDHR and embodied in the ICESCR (Article 12: "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"), this right is also embodied in a number of universal and regional instruments. Its content has been elaborated in General Comment no. 14 of the International Committee, which monitors ICESCR.

The current play of market forces and corporate ambition, expressed in such rules as the agreement on TRIPs, and the implications of the proposed rules for a much expanded GATS, confront the public interest with profound challenges. As the meeting of legal experts convened by the New Global Contract initiative pointed out, the assumed trade-off between protecting corporate IP privileges today in the hope that it means investment for prevention and cure later, is a trade-off that "does not always hold and is morally repugnant."[19]

Illustrations of diverse interactions between the State's responsibility to protect the right to health and new trade, investment and IP rules are found in this initiative's "Table of Conflicts." Among them:

- The overall pressure to deregulate and "liberalize," which can and does remove protections to consumers and citizens present in national regulation, and undermines the democratic right to regulate in any case;

- The principle of national treatment in trade agreements,which may prevent an importing country from banning a product that it deems dangerous;

- Under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures countries are allowed certain measures to protect health. They must meet an international standard set by the Codex Alimentarius or show strong scientific reason for a higher standard. Problems include lack of funding for most developing countries, and the inappropriate access and influence of corporations to the Codex's rule-making meetings; and

- The obligations of the Convention on Biological Diversity (CBD) are challenged by the IP regime's assertion of priority of private property and profit. The CBD places the public interest and the common good over private property and vested interests. TRIPs does the exact opposite.

There are a number of instances where a key procedural issue is the "burden of proof." Deregulation often puts the burden of proof on regulatory authorities to show that measures to protect human, animal and plant health are "necessary" to meet a regulatory objective, and that they are justified by a risk assessment. This is at odds with a system that wants to put health at the center of policy. Thus tests of "necessity" or "risk assessment" replace the precautionary

principle, which is often enacted by placing the burden of proof on the producer or corporation that wishes permission to promote or sell a product.[20]

The issue of whether a particular state, particularly a developing country with limited resources, can afford to undertake the work necessary to defray the burden of proof is basic to their ability to protect their citizens.

III. Global Organizing

States and their governments remain instrumental in governance and the development and implementation of regulations (in the public interest or in service of specific private privileges). However, recent decades have seen a "dispersal of regulatory competence across sub-state, state, supra-state and private sites of governance."[21] Consider municipalities and provinces as key actors, as well as the state of which they are a part, surpra-state bodies like the WTO and private bodies like the International Organization for Standardization or the Codex Alimentarius Commission.

Civil society organizations like those described in this framework have responded in a number of ways. Globalization analyst Jan Aart Scholte of the University of Warwick describes seven ways in which civil society organizations have "gone global."

1. In addressing the governance of transplanetary problems, including arms control, asylum seekers, climate change, cultural protection, debt relief, gender equity, HIV/AIDS and much more;

2. In obtaining "global qualities," leapfrogging over national governments to engage international institutions such as the United Nations, the World Bank and the WTO directly;

3. By employing a mix of face-to-face encounters and events like the World Social Forums, air travel, and extensive use of the internet and electronic mass media;

4. In developing global organizational structures (as well as regional versions of the same): unitary (the private-sectors' World Economic Forum), federal (labor's ITUC), regional (Afrodad, the Hemispheric Social Alliance), campaign networks (Our World is Not for Sale), specific issue networks (People's Health Movement, Gender and Water Alliance), networks among local initiatives (the Street/Net alliance of street vendors), etc;

5. In securing private financial sources (foundations such as the Friedrich Ebert Stiftung, Soros/Open Society, Ford, Mott), have supported important elements of this evolution;

6. In creating an ethos of transplanetary solidarity, a collective or shared identity forged in common advocacy or a common ethic that transcends geographic boundaries; and

7. Some of these initiatives have begun to undertake transplanetary regulatory activities. These may be relatively autonomous like the Ethical Trading Initiative, or may be collaborations in the elaboration of UN or other declarations and agreements, like the early development of the World Conservation Strategy or the Tropical Forest Action Plan. These alliances have also been active in thwarting the extension of private property privileges, such as the proposal of some governments for a multilateral agreement on investment (MAI), or specific and dangerous initiatives like multilateral development bank support for dam construction.

Two other dimensions might be added. There are multi-level strategies—for example, the effects of international networking on participatory budgeting, catalyzed by the World Social Forum and networks like Social Watch, and its effects of national level governmental budget participation, monitoring and accountability. We are also witnessing the increasing competencies of many networks in intelligence, research and legal expertise.

Princeton University's Richard Falk writes that civil society in a global context is "[evolving] ideas about global governance to offset the plans of leading states and dominant market forces; to resist where necessary, to collaborate where possible, while being wary about co-option traps and dogmatic anti-statism."[22] The UK's David Held and Anthony McGrew remind us that the fundamental challenges lead beyond the actions of particular networks or groups toward a more transformative political change—the achievement of cosmopolitan social democracy on a global scale.[23]

Agendas for Change

As we hope is clear from this framework paper, people concerned with defending and extending the public interest have many choices before them as to where to most strategically to deploy their intellectual, ethical and other resources:

- Defending and further democratizing the United Nations, the Economic and Social Council, and creating a strong and unified environmental policy and implementation agency within the United Nations;
- Strengthening and extending positive international norms, taking part in creating new treaties and covenants;
- Deepening constitutional human rights guarantees at the national level;
- Seeking to ensure the recognition of the priority of human rights and environmental guarantees in trade, investment and intellectual property accords, including such items as the precautionary principle;
- Ensuring that such agreements are negotiated in a transparent and accessible fashion;
- Challenging proposed and actual provisions of such accords deemed injurious to human, animal and environmental health;
- Undertaking human rights and environmental impactassessments of proposed trade, investment and intellectual property accords;
- Seeking ways of participating in, informing, and influencing international and regional appellate and dispute settlement processes, including recognition as amicus curiae;
- Undertaking or supporting legal action to amplify human rights and environmental guarantees at home;
- Monitoring legislative bodies to ensure that regressive initiatives are publicized and opposed;
- Collaborating in the development of positive legislative initiatives, and building public support for them; and
- Deepening public understanding of the role and importance of human rights, environmental guarantees and regulation in the public interest, as well as expanding recognized venues for public participation in the consideration, development, approval, monitoring and evaluation of measures that affect them.

Strategies for Success

While often responsive or reactive, public interest campaigns have on occasion scored what might be termed preventative victories, and have been contributors to the development of new norms. Some of the more critical examples include:

Focused international campaigns with national expression: Negotiations for an agreement privileging the rights of foreign investors (the proposed MAI), carried out in the Organization for Economic Cooperation and Development (OECD), were suspended in 1998 in the face of a widespread international civil society campaign of opposition. As noted by Caroline Dommen, "civil society activities around the MAI established the power of email and the Internet as tools for coalition-building, communication and effective international campaigning." Strategic elements included street protests at the WTO second ministerial, national and international petition/statements, and work in the UN Committee on Economic, Social and Cultural Rights and the sub-Commission on Promotion and Protection of Human Rights to get statements and resolutions on the impact of trade and investment policies on human rights, etc.

Broad international campaigns, with diverse national expressions: Multi-year negotiations to achieve a regional trade and investment agreement for the Americas (otherwise known as the Free Trade Area of the Americas (FTAA)) ground to a widely-recognized halt with the Mar del Plata Summit of the Americas (2005).[24] The movement against the proposed agreement included a diverse Hemispheric Social Alliance, with national coalitions in many of the three dozen countries involved, with the most significant common element being the regional trade union formation (ORIT) and progressive ecumenical church bodies. Civil society tactics included massive street protests at the 2001 Quebec City Summit of the Americas, a popular referendum involving several million citizens in Brazil and informal alliances with geo-political actors like the governments of Cuba and Venezuela. The ensuing battles over the bilateral U.S. agreements with Central America, Peru and Colombia continued but offered new challenges. The results of a closely fought official referendum in Costa Rica have been challenged, while debate over trade agreements in the U.S. Congress (and among U.S. presidential candidates) continues.

Campaigns to modify existing international agreements in favor of respect for human rights: Perhaps the most successful campaign of this type was the achievement of the Doha "Declaration on the TRIPs Agreement and Public Health," and subsequent actions facilitating provision of generic drugs for HIV/AIDS and other diseases. The declaration that interprets existing TRIPs provisions resulted from a mixture of popular campaigns in South Africa and Brazil among international AIDS service and human rights groups, and emerged from a conflict with the United States.

Organizing to create new international norms or to define national legislative and/or constitutional protections: Whether it is health specialists and anti-smoking advocates developing the International Framework Convention on Tobacco (for more detail, see "Approaches and Mechanisms…" appendix), environmentalists working on a new convention or protocol, actors, broadcasters and public servants working on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, land-mines activists building the "Ottawa" treaty or World Federalists working on the International Criminal Court, the past ten years have been peppered with successful efforts to expand international law in key areas.

In some cases, the resulting instruments are largely compromise documents; in other cases, they open new protections for the public interest. In many cases these achievements embody what sociologist Jackie Smith terms "polycentric development coalitions (PDCs)," including sympathetic government officials, elements in international agencies, civil society actors and in some cases, private sector representatives.

The campaign to ensure that water resources and services remained in the public domain in Uruguay was a remarkable national success, utilizing a national referendum and a broad coalition of social movements, academics and politicians.

Diverse national campaigns to challenge ongoing multilateral and bilateral trade and investment negotiations: The recent alliance of U.S.-based coalitions such as the Alliance for Responsible Trade with some politicians and Costa Rican advocates supporting a "no" vote in the national referendum on the bilateral trade and investment agreement embodied a fairly highly developed range of tactics, coming close to victory. In recent years, increasingly well-informed and well-connected advocacy groups and networks in Africa and elsewhere have reinforced the continuing diverse national campaigns against the Doha Round, represented to some extent in international alliances such as Our World is Not for Sale. Similar, and in some cases overlapping, networks are engaged in opposition to the negotiating tactics and content employed in the renegotiation of Economic Partnership Agreements between the EU and a broad range of former colonies/developing country partners. An instrumental element in many of these efforts is increasingly sophisticated intelligence (breaking through the lack of transparency in negotiations) and detailed research, written up in learned articles, opinion pieces and popular education fact sheets.

Persistent efforts to ensure effective national implementation of positive international norms: Social development organizations and anti-poverty groups have backed international agreements like the Copenhagen Declaration (1995) for national plans with targets and timelines for progressive public objectives. The international women's movement, following the Beijing Conference, has sought a similar measure of accountability. The Social Watch, founded in the wings of the Copenhagen Conference, and taking on the Beijing Programme of Action, is one of the most successful alliances in this regard. Led from the "South" with a secretariat in Montevideo, and composed of more than 50 autonomous national coalitions, it monitors and reports on national compliance with international commitments, including focused reports on gender equity and basic capabilities (a set of minimum social services), country by country. Relying in part on "naming and shaming" and in many cases by persistent advocacy by the national coalitions, the Watch attempts to quicken energies to fight poverty, inform positive extension of social services and to reinforce the defense of rights, including women's emancipation.

Coalitions of civil organizations in Mexico and Brazil have utilized the periodic regular review of their countries' compliance with the Covenant on Economic and Social Rights to assemble their own independent assessment, create "shadow" reports and testify at the International Committee review covenant compliance. Women's networks have adopted similar techniques in dealing with CEDAW processes at the UN.

In Brazil, human rights networks have combined in a longer-term campaign that seeks to get the government to implement its pledges of respect, protection and fulfillment of human rights at home. This effort includes diverse efforts to educate the populace as to their rights and ways to ensure their fulfillment.

Current international networks fighting for accountability to the Millennium Development Goals are a recent expression with similar goals. With greater success, environmental organizations in some countries have achieved national monitoring mechanisms and public audits of environmental progress against commitments.

Active defense of human rights or environmental standards when claims are in conflict: The aggressive and quite negative impacts of trade and investment agreements on the human right to health have spurred civil society organizations and, on occasion, government departments and official human rights agencies to provide data and argumentation defending the public interest. The recent human rights impact assessment of the Thai Human Rights Commission regarding the proposed U.S./Thailand Free Trade Agreement is a case in point, as is the work of the Peruvian Ministry of Health regarding the impact of the intellectual property provisions of the U.S./Peru bilateral agreement on access to medicines. Such

initiatives are encouraged by the international work of the UN Special Rapporteur on the Right to Health. However the relative political weakness of health ministers and advocates over finance and trade portfolios, and the interests of large foreign corporations and their governmental allies can overwhelm both good arguments and strong evidence.

Toward a New Global Contract

This project is engaged in building a new future. Right now, we must choose between two potential paths. The first is one in which democracy is in retreat in the face of executive branches, public-private partnerships and voluntary codes (Corporate Social Responsibility) instead of regulation. The second is one in which there is a push to the local, where accountability can work, where national governments take responsibility for the direction the world is headed and where norms such as benefit sharing, differentiated responsibilities are at the center.

The core issues of human survival are very much in play. This initiative is designed to contribute to the clarification of the tasks and the reinforcement of positive energy and enhanced strategies.

"Now, the world community has turned from many directions inward and outward: to the private sphere and the global arena. At the human rights frontiers, new groups and old are constructing an enhanced vision of the human condition. This vision is based on articulating a set of deep questions under changing social circumstances and across domains: who counts as human, what are rights and who is responsible?"

Alison Brisk, Human Rights and Private Wrongs:
Constructing Global Civil Society.

The research, papers and meetings of this initiative are only one response to challenges faced by many actors, many of them lacking access to adequate legal or political means of redress. The question we all need to keep asking ourselves is: what sort of international initiatives would strengthen the capacity of the diverse forces challenging those who would marginalize or subvert human rights and environmental norms and standards?

Clearly, continued research and monitoring of tools and experiences to be used by those engaged in defending the public interest are critical. Additionally, it will be essential to bring actors together to share strategies from particular conflicts and to build approaches in order to effectuate change. The struggle over moral progress is very much engaged, and involves a diverse series of actors and a challenging variety of struggles. Given the ambitions of those who seek greater privilege for private gain, we as citizens of the world are challenged to be more ambitious in protecting the public interest.

"We have already delayed too much for the great aspirations of well-intentioned people. Do not let us further increase this delay with our despair, lethargy and skepticism. We have no time to waste."[25]

Norberto Bobbio, The Age of Rights

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Endnotes

[1] Note: The author would like to express his appreciation for the patience and advice of Sophia Murphy, Alexandra Spieldoch and the other members of the Rebalancing steering committee for their helpful advice in the preparation of this paper.

[2] Ruggie, John G, "Business and the Rules of the Game: From Rule-takers to Rule-makers?" Remarks at Plenary Session on "Business and the rules of the game: From rule-takers to rule-makers?" 12th International Business Forum, World Bank, Washington, DC, 8-10 October 2007.

[3] Harrison, James. The Human Rights Impact of the World Trade Organisation. Hart Publishing, 2007. p. 245.

[4] Trade liberalization, according to James Harrison, has "been supported from an economics perspective by statistical analysis which has led the majority of economists to conclude that trade liberalization is an essential part of the economic welfare of nation states as well as being vital for overall global economic well being. It has, over the last twenty years, become an accepted part of global mainstream policy advice that a strategy of trade openness leads to increases in growth and prosperity." Harrison, p.8.

[5] Harrison, p. 43.

[6] For an illustration of how this process rewards corporations, see the examination of Wal-Mart's benefit from NAFTA in Antonia Juhasz, The Bush Agenda: Invading the World One Economy at a Time. New York, Reganbooks, 2006. pp. 84-88.

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14 Petersmann, Ernst-Ulrich. "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration." European Journal of International Law 2002 13(3):621-650; doi:10.1093/ejil/13.3.621

15 Alston, Philip. "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann." European Journal of International Law 2002 13(4):815-844; doi:10.1093/ejil/13.4.815

16 Toward a New Global Contract has developed other materials along these lines: a matrix that provides information on the legal conflicts in these four areas and a related paper on successes detailing the engagement of civil society organizations, as well as the state of the contest.

17 Article 11, International Covenant on Economic, Social and Cultural Rights., http://www.unhchr.ch/html/menu3/b/a_cescr.htm

18 For an examination of this development see Prof. Dinah Shelton, "Human Rights and Environ-ment Issues in Multilateral Treaties Adopted Between 1991 and 2001." Environmental Policy and Law, v. 32, n.2, 2002. http://iospress.metapress.com/content/9hdpdte1lg5c5tty/

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20 The Precautionary Principle prohibits scientific uncertainty from being used as a reason for inaction.

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