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Working Paper

Progressing towards a just future through the MDGS:
what is the meaning of Equity in the trading system?

TranState working papers, No. 67

Provided in cooperation with:

Universität Bremen

Suggested citation: Beviglia Zampetti, Americo (2007) : Progressing towards a just future through the MDGS: what is the meaning of Equity in the trading system?, TranState working papers, No. 67, <http://hdl.handle.net/10419/24979>

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TranState Working Papers

PROGRESSING TOWARDS A
JUST FUTURE THROUGH
THE MDGS: WHAT IS THE
MEANING OF "EQUITY" IN
THE TRADING SYSTEM?

Americo Beviglia Zampetti

No. 67

Universität Bremen • University of Bremen
Jacobs Universität Bremen • Jacobs University Bremen

Staatlichkeit im Wandel • Transformations of the State
Sonderforschungsbereich 597 • Collaborative Research Center 597

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TranState Working Papers

No. 67

Sfb597 „Staatlichkeit im Wandel“ – „Transformations of the State“

Bremen, 2007

[ISSN 1861-1176]

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(TranState Working Papers, 67)

Bremen: Sfb 597 „Staatlichkeit im Wandel“, 2007

ISSN 1861-1176

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Diese Arbeit ist in Zusammenarbeit mit dem Sonderforschungsbereich 597 „Staatlichkeit im Wandel“, Bremen, entstanden und wurde auf dessen Veranlassung unter Verwendung der ihm von der Deutschen Forschungsgemeinschaft zur Verfügung gestellten Mittel veröffentlicht.

Deutsche
Forschungsgemeinschaft

DFG

***Progressing towards a just Future through the MDGs:
What is the Meaning of “Equity” in the Trading System?***

ABSTRACT

In the trade policy area MDG 8 “Develop a global partnership for development” is the most relevant. Despite important efforts, MDGs’ implementation is proving very complex and it is falling way behind schedule. This is also reflected in the enduring difficulties current round of multilateral trade negotiations: the “Doha Development Agenda”. Hence, two key questions come to the fore. Do statements such as the Millennium Declaration, and in particular their call for “equity” in the trading system, have any (policy) impact? And even more basically, do they ‘mean’ anything? And, if they do, what is such meaning, or perhaps more normatively, what should it be? The paper attempts to provide some tentative replies to such questions. It argues that negotiations especially in the Doha Round have registered limited progress and that it would be necessary to move decisively in the direction of opening developed country markets to products, services and workers of developing countries, encouraging and supporting appropriate and paced liberalization and domestic reform efforts in poor countries, increasing their export capacity, while preserving their ability to pursue human development policies. But more fundamentally it stresses that trade liberalization commitments of this kind may not be enough to achieve an ‘equitable’ trading system truly able to deliver benefits commensurate to the development needs of all its participants. An ‘equitable’ system could not but put people with their rights and needs as its focus of attention. This would mean unequivocally according instrumental value to trade liberalization and intrinsic value and hence priority to sustainable human development.

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Progressing towards a just Future through the MDGs: What is the Meaning of “Equity” in the Trading System?¹

1. INTRODUCTION

The drive to achieve the Millennium Development Goals (MDGs),² combined with pressure arising from the perceived adverse social consequences of globalization, has been instrumental in bringing about extensive analysis of linkages between trade liberalization and poverty. The last few years have indeed seen growing attention paid to ensuring that international trade is supportive of the goal of sustainable human development.

Trade liberalization has long been considered an important source of income convergence across countries and an important element of any development strategy. The reallocation of resources engendered by the pressure of comparative advantage is generally expected to yield significant efficiency and welfare gains. Without underestimating the important role that trade and investment liberalization can play in enhancing the overall efficiency with which resources are used and deployed within and between nations, what matters from a development point of view is whether closer economic integration and faster expansion of imports, exports and investment allow developing countries to catch up with the industrial countries, and especially the poor with the rich.³

The orthodox view of the relationship between trade liberalisation and poverty reduction is predicated on the belief that liberalization spurs economic growth, and therefore,

¹ This paper was prepared when the author was with the United Nations, Geneva. The views expressed are strictly personal. The author has greatly benefited from discussions held at the 2005 ACUNS/ASIL Summer Workshop on “The Millennium Development Goals: Progressing towards a Just Future” (Wilfrid Laurier University, Waterloo, Ontario) and at the 2005 seminar on “Trade Governance, Democracy, and Inequality” (University of Bremen), as well as from comments by F. Garcia, P. Mavroidis and C. Wilkie.

² The MDGs are contained in the “Road map towards the implementation of the United Nations Millennium Declaration. Report of the Secretary General”, 6 September 2001, UN doc. A/56/326. The Goals are 1: Eradicate extreme poverty and hunger; 2: Achieve universal primary education; 3: Promote gender equality and empower women; 4: Reduce child mortality; 5: Improve maternal health; 6: Combat HIV/AIDS, malaria and other diseases; 7: Ensure environmental sustainability; and 8: Develop a global partnership for development. The eight MDGs have a target date of 2015 and are accompanied by a framework of 18 targets and 48 indicators to measure progress towards their achievement.

³ This is the traditional perspective of policy-makers at the national and international levels. ‘Catching-up’ is very much part of their vernacular. For a critique highlighting the limitation of such perspectives, see David Kennedy, “The Politics of the Invisible College: International Governance and the Politics of Expertise”, *European Human Rights Law Review*, Issue 5, 2001, pp. 463-497.

at least indirectly, the resulting increased trade and investment support poverty reduction.⁴ The claim is that sustained rapid growth cannot be achieved without increasing trade and investment flows. This is based on the experience during the second half of the 20th century which, according to the proponents of this thesis, offers virtually no examples of countries attaining significant growth without at the same time (or some would argue as a prerequisite of it) achieving sustained growth in trade and investment, facilitated or induced by low or high but declining trade barriers.⁵

This orthodox view is reflected in a series of international pronouncements, among which the solemn 2000 Millennium Declaration. There, in the section entitled “Development and Poverty Reduction”, UN Member States committed “to create an environment - at the national and global levels alike - which is conducive to development and to the elimination of poverty.” This is said to depend on “good governance within each country” and on “good governance at the international level, and on transparency in the financial, monetary and trading systems.”⁶ In this context, Member States “are committed to an open, *equitable*, rule-based, predictable and non-discriminatory multilateral

⁴ The literature is extensive. See, among others, David Dollar and Aart Kraay (2001), “Globalization is Good for the Poor”, World Bank, http://econ.worldbank.org/files/1696_wps2587.pdf; David Dollar and Aart Kraay, “Trade, Growth and Poverty”, (2001), http://econ.worldbank.org/files/2207_wps2615.pdf; Jeffrey Sachs and Andrew Warner, *Economic Reform and the Process of Global Integration*, 1995 Brookings Papers on Economic Activities. However, the conclusions of these studies have been challenged by other economists, see Ravi Kanbur, (2001), “Growth and Trade: The Last Redoubt?”, <http://people.cornell.edu/pages/sk145/papers.htm>; Milanovic, Branko (2002), “The Two Faces of Globalization: Against Globalization as We Know It”, New Delhi, India: International Development Economics Associates; Dani Rodrik, “Comments on ‘Trade Growth And Poverty’ by D. Dollar And A. Kraay” (2000), www.gapresearch.org/eldis/; Mark Weisbrot and Dean Baker, (2002), “The Relative Impact of Trade Liberalization on Developing Countries”, www.cepr.net/pages/Globalization_page.htm; Paul Mosley, (2000), “Globalisation, Economic Policy and Convergence”, 23 *World Economy* 613; Francisco Rodriguez and Dani Rodrik, “Trade Policy and Economic Growth: A Skeptic’s Guide to the Cross-National Evidence”, *Macroeconomics Annual* 261 (Ben S. Bernake and Kenneth Rogoff eds., 2000).

⁵ See, for instance, Arvind Panagariya, (2004), “Miracles and Debacles: In Defense of Trade Openness”, 27 *World Economy* 8, August, p. 1149.

⁶ Good governance is a broad notion difficult to circumscribe. For a useful definition in a plurilateral contest see article 9(3) of the Cotonou Agreement between the African, Caribbean and Pacific States and the European Union and its Member States of 23 June 2000, which states: “In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. ...”.

trading and financial system” (emphasis added).⁷ International trade is thus considered as an activity contributing to the realization of the development and poverty reduction objectives. The subsequent resolution adopted at the 2002 International Conference on Financing for Development (the Monterrey Consensus) stresses this link in even clearer terms.⁸ Three years later, at the 2005 UN World Summit, Heads of State and Governments reaffirmed their commitment to “promote international trade as an engine for development ...” and, more specifically, “to trade liberalization and to ensure that trade plays its full part in promoting economic growth, employment and development for all.”⁹ In the same document UN member states reaffirmed their “commitment to governance, equity and transparency in the financial, monetary and trading systems.”¹⁰ Hence, while the pivotal role of trade and trade liberalization for development is underlined, at the same time the notion that the working of international trade relations and the trade regime is wanting from an equity perspective is also stressed.

In an attempt to ‘operationalize’ the Millennium Declaration commitments a series of specific goals accompanied by targets and quantitative indicators, were set. In the trade policy area MDG 8 “Develop a global partnership for development” is the most relevant.¹¹ Despite important efforts, MDGs’ implementation is proving very complex and it is falling way behind schedule. One year after issuing the Millennium Declaration WTO Members launched a new round of multilateral trade negotiations, which was emphatically called the “Doha Development Agenda”. These negotiations have also dragged

⁷ United Nations Millennium Declaration, UN General Assembly Resolution, A/RES/55/2, 18 September 2000, para 12-13.

⁸ Report of the International Conference on Financing for Development, Monterrey Mexico, 18-22 March 2002, UN Doc. A/CONF.198/11.

⁹ 2005 World Summit Outcome, UN General Assembly Resolution, UN doc. A/RES/60/1, para. 21 and 27.

¹⁰ Id., para. 36.

¹¹ The targets accompanying MDG 8 (target 12 to 18 of the overall list) are: "Develop further an open trading and financial system that is rule-based, predictable and non-discriminatory, includes a commitment to good governance, development and poverty reduction - nationally and internationally; Address the least developed countries' special needs. This includes tariff- and quota-free access for their exports; enhanced debt relief for heavily indebted poor countries; cancellation of official bilateral debt; and more generous official development assistance for countries committed to poverty reduction; Address the special needs of landlocked and small island developing States; Deal comprehensively with developing countries' debt problems through national and international measures to make debt sustainable in the long term; In cooperation with the developing countries, develop decent and productive work for youth; In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries; In cooperation with the private sector, make available the benefits of new technologies - especially information and communications technologies." (See Roadmap, cit., Appendix).

along amidst great difficulties and drama – in particular at the 2003 Cancun Conference. At the 2005 WTO Hong Kong meeting Ministers avoided a disastrous replay but achieved little in terms of concrete commitments. Prospects for a positive conclusion remain elusive.¹²

From both a practical and academic standpoint, at least two key questions need to be asked. Do statements such as the Millennium Declaration and the World Summit Outcome, and in particular their call for “*equity*” in the trading system, have any (policy) impact? (Section 2). And more basically, do they ‘mean’ anything? (Section 3). And, if they do, what is such meaning, or perhaps more normatively, what should it be? (Section 4 and 5). Answering these questions one way or the other does not appear trivial, as a sceptical reply would render declarations of this kind no more than vacuous grandstanding or at best a selfish public relations tool not dissimilar to the empty promises often proffered by politicians in the domestic arena, while an optimistic response would give some political and policy substance to the search for global justice that many governments seem to consider one of their priority for international action.

The contention of the paper is that wide-ranging commitments such as those contained in the Millennium Declaration are meaningful and important as part of the broad international policy- and rule-making process. However, so far, a wide gap remains between them and the actual practice of trade negotiations. This is due in good measure to a persisting fundamental disagreement on the nature of equity in the trade system. Such disagreement can only be addressed by an increase in debate and democratic deliberation involving to a greater extent the ultimate beneficiaries of (international) economic activities: the people. This would allow taking into account their views in the design of more equitable global institutions. Two main propositions ensue: On method, in order to muster consensus trade negotiations need to move away from mercantilistic, state-centred, technocratic, short-sighted and self-contained negotiations, thus becoming a real instrument of world democratic governance.¹³ This also means ending (or at least reducing) the disjoint between broad and visionary discussions (some would say far-fetched) in New York and the practice of hard-nosed negotiations in Geneva. On substance, in this modified perspective, a deep re-thinking of the trade system foundations is called for. This means - it is argued - that only an approach putting people's well-

¹² In the summer of 2006 no agreement was in sight so that the WTO Director General decided to call for a suspension of the talks. The WTO General Council endorsed this proposal at its meeting on 26-27 July 2006. Negotiations restarted a few months later.

¹³ How to address the “democratic deficit” of international economic and trade negotiations is a vast subject that is largely beyond the scope of this paper.

being at the centre can deliver on the wider vision, values and objectives of the Millennium Declaration.

2. A REALITY CHECK: THE POTENTIAL OF THE DOHA ROUND

An obvious and very important forum where the vision expressed in the Millennium Declaration should be brought to bear is the current round of trade negotiations. Even before dwelling on the deeper meaning of such ‘new’ orientation, and assuming for the moment that it can be linked to the growing attention on the requirements of development and poverty reduction, not much decisive *action* seems - at least so far - to be taking place.¹⁴

Development concerns are not new to the WTO or the global trading system. Building on language in the GATT of 1947, the Marrakesh Agreement Establishing the WTO recognizes the shared goals of WTO members in “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development,” as well as the “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”¹⁵

The characterization of the first WTO negotiating round, which emerged from the Doha Ministerial Conference, as a “Development Agenda” was revealing. The failure to launch a new round of trade negotiations in Seattle in 1999 had been attributed in large part to the dissatisfaction of many developing countries with their experience in implementing the Uruguay Round agreements. It was apparent that further progress would not be made at Doha unless developing country concerns were addressed. The dissatisfaction of developing countries with the results of trade liberalisation and the operation of the WTO system had also found support among various experts, development agencies and many civil society groups in both developed and developing nations, fuelling the continuing debate over the links between liberalisation and poverty.

¹⁴ The single undertaking logic prevailing in WTO rounds means that generally all commitments and their implementation hinges on final agreement on all issues under negotiations. However this should not stop countries to unilaterally proceed with actions that are considered useful, as - for instance - the EU did with the extension of preferential tariff treatment for LDCs (the so-called "Everything but Arms" initiative).

¹⁵ See Marrakesh Agreement Establishing the WTO, Preamble, in *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, WTO, Geneva 1995. For a penetrating discussion of this problematique, see F. Garcia, *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade*, Transnational Publishers, Ardsley, NY, 2003.

The Ministerial Declaration of the Doha Conference asserted that developing countries' "needs and interests [would be] at the heart of the Work Programme" included in that document, and that "the marginalization of least-developed countries in international trade" would be addressed.¹⁶ Developing country concerns were reflected most prominently in the Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Public Health¹⁷ and the Decision on Implementation-Related Issues and Concerns.¹⁸ However, developing country interests were also mentioned in provisions of the main Ministerial Declaration relating to agriculture, services, market access, investment, competition policy, trade facilitation, subsidies and countervailing measures, environment, small economies, debt and finance, technology transfer, technical cooperation and capacity building, LDCs, and "special and differential" treatment.

By the time of the Fifth Ministerial Conference in Cancun in late 2003, little progress had been made on the Doha commitments of most interest to developing countries.¹⁹ The Cancun Ministerial Conference commenced amidst wide differences among country groups, and ended abruptly, when there appeared to be still an impasse over the very scope of the negotiation (in particular with regard to investment, competition policy, transparency in government procurement and trade facilitation)²⁰ and wide gaps remained in country positions on agriculture.

In the two subsequent years of work which led to the Sixth WTO Ministerial Conference in Hong Kong, negotiations did not progress particularly fast or smoothly. The

¹⁶ WTO Ministerial Conference, Fourth Session, *Ministerial Declaration*, WT/MIN(01)/DEC/1, paras. 2-3.

¹⁷ WTO Ministerial Conference, Fourth Session, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (20 Nov. 2001).

¹⁸ WTO Ministerial Conference, Fourth Session, *Implementation-Related Issues and Concerns*, WT/MIN (01)/17 (20 Nov., 2001).

¹⁹ The only tangible advance - a WTO General Council decision allowing some flexibility in the application of the compulsory licensing provision of the TRIPS Agreement - emerged only in late August 2003, and after months of protracted debate and negotiation. See WTO General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (1 Sept. 2003).

²⁰ These are the so called "Singapore issues", as they were first discussed at the 1996 WTO meeting in Singapore. For a number of reasons, including tactical ones, the demand of the majority of developing countries to jettison them from the negotiation has been subsequently agreed for all but trade facilitation. From one perspective this can be considered a victory for developing countries, which basically took the view that only damage could be inflicted to them if rules were to be agreed in these areas. However, the dropping of three out of four Singapore issues has certainly reduced the scope of the negotiation thus also potentially limiting the areas where development gains can be achieved.

Hong Kong outcome,²¹ while containing some useful progress, did not seem to have achieved more than avoiding an embarrassing stalemate.²² The impasse ensued in the summer of 2006. Realizing the repeated call to put the development dimension at the centre of the negotiations remains daunting.

The catalogue of objectives for a meaningful “development package” is long and will be undoubtedly difficult to achieve in any final deal.²³ Such package would include:

- Enhanced and predictable market access for developing countries in industrial and agricultural goods, and services, including in the area of movement of people;
- Removal of trade-distorting non-tariff barriers and market entry barriers;
- Elimination of export subsidies and substantial reductions in trade-distorting domestic support in agriculture by a credible end date;
- Provision of bound duty-free and quota-free market access for all exports of LDCs;
- Provisions for enhancing utilization of trade preferences by improving preferential schemes;
- Provision of adequate financial and technical support to developing countries to help them meet adjustment and implementation costs, including the erosion of preferences, and to ensure sustainability of trade reforms;
- Provision of adequate support for building supply capacity and trade-related infrastructure, including trade financing mechanisms;
- Ensuring that trade liberalization does not adversely affect the livelihoods of the poor and vulnerable, and universal access to essential services.

It does not take an in-depth knowledge of trade politics to predict that, even if the Round is finally concluded, many of the more ambitious objectives of a ‘development package’ in the end will be missed, downsized or fudged. In any case the welcome spurt

²¹ See Doha Work Programme Ministerial Declaration, WTO doc. WT/MIN(05)/W/3/Rev.2 of 18 December 2005.

²² The agreement to phase out remaining agricultural export subsidies by 2013 did not add much to previously expressed commitments, while allowing for a generous transition period. No parallel advancement was achieved in the area of domestic farm subsidies. The commitment to apply duty-free and quota-free access to 97 percent of LDCs’ trade by 2008 similarly did not significantly improve on the current situation in many export markets, such as the EU, which had already adopted this policy in 2000 (and the 3 percent loophole provides scope to continue protecting sensitive sectors). Developed countries promised to increase the financial resources for development assistance linked to international trade, but such pledges remain free-standing and it is not clear whether these will be integrated into the final agreement. In all other areas progress, if any, was hardly of consequence.

²³ Different priorities can obviously be set, see A. Charlton and J. Stiglitz, “A Development-friendly Prioritization of Doha Round Proposals”, *The World Economy*, 2005 pp. 293-311.

in economic growth that future trade liberalization is likely to engender will be beneficial to some countries and people, but inevitably more to some than others and unfortunately net losers will also emerge. Hence, the promised contribution of the trading system to the realization of the Millennium Declaration's goals and in particular the reduction of poverty remains wanting. This is even more so if one moves from the more specific objectives mentioned above to consider the predictable Doha Round's outcome in terms of development more broadly.²⁴ A mainstream approach to economic development emphasises issues, such as the possibility of retaining sufficient national economic policy-making autonomy, institutional innovation and up-grading, investment in human capital and development-oriented infrastructure, supply-side competitiveness, a favourable legal and regulatory environment including for SMEs, access to financial capital, science and technology, as well as research and development capacity-building, and a global efforts to protect the environment and to address climate change. In most of these areas the expected positive contribution of the negotiations is likely to be limited – as, indeed, arguably in many cases these broader development issues even fall outside much of the scope of the current WTO negotiation agenda as finally agreed.

The treatment of technical assistance, institution- and capacity-building for trade will be a partial but telling litmus test of the Doha package.²⁵ The role of such support in many trade-related fields is important in assisting poor countries to negotiate, to implement their obligations and to bring claims to dispute settlement. Commitments by developed countries in these areas should be in the nature of hard obligations, not best endeavours. Furthermore, technical assistance and capacity-building should be understood in an expansive fashion, which can be supportive of the developing countries' efforts to increase their supply response capacities, competitiveness and ability to attract foreign investment in both goods and services sectors, thus allowing them to benefit from market opening commitments by developed countries.

Indeed, although *formal* liberalization has taken place in a number of countries as a result of trade negotiations, the necessary ensuing changes or improvements in market regulation typically remain to be fully implemented, as these are highly technical and complex, requiring significant financial and human resources – resources that are often

²⁴ For a broader understanding of the development dimension of the current Round, see F. Ismail, "Economic Development and Multilateral Trade Cooperation", in S. Evenett and B. Hoekman (eds), *Economic Development and Multilateral Trade Cooperation*, Palgrave Macmillan and the World Bank, 2005, pp. 213-228.

²⁵ WTO Members decided at the Hong Kong Ministerial to create a Task Force to provide recommendations on how to operationalize trade-related assistance (dubbed "Aid for Trade") and "on how Aid for Trade might contribute most effectively to the development dimension of the DDA". The Task Force recommendations are contained in WTO doc. WT/AQFT/1 of 27 July 2006.

in short supply in the developing world. Assistance with regulatory reforms and institution building for which developed countries have a long experience, could be agreed as a necessary complement to the liberalization commitments to be undertaken by developing countries.²⁶ This, similarly to the improvement of supply capacity and export competitiveness, is a highly resource intensive area, which requires a concerted effort by developed countries (as providers of financial as well as human resources), the competent international and national agencies (as executing entities), and the recipient countries.²⁷

A serious effort at technical assistance and capacity building requires undoubtedly important resources. It remains unclear whether even this modest attempt at international redistribution will be meaningfully pursued and find its place in any Doha Round outcome, beyond the traditional hortatory language characteristic of much of the development-related provisions of the WTO Agreements.²⁸ Or, worse, fresh resources will be made available conditional to developing countries granting concessions in other areas. Hence, even against the benchmark of promoting development, surely more modest than pursuing equity in the trading system, the current WTO negotiations seem to fall short.

3. NEITHER DEAD LETTER NOR BLACK LETTER: A LEGAL-POLITICAL PERSPECTIVE ON THE MDGs

If the solemn pronouncements of world leaders convened at the United Nations have very little apparent impact on actual trade negotiations and policy-making a further question arises: What do they mean? From a strictly formalistic perspective both the Millennium Declaration and the recent UN World Summit Outcome are simply General

²⁶ While both traditional market access commitments and trade rules, as well as the TA/CB commitments can have the same obligatory status under international law (with ensuing possibility of redress), they should not be entered into as reciprocal engagements, or worse as a way of compensating developing countries for otherwise harmful market access and rule commitments (see below section 4).

²⁷ For example, sustained institutional and human capacity building assistance, involving long-term partnership arrangements between counterpart ministries, supervisory and regulatory agencies, but also labour unions, chambers of commerce, industry associations and NGOs, could be provided in key areas, such as auditing, accounting, competition policy, technical regulations and standards, utility regulation, administration of justice, consumer protection, social and environmental policies.

²⁸ Interestingly even IMF and World Bank officials have voiced opposition to the idea of setting up a dedicated aid fund, see "Experts say no need for freer trade aid fund", Financial Times, 21 September 2005. See also "Doha Development Agenda and Aid for Trade", paper prepared by IMF and WB staff for the 23 September 2005 Development Committee Meeting; S. Prowse, "'Aid for Trade': A Proposal for Increasing Support for Trade Adjustment and Integration", in S. Evenett and B. Hoekman, cit., 2005, pp. 229-267.

Assembly resolutions. As such they pertain to the realm of “soft law” and are not formally binding on States or individuals.²⁹ Beyond obligation, in terms of the other two characteristics associated with ‘legalization’ - namely precision with respect to authorized or prescribed state conduct, and delegation with respect to interpreting, implementing, and applying authority - ³⁰ the Millennium Declaration and the World Summit Outcome are also rather soft, at least in the area of development-related provisions. The Declaration and the Outcome express a vision and state several commendable (some would say also lofty and vague) objectives, but are short on concrete commitments. The attempt to delegate some authority to the UN Secretary General to provide more precision, which gave rise to the MDGs,³¹ has remained controversial.³² In this regard the Summit Outcome document clarifies that reference to the MDGs should not be construed to mean the, arguably more precise, eight goals set by the Secretary General, but

²⁹ On the relative costs and benefits of ‘hard’ and ‘soft’ legalization, see K. Abbott and D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, vol. 54, no. 3, Summer 2000, pp. 421-456.

³⁰ See K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter and D. Snidal, “The Concept of Legalization”, *International Organization*, vol. 54, no. 3, Summer 2000, pp. 401-419.

³¹ The MDGs are not even set in a resolution. They are included in a UN Secretary General’s report (*Road map towards the implementation of the United Nations Millennium Declaration*, cit.), which the General Assembly had requested in resolution 55/162 (Follow-up to the outcome of the Millennium Summit, 18 December 2000, para. 18). The Report was meant to set out in detail how the Millennium Declaration commitments could be fulfilled. Goals were set in all areas, but in the field of “Development and poverty eradication” specifically, these were named the “millennium development goals” were said to “highlight some of the priority areas that must be addressed to eliminate extreme poverty” (para. 80). The MDGs were established through consultation among members of the United Nations Secretariat and representatives of IMF, OECD and the World Bank. The group discussed the respective targets and selected relevant indicators with a view to developing a comprehensive set of indicators for the goals (Appendix to the Report).

³² During the negotiation of the World Summit Outcome, the US voiced strong opposition to inclusion of reference to the MDGs in the document. In September 2005 Assistant Secretary of State K. Silverberg clarified the US position in an interview stating that the United States continues to “strongly support” the goals it agreed to in the Millennium Declaration, such as reducing world poverty by half by 2015 and reducing instances of HIV/AIDS. “Sometimes people use [the term] MDGs to mean other things, in particular of a list of targets and indicators that were in a document the [UN] secretariat produced” following the Millennium Declaration, Silverberg said. “The United States did not negotiate that document or agree to it and neither did many other states. It is solely a document of the secretariat. Confusion about the U.S. stance on the MDGs was a result of erroneous reports presented by some media about the meaning of the term ‘Millennium Development Goals’. The outcome document clarifies the term MDGs, which means goals in the Millennium Declaration.” (<http://usinfo.state.gov/is/Archive/2005/Sep/16-778624.html>).

– more generally – (all) the development goals in the specific formulation states subscribed to in the Millennium Declaration.³³

UN resolutions, while soft, may still possess considerable legal and political authority, to the extent that they often represent widely held expectations that affect in a variety of ways the actual behavior of economic and political actors. Even apart from an eventual transformation of their status into binding rules,³⁴ ‘soft law’ standards may serve to lend increased legitimacy on actions and rules that conform to them. Nonetheless the Millennium Declaration commitments and the derivative MDGs remain very far from “Black Letter” law. The question then arises: do they in fact amount to a ‘dead letter’?

If one were to look only at the actual immediate impact on trade negotiations the answer would probably incline towards the affirmative, but if attention is paid for instance to the controversy that preceded the 2005 World Summit and the protracted and arduous negotiation of the Outcome document,³⁵ the reply would probably need to be more nuanced. Viewed from a broad realist perspective, it would be easy to dismiss negotiations of the kind of the Millennium Declaration or the World Summit Outcome as either exercises in futility or at best self-serving efforts in boosting reputation. However, while the issue of reputation is certainly important in international relations, ‘soft’ commitments seem to matter beyond that. Even international formally non-binding commitments exhibit an autonomous ‘compliance pull’, whereby states feel compelled to respect them even when, from a utilitarian perspective, they have an incentive to break them and free-ride.³⁶

The strength of the compliance pull is linked to the extent to which specific rules and regimes are regarded as legitimate. Following Franck, legitimacy, which can be defined

³³ The Summit Outcome, cit., indeed states: “We strongly reiterate our determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including those agreed at the Millennium Summit that are described as the Millennium Development Goals, which have helped to galvanize efforts towards poverty eradication” (para 17).

³⁴ “Even when they are framed as general principles, [UN General Assembly] resolutions ... provide a basis for the progressive development of the law and the speedy consolidation of customary rules.” See I. Brownlie, *Principles of Public International Law*, Oxford, 1979, p. 14.

³⁵ In the development area, for instance, the United States specifically requested that reference to the MDGs be substituted by “internationally-agreed development goals” as it wanted, or at least many of its critics so claimed, to make sure that Washington does not commit itself, inter alia, to a timetable on foreign aid. See, for instance, “U.S. Wants Changes In U.N. Agreement”, *The Washington Post*, 25 August 2005.

³⁶ See Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument*, Finnish Lawyers’ Pub. Co., Helsinki, 1989, chapter 1.

as the quality of prescriptions making states abide by them voluntarily,³⁷ is dependent on a number of dimensions related to textual clarity and validation through adherence to the “standards that define how rules are to be made, interpreted, and applied”.³⁸ But even more importantly, legitimacy derives from ‘coherence’. “Rules to be perceived as coherent must emanate from principles of general application”.³⁹ Thus, the degree legitimacy depends in large part on the “connectedness between rules united by underlying principles ... manifest[ing] the existence of an underlying rule-skein which connects disparate ad hoc arrangements into a network of rules ‘governing’ a community of states, the members of which perceive the coherent rule system’s powerful pull towards voluntary compliance”.⁴⁰ It is this link between rules and higher-order principles that leads states to comply, in good measure, with the rules, even when their contingent interests would indicate a different course of action. This respect for the fundamental structure of the international society and of its legitimate rules creates a sense of community, which in turns leads to a tendency to disapprove of and often sanction free-riding.⁴¹ Among the higher order principles, there are certainly those that derive from a shared sense of justice. These lend a particular compliance pull to the bodies of rules linked to them, such as human rights and environmental rules. As Hurrell put it: “rules and norms of this kind do not develop as a result of a distinct interplay of states interests or because of the functional benefits which they provide. Rather they depend on the common moral awareness that works directly, if still in fragile and uneven ways, on the minds and emotions of individuals within states”.⁴² Ideas about equity and justice are

³⁷ At a general level, Franck defines legitimacy as “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively”. See Thomas Franck, *The Power of Legitimacy among Nations*, 1990, Oxford University Press, p. 16.

³⁸ Id., p. 184.

³⁹ Id., p. 152.

⁴⁰ Id., p. 181.

⁴¹ This is consonant with Hedley Bull’s understanding of the international society: “A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another and share in the workings of common institutions”. See H. Bull, *The Anarchical Society: A Study of Order in World Politics*, London, 1977, p. 13.

⁴² See A. Hurrell, “International society and the Study of Regimes. A reflective Approach”, in Volker Rittberger (with the assistance of Peter Mayer), ed., *Regime Theory and International Relations*, Clarendon Press, Oxford, 1993, pp. 65-66.

thus particularly important because they facilitate cooperation and greatly add to the stability and workability of social arrangements.⁴³

Indeed states, in their cooperative relationships and particularly in institutionalised relationships, rely on discourses⁴⁴ in order to arrive at a common understanding of the required behavior in any given social situation. In the area of international economic relations in which the use of force has lost much of its relevance and the identification of national interests is already increasingly difficult due to globalization and interdependence, discourse and persuasion become important instruments of state action coordination. Divergent interpretations and applications of rules are bound to arise in a dynamic, ever-changing, international environment where regimes' rules cannot aspire to cover all possible contingencies. This would make rule-governed cooperation impossible in the absence of communicative action by states aimed at inducing behaviour consistent with shared interpretations and legitimate, patterned expectations of other community members.⁴⁵ In their discourses, states argue for a preferred course of action, and they do so in the context of a rule-governed situation, in terms of the legitimacy of their position. Their arguments are more convincing, and their positions more acceptable, the more they are grounded in general principles and shared understandings -- or, in other words, the more legitimate they are perceived. Higher-order constitutive principles, such as fairness, reciprocity, equity, and respect for sovereignty and promises lend that legitimacy.⁴⁶

⁴³ Ultimately, "legal claims are legitimate and persuasive only if they are rooted in reasoned argument that ... attends to the contemporary social aspirations and the larger moral fabric of society". See M. Finnemore and S. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics", *International Organization*, vol. 54, no. 3, Summer 2000, p. 749.

⁴⁴ A discourse in this context is "a debate conducted by members of a community aiming at establishing or re-establishing a consensus on common norms of conduct as well as on their interpretation and proper application in concrete situations". See Hasenclever, A., P. Mayer and V. Rittberger, *Theories of International Regimes*, Cambridge University Press, Cambridge, 1997, 176.

⁴⁵ See Kratochwil, F., *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, Cambridge, 1989, and Kratochwil and Ruggie, Kratochwil F. and J. G. Ruggie, "International Organization: A State of the Art on an Art of the State", *International Organization*, vol. 40, 1986, pp. 753-75. At the same time, it also important to emphasise that international regimes are not cast in stone but are "the product of an on-going process of community self-interpretation and self-definition in response to changing context". See Mark Neufield, "Interpretation and the 'Science' of International Relations", in *Review of International Studies*, vol. 19, n. 5, 1993, p. 55.

⁴⁶ In trade negotiations it is apparent that despite the meagre results so far, the overall discourse is now characterised by the development perspective introduced by the Millennium and Doha Declarations. Regardless of their

However, while it is true that states often make only rhetorical reference to principles to conceal their interests and amply use coercion and bargaining, it is also true that most of the time they engage in serious discourse in order to justify their actions and do so out of the ‘sense of obligation’ they perceive. This stresses the important role of moral ideas in international relations, in particular because of the constitutive function these ideas fulfil for the international society, but also in the light of the role they play in shaping the identity of states, their conception of the self as it relates to other actors.⁴⁷ The self-understanding of states and their behavior is an intersubjective and iterative process, which is much influenced by ideas, rules, and institutions. It is in this sense that ‘soft’ commitments such as those of the Millennium Declaration ‘mean’ something. They are (or at least they ought to be) indicative of the emerging of ‘shared understandings’ and expectations among states. And as such they do matter in the process of international policy- and rule-making.

4. WHAT IS AN EQUITABLE TRADING SYSTEM?

Hence, if one were to agree that the Millennium Declaration and the World Summit Outcome commitments do have meaning and that states actually mean what they declare - namely that these statements are more than mere opportunistic public relations efforts⁴⁸ and create behavioral expectations -, then the enquiry on the actual meaning of the call to make the trading system “equitable” acquires salience. In the words of the Millennium Declaration, UN Member States “are committed to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system.” In the words of the World Summit Outcome they are committed to “governance, equity and transparency in the financial, monetary and trading systems.”⁴⁹ What do these statements mean? Or, *rectius*, what do states uttering them mean?

“Equity” is a difficult notion to define in theory. It belongs to a family of concepts, including also equality, fairness and justice, which may mean different things depending on the particular political philosophy approach chosen. Moving from theory to state practice, the latter is, unfortunately, not very helpful in discerning what an equitable

underlying interests, trade negotiators and other interested parties are now far more likely to couch their proposals, rhetorically some would say, in terms of the likely benefits or harms to developing countries.

⁴⁷ “Identification is a continuum along which actors normally fall between the extremes, motivated by both egoistic and solidaristic loyalties.” See Alexander Wendt, “Collective Identity Formation and the International State”, *American Political Science Review*, 1994, vol. 88, p. 387.

⁴⁸ This type of state behavior meant to build image is in a way not too dissimilar to that of companies which try to enhance their corporate identity through instruments such as Cause Related Marketing campaigns aimed at eliciting favorable consumer responses as a result of the company’s support of a socially responsible cause.

⁴⁹ Para. 13 and 36 respectively.

trading system would look like. Sadly, it would be more useful in describing what an inequitable system is. Furthermore, equity is hardly present in the vernacular of trade policy-makers and negotiators. Hence, it remains difficult to determine what states mean when they emphatically commit to the promotion of equity in the trading system.

On the other hand, the strong emphasis (albeit, at least, partly rhetorical) on the requirements of development and poverty reduction in the current international trade policy discourse authorizes to use such perspective as starting point for analysis. The hypothesis thus would be: “an equitable trading system is one that is conducive to development and poverty reduction”. While this approach may not be immune from criticism from a theoretical (it may be more correct to try and link equity of the trading system directly to the achievement of distributive justice), as well as from a practical perspective (it is not easier to define ‘development’ than ‘equity’ or ‘distributive justice’), still it appears useful on two accounts. First, the emphasis on development in the current Round of trade negotiations seems to have been internalized by policy-makers and negotiators; and second, the treatment of development in the Millennium Declaration and other international documents in particular, as well as the broad development discourse in general, appear more hospitable to an elaboration of the notion of equity than the traditional and somewhat stifled economism common to the trade policy discourse.

In this context, there is one syllogism that needs to be put aside from the start. That is to assume that a liberal trading system is conducive (via economic growth) to development and poverty reduction. Hence, a liberal trading system *is* an equitable trading system; Trade liberalization is *per se* equitable. Regardless of whether the causal chain -- liberalization-growth-development -- is empirically true and under what circumstances, this perspective (quite common among orthodox economists and market libertarians) would render the whole debate about ‘equity’ in the trading system moot. The trading system remains inequitable, it is argued, because it is still not fully liberalized. However, such claim can only be sustained by positing the free market as the *true* and *only* just distributive mechanism.⁵⁰ This approach has helped to legitimize trade liberalization as one of the main tenets of the economic policy framework commonly referred to as the “Washington Consensus”, which has informed (some would say constrained) the policy choices of many developing countries since the 1980s. As a result trade liberalization itself has progressively even acquired, in the eyes of many, a sort of intrinsic (as opposed to instrumental) value.⁵¹

⁵⁰ This is hardly surprising as virtually all trade economists, lawyer and policy-makers are socialized in an orthodox, neo-classic and technocratic approach.

⁵¹ This is often reflected in trade policy-makers statements. See, for instance, P. Lamy, “Towards Global Governance?”, lecture given at the Institut d’Etudes Politiques de Paris, 21 October 2005, openly stating that: “The basic

However, in the face of increasing (or much too slowly declining) poverty and inequality, there is a growing awareness that tackling their root causes requires a broader treatment than orthodox economists generally admit. In particular, trade liberalization, while usefully increasing economic efficiency, does not *necessarily* promote the well-being of *all* participants in international commerce and lead to equitable results. Hence, trade liberalization is not an end but only a means. This re-evaluation owes much to the emergence of alternative development discourses, such as UNDP's "human development" framework⁵² and Amartya Sen's "capabilities" approach. Human development has come to be defined as an enhancement of capabilities, a widening of choices, and an expansion of freedoms. "Focusing on human freedoms contrasts with the narrower view of development, such as identifying development with the growth of gross national product, or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization."⁵³ The focus of development ought to be on the *ends*, namely, on *people* and their quality of life. Increases in income (through trade liberalization or otherwise) are important as a means, not as a goal of development.

Many economists, influenced by these lines of research, are now also reconsidering trade liberalization in terms of its social impacts.⁵⁴ The emerging consensus is that public goods, including key public services, which benefit everyone in society and are often available through public systems, are essential for poverty eradication. Orthodox economists champion the idea that the market, as much as possible, should supply food, water, medicine and employment. However, everyone benefits from the public provision of clean water or cheap energy and transport and meeting basic needs of this kind is crucial to the process of human development. While market orthodoxy remains strong, there is a growing attention being paid to the need to reach an appropriate balance between public and private action and to the importance not to entrust human well-being and poverty eradication exclusively to market forces. At least public intervention remains necessary in the form of the establishment of appropriate regulatory frameworks within which to allow the provision of public goods by private entities.

A clear example of these complexities can be found in the area of services trade liberalization. Eradication of extreme poverty and hunger is a key objective of the Millennium Declaration, where trade in services could play an important role. Most service sectors are typically dual in nature: in addition to the purely commercial side, they are

value underpinning the WTO is that market opening is good."

⁵² UNDP, Human Development Report 2003, at 27-29 (2003).

⁵³ Sen, Amartya (1999) *Development as Freedom*. New York: Knopf.

⁵⁴ On the relations between trade and human development see, most recently, UNDP, *Asia-Pacific Human Development Report 2006: Trade on Human Terms*, Macmillan, 2006.

important in their social, cultural, welfare-enhancing dimensions. Translating an increase in services trade into poverty alleviation is not an automatic process. It depends largely on government policies aimed at promoting domestic employment at lower skill levels (e.g. in tourism and construction), fostering the movement of people across borders (e.g. health and construction services providers), ensuring availability and accessibility of essential services to the poor (e.g. in health and education), and investments in the building of efficient and accessible infrastructure services (e.g. telecommunications, transportation, financial, water and sanitation). Services trade liberalization alone is unable to deliver, *ipso facto*, poverty alleviation.

From an institutional perspective, the increasing global acceptance of the Millennium Declaration's objectives and the related MDGs represents a major commitment by the international community to eliminate poverty and accelerate human development. Encouragingly, there seems to be a growing awareness that a world in which about 15 percent of humankind living in 'high-income economies' have over 80 percent of global income, while the rest 85 percent of humankind share the remaining about 20 percent is unjust and unsustainable.⁵⁵

And, importantly, the international community seems to be conscious of "the role that the design of the *global* institutional order plays in the persistence of severe poverty".⁵⁶ Such collective responsibility has been recognized in the clearest terms in the 2000 UN Millennium Declaration, which states that "the central challenge we [the UN member states] face today is to ensure that globalization becomes a positive force for all of the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed". In this respect, the value of 'solidarity' is recognised as "essential to international relations in the twenty-first century". Solidarity requires that "global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most".⁵⁷

⁵⁵ See World Bank, *World Development Report 2003*, Oxford University Press, New York, 2002, p. 235. Inequalities in wealth are significantly greater than inequalities in income. "The additional cost of achieving and maintaining universal access to basic education for all, basic health care for all, reproductive health care for all women, adequate food for all and safe water and sanitation for all is ... less than 4% of the combined wealth of the 225 richest people in the world". See UNDP, *Human Development Report 1998*, Oxford University Press, New York, 1998, p. 30.

⁵⁶ See Thomas Pogge, "World Poverty and Human Rights", *Ethics and International Affairs*, vol. 19, no. 1, 2005, pp. 5-6.

⁵⁷ United Nations Millennium Declaration, cit., para. 5-6.

In discussing the need to address “the abject and dehumanizing conditions of extreme poverty, to which more than a billion [people] are currently subjected,” the Millennium Declaration stressed the commitment “to create an environment - at the national and global levels alike - which is conducive to development and to the elimination of poverty”. And an “open, equitable, rule-based, predictable and non-discriminatory” multilateral trading system⁵⁸ (as operationalized by MDG 8: “Develop a global partnership for development”) is seen as playing a key role in this context.⁵⁹

The pledge of WTO members at Doha in 2001 to prioritize developing country needs and interests in the implementation of the Uruguay Round agreements and new trade negotiations needs to be understood in this broader context. Less than a year after Doha, the international community convened again for the International Conference on Financing for Development in Monterrey. The Monterrey Consensus adopted at the conference confirmed that the international community would give priority to “mobilizing and increasing the effective use of financial resources and achieving the national and international economic conditions needed to fulfil internationally agreed development goals, including those contained in the Millennium Declaration, to eliminate poverty, improve social conditions and raise living standards, and protect our environment.”⁶⁰

The consensus reached in the Conference emphasizes at the outset that while each country has primary responsibility for its own economic and social development, national efforts need to be supported by an enabling international economic environment. Under the emerging framework, both developing and developed countries are to provide the necessary means to attack poverty. On their part, developing countries are required to mobilize resources for sustainable pro-poor growth, formulate sound macroeconomic policies, promote a good investment climate, design and implement effective and coherent poverty reduction strategies, and provide a voice to the poor - all with “sound policies, good governance at all levels and the rule of law.”⁶¹ In return, rich countries must be willing to provide an enabling environment for development, enhance market access (including through phasing out of agricultural subsidies), support the flow of private capital to the developing countries⁶², accelerate effective debt relief, and provide a substantial increase and sustainability in development assistance.

⁵⁸ Id., para. 11-3.

⁵⁹ Disturbingly in the formulation of Target 12 associated with MDG 8 (see note 10, supra) the word “equitable” disappeared. It is to be hoped that it was a typographical error more than a Freudian slip.

⁶⁰ Report of the International Conference on Financing for Development, cit., ch. 1, para. 3, p. 2.

⁶¹ Id., para. 4.

⁶² The importance attached to private investment for development casts doubt on the wisdom to insist on the jettisoning of investment issues in the context of the Doha Round.

The Monterrey Consensus also reaffirmed UN members' commitment to trade liberalization, but noted that developing countries need "appropriate institutions and policies" to benefit fully from trade, and welcomed the emphasis in the Doha Development Agenda on giving priority to developing countries' needs and interests.⁶³ Hence, the Monterrey Consensus can be interpreted as embodying a further step in the attempt to establish a new framework of mutual commitments and accountability between developed and developing countries.⁶⁴ Finally the 2005 UN World Summit Outcome reiterates that "A universal, rule-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development worldwide, benefiting countries at all stages of development."⁶⁵ In all cases the primacy of development and poverty reduction and the *instrumental* character of trade liberalization were stressed.

It is against this background that one needs to understand what an "equitable" trading system means (or ought to mean) in the context of the pursuit of the Millennium objectives. However, as designed and as it has developed since its inception, the trading system, with its enduring focus on reciprocal bargaining, does not seem able - within its current design and remit - to guarantee equity and true solidarity.⁶⁶ The system does promote fairness (as commutative market-based justice), hence contributing to economic efficiency (enlarging the proverbial pie), but it should also contribute to the achievement of distributive justice (through an equitable sharing of such pie), by electing to foster equitable development as one of its key objectives. Reciprocity would need to be considered a second-order value and be subjected to equity and solidarity.⁶⁷

For instance, solidarity, one of the key values of the Millennium Declaration, should not be confined to relatively minor exceptions to the rules, such as special and differential treatment for developing countries and limited safeguards measures reserved for

⁶³ Id., paras. 26-7.

⁶⁴ Id., para 1.

⁶⁵ United Nations General Assembly document A/60/L.1 of 20 September 2005, para. 27.

⁶⁶ Even one of the much touted features of the WTO as a ruled-based system: equality before the law, loses some of its meaning in the light of existing power and economic asymmetries, which make redress often de facto unavailable for the poorer WTO members.

⁶⁷ "Solidarity is neither charity nor welfare; it is an agreement among formal equals that will all refrain from actions that would significantly interfere with the realization of common goals and fundamental interests. Solidarity requires an understanding that every member of the community must consciously and constantly conceive of its own interests as being inextricable from the interests of the whole". See R. St. J. Macdonald, "The Principle of Solidarity in Public International Law", in C. Dominicé et al., eds, *Études de Droit International en l'honneur de Pierre Lalive*, Helbing and Lichtenhahn, Basle, 1993, p. 293.

domestic producers that may be injured because of import liberalisation. Solidarity and equity truly need to be elevated as fundamental values on which to base policy- and rule-making for development, which is an interest shared by the entire international community.⁶⁸ Indeed, “by asserting the common good ... the majority of States have set in train a process in which the emphasis is placed on whatever may be expected to contribute to reducing the de facto inequalities between States and to promote greater heed for the long-term interests of the globe”.⁶⁹ However, as noted in section 2, a wide gap remains between the vision, as expressed in the Millennium Declaration and other statements, and the practice of trade negotiations.

The multilateral trade regime is fully part of the global economic governance system and as such cannot escape from the ‘requirements of justice’.⁷⁰ The regime can no longer simply aim at ensuring non-discrimination and reciprocity as a way of eliminating trade barriers, which distort the functioning of markets, and hope that this ‘fair’ approach will also produce ‘equitable’ results. While the current Round of multilateral trade negotiations may deliver some advances in terms of redressing existing imbalances in the distribution of benefits and costs, be that in the area of market access or farm subsidies, a deeper rethinking and reordering of priorities is required if a true ‘equitable’ trading system, as called for by the Millennium Declaration, is to be achieved.

The key question thus remains whether commutative and distributive justice, fairness and equity, can be jointly sought or whether their respective meanings are intrinsically different – or worse, incompatible – thus preventing any common pursuit. In the face of growing inequality across nations, many developing countries and emerging transnational civil society groups have been increasingly assigning part of the blame for this predicament to the free market approach under which the trade regime mainly operates. The continuing difficulties in the current round of WTO trade negotiations (as well as its arduous preparatory phase) can be partly ascribed to this lack of consensus on what a ‘fair’ and ‘equitable’ regime is, and how it should operate. Indeed, a modicum of consensus on these notions remains a key factor in the continuing legitimacy of the trade (and virtually any) regime and its satisfactory working.

⁶⁸ On the notion of community interest, see Bruno Simma, "From Bilateralism to Community Interest in International Law", *Collected Courses of the Hague Academy of International Law*, 1994, p. 229 et seq.

⁶⁹ Mohammed Bedjaoui, “General Introduction”, in Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects*, Martinus Nijhoff Publishers, Dordrecht, 1991, p. 14.

⁷⁰ “The requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place.” See Charles Beitz, *Political Theory and International Relations*, Princeton, 1979, p. 131.

5. APPLYING A RIGHTS-BASED APPROACH TO THE TRADE SYSTEM

A promising avenue may be to adopt a rights-based approach to distributive justice and development, building upon the wide acceptance that human rights have received in the post World War II period.⁷¹ Justice can be understood as “the system of entitlements on the basis of which people can demand social recognition of their legitimate claims (e.g. for resources, freedoms, etc.)”,⁷² and human rights can be considered minimum, necessary expressions of these entitlements. Indeed, most human needs have been framed in modern times as legitimate rights to which people can aspire, and which governments have an obligation to respect and provide for.⁷³ Hence, in the trade area, generally recognized economic and social rights, from the right to food to the right to health,⁷⁴ could provide a benchmark of what people can claim as a matter of justice. Steps in the direction of fulfilling such rights for all would mean moving closer to the realization of distributive justice. These steps would also need to include the necessary reform of international regimes that affect the realization such rights. Indeed already the 1948 Universal Declaration of Human Rights stipulated that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.⁷⁵

Such a rights-based approach would obviously represent a radical discontinuity with the past practice and can easily be marked as utopian if not meaningless. Even the full realization of a substantial 'development package' as described in section 2, arguably an important step in the creation of a more just international trade system, would remain in the fold of existing WTO state-centred practice. However, the current protracted difficulties in the WTO (as well as in other trade talks), both at the level of negotiations and of its dwindling popular consensus base,⁷⁶ call for a deeper reflection on the foundational basis of the system.

Despite the growing attention paid in the North to the issues of inequality and poverty, pursuing a rights-based justice discourse in the WTO would certainly be challeng-

⁷¹ This, obviously, without underestimating the continuing controversies over the scope and interpretation of economic and social rights in particular.

⁷² See Will Kymlicka, *Liberalism, Community, and Culture*, Clarendon Press, Oxford, 1989, p. 234.

⁷³ See Johan Galtung, *Human Rights in Another Key*, Polity Press, Oxford, UK, 1994.

⁷⁴ See Ana Gonzalez-Pelaez, *Human Rights and World Trade: Hunger in International Society*, Routledge, London, 2005.

⁷⁵ See UN General Assembly resolution 217 A (III), 10 December 1948, art. 28.

⁷⁶ In various respects similar difficulties are experienced in another economic integration project, the EU where the people when asked in recent national referenda have expressed a significant opposition to both the method of rule-making and the substance of the proposed rules, generally referred to with the short-hand term 'neo-liberal'.

ing. The trade regime still remains solidly steeped in its traditional, narrow market-based fairness approach, notwithstanding the (limited) concessions to the notion of special and differential treatment for developing countries. Its guiding star remains reciprocity not solidarity. Furthermore any (limited) attempt to cater for the needs of the less well-offs is always conceived in terms of the respective situation of *states*: developed on one side and developing and least developed on the other. What happens to actual people who are involved in - or affected by - international trade is generally left to individual states to take care of. Even the main, albeit limited and largely ineffective, attempt at redistributing income by means of lower, preferential tariffs (such as the GSP scheme)⁷⁷ remains in the general fold of traditional GATT and now WTO law, with its focus on the (legal) treatment of products, and really does not aim at directly modifying the ‘treatment’ poor producers, men and women, receive. Moving in this direction would considerably affect the commitments countries should demand and undertake and the way rules are designed.

One possible gateway for introducing this type of discourse could be the concept of sustainable development,⁷⁸ which entails – in its wider understanding – a commitment to both human development and the fulfilment of basic human rights. Human development embodies a concept of development that goes beyond economic growth to include the development of the human person as a main outcome. In this context, equity needs to be considered with respect to wellbeing, a significantly broadened concept with respect to ‘welfare’, as generally understood in the utilitarian and welfare economics tradition. “The idea of human development focuses directly on the progress of human lives and wellbeing. Since wellbeing includes living with substantial freedoms, human development is also integrally connected with enhancing certain capabilities – the range of things a person can do and be in leading a life”.⁷⁹

Hence, development is not only the acquisition of more goods and services, but also the enhanced freedom to choose, or the capability to lead the kind of life one values.⁸⁰

⁷⁷ A full recast of preferential market access would be an important step in achieving redistribution and inter-state justice along Rawlsian lines, see F. Garcia, "Developing a Normative Critique of International Trade Law: Special and Differential Treatment", mimeo, 2006.

⁷⁸ The concept of sustainable development despite its currency in the past two decades is not entirely settled. See for a recent review, D. Victor, "Recovering Sustainable Development", *Foreign Affairs*, Jan./Feb. 2006, pp. 91-103.

⁷⁹ See UNDP, *Human Development Report*, New York, 2000, p. 19.

⁸⁰ Capabilities are thus the substantive freedom to achieve alternative ‘functionings’ combinations. Indeed, “living may be seen as consisting of a set of interrelated ‘functionings’, consisting of beings and doings. A person’s achievement in this respect can be seen as the vector of her functionings. The relevant functionings can vary from such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity, and

On the other side, poverty is the deprivation of basic capabilities, not just lowness of income.⁸¹ Although income inequality is of crucial importance, it does not exhaust all deprivations that lead to poverty, including unemployment, ill health, lack of education, and social exclusion. Hence, the emphasis needs to be placed on the broader notion of social and economic (not just income) equality and freedom. Indeed, not always and automatically does income growth translate into individual achievements (‘capabilities to function’ or ‘functionings’) in terms of wellbeing and substantive freedoms.

The approach focused on capabilities thus broadens the understanding of development to include both human wellbeing and freedom, which means widening the choices people enjoy in the political, civil, social, economic, and cultural spheres. As such, “human development shares a common vision with human rights. The goal is human freedom. And in pursuing capabilities and realizing rights, this freedom is vital. People must be free to exercise their choices and to participate in decision-making that affects their lives. Human development and human rights are mutually reinforcing, helping to secure the wellbeing and dignity of all people, building self-respect and the respect of others”.⁸² Furthermore, “if human development focuses on the enhancement of the capabilities and freedoms that the members of a community enjoy, human rights represent the claims that individuals have on the conduct of individual and collective agents and on the design of social arrangements to facilitate or secure these capabilities and freedoms”.⁸³

The body of rules that govern international trade represents one important example of such social arrangements. These rules need to be designed and interpreted with the ultimate goal of enhancing sustainable human development and human rights. Indeed, “economic growth, increased international trade and investment, technological advance – all are very important. But they are means, not ends. Whether they contribute to human development in the 21st century will depend on whether they expand people’s choices, whether they help create an environment for people to develop their full potential and lead productive, creative lives”.⁸⁴ This would require that states clearly accept as a matter of law the primacy of human rights obligations over other sources of international law, including international trade and economic law; and as a matter of policy (and

premature mortality, etc. to more complex achievements, such as being happy, having self-respect, taking part in the life of the community and so on”. See A. Sen, *Inequality Reexamined*, Oxford, Oxford University Press, 1992.

⁸¹ See A. Sen, *Development as Freedom*, New York, 2001, in particular chapter 4.

⁸² See *Human Development Report*, New York, 2000, p. 9.

⁸³ *Id.*, p. 20.

⁸⁴ See *Human Development Report*, New York, 2002, p. 13.

negotiating stance), that states act, implementing existing rules and commitments and establishing new ones, with a view to protecting, respecting and fulfilling human rights and promoting sustainable human development. This may also require a paradigm shift in trade negotiation, from a reciprocity-based, contract-making *modus operandi*, to a governance-minded, law-making one, where countries accept that shared interests have primacy over national preoccupations.

While human rights as such are not mentioned anywhere in WTO law,⁸⁵ the notion of development has acquired a certain pre-eminence. The Preamble of the Marrakesh Agreement establishing the WTO, in its opening paragraph, recognises that international economic and trade relations should have among their objectives both the ‘raising of standards of living’ and ‘sustainable development’. And the preamble contributes to delineating the context within which the interpretation of specific provisions must be conducted, in the light of the instrument’s objectives.⁸⁶ In this way, these references establish a textual bridge between the pursuit of both human development – which needs to be inclusive of human rights – and WTO law. The reference to standards of living, which was already present in the 1947 Preamble of the GATT, stresses one of the key capabilities necessary for human development.⁸⁷ The inclusion of the objective

⁸⁵ However, there seems to be little doubt that, as a matter of treaty interpretation, WTO law needs to be read and applied consistently with the human rights obligations of WTO Members. This is obviously particularly important when interpreting the existing exceptions in WTO agreements. See for instance, S. Charnovitz, “The moral Exception in Trade Policy”, *Virginia Journal of International Law*, Vol. 38, 1998, p. 689-745; R. Howse and M. Matua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, Rights and Democracy, Montreal, 2000; G. Marceau, “WTO Dispute Settlement and Human Rights”, *European Journal of International Law*, Vol. 13, No. 4, 2002, pp. 753-814; E.-U. Petersmann, “Human Rights and the Law of the World Trade Organization”, *Journal of World Trade*, April 2003, pp. 241-281; P. Mavroidis, “Human Rights, developing countries and the WTO constraint: the very thing that makes you rich makes me poor?”, in E. Benvenisti and M. Hirsh, eds., *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge University Press, Cambridge, 2004, pp. 244-260; S. Leader, “Trade and Human Rights”, in P. Macrory, A. Appleton and M. Plummer, eds., *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. I, Springer, New York, 2005, pp. 663-696.

⁸⁶ In this respect, the Vienna Convention on the Law of Treaties, 1969, United Nations Doc. A/CONF.39/27, at Art. 31 states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The text of the treaty itself, “including its preamble and annexes” constitutes an important “context” for treaty interpretation as well as an expression of the treaty’s objectives.

⁸⁷ For instance, the UNDP Human Development Index measures the average achievements in a country on three basic dimensions of human development: a long and healthy life, knowledge, and a decent standard of living.

of sustainable development, which was added at the inception of the WTO in 1994, aligns this organization with the goals that the international community has set for itself on numerous occasions and restated, most recently, in the Millennium Declaration and the World Summit Outcome.

Sustainable development and human development are by no means incompatible or alternative concepts. On the contrary, the two are mutually supportive and are sometimes made to converge in the notion of ‘sustainable human development’.⁸⁸ Furthermore, with the adoption of the Declaration on the Right to Development, ‘development’ itself has been characterized as a human right.⁸⁹ This Declaration advances a number of important normative claims. First, it defines development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”.⁹⁰ Second, it declares that the right to development is a human right “by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.

Hence the Declaration on the Right to Development, as confirmed by the 1993 Vienna Declaration,⁹¹ and again most recently by the Millennium Declaration, could be argued to represent an emerging consensus within the international community that the

⁸⁸ “Sustainable human development seeks to expand choices for all people – women, men and children, current and future generations – while protecting the natural systems on which all life depends. Moving away from a narrow, economy-centred approach to development, sustainable human development places people at the core, and views humans as both a means and an end of development. Thus sustainable human development aims to eliminate poverty, promote human dignity and rights, and provide equitable opportunities for all through good governance, thereby promoting the realization of all human rights – economic, social, cultural, civil and political”. See “Integrating human rights with sustainable human development. A UNDP policy document”, UNDP, mimeo, New York, 1998, p. 5. See also J. Bertram-Nothnagel, “The Mutual Feedback between Sustainable Development and Human Rights: Adding Responsibility as a Catalyst”, in Roy Lee, *Swords Into Plowshares: Building Peace Through the United Nations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 33-71.

⁸⁹ Declaration on the Right to Development, General Assembly Resolution 4/128, 4 December 1986.

⁹⁰ Ibid., Preamble. See also Art 2.

⁹¹ Vienna Declaration and Programme of Action, adopted by consensus at the UN World Conference on Human Rights on June 25, 1993. See also the Copenhagen Declaration on Social Development, in Report of the UN World Summit for Social Development, UN doc A/CONF.166/9, 1995 stating that development must incorporate democracy, social justice, economic development, environmental protection, transparent and accountable governance, and universal respect for human rights.

realization of human rights is an integral part of the process of development.⁹² This fuller notion of development also binds (or at least ought to bind) states in their international economic and trade relations. The reference to the pursuit of the objective of development in the Preamble of the Marrakesh Agreement seems to point in the same direction. While the link with human rights norms has never been tested in WTO dispute settlement proceedings, the Appellate Body “has shown itself as sensitive to the range of normative sources in international law and policy relevant to the elaboration of meanings of trade rules ...[and] is *in principle* open to interconnectedness in the interpretation of ‘development’”.⁹³

Moreover, as a human right, the right to development “confers unequivocal obligation on duty-holders: individuals in the community, states at the national level, and states at the international level. National states have the responsibility to help realize the process of development through appropriate development policies. Other states and international agencies have the obligation to cooperate with the national states to facilitate the realization of the process of development”.⁹⁴ The duty to cooperate, to assist developing countries as a matter of solidarity, and the commitment to promote human development and the realization of human rights for all, from poor farmers in Africa, to women garment producers in Asia, to mine workers in Latin America (as well as their families and communities), constitutes the real ‘equity’ challenge for the trading system of the 21st century.⁹⁵ All states, and the international institutions they establish, have a specific responsibility in this respect.⁹⁶

However, the enduring debate over the balancing of freedom rights linked to the efficient operation of the market system and social, economic and developmental rights

⁹² In spite of the Declaration, the characterization of the ‘right to development’ as a human right remains controversial. See, for instance, L. Henkin, *International Law: Politics and Values*, op. cit., p. 181.

⁹³ See UN Economic and Social Council, Commission on Human Rights, “Mainstreaming the right to development into international trade law and policy at the WTO”, (report prepared by R. Howse), UN doc. E/CN.4/Sub.2/2004/17, para. 21. See also C. Wilkie, “Enhancing Global Governance: Corporate Social Responsibility and the International Trade and Investment Framework”, in J. Kirton and M. Trebilcock, eds. *Hard Choices, Soft Law – Voluntary Standards and Global Trade, Environment and Social Governance*, Ashgate (2004); see esp. pp. 288-290; 301-306.

⁹⁴ See A. Sengupta, “The Right to Development as a Human Right,” François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, mimeo, 2000, p. 5.

⁹⁵ While the emphasis in this paper is on people in the developing world, similar arguments would apply for instance to unemployed and dislocated workers, negatively affected by trade liberalization.

⁹⁶ See M. Green, “Institutional Responsibility for Moral Problems”, *Philosophical Topics*, Fall 2002, vol. 30, no. 2, pp. 1-28.

required to ensure an acceptable degree of equity remains unresolved. While the appeal to solidarity, equity and shared responsibility in the Millennium Declaration are important steps forward, much remains to be done to achieve a “shared understanding” of these notions and commitments. Unlike other Millennium Declaration commitments and the derivative MDGs, the call for equity has not become a major feature of the global trade and development discourse, policy- and rule-making. Hence, even more remains to be done in order to spell out the meaning of equity in the trading system and to translate that into actual negotiations and rule-making, as the troubled unfolding of the Doha Round testifies. In this respect it is crucial that all actors and stakeholders participate and contribute to the debates, not only states but also and non-state actors, such as civil society organizations, transnational political entities and epistemic communities. The need to bring politics back into technocratic negotiations and expand the reach of democratic deliberation appears fundamental.⁹⁷

6. CONCLUDING REMARKS

Even if the ability of international trade liberalization and agreements to contribute directly and significantly to the eradication of poverty suffers from a number of limitations, there is little doubt that more can and should be done to ensure that international trade plays its part in the realization of the Millennium Declaration commitments. However, concrete measures taken to date to promote the notion of pro-poor trade liberalization have been of limited effectiveness, and negotiations especially in the Doha Round have registered little progress. In order to advance it would be necessary to move decisively in the direction of opening developed country markets to products, services and workers of developing countries, encouraging and supporting appropriate and paced liberalization and domestic reform efforts in poor countries, increasing their export capacity, while preserving their ability to pursue human development policies. Policy coherence requires that, in parallel to trade liberalization efforts, the supply and institutional constraints of developing countries, and in particular those of LDCs, are addressed and that greater and more adequate forms of adjustment assistance is made available. This could be a meaningful result of the “global partnership for development” as called for by MDG 8.

However, trade liberalization commitments of this kind may not be enough to achieve an ‘equitable’ trading system - as advocated by the international community both in the 2000 Millennium Declaration and again in the 2005 World Summit Outcome

⁹⁷ See R. Howse, "From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime", *The American Journal of Int'l Law*, vol. 96, 2002, pp. 94-117; A. Beviglia Zampetti, "Democratic Legitimacy in the WTO: The Justice Dimension", *The Journal of World Trade*, February 2003, pp. 105-126; S. Charnowitz, "The WTO and Cosmopolitics", *Journal of International Economic Law*, Sept. 2004, pp. 675-682.

– truly able to deliver benefits commensurate to the development needs of all its participants. An ‘equitable’ system cannot but put people with their rights and needs as its focus of attention. This means unequivocally according instrumental value to trade liberalization and intrinsic value and hence priority to sustainable human development. Trade, as other economic activities, is a means, while people’s wellbeing a shared end. On this account the initial definition of the role of equity would need to be modified as follows: “an equitable trading system is one that contributes to sustainable human development and the fulfilment of human rights”.

However, while states have shown signs of a growing convergence on the importance of equity and solidarity, an understanding of this kind would at present muster some support but no consensus. This is even more so as this notion of equity would imply significant institutional reforms, which are certainly beyond the remit of the current Round of negotiations.⁹⁸ Such reforms are complex and more time is necessary to nurture a true shared understanding in the international community on the requirements of an “equitable” trading system. The affirmation of equity within the Millennium Declaration vision is important but it is also far from representing a “shared understanding” of the international community on the way the trading system should be reorganized. However, it is only such an understanding based on cosmopolitan solidarity, as well as human rights values and norms, and not on communitarian national interest, which could finally make the difference when actual commitments and rules are negotiated at the WTO and elsewhere, and could contribute to deliver significant advances towards the realization of the Millennium Declaration objectives. Hence, trade negotiations need to be extricated from the still prevailing mercantilist, short-term, point-scoring mindset so that these can give their contribution to global problem-solving and multilateral governance for the benefit of all. Striving for a shared understanding, through democratic deliberation, of what equity means in the trade system remains crucial in this endeavour.

⁹⁸ In this context the best that can be hoped for is that proposed new commitments and rules would be assessed in detail from a sustainable human development perspective and that adequate policy flexibility is preserved to ensure that poor countries can pursue their specific development strategies. Greater use of Social Impact Assessments should also be made, notably during and before concluding negotiations and before a new member accedes to the WTO.

BIOGRAPHICAL NOTE

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