

Trade and human rights: A perspective for agents of trade policy using a rights-based approach to development

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Summary

International trade is essential for economic growth. It provides opportunities for employment, income, foreign exchange and access to foreign products and technologies. In the process of achieving these gains, the possibility exists for negative and adverse socio-economic effects on groups, individuals and the environment. Presently being debated is the impact of international trade on the environment, health, labour and human rights. Various economic, social and political arguments have been made to resist addressing these issues using the international trade regime. Employing the twin concepts of a rights-based approach to development and sustainable development, this paper argues for these concerns to be made an integral part of international trade law policy design and implementation, at national and international levels. While international trade may lead to economic growth, current studies show that it may not necessarily lead to development. This is especially so if international trade rules and policies fail to focus on the central object of development, which is the human being. Trade rules should have as its ultimate and foremost aim the promotion of human welfare. Consequently, since human rights, health, the environment and labour rights impinge directly on human welfare, they must not be considered in isolation from trade.

1 Introduction

International trade has been responsible for the economic growth of many countries.¹ The period after World War II has witnessed a massive expansion in trade, especially between developed countries. This expansion came after a period of devastating protectionism during the inter-war years.² In recent times, too, Asian countries such as

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¹ The link between trade and growth is not free from doubt. See Y Akyuz *Developing countries and the world trade: Performance and prospects* (2003) 3.

² World Bank *Globalisation growth, and poverty reduction building an inclusive world economy* World Bank Policy Research Report (2002) 23-51.

India, Thailand, China and Malaysia have benefited greatly in terms of economic growth from increased participation in international trade. By contrast, African countries continue to experience a reduction in their share of the volume of international trade and a deterioration in their economic conditions.³ It is estimated that Africa's share of world trade decreased from around 6% in 1980 to around 2% in 2002 and that, unless this trend is reversed, Africa will not be able to meet the Millennium Development Goals.⁴

International trade, currently being pursued under the aegis of the World Trade Organization (WTO), provides employment opportunities, foreign exchange, access to products and services that are otherwise not available, and encourages investment and the transfer of technology. All these are essential for economic growth and development. Notwithstanding these benefits, concerns have been expressed regarding the negative socio-economic effects that trade liberalisation is having on countries. These concerns, chronicled by various international bodies, including the United Nations (UN) Commission on Human Rights as well as individual researchers,⁵ relate to human and labour rights abuses, increased poverty, environmental degradation and deterioration in the health conditions of individuals in these countries.⁶

In spite of the negative impact international trade is having in some developing countries, there has been resistance to the integration of social concerns such as human rights, environmental and health considerations into the WTO framework. Often this resistance has been couched in economic and political terms. Developing countries have been at the forefront of this resistance. Arguments such as the threat to comparative advantage and national sovereignty, the socio-economic cost of

³ UNCTAD *Trade and Development Report* (2004) 3-41.

⁴ *Our common interest*, Report of the Commission for Africa (2005) 248. For a discussion of the goals, see P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755.

⁵ See eg UN Commission on Human Rights 'Globalisation and its impact on the full enjoyment of human rights' E/CN 4/2002/54; 'The impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on human rights' E/CN 4/Sub.2/2001/13; 'Liberalisation of trade in services and human rights' E/CN 4/Sub.2/2002/9; 'Human rights, trade and investment' E/CN 4/Sub.2/2003/9. See also JE Stiglitz *Globalisation and its discontent* (2003) 59; JA Hall 'Human rights and the garment industry in contemporary Cambodia' (2000) 36 *Stanford Journal of International Law* 119; K Kolben 'Trade monitoring and the ILO: Working to improve conditions in Cambodia's garment factories' (2004) 7 *Yale Human Rights and Development Law Journal* 79.

⁶ For a discussion of some specific areas of conflict between human rights and WTO law, see C Dommen 'Raising human rights concerns in the World Trade Organization: Actors, processes and possible strategies' (2002) 24 *Human Rights Quarterly* 13-41.

adjustment, the competence of the WTO, and the appropriateness of using the trade regime to resolve these concerns have been made.⁷

This paper argues for a shift from such arguments of resistance to an acceptance of the importance of these social concerns, using the twin concepts of a rights-based approach to development and sustainable development. It is suggested that whilst international trade and investment may lead to economic growth, unless the relevant actors in the trade arena factor these social concerns into trade policy, it may fail to benefit the ultimate end of development, that is the human being.

2 A rights-based approach

2.1 The rights-based approach, sustainable development and trade policy

Traditionally, development has been conceived of as increasing the gross domestic product (GDP) of a country. Under this conception, the basis and aim of development strategies is the maximisation of GDP. The belief was that such increases in GDP would result in increased wealth and hence the general welfare of the people. This view regarded social and human development as the derived objective of growth and almost always as functions of economic growth. Under this approach to development, the central object of any development effort, that is the human being, is given a subsidiary place in the process of formulating economic policies. Additionally, the impact of economic activity on issues such as the environment and health are considered externalities to be dealt with outside the free market.

This approach to development can be criticised in many respects. First, it fails to focus on human beings as the central object of development. As a result, the rights of individuals are often sacrificed in the effort to develop. This is especially true in some developing countries where many human rights abuses happen in what is seen as a

⁷ Much has been written on this issue. A selected few are: DA Zaheer 'Breaking the deadlock: Why and how developing countries should accept labour standards in the WTO' (2003) 9 *Stanford Journal of Law Business and Finance* 90-92; LA DiMatteo 'The Doha Declaration and beyond: Giving a voice to non-trade concerns within the WTO trade regime' (2003) 36 *Vanderbilt Journal of Transnational Law* 95; K Jones *Who's afraid of the WTO?* (2004) 125-146; M Monshipouri 'Promoting universal human rights: Dilemmas of integrating developing countries' (2001) 4 *Yale Human Rights and Development Law Journal* 52; H Cullen 'The limitation of international trade mechanisms in enforcing human rights: The case of child labour' (1999) 7 *International Journal of Children's Rights* 1.

necessary prelude to development.⁸ Second, economic growth resulting from such development efforts often fails to enrich the lives of people. For example, by prioritising efficiency considerations, it may lead to the uneven distribution of the gains of development, or fail to protect vulnerable groups such as children and women. Third, it may also lead to economic policies that take little account of the environmental impact. Environmental impact assessment of projects may not be mandatory, and over-exploitation of natural resources may ensue. Generally, the focus of this approach to development is narrow.

In recent times, another approach to development has been advocated. This is the rights-based approach to development.⁹ It is that process of development in which all human rights and fundamental freedoms can be fully realised. According to the Office of the UN Commissioner for Human Rights:¹⁰

A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. ... [It] integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.

The Office identifies express links to rights, accountability, empowerment, participation, non-discrimination and attention to vulnerable groups as key elements of this approach. Every human being is entitled to this process of development on account of the right to development; however, the 'process' and the 'right' should not be confused.¹¹ This

⁸ See Y Osinbajo & O Ajayi 'Human rights and development in developing countries' (1994) 28 *International Lawyer* 727.

⁹ For a discussion of the concept, see M Darrow & A Tomas 'Power, capture, and conflict: A call for human rights accountability in development co-operation' (2005) 27 *Human Rights Quarterly* 471.

¹⁰ <http://www.unhchr.ch/development/approaches-04.html> (accessed 1 March 2006).

¹¹ See A Sengupta 'The human right to development' (2004) 32 *Oxford Development Studies* 179 181, where he notes that a process of development which is carried out in a manner consistent with human rights is rights-based. When that process can be claimed as a right, satisfying the test necessary to make that claim and entailing binding obligation on the duty holders to enable the fulfilment of the claim, then the process can be the object of the right to development. The right to development is a claim to a rights-based process of development. See also Declaration on the Rights to Development, adopted 4 December 1986, 6 A Res 41/28; A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 837; and S Marks 'The human rights framework for development: Seven approaches' FXB Center Working Paper No 18 (2003)

rights-based approach sees the human being as the central object of development and not merely as its facilitating instrument; it treats individuals as the end and not merely the means of development. Under this approach, the design of any policy has to take account of its impact on individual freedoms and rights. Thus, for example, policies that may result in the abuse of children will not be protective of the interests of the weak and vulnerable, or that may result in adverse environmental impact, must be reassessed.

This approach to development in no way discounts the importance of economic growth. The approach does not advocate that it is possible to achieve human development only by following the rights-based approach to development and ignoring policies for economic growth.¹² Economic growth through trade and investment is essential for the realisation of human rights. Indeed, empirical studies suggest that policies that promote real income growth will tend to promote human rights across a broad range of concerns.¹³ What the rights-based approach advocates is that the growth of resources through trade and investment must be realised in a manner in which all human rights are respected and promoted. Thus, for example, the approach does not advocate that developing countries should not proceed on the path of economic development until all human rights have been realised. Such thinking will be inconsistent with the approach and indeed senseless. What the approach advocates is that respect for human rights should be an essential component of all development policies, including trade.

So conceived, the approach provides a challenge to the theory that economic development in developing countries, through the vehicles of international trade and investment, must necessarily involve compromises in relation to human, labour, health and environmental rights. History provides examples of development that were initially built on human rights, labour and environmental abuses. The use of slave and child labour during the industrial revolution in Europe and later in American plantations as well as the massive exploitation of the natural resources of the colonial territories, are cases in point. These are, however, not courses that can be followed in this age. The rights-

http://www.hsph.harvard.edu/fxbcenter/research_publications.htm (accessed 1 March 2006) for other approaches to development.

¹² Third report of the Independent Expert *The right to development* E/CN.4/2001/WG.18/2 paras 14-15.

¹³ AO Sykes 'International trade and human rights: An economic perspective' (June 2003) *U Chicago Law & Economics* Olin Working Paper No 188 <http://ssrn.com/abstract=415802> (accessed 1 March 2006).

based approach makes respect for rights an indispensable part of the development process, but with a consciousness of the difficult policy choices it presents for, especially, developing countries.

2.2 Sustainable development and the rights-based approach

Like the rights-based approach to development, the concept of sustainable development also focuses on the individual as the central object of development. Principle one of the Rio Declaration on Environment and Development declares that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'¹⁴ Sustainable development has been defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.¹⁵ It thus focuses not only on the present and immediate, but also on the future.

The concept of sustainable development can be viewed as having three structural components, namely, international human rights law, international environmental law and international economic law.¹⁶ Viewed in this light, the concept brings together three regimes that have hitherto evolved separately and in isolation from each other.¹⁷ Sustainable development integrates all three into a single policy instrument. Integrating all three components into a single policy instrument, however, presents a challenge. For example, economic efficiency considerations may dictate the establishment of a project in a given location. The project may provide employment and income to families in the area, but can produce adverse environmental and health impacts on the population. Any decision taken must have regard, after consultation, for all the interests and rights engaged in such a situation.

¹⁴ Rio Declaration on Environment and Development 1992 <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> (accessed 1 March 2006).

¹⁵ World Commission on Environment and Development *Our common future* (1987) 19.

¹⁶ D McGoldrick 'Sustainable development and human rights: An integrated conception' (1996) 45 *International and Comparative Law Quarterly* 796.

¹⁷ The foundations of the current regime on trade and human rights law date back to the early post-World War II era. International environmental law, on the other hand, started around 1972, when the first UN Conference directly concerned with environmental issues was held leading to the formation of the United Nations Environment Programme.

An essential element of the concept of sustainable development is a commitment to integrating environmental considerations into economic and other developmental activities. However, sustainable development is not just about the environment. It is also concerned with other things people care about, such as poverty, food, health and education, all of which are essential for the well-being of the individual.¹⁸ It provides a foundation for the appreciation of the fact that environmental protection is vital for the realisation of other human rights. As Vice-President Weeramantry of the International Court of Justice notes:¹⁹

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

Under principle four of the Rio Declaration on sustainable development, environmental protection has to be an integral part of the development process and must not be considered in isolation from it.²⁰ All these represent an acknowledgment that environmental considerations should be a key component of any development policy. They represent a challenge to the notion of 'develop now, clean up later'.

Environmental considerations can be made part of the developmental process through, for example, the provision of information on the environment, the conduct of environmental impact assessments and 'green conditionality' for development assistance. Whilst this may entail costs in the short term, it remains true that a development policy or investment that puts priority on growth at the expense of the environment may entail higher costs in the future. Thus, environmental problems and effects must be actively managed as part of policies leading to economic growth. Environmental protection should be an essential component of any development policy.

¹⁸ See DC Esty *Greening the GATT: Trade, environment, and the future* (1994) 183-184.

¹⁹ Separate Opinion of Vice-President Weeramantry in the case concerning the Gabčíkovo-Nagymaros Project, *Hungary v Slovakia* (1997) ICJ Reports 91-92.

²⁰ Rio Declaration (n 14 above).

It cannot be deferred until rising incomes make more resources available for environmental protection.²¹

The notion of sustainable development adopts an integrating approach to the issue of the relationship between international trade and environmental protection. It sees trade not as an end in itself, but as a means to an end, that is sustainable development. Trade liberalisation should serve the objective of human well-being. This calls for a shift in focus from the question: Is this environmentally protective measure consistent with existing trade rules? to the question: Does this measure (be it environment or trade related) help as a means to achieving the ultimate goal of sustainable development? Sustainable development places environmental and trade concerns on an equal footing. Both are essential means to achieving, and must serve the overarching goal of sustainable development.²²

Conceived of as above, the notion of sustainable development can indeed be deemed an aspect of the rights-based approach to development. This is because the rights-based approach envisages a kind of development in which all human rights, be they economic, social, political or cultural, are realised. Indeed, it is now generally accepted that sustainable development is impossible without human rights.²³ As Oloka-Onyango notes, a respect for human rights is 'the bedrock of a wholesome and integrated approach to sustainable development. An inordinate focus on one category [of rights] at the expense of another will obviously produce a truncated human reality.'²⁴

Sustainable development acts both as an element of, and a restraint on, the rights-based approach to development. As an element, it calls for the protection of human rights, including the right to a healthy environment as an essential right in the process of development. It provides a redefinition of development by seeing it not only in terms of economic development, peace, security and human rights, but also in terms of the

²¹ UNDP *Human Development Report 2003 Millennium Development Goals: A compact among nations to end human poverty* 123.

²² EB Weiss 'Environment and trade as partners in sustainable development: A commentary' (1992) 86 *American Journal of International Law* 728

²³ World Bank Group *Development and human rights: The role of the World Bank* (1998).

²⁴ J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 44.

extent to which it protects and restores the environment.²⁵ It acts as a restraint by not only admonishing policy makers to consider the impact of their policies on the present generation, but also the future generation. This is the intergenerational aspect of sustainable development. It imposes limits on the extent to which we are able to pursue economic and other developmental activities without a concern for the legacy we pass to future generations.

2.3 The utility of the rights-based approach

The benefits of adopting this approach to development are many.²⁶ The approach is consistent with current opinion on the best approach to development.²⁷ For example, to Sen, development must be seen as an expansion of human capabilities. Development cannot be thought of merely as the provision of basic needs. It must be empowering, focusing on the individual as an end and not merely as the means to development.²⁸ In the field of trade, the Preamble to the Agreement Establishing the WTO declares that international trade should be pursued with the object of raising living standards and sustainable development in mind. Arguably, this provision provides a foundation for putting sustainable development and human rights at the forefront of the activities of the WTO and its members.

The rights-based approach to development also will tend to afford greater legitimacy to development policies. Policies that have the human being as its central object are more likely to elicit human attention and participation than those that do not. The principles of non-discrimination, equality of treatment and participation, all of which are essential components of this approach to development, work to give greater legitimacy to government policies. At the same time, the approach provides a means by

²⁵ JC Dernbach 'Making sustainable development happen: From Johannesburg to Albany' (2002-2004) 8 *Albany Law Environmental Outlook* 177.

²⁶ For a critique of the approach, see Alston (n 4 above) 804-807; M Malone & D Belshaw 'The human rights-based approach to development: Overview, context and critical issues' (2003) 20 *Transformation* 86-87.

²⁷ The Preamble to the Declaration of the Right to Development (1986) recites that development is a comprehensive economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active free and meaningful participation in development and the fair distribution of the benefits resulting therefrom.

²⁸ A Sen *Development as freedom* (1999) 3.

which one can evaluate the policies and programmes of a government to determine how consistent they are with its human rights obligations. In designing development policies under this approach, a government should have in mind its commitments under various international and domestic human rights instruments with the view to designing and implementing policies that promote and realise the rights enshrined in these instruments.

Additionally, by combining the concept of rights with the notion of development, a basis for focusing on those with a duty to ensure its realisation is provided. By seeing development and the process of development as a right, we are implicitly saying that others have a duty to ensure that this right is achieved. For example, the recognition of the process of development as a human right demands the setting aside of national and international resources to help realise this right. It obliges states and other agencies of society, such as civil society groups, corporations and indeed individuals, to implement and adhere to this approach to development. The nature and scope of such a duty may be difficult to determine and may vary with each agency, but these do not negate the existence of the duty. The approach also calls for international co-operation and assistance, both multilateral and bilateral, to ensure its realisation. In the field of trade, this may entail, among others, the supply and transfer of technology, technical assistance, improving and providing market access for developing countries, adjusting the rules of operation of the existing trading and financial institutions for the benefit of developing countries, and reforming existing laws on intellectual property to meet the health and technology needs of developing countries.²⁹

Another benefit from using a human rights approach to development is that it focuses attention on those who lag behind in their enjoyment of rights, for example the poor, sick, children and women. It requires that positive action be taken on their behalf. It calls for the design of policies aimed at improving their position. The eradication of poverty is seen as especially important in this regard. As has been noted, a motivation of the human rights approach to development guides one along the lines of protecting the worst-off, the poorest and the most vulnerable.³⁰

²⁹ Fourth report of the Independent Expert *The right to development* E/CN.4/2002/WG.18/2.

³⁰ A study on the current state of progress in the implementation of the right to development submitted by AK Sengupta, Independent Expert, pursuant to Commission Resolution 1998/72 and General Assembly Resolution 53/155 E/CN.4/1999/WG.18/2 para 31.

2.4 Trade policy and the rights-based approach

The adoption of a human rights-based approach to development calls for the design of trade and investment policies aimed at achieving as its central objectives the improvement of the welfare of the individual both from the economic and human rights perspective. Such policies must have certain components. How far a country can realise these components may be context-dependent. Account should be taken of the circumstances of each country. Resources may have to be devoted to the realisation of certain rights in order to make the enjoyment of other rights meaningful. For example, the right to participate in decision making may not be truly meaningful in the absence of an educated, informed and healthy population. This may therefore call for the devotion of more resources to education, promotion of literacy and health.

Policies adopting the approach should aim ultimately at the fulfilment of all human rights: civil, political, economic and social. In the field of trade, it is likely that more can be done initially in the area of economic rights than in the area of civil and political rights. This does not, however, mean that civil and political rights have no place in the design of trade policy. For example, there must be a right to participate in the decision-making process both at the national and international levels. Indeed, a rights-based approach entails the consultation and participation of all affected parties in the design of policies. This is important so that any adverse effect of the policy will be brought to the fore and catered for. It also enriches the policy by virtue of the input from outside, and accords it greater legitimacy. Consultation and participation are also key elements of sustainable development.

It needs to be emphasised that under this approach, no right is more important than the other. In the words of the Independent Expert:³¹

Because all human rights are inviolable and none is superior to another, the improvement of any one right cannot be set off against the deterioration of another. Thus, the requirement for improving the realisation of the right to development is the promotion or improvement in the realization of at least some human rights, whether civil, political, economic, social or cultural, while no other deteriorates.

³¹ n 12 above, para 10.

A violation of one right is the violation of the right to development itself and is inconsistent with a rights-based approach. Thus, for example, the right to education cannot be sacrificed for the right to work. Neither can the right to health be sacrificed to the right to property. All rights must be accorded equal importance in the design of trade policies; this may call for 'human rights impact assessment' of all projects and policies.

The above views on the relationship between rights may, however, be considered the ultimate goal of this approach. In the initial stages of development, choices have to be made. These choices, however, should be made after due consultation, with the general welfare of the population in mind, and should not be discriminatory, unless the discrimination is aimed at positively improving the welfare of the underprivileged.

The eradication of poverty should also be at the heart of any trade policy based on this approach to development. As Sen notes, poverty should not be seen only as a deprivation of income, but also of capabilities.³² Poverty reduces the capability of individuals to act for themselves, and leads to the non-realisation of other rights. It limits human freedoms and deprives a person of dignity. Taking people out of poverty and placing them on the path or ladder of development is becoming increasingly an international concern.³³ Improving access to markets, for example, is an important step that can be taken in the fight against poverty. Developed countries must open their markets to products from less developed countries to facilitate economic growth in these countries. Indeed, poverty has been shown to be the root cause of many of the ills of society; including child labour and environmental degradation.³⁴

[P]overty itself pollutes the environment ... Those who are poor and hungry will often destroy their immediate environment in order to survive. They will cut down forests; their livestock will overgraze grasslands, they will overuse marginal land ...

Poverty, however, may not be the sole cause of environmental problems; other challenges such as the emission of greenhouse gases, improper disposal of industrial waste and more are relevant.

³² Sen (n 28 above) 87.

³³ J Sachs *The end of poverty* (2005).

³⁴ n 15 above, 7.

Ensuring access to the basic necessities of life, such as food, health and education, should also be an essential component of trade policy under this approach to development. This is especially important from the perspective of the poor and vulnerable, such as children and women. Policies that restrict access to basic needs for such people would be inconsistent with this approach to development.³⁵ The approach calls not only for an economic efficiency assessment of trade policies, but, more importantly, their equity and fairness dimensions. For developing countries, this suggests a crucial role for governments. While the market may produce efficiency, it often fails to ensure the fair and equitable distribution of gains.

Under the rights-based approach, the impact of all trade policies on human rights must also be assessed. Many countries now require environmental impact assessments for all development or investment projects. This assessment must be extended to trade policy, the impact of trade liberalisation on the economic, social and cultural rights of people will have to be assessed and taken into account in the design of trade policy. Effective assessment will require adequate information and expertise. Here, civil society groups representing affected individuals can be a valuable source of such information and expertise, but they cannot be a substitute for the views of the affected groups.

3 Ensuring the rights-based approach: The role of agents of trade policy

The adoption of a rights-based approach to development calls for an examination of the parties upon whom a duty is imposed, to ensure that such an approach to development is adopted in the design and implementations of trade policy. The notion of rights cannot be separated from the concept of duties. Where there is a right, there must be a duty.³⁶ The fact that the duty is not fulfilled - honoured with rhetoric rather than performance - does not negate the existence of the right.

The principal agents in ensuring that the rights-based approach is adopted and implemented in the field of international trade are states and the WTO. Corporations,

³⁵ See fourth report of the Independent Expert (n 29 above) para 20.

³⁶ See generally WN Hohfeld *Fundamental legal conception as applied in judicial reasoning* (1923).

civil society organisations and individuals also have a role to play.³⁷ The approach demands co-ordination and co-operation between these agents to ensure the realisation of the right. The extent of the duty imposed, and the modes for facilitating the realisation of the right, will vary depending on which agent is being discussed. One also has to take into account the peculiar circumstances of each agent, and the context in which performance is demanded.

3.1 Developing countries

Developing countries have a lot to gain from international trade: employment, foreign exchange, new technologies and more. However, unless the concerns demonstrated above, especially in the field of labour, human and environmental rights, are taken into account, these gains will not be sustainable in the long term, and may fail to achieve the ultimate goal of improving the welfare of their citizens. Thus, the trade policy of developing countries should be pursued within a framework of ensuring and not undermining the realisation of these rights.

The development of human capital is the key to any effort to achieve development. A well-trained and skilled population is more likely to take advantage of emerging economic opportunities than an illiterate population. The success of the East Asian economies can be partly attributed to the highly skilled labour force that existed at the time they were opening up their economies. No country can develop by relying on cheap and unskilled labour. While this reliance may present advantages, they may be short-lived. For example, advancement in technology can render unskilled labour redundant. Their level of productivity may be low. Indeed, the idea of having a comparative advantage in cheap and unskilled labour conjures up images of slavery and the notion that some are 'hewers of wood and drawers of water' consigned to the most basic forms of production and economic activity. Such neglect of human capital will not lead to sustainable development. It fails to recognise and utilise the full capabilities of

³⁷ Space does not allow for a discussion of the role of all these entities. On corporations, see generally J Dine *Companies international trade and human rights* (2005) 167-221; M Monshipouri *et al* 'Multinational corporations and the ethics of global responsibility: Problems and possibilities' (2003) 25 *Human Rights Quarterly* 965; S Deva 'Human rights violations by multinational corporations and international law: Where from here?' (2003) 19 *Connecticut Journal of International Law* 1.

the population. A rights-based approach to development requires that people should be empowered; education provides one channel for such empowerment.

Thus, developing countries should invest in the education of their people, especially women and children. They should be taken away from the 'sweatshop factories' and given education. Though this may cause problems in the short run, in the long term it will be for the benefit of these countries in terms of enhancing productivity and social stability. The hardship resulting from this can be mitigated by financial assistance to families that will be affected. This process should, however, be gradual and well-regulated to mitigate the initial hardship. This process should be complemented with policies aimed at increasing the economic opportunities for the adult family members.³⁸

Equally important to enhancing the productivity of labour are favourable working conditions in the form of decent wages, job security, freedom of association in the form of trade unions, and effective retirement schemes. Ensuring this does not only demand effective legislation, but also active efforts on the part of the government to ensure compliance.

Whilst investors may be concerned about the cost implications of complying with these requirements, they are equally concerned about productivity. The cost of compliance may indeed not be excessive. In 1992, it was estimated that it cost Nike \$5,60 to produce a pair of shoes in Indonesia which it sold for \$45,80 in the United States.³⁹ Thus, increases in cost for the purpose of improving labour conditions could have been accommodated without adversely affecting the investment opportunities in Indonesia. Improved labour conditions will enhance the welfare of workers and productivity. The fear of losing investors will be minimised if there is a degree of uniformity in the standards across nations and if they are applied non-discriminatorily to all investors. Indeed, an Organisation for Economic Co-operation and Development (OECD) study found that respect for basic labour standards similar to those found in the

³⁸ Jones (n 7 above) 137-140.

³⁹ JL Johnson 'Private-public convergence: How the private actor can shape public international labor standards' (1998-1999) 24 *Brooklyn Journal of International Law* 330 n 183.

ILO Declaration supports rather than undermines open trade-oriented growth policies in developing countries.⁴⁰

The rights-based approach to development, and the goal of achieving sustainable development, also call for a redirection of the export promotion efforts of developing countries from primary commodities to manufactured products and services.⁴¹ Reliance on primary commodities tends to be environmentally unfriendly, their prices fluctuate, and they create favourable conditions for struggles and instability, which are the bane of many developing countries. Citizens fight over land for cultivation and feeding their livestock, minerals, timber and other raw materials.⁴²

Very few countries have developed relying on the export of primary commodities.⁴³ The contrast between the Asian developing economies and Africa is a case in point. Manufacturing creates multiple avenues of demand and job opportunities that exist only to a limited degree with reliance on primary production. Whilst African countries continue to rely on exports of primary commodities, the Asian economies have moved into manufacturing and services. Although export promotion is relevant for development, the kind of thing being exported is of utmost significance.⁴⁴ Indeed, the 'curse' of developing countries, especially in Africa, appears to be the abundance of natural resources.⁴⁵ By consigning themselves to the provision of basics; cheap and unskilled labour, primary commodities and natural resources, developing countries risk being perpetually at the mercy of the developed economies.

One cannot also discount the importance of a favourable political climate. It is only in a politically favourable climate that the integration of human rights in the development process, as well as the need for accountability, will be realised and respected. Political instability results in human rights abuses. It does not make for effective long-term planning, drives away investment and generally creates an unfavourable climate for

⁴⁰ OECD *Trade, employment and labour standards: A study of core workers' rights and international trade* (1996).

⁴¹ *Our common interest* (n 4 above) 263-265; Akyuz (n 1 above).

⁴² UN Secretary-General Report to the Security Council *The causes of conflict and the promotion of durable peace and sustainable development in Africa* (1998).

⁴³ See generally UNCTAD *Economic development in Africa trade performance and commodity dependence* (2003).

⁴⁴ C Thomas 'Poverty reduction, trade and human rights' (2002-2003) 18 *American University International Law Review* 404-408.

⁴⁵ *Our common interest* (n 4 above) 21.

development. Political stability makes for long-term planning, while a respect for basic human rights and freedoms helps people to realise their capabilities. There is a mutually reinforcing relationship between economic and political development. As Sen notes, there is a⁴⁶

remarkable empirical connection that links freedoms of different kinds with one another. Political freedoms (in the form of free speech and elections) help promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities to participate in trade and production) can help to generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.

An important right that may be classified as a political right, and a key element of the rights-based approach to development, is the right of participation in decision making in general and specifically in the design of trade policy. Whilst environmental impact assessment is often done to assess the impact of development activities on the environment, no such assessment is done to know the impact of trade policy on the rights and living conditions of individuals. Trade deals are often done behind closed doors, outside the view of the public and without much input from individuals. Developing countries must offer more opportunity for citizens to debate and give input into the design and implementation of trade policy. This will allow for all affected interests to be appreciated and catered for. This is especially so under the rights-based approach where all rights are deemed equally important, interdependent, and must be accorded the needed attention in designing policies.

The above demonstrates that there exists a crucial role for the governments of developing countries to ensure that the international trade, being pursued under the auspices of the WTO, is managed and not left entirely to 'the market'. Indeed, economic theory does not teach that unfettered operation of the market is always desirable. The presence of externalities, such as environmental pollution, human and labour rights abuses, calls for governmental intervention.⁴⁷

⁴⁶ Sen (n 28 above) 11.

⁴⁷ Sykes (n 13 above).

International trade deals and investment flows are not motivated by altruism, but by profit. Investors move to developing countries to access cheap labour, take advantage of low production costs, and free themselves of strict and costly environmental and labour standards. The rights-based approach requires mechanisms for ensuring that international human rights, labour and environmental standards are upheld in the drive to secure increased trade and investment. This demands governmental intervention and involvement. Reliance on market forces alone will not do. Trade and investment must be 'managed' for its full benefits to be realised. For example, governmental intervention may be necessary to protect affected groups in the transition period from a closed to a liberalised economy. As Stiglitz notes:⁴⁸

The most successful developing countries, those in East Asia, opened themselves to the outside world but did so slowly and in a sequenced way. Those countries took advantage of globalisation to expand their exports and grew faster as a result. But they dropped protective barriers carefully and systematically, phasing them out only when new jobs were created. They ensured that there was capital for new jobs and even took an entrepreneurial role in promoting new enterprises.

This is a worthy lesson for many African and developing economies currently pursuing trade liberalisation policies.

The governments of developing countries need to enact laws to protect the labour force from abuse, to regulate competition to mitigate its effect on individuals, to ensure sustainable exploitation of natural resources, and to promote a respect for human rights. Governments should see the call to integrate social concerns into their trading policies not as a threat to their competitiveness or development. Rather, it should be seen as an invitation to change the character of trade policies to one which places the human being at the centre of the process, takes due account of the environment, and emphasises sustainability.

3.2 Developed countries

Developed countries also have a role to play in ensuring the realisation of the benefits of the rights-based approach in the design and implementation of trade policy. In this

⁴⁸ Stiglitz (n 5 above) 60.

respect, developed countries should give special attention to trade policies that can facilitate the eradication of, or at least a reduction in, the level of poverty in the developing world. The recently released Commission for Africa Report emphasised the urgent need for this.⁴⁹ As noted above, poverty implicates many of these social concerns relating to the activities of the WTO.

The provision of enhanced market access is vital in this respect. Enhanced market access by developed countries to products from developing countries, such as agricultural produce, textiles and tropical products, will go a long way to improve the living conditions of people in the developing world by providing employment and income to families. It will also enhance the flow of foreign direct investment into developing countries, as investors try to take advantage of the generous market opportunities available to such countries.

Currently, developed countries, as mandated by the Enabling Clause of the WTO and through their various Generalised System of Preferences (GSP) schemes, provide enhanced market access to developing countries.⁵⁰ Access to these schemes is conditioned on the pursuit of certain social policies by the beneficiary country. For example, the EU scheme⁵¹ makes available to the beneficiary countries five different arrangements. First, all beneficiaries enjoy the benefit of a general arrangement. Second, there is a special arrangement for the least developed countries, also known as the 'Everything But Arms Initiative', which grants duty-free access to imports of all products from such countries without quantitative restrictions, except for arms and ammunition. Third, there is a special arrangement to combat drug production and trafficking. This is intended to assist beneficiaries in their fight against drugs. There are also special arrangements for the protection of labour rights and environmental rights.

The United States scheme also conditions access on, *inter alia*, the protection of internationally recognised workers' rights, respect for human rights, the rule of law, political pluralism, the right to due process and combating bribery and corruption.⁵²

⁴⁹ *Our common interest* (n 4 above); see also Sachs (n 33 above).

⁵⁰ See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) 1979.

⁵¹ Council Regulation (EC) No 2501/2001; Council Regulation 416/2001. See generally L Bartels 'The WTO Enabling Clause and positive conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507.

⁵² Trade Act of 1974, 19 USCA 246, Trade and Development Act 2000, 114 Stat 251.

Thus, these GSP schemes aim not only at providing enhanced market access, but also are designed to change perceived adverse social conditions within the beneficiary countries.

Some have argued against the use of GSP schemes to promote non-trade objectives.⁵³ Under the text of the Enabling Clause, these preferences should be designed to 'respond positively to the development, financial and trade needs' of beneficiaries.⁵⁴ In a recent challenge by India to the Drug Arrangement under the EU GSP scheme, the Appellate Body found the inability of the EU to provide any indication as to how it would assess whether the Drug Arrangements provide an adequate and proportionate response to the needs of developing countries suffering from the drug problem fatal to the requirements of the Enabling Clause.⁵⁵ The Appellate Body noted that paragraph 3(c) of the Enabling Clause 'does not authorise any kind of response to any claimed need of developing countries'.⁵⁶ The types of needs to which a response is envisaged are limited to 'development, financial and trade needs'. The existence of these needs will have to be assessed according to an objective standard. The response of a preference-granting country must be taken with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue. A sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the identified need.⁵⁷ There is therefore a limit on the extent to which developed countries can use these schemes to promote non-trade concerns.

This limitation is important to prevent a situation where trade benefits are conditioned on the pursuit of policies that are ultimately for the benefit of the preference-granting country. For example, one may view the EU Drug Arrangement as an attempt to solve the drug problem in Europe rather than a genuine desire to assist in solving the drug problem in developing countries. Whilst this is not a defence of drug production, it

⁵³ See generally JL Stamberger 'The legality of conditional preferences to developing countries under the GATT Enabling Clause' (2003) 4 *Chicago Journal of International Law* 607; R Howse 'India's WTO challenge to drug enforcement conditions in the European Community generalised system of preferences: A little known case with major repercussions for 'political' conditionality in US trade policy' (2003) 4 *Chicago Journal of International Law* 385.

⁵⁴ Enabling Clause (n 50 above) para 3(c).

⁵⁵ European Communities - Conditions for Granting Tariff Preferences to Developing Countries, WTO Appellate Body Report WT/DS246/AB/R 7 April 2004.

⁵⁶ n 55 above, paras 163-164.

⁵⁷ n 55 above, paras 162-164.

serves to illustrate the potential for abuse under the GSP schemes in the absence of objective limitations on its use.

The conditioning of access to markets on respect for human, environmental and labour rights, and the consequent exclusion of countries which do not meet those criteria from enjoying the benefits of the scheme, may not be wholly facilitative of the rights-based approach to development. Aside querying the objectivity of the criteria for determining which countries benefit from the schemes, it may be argued that if development is a right, then the denial of instruments or access to policies - in this instance trade - that will enhance that right can be deemed a violation of the right.

A better approach in this instance, it is suggested, will be to provide some minimum level of access irrespective of the social conditions in a country, but to provide enhanced access in case of advancement of social conditions in the beneficiary country. Recognising the huge developmental needs of developing countries, this minimum level of access should go beyond that provided by the ordinary rules of most favoured nation and national treatment under the WTO. Those rules are only meaningful for competition among equals. Developing countries cannot effectively compete with developed countries under that regime. Some minimum level of mandatory special and differential treatment is needed. This does not deny the need for such social concerns to be given the needed attention in the domestic policies of developing countries.

There are other limitations on the utility of current schemes for developing countries. They are voluntary and hence provide no security of access; apply to only a limited number of countries; and cover only a defined category of products with stringent rules of origin. These products are often primary products that suffer from fluctuating prices and, as noted above, perpetuate a cycle of dependency on the developed world. There is also the problem of underutilisation of these schemes. This is due to a lack of knowledge on the part of exporters as to the existence of the schemes and the absence of efficient institutions to administer and promote exports under existing preferential arrangements. The implementation of these schemes is also often influenced by political consideration rather than economic need. These limitations notwithstanding, GSP schemes offer a potential for development and poverty reduction in the developing world

through the provision of access to the markets of the developed world.⁵⁸ Objectively managed, it offers an avenue for linking trade policy with human rights.

Improved market access alone will, however, not be sufficient to meet all the development challenges facing the developing world. It must be coupled with financial aid and technical assistance. Such assistance should be demand-driven; aimed at meeting the needs of the receiving countries rather than offloading a surplus or the unwanted of the giver. Financial aid and technical assistance should be monitored to ensure accountability, and designed to empower especially the vulnerable. In the field of trade, they should be aimed at enhancing the capacity of developing countries to take advantage of the opportunities offered by the international trading system. Additionally, they should focus on assisting developing countries in diversifying their exports by placing greater emphasis on manufacturing and the provision of services. However, technical assistance and financial aid should not be a substitute for national initiative and decision. As Stiglitz notes, developing countries should consciously define for themselves their trading interest and have the political will to articulate and pursue it in international fora.⁵⁹

One area where the developed world can do more is in the fight against HIV/AIDS. The links between the disease, human rights and development are too obvious to be chronicled here. The recently released report of the Commission on Africa provides grim statistics on the impact of the disease on sub-Saharan Africa.⁶⁰ It is estimated that the disease killed about 2,3 million people in 2004. Women and children are the most affected. Sadly, only about 8% are receiving treatment. Whilst preventive efforts are being made and indeed stressed, pharmaceutical companies through patent claims have hampered attempts at using generic drugs for treatment.⁶¹ Providing cheap and affordable drugs, encouraging their production through technical assistance and

⁵⁸ UNCTAD *Improving market access for least developed countries* (2001).

⁵⁹ Stiglitz (n 5 above); C Michalopoulos 'Developing countries' participation in the World Trade Organization' (March 1998) World Bank Policy Research Working Paper 1906 <http://ssrn.com/abstract=620518> (accessed 1 March 2006).

⁶⁰ *Our common interest* (n 4 above) 194 –200.

⁶¹ South Africa was, eg, threatened with a WTO challenge that was subsequently dropped in the face of international outcry and condemnation. See generally L Ferreira 'Access to affordable HIV/AIDS drugs: The human rights obligations of multinational pharmaceutical corporations (2002) 71 *Fordham Law Review* 1133.

financial aid for educational campaigns will assist in the fight. The developed world has a role to play in all these.

Developed countries should also monitor the activities of multinational companies incorporated in their jurisdiction, but operating in developing countries.⁶² They should legislate for stricter standards for companies originating from their jurisdiction, but operating in the developed world. The linking of rights to the development process provides a basis for such legislation. Developed countries should also encourage strict adherence to the various voluntary codes of conduct such as the UN Global Compact of 1999 and others developed by multinationals. More importantly, there should exist in the developed countries criminal and civil liability for multinational corporations that engage in human rights violations or environmental damage. These are especially important and necessary, since developing countries do not have the economic might to 'take on' these huge multinationals that engage in rights abuses.

Notwithstanding any debate as to the propriety of its extraterritorial implications, the US Alien Torts Claim Act⁶³ presents an example of legislation under which a foreign corporation operating in a developing country can be held liable in the United States for human rights and environmental abuses committed there. As Abadie notes:⁶⁴

By providing a basis for liability, business as usual, may not always prevail. Brandishing the [Alien Torts Claim Act] as a legal weapon to break the power of impunity, lawyers with imagination and courageous judges will find a way to ensure that equal protection from risk across national boundaries can be guaranteed.

⁶² R Klein 'Cultural relativism, economic development and international human rights in the Asian context' (2001) 9 *Touro International Law Review* 50-57.

⁶³ 28 USC 1350. The Act provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. For a recent decision under the Act, see *Sarei v Rio Tinto* PLC 221 F Supp.2d 1116.

⁶⁴ P Abadie 'A new story of David and Goliath: The Alien Tort Claims Act gives victims of environmental injustice in the developing world a viable claim against multinational corporations' (2004) 34 *Golden Gate University Law Review* 748. See also R Shamir 'Between self-regulation and the Alien Tort Claims Act: On the contested concept of corporate social responsibility' (2004) 38 *Law and Society Review* 635; C Salazar 'Applying international human rights norms in the United States: Holding multinational corporations accountable in the United States for international human rights violations under the Alien Tort Claims Act' (2004) 19 *St John's Journal of Legal Commentary* 111.

Whilst this may be an exaggerated hope in the ability of the Act to offer protection, especially on account of the significant jurisdictional hurdles a litigant has to surmount,⁶⁵ it is nonetheless true that the threat of a lawsuit with its potential monetary liability is more likely to induce compliance than mere exhortations to adhere to voluntary codes which are vague and lack enforcement mechanisms.

3.3 The World Trade Organization

The WTO also has a crucial role in integrating the rights-based approach into the design and implementation of trade policy. This role calls for a broadening in the outlook of the WTO from its narrow focus on the economics of trade liberalisation to an approach that sees trade not as an end in itself, but as a means to an end. Such an outlook entails consideration of the human rights, labour, health and environmental implications of trade policy with the WTO's framework. Indeed, such a broader outlook is mandated by the text of the Agreement Establishing the World Trade Organization, the Preamble of which contains references to the notions of 'sustainable development' and 'raising standards of living'.⁶⁶ These are concepts that cannot be truly meaningful outside the human rights framework. The WTO should therefore become more concerned about the impact of its activities on human rights, health, labour and the environment.

One forum where the impact of trade liberalisation on these social concerns can be brought to the fore and members' policy challenged is through the Trade Policy Review Mechanism.⁶⁷ Currently, the Mechanism allows for periodic review of the trade policies and practices of members to assess 'their impact on the functioning of the multilateral trading system'. There is a need to broaden the scope of the reports and the extent of review to cover the impact of trade policies and practices on human rights, labour, health and the environment. A member who is aware that its policies are going to be reviewed for such impacts will be more careful in the design and implementation of its trade policy, even if the report does not constitute the basis of any enforceable action. The publicity that comes with the review may afford enough deterrence. In case it does

⁶⁵ Abadie (n 64 above) 759-774.

⁶⁶ World Trade Organization *The legal text. The results of the Uruguay round of multilateral trade negotiation* (1999) 4.

⁶⁷ World Trade Organization (n 66 above) 380.

not, and violations are such as will demand action (for example sanctions, suspension of membership, denial of organisational privileges) by the WTO, such action should be a multilateral decision. Unilateral measures are susceptible to abuse.

There is also a need for greater collaboration between the WTO and other institutions that have mandates over these social concerns.⁶⁸ The WTO cannot function in isolation. A great deal of complementarities exist between the work of the WTO and other institutions, such as the UN Human Rights Council (which recently replaced the Human Rights Commission), the UN Environment Programme, the UN Economic and Social Council, the World Bank and the International Monetary Fund, to mention but a few. Indeed, the WTO agreement envisages collaborations. Article V mandates the General Council to 'make appropriate arrangements for effective collaboration with other intergovernmental organisations that have responsibilities related to those of the WTO'. The WTO can benefit from the experience and expertise of these institutions as it strives towards integrating these social concerns into trade policy. Such collaboration will ensure co-ordination of responses. This collaboration should extend to civil society groups that represent these interests and can bring area-specific knowledge to the design and implementation of trade rules.

The WTO must reorient itself and focus on development as understood from a rights perspective. The Preamble to the Marrakesh Agreement Establishing the WTO recognises 'sustainable development' as one of the key objects of the WTO. The concern of the WTO should not only be to design rules to facilitate trade, but also to ensure development in which rights are respected. The WTO should pursue trade liberalisation with the object of sustainable development in mind. There should be an appreciation that trade liberalisation will not necessarily lead to development as currently understood, but can indeed produce negative consequences for countries and individuals. Development should therefore be the overriding principle that guides the work of the WTO. It should be central in the design and implementation of trade rules.

Greater attention should also be given to the concerns of developing countries in the design of trade rules. This is especially important in the current trade round, which

⁶⁸ GP Sampson 'Is there a need for restructuring the collaboration among the WTO and UN agencies so as to harness their complementarities?' (2004) 7 *Journal of International Economic Law* 717.

has appropriately been named the 'development round'.⁶⁹ Issues relating to technology transfer, technical assistance, capacity building, market access, health, and special and differential treatment should be given much attention. Greater efforts in these areas will enable developing countries to take advantage of the potential that international trade has for development and poverty reduction. The ultimate aim should not merely be trade liberalisation, but, more importantly, ensuring that trade rules are just, fair and equitable for developing countries.⁷⁰

4 Conclusion

This paper has examined the place of social concerns in the international trading system. The integration of these concerns has been met with resistance. Using the twin concepts of a rights-based approach to development and sustainable development, a case has been made for these concerns to be given greater attention, both within and without the framework of the international trade regime. The essence of the rights-based approach to development and sustainable development demands this. These approaches to development call for human rights, labour rights and environmental concerns to be at the centre of all efforts at development, including international trade. Various agents have been identified as having a crucial role to play to this end. Whilst these concerns are international, at their root are national or domestic policies that need change and modification. Action is required at both the national and international level. At the international level, emphasis needs to be placed on multilateral solutions rather than unilateral undertakings. While not discounting the role of developed countries and the WTO as an organisation, developing countries as a matter of long-term self-interest have a lot more to do in this direction.

⁶⁹ See generally SP Subedi 'The road from Doha: The issues for the development round of the WTO and the future of international trade' (2003) 52 *International and Comparative Law Quarterly* 425; I Haque 'Doha development agenda: Recapturing the momentum of multilateralism and developing countries' (2001-2002) 17 *American University International Law Review* 1097.

⁷⁰ JP Trachtman 'Legal aspects of a poverty agenda at the WTO: Trade law and "global apartheid"' (2003) 6 *Journal of International Economic Law* 3.

