January 2002

Trade, Constitutionalism and Human Rights: An Overview

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Recommended Citation

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Frederick Abbot asks a question: "If the WTO is a trade constitution, what should its bill of rights look like?" My remarks address a preliminary question: Why should the World Trade Organization (WTO) have a bill of rights?

The "constitutionalism critique" claims that the WTO lacks legitimacy because its exercise of state power at the international level is not the direct result of a participatory interest-balancing political process and is not adequately subjected to fundamental rights-based restraints and guarantees. The matter is further complicated by our current "functional specialization" model of international governance. In domestic governance a single integrated legislative/executive/judicial system resolves matters of economic policy, human rights, and their interrelationships. For international governance, states create separate legal-institutional regimes specialized according to function and lacking a central coordinated approach to the problems of multiple overlapping jurisdiction—such as the many current "trade and _____" problems. Constitutionalism is one way of demanding more comprehensive consideration of such issues than the current functional specialization approach permits. Constitutional modifications could incorporate human rights more fully into the WTO system, both in terms of substantive policymaking and as a constraint on the WTO-based exercise of state power. Hence, the question of a WTO bill of rights.

Turning now to the question of human rights and the WTO, it is useful to distinguish between internal and external challenges. Internal human rights issues are raised by the WTO system itself: trade law as the problem. One can ask, for example, whether the operation of particular trade rules infringes upon or threatens human rights, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the right to health or Generalized System of Preferences implementation and the right to development. Here, human rights discourse has been adopted as the vehicle through which to express disagreement with the balance struck in particular cases between producer interests and consumer/public interests.

External human rights challenges highlight the role trade law could have in addressing human rights problems that arise outside of trade law itself. There are several sources of external challenge, among them unilateral state human rights activism, multilateral treaty-based human rights activism, and the prospect of human rights-based trade conditionality.

When states employ trade sanctions unilaterally to protect human rights in other jurisdictions, a WTO issue is raised. An example would be the U.S. ban on imports manufactured through indentured child labor. Under the WTO doctrinal structure, such a measure would not easily survive legal challenge: There is no explicit human rights exception in Article XX of GATT, and applying existing exceptions in such cases raises interpretive difficulties. Moreover, the approach taken by WTO doctrine to such a challenge (balancing trade liberalization against human rights protection) could be considered inappropriate where human rights are concerned. Thus, the WTO could be an obstacle to human rights protection.

A second, related problem is posed by multilateral human rights activism if trade sanctions against a member for human rights violations were to be organized by a regional or multilateral human rights or collective security mechanism such as the Organization of

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American States, the United Nations, or the Council of Europe. This would also be vulnerable to a WTO legal challenge because there is no general mechanism in WTO law to defer to, recognize, or incorporate collective human rights sanctions. The only exception, found in GATT XXI(c), is limited to actions taken pursuant to UN obligations to maintain international peace and security.1

The third way external human rights issues come into trade law involves conditionality: to what extent should human rights compliance be a precondition to WTO trade benefits? Conditionality is an attractive mechanism for human rights advocates, and the European Union, Mercosur, and other trade regimes already require adherence to basic human rights as a condition for membership. However, the WTO does not—and therein lies either an embarrassment or an opportunity depending on your viewpoint.

The simplest WTO response to all these challenges is to do nothing. Inaction would imply ratification by the international community of the following propositions:

— Current WTO agreements reflect the appropriate balance between economic values and human rights values.

— Any trade sanction short of a UN sanction will be rejected if challenged in WTO.

— There need be no baseline human rights commitments for WTO membership.

Such implicit ratification could cause a WTO legitimacy crisis, at least for liberal states.

Another possible WTO response could be to address internal challenges only, either in a limited or a broad way. A limited approach would be to modify specific agreements (e.g., TRIPS) to address human rights concerns on an ad hoc political basis. A broader approach would be to draft a statement of human rights principles that all WTO agreements must comply with. This starts to look like a WTO bill of rights. If this approach is taken, should states be permitted to challenge nationally implemented WTO rules on grounds that how they are implemented violates WTO human rights rules, thus creating a new, independent ground for WTO complaints? Should states be permitted to challenge provisions in the WTO Dispute Settlement Body as violating WTO human rights rules, like using a court-based constitutionality review? Not easy questions.

Even this type of response, complicated as it is, does not address any of the external human rights challenges facing the WTO. These challenges pose perhaps the most difficult question of all: Is the WTO to serve as a vehicle to facilitate, or even organize, human rights trade sanctions? If not, the status quo is unchanged. If so, then WTO doctrine must be reformed to create room for human rights sanctions, whether unilateral or multilateral. This would require an amendment, because judicial implementation arguably exceeds the WTO Appellate Body’s current competence. Options include a new across-the-board human rights exception like the Article XXI national security exception; a hierarchy of norms provision like North American Free Trade Agreement Article 104,2 to defer to certain treaty-based human rights sanctions; or amending Article XX to add a human rights exception. The literature is rich with discussions of the many substantive, normative, and political issues raised by all these approaches.

Finally, WTO members may decide human rights conditionality delivers the greatest benefit with the least political cost. WTO members are already subject to the Universal Declaration of Human Rights and other customary human rights laws, and the majority are parties to the main human rights treaties. Amending the WTO Charter to condition membership on adherence to such instruments, or drawing a list of core human rights

1 General Agreement on Tariffs and Trade—Multilateral Trade Negotiations, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, art. XXI(c), 33 ILM 1125 (1984).
from such instruments which current and aspiring WTO members would have to respect, establishes an important precedent. In both cases, however, the difficult question is enforcement: should the WTO permit or require trade sanctions if members fail to honor their commitments?

Any human rights modifications of the WTO regime would need to address the following issues:

- Institutional culture: Can WTO institutions adequately deal with human rights concerns?
- Participation: Would WTO human rights activism intensify calls for increased civil society participation?
- Cultural Relativism: What about claims of regional differences in human rights cultures within the WTO membership?
- Trade and Development: Are different regulatory standards (for labor rights, for example) a valid responses to development needs?
- Jurisdiction: Will the WTO regulate investment and corporate conduct human rights issues?
- Sanctions: How should the WTO respond to challenges to the morality and efficacy of sanctions?
- Subsidiarity: Will states remain the primary agents of human rights protection, or will multilateral institutions like the WTO take over?

Such conflicts require the sort of interest-balancing political process that constitutional systems create, subject to the sort of fundamental safeguards that rights-based constitutions safeguard. The current architecture limiting the constitutional process to the member state level and funneling its outputs into functionally specialized treaty bodies is inadequate to legitimately, and effectively, address the many human rights issues raised internally and externally by trade law. Adding a bill of rights to the WTO deals with some problems, but not this one.

The trade and human rights debate is thus another area of international life posing the difficult question—if the functional specialization model is inadequate, what will replace it? In this sense, the trade and human rights discussion is part of global society's ongoing constitutional convention.