

Is the Right to Development compatible with the World Trade Organisation?

By:

Lorenzo Nerantzis

A thesis submitted to the European Inter-University Center in partial fulfillment of the requirements for the degree of the European Master Programme on Human Rights and Democratization

Supervised by prof. Sonnevend Pál

Written in Budapest, Summer Semester 2012

Eötvös Loránd University, Central European University

July 12, 2012

Abbreviation

AoA	Agreement on Agriculture
ATC	Agreement on Textiles and Clothing
DRD	Declaration on Right to Development
DG	Director General
DSB	Dispute Settlement Body
GATS	General Agreement on Trade in Service
GATT	General Agreement on Tariffs and Trade
GC	General Council
HRAD	Human Rights Approach to Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFI	International Financial Institutions
IMF	International Monetary Fund
ITO	International Trade Organisation
LDC	Less Developed Countries
MC	Ministerial Conference
MFN	Most Favoured Nation (principle)
NIEO	New International Economic Order
NAM	Non Aligned Movement
NGO	Non-Governmental Organisation
RTD	Right to Development
SIIP	Service, Investment, Intellectual Property
SDT	Special and Differential Treatment
TRMS	Trade Policy Review Mechanism

TRIPS	Trade Related Intellectual Property Rights
UN	United Nations
UNDR	Universal Declaration of Human Rights
WTO	World Trade Organisation

Contents

<i>PART I: Right to Development</i>	p. 1
Chapter 1: The Evolution of RTD as a Human Right	p. 2
1. History	
2. Textual Analysis	
3. Controversies	
Chapter 2: Current Status of RTD	p.-
1. Obstacles	
2. Reality	
3. Part of Customary Law?	
Chapter 3: RTD Principles	p. 19
1. Development as a Right	
2. Progressive Realization	
3. Non-retrogression of human rights	
4. Development with equity	
5. International cooperation under human right principles	
 <i>Part II: World Trade Organisation</i>	 p. 28
Chapter 4: Presentation of WTO	p. 29
1. Historical Background	
2. The GATT System	
3. Functions and Structure	
4. Decision-making	
5. Accession	

Chapter 5: Development at WTO	p. 44
1. Comparative advantage theory	
2. Development provisions	
2. Development impact of WTO	
Chapter 6: Human Rights at WTO	p. 55
1. 'Human right' provisions	
2. Right to Health	
3. Right to Food	
<i>Part III: Is the Right to Development compatible with the WTO?</i>	p. 66
Chapter 7: Is RTD compatible with WTO?	p. 67
1. Compatibility Test	
2. Conclusions	
Acknowledgments	p. 93
Bibliography	p. 94

Part I:
Right to Development

Chapter 1

The Evolution of Right to Development as a Human Right

1. History

Forty years have passed since the RTD was publicly proposed as human right, twenty-six years since the General Assembly officially recognized this right in a Declaration, nineteen years since a consensus on RTD involving all governments was reached in Vienna, and fourteen years since a Working Group and an Independent expert related with the RTD were established by the United Nations¹. The right has been regularly mentioned in declarations of international conferences, in development summits, in the annual resolutions of the General Assembly and the Commission of Human Rights.

However, despite their rhetorical support, states neglect RTD's basic precepts in development practice and some of them (such as United States) have been consistently negative to recognize it as a right. To understand why this is happening, it is useful to examine the history behind RTD that was introduced during the 1970s as one of the several rights belonging to the so called third generation of human rights.

1.1 Declaration

The adoption by the United Nations in 1986 of the Declaration on the Right to Development was the culmination of many years of international deliberation and negotiations for the word community to get back to the original conception of integrated and indivisible human rights²³. Since from the beginning, human rights were perceived

¹ Marks identifies the starting date in the paper of Jeba M' Baye, 'Le droit au développement comme un droit de l' homme', Human Rights Journal, Vol. V, No. 2-3, pp 505-534. However, Sengupta noticed that Eleanor Roosevelt (the head of the UD delegation during the drafting of the UNHR) was the first one to identify the RTD when she stated "We will have to bear in mind that we are writing a bill of rights for the world, and one of the most important rights is the opportunity for Development."

² The Declaration on the Right to Development was adopted by the General Assembly in its resolution 41/128 of December 1986. UN Doc. A/41/53 (1986)

as an integrated whole consisting of all civil, political, economical, social and cultural rights

In the aftermath of the atrocities of World War II, the international community wanted to ensure that never again would be a repeat of the Holocaust and no one would be unjustly denied life, freedom, food, shelter, and nationality. The essence of these emerging human right principles was captured by President Franklin Roosevelt in 1941. In his famous Four Freedoms' speech in front of the Congress, he described a world founded on four essential freedoms (freedom of speech and religion and freedom from want and fear). All these freedoms had to be included in an International Bill of Rights that could be drafted after the war.

This idea was promoted in the San Francisco meeting, and was then embodied in the Charter of the United Nations, in 1945. Three years later, the Universal Declaration of Human Rights (UNHR) was adopted recognizing the unity of all rights. According to the Declaration, human rights constituted both civil and political rights (Articles 1 to 21) and economical, social and cultural rights (Articles 22 to 28). It was clear that, at that time, political and economic rights were seen as interrelated and interdependent components of human rights, and that "true individual freedom cannot exist without economic security and independence"⁴. After the adoption of the UDHR, an overall covenant was to be expected to include all those right identified in the Declaration, but with the binding status of an international treaty.

However, the consensus over the unity of civil and political rights (considered as the first generation of human rights) and economic social and cultural rights (considered as the second generation of Human Rights) was broken during the 1950s, with the spread of the Cold War. The political tension between the superpowers gave away the post-war solidarity and the countries were divided in their support on the different generations⁵.

³ See Sengupta A., *'On the Theory and Practice of the Right to Development'*, Human Rights Quarterly, Vol. 24, No. 4, pp 837-889, 2002;

⁴ President Franklin Roosevelt, State of the Union Message to Congress (11 Jun 1944).

⁵ The Western block was supporting more the first generation and the socialist countries was pressuring for the rights second generation. See also Section 3 of this Chapter.

As a result, those rights were codified in two separate covenants, one covering the first generation and another covering the second generation of human rights⁶.

Yet, the human right movement continued to develop. It was during the wave of decolonization in the 1960s when the RTD was first articulated by the developing countries as a companion of their newly acquired political emancipation from their colonial masters⁷. It emerged from the legitimate preoccupation that, beside their political independence, they were still economically dependent on developed countries⁸. After the 1960s, their claims were formulated to a demand for the establishment of a 'new international economic order' (NIEO) which would be more conducive to the economic progress of developing countries, and more close to the notion that peoples must have full control over their national wealth and resources.

This initiative was eventually represented by the RTD and it was meant to address the effects of the economic imbalances between the developed and developing countries. With the adoption of a Declaration on RTD which will explicitly mention NIEO, the hope was that the categorical imperatives of human rights could be used to oblige those countries that dominate the international economy to accept greater responsibility for eliminating the cause of poverty and maldevelopment, pay more for raw materials extracted from developing countries, provide more aid, and improve the terms of trade in favour of developing countries⁹. These facts, combined with the efforts to use the United Nations to advance the idea of NIEO, generated a reaction among Western delegations that ranged from cautious support to hostility for the idea of a human right to development.

⁶ The International Covenants on Human Rights were the International Covenant on Civil and Political Rights, adopted 19 December 1966 G.A. Res. 2200 (XXI), U.N. Doc A/6316 (1966) [entered into force 23 March 1976] and the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 G.A. Res. 2200 (XXII) U.N. Doc A/6316 (1966) [entered into force 3 June 1976]

⁷ See Villaroman N. G. *'Rescuing A Troubled Concept: an Alternative View of the Right to Development'*, Netherlands Quarterly of Human Rights, 2011.

⁸ See Marks Stephen, *'The Human right to development: between Rhetoric and Reality'*, Harvard Human Rights Journal, 2004.

⁹ Marks Stephen, *'The Human Rights Framework for Development: Five Approaches'*, Harvard University, 2003;

Throughout the 1970s, various reports and extensive debates examining the different aspect of the RTD were launched by the international community. These discussions lead to the establishment of a group in 1981 that eventually drafted the Declaration. The Western delegation made it clear that they would not allow the declaration to create any kind of entitlement to a transfer of recourses. From their point of view, financial aid was a matter of sovereign decision of every state. However, the developing countries were supported from studies which were showing that the international division of labor was favouring the countries of the center, leaving those in the periphery in a great disadvantage¹⁰. According to them, any unjustness in the international economic order could be corrected if a human right to development was emerged.

Finally, after long discussions and political bargaining, the United Nations General Assembly proclaimed development as a human right in its 1986 Declaration on the Right to Development (DRD). The resolution was adopted by an overwhelming majority. Yet, several Western countries abstain¹¹, with the United States casting the only negative vote; even though the declaration was in effect, an attempt to revive the immediate post-war consensus about human rights, including the freedom from want.

1.2 Politicization

Although the Declaration tried to get back to original concept of integrated and indivisible human rights, it did not imply the end of controversy in all the issues. Far away from a consensus, the world was still divided between those who denied that economic, social and cultural rights can be regarded as human rights, and those who consider that economic, social and cultural rights were not only fully justifiable rights but were essential, even necessary, to realize civil and political human rights¹².

¹⁰ Samir Amin and Raul Presich, two famous Unequal Exchange economic theorists, were the first to notice that the exchange of goods between low-wage developing countries and high-wage developed countries was highly unequal.

¹¹ The eight countries that abstained were: Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the UK. Four countries did not vote: Albania, Dominica, South Africa, and Vanuatu.

¹² Nelson Mandela warned against the tendency to restrict human rights to civil and political rights: "The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom."

This new generation of human rights emerged from the necessity to enable individuals to develop their full human potentiality through cooperation and participation of all individuals, governments, public and private organisation and international community¹³. In response to these new demands, a third generation of human rights was introduced and consisted of all those solidarity rights belonging to people and covering concerns like development, environment, humanitarian assistance, peace and common heritage¹⁴.

However, trying to identify the concept of RTD in UN fora proved to be a difficult task. Since the adoption of the DRD, the political discourse in the Commission of Human Rights was often characterized by predictable posturing of political position rather than practical dialogue. This politicization of the RTD discussion has been a general phenomenon in the UN and has been maintained throughout the various Working Groups and Resolutions discussions. The political position of states regarding RTD can be categorized based on the statements and voting throughout the various resolutions and reports¹⁵.

One group, from where RTD gains most of its political support, is the Non-Aligned Movement (NAM), consisting of countries such as Algeria, Bangladesh, China, Cuba, Egypt, India, Iran, Malaysia, Pakistan etc. They take the position “that developing countries continue to face difficulties in participating in the globalization process, and they may risk being marginalized and effectively excluded from its benefits”¹⁶. They believe that RTD can be a valuable tool to reduce the inequalities of international trade, the negative impact of globalization, differential access to technology, the crushing debt burden, and other factors that potentially damage the enjoyment of human rights and development.

A second group consists of those developing countries that try to keep the balance and support the idea to integrate human rights into national and international developing

¹³ See: Sengupta Arjun, ‘*On the Theory and Practice of the Right to Development*’, Human Rights Quarterly, 2002.

¹⁴ The last part of this chapter analyses better the philosophy behind solidarity rights.

¹⁵ Stephen Marks, ‘*Obstacles to the Right to Development*’, Harvard University, 2003.

¹⁶ General Assembly Resolution 56/150, para. 20.

policies but, at the same time, want to maintain a positive relationship with the donor community, the international development agencies, and financial institutions.

A third group is expressed by countries in transition and developed nations that tend to support the idea of RTD as an instrument to improve the dialogue between developed and developing countries. They would like to see some progress towards the implementation of this right but they are quite reluctant to authorize the Commission to do so. They will favor a resolution if nothing particularly objectionable is mentioned or, in the worst case, they will abstain. In this group, most of the times, members of the EU are the main players.

The fourth group is dominated by the US and votes always against RTD. Supported by other members that, according the circumstances, will include Japan, Denmark or Australia, along with smaller countries under the influence of the US, they will insistingly object any reference to the RTD in the resolutions. The US school of realpolitik in international relations is underlining the concerns that RTD is dangerous for political economy based on the fact that there is no internationally accepted definition and RTD could be translated as ‘right to everything’. Paradoxically many of the fundamental RTD’s principles are included in the US development programs, beside the fact that neither human rights nor the RTD are mentioned even once.¹⁷.

1.3 Consensus

There are three times in the history of RTD when a consensus emerged. The first one was in Vienna’s Declaration at the Second UN World Conference on Human Rights in 1993, which even the US supported. During this conference the developed and developing countries reached a consensus that the RTD is indeed a human right. The Vienna Declaration that was adopted by the end of the conference, affirmed the right to development, as established in the DRD, as universal and inalienable right and integral part of fundamental human rights¹⁸.

¹⁷ Marks, see above 8.

¹⁸ Vienna Declaration and Program of Action, UN Doc. A/CONF.157/23 (1993).

The second breakthrough occurred on 22 April 1998, when the U.N. Commission on Human Rights adopted by consensus a resolution on RTD, with the support from the US, recommending to the Economic and Social Council the establishment of a follow up mechanism¹⁹. This mechanism would be consisting of: i) an Open Ended Working Group (OEWG), with a mandate to monitor and review progress made in the promotion of RTD at the national and international level, and ii) an Independent Expert, with the purpose to present to the working group studies on the current stage of progress in the implementation of RTD. Dr Argun Sengupta was appointed Independent Expert, and his reports did not only explain in detail the concept of RTD, but also analyse the different dimensions implied in the RTD and propose ways for its concrete realization²⁰.

The third consensus occurred in 2000, when the world leaders attending the UN Millennium Summit reached an agreement on a set of goals and targets for fighting extreme poverty, hunger, illiteracy, environmental degradation, disease, and discrimination against women, which later became the Millennium Development Goals. According to the Summit Declaration, the head of States and Governments reaffirmed their commitment “to making the right to development a reality from everyone and to freeing the entire human race from want²¹”. Especially, Millennium Development Goal 8 calls for ‘global partnership for development’ renew the interest for RTD by integrating some points of the right based framework into the MDGs strategy²².

2. Textual Analysis

We have already seen the historical and political background of RTD. But what is, in sum, the RTD? The best short definition was proposed by its first Independent Expert,

¹⁹ Commission on Human Rights Res 72, UN Doc. E/CN.4/1998/177 (1998).

²⁰ List of the reports of the Independent Expert on the Right to Development can be found in the bibliography

²¹ United Nation Millennium Declaration, G.A. resolution 55/2.

²² See Sitta A., ‘*The role of the Right to Development in the Human Rights Framework for development*’, 2005.

Mr Sengupta, who defines RTD as “the right to a particular process of development in which all human rights and fundamental freedoms can be fully realized”²³.

2.1 Definition

This definition is very much related to the content of the first Article 1 of the 1986 Declaration, which states²⁴:

“The right to development is an inalienable 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.”

According to this article: (a) there is inalienable right that is called RTD (b) there is particular process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized and (c) RTD is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute and enjoy that particular process of development. So the article affirms that: first, RTD is an unalienable human rights that cannot be taken or bargain away; second, development should be processed in terms of realization of human rights, as they can be found in the UDHR and other human right conventions; and finally, human persons and all people are the right-holders in term of claims and entitlements, which duty holders must protect and promote.

Development is defined in the preamble of the Declaration on the Right to Development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being 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 there from”. According to this definition, development has to be a “comprehensive process”, not just economic but also social,

²³ The textual analysis is based on Sengupta Arjun, *The Right to Development as a Human Right*, Harvard School of Public Health, 2000.

²⁴ See also Sita, above 19.

cultural, and political, in a way that is participatory with “active free and meaningful participation”, and equitable with fair distribution of the benefits of development.

But the most important aspect of this explication is that puts forward the notion of “well-being”, the improvement of which is the objective of development process. In effect, development as such aims the constant improvement of the well being of “every human person and all peoples”, but this is possible when the corresponding obligations can be clearly specified, when the improvement in the realization of the rights can be decently identified, and when the process is carried out in way that is rights based, in accordance with the human rights standards.

To sum up, the Declaration offers in article 1 the legal base in defining the RTD as a human right. Development, in this context, abandons the traditional economic characterization of giving priority only to outcomes and results. Instead, development becomes understood as a process that aims to expand the real freedoms that people enjoy by focusing on an economic growth that takes place in a manner consistent with human rights norms and does not conflict with the realization of all the different rights.

2.2 Duties

To succeed this process of development, there are responsibilities to be borne to the different agents. The Declaration provides a broad definition of the duty-bearers and assigns these responsibilities to “the human person”, “the states operating nationally” and “the states operating internationally”. Thus, the responsibility to fulfill the RTD is up to individuals, states and international community, together but each with a different degree.

According to Article 2, Clause 2, “all human beings have the responsibility for development individually and collectively”. They must take appropriate actions, keeping in the same time “full respect for the human rights and fundamental freedoms as well as their duties to the community”. It comes out that human beings are recognized to function both individually (as a person) and collectively (as members of a

community), and to have duties to their communities that are necessary to be carried out in promoting the process of development based on RTD.

However, the “states have primary responsibility for the creation of national and international conditions favorable to the realization of the right to development”, as Article 3 categorically suggests. That means that the states are carrying the load to realize RTD, but their responsibility is complementary to the individual’s responsibility, and not unrelated. In other words, states have the responsibility to create the conditions for realizing RTD, and not necessary for actually realizing the right itself. It is up to the individuals themselves to make RTD a reality.

At the national level, Article 2(3) raises that “States have the right and the duty to formulate appropriate national development policies”. Article 8(1) points out that “States should undertake, at the national level, all necessary measures for the realization of the right to development” maintaining the “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income”. In addition, in Article 6(3), states are required to “take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights” because the “implementation, promotion and protection” of these rights is essential for realizing RTD.

Regarding the obligations of states operating at the international level, the Declaration highlights the importance of international cooperation. Article 3(3) points out the duty of states “to co-operate with each other in ensuring development and eliminating obstacles to development [...] and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation”. Furthermore, Article 6(1) underlines that “all States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms”. Finally, according to article 7, “all States should promote [...] international peace and security and [...] disarmament under effective international control, as well as to ensure that the resources

released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries”.

The Declaration further elaborates the principles of the development policies by putting a strong emphasis on international cooperation. Article 4 emphasises the duty of states, individually and collectively, to formulate international development policies to facilitate the full realization of RTD. It recognises that “sustained action is required to promote rapid development of developing countries” and “as a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development”.

All in all, in the event that a state is unable to formulate and execute those development policies that fulfill RTD, it has the right to claim cooperation and help from other states and international agencies. This acknowledgment implies that not only rich countries must provide aid to developing ones, but also the whole international community has a duty to modify or even discontinue certain activities, such as international economic or financial agreements, that may result underdevelopment or unfavorable conditions that damage the realization of human rights. It is easy to understand that such a prospective would imply revolutionary consequences in political and economic relations between states. The most important of these consequences is a shift from in the international development cooperation, from a context of charity/aid to a context of right/responsibility. This acknowledgement represents the most controversial aspect of the RTD.

2.3 Right-holders

As we have seen, Article 1 recognises that not only “every human person” but also “all peoples” are entitled to this right. In Article 2(1), the Declaration states that “the human person is the central subject of development and should be the active participant and beneficiary of the right to development.” In other words, the Declaration identifies human beings (both as individual and as member of a community) and peoples (in a collective form such of a state) as the right-holder of RTD. For the first time, it is

possible for a group of people to figure as rights-holders, with the duty bearer no longer being only the state they belong to, but also the international community as a whole.

Correspondingly, the objectives of development should be expressed in terms of entitlements of right-holders. The Declaration presents two readily identifiable entitlements in favour of the individuals and people of a State as the right-holders. First, they have the right to implement a process of economic development independently and free from pressure, influence or interference from other states or international organizations. Second, the international community has an obligation to establish favorable conditions, rather than harmful or damaging, for the full realization of all human rights and fundamental freedoms, including RTD²⁵.

The process of claim is double: an individual has the right to claim his RTD realised by his own country, and, in the same way, the country has the same right in relation with the international community or other international organizations. Therefore, RTD is an individual right, a collective right and a right of solidarity, which pose the realization both at the individual and collective level. This is very important to understand that “peoples’ right” are not coming first or prevail over the individual’s or “every human person’s” right. By stating that the States can claim entitlements, does not mean that States posses human or peoples’ right. Instead, this prospective implies that a State is regarded as the legitimate representative of its people in international stage. It is clear therefore that RTD is a right that a State can use on behalf of its people against the international community.

3. Controversies of RTD

There two elements of RTD that still in human rights theory are regarded as contradictive and have produced different type of criticism: (i) the relation of the first and second generation of human rights with the third generation, and (ii) the contradiction between the collective and individual rights. This part will present a brief analysis of the debate around these issues.

²⁵ Villaroman N. G, above 7.

3.1 First vs. Second vs. Third Generation

The division between the three generations of human rights is related to the historical context in which they emerged. During the Cold War, the world was divided in three groups of countries: the First World consisting of western democracies; the Second World consisting of socialist countries; and the Third World consisting with the rest of world (developing and newly independent countries). This division in the human right world was represented by the Western block for supporting the civil and political rights (first generation) and the socialist countries for pressuring for the economic and social rights (second generation). The third generation was proposed during the 60s by the Third World countries in response to their concerns for the gross economic inequalities with the two other Worlds.

The reasons why the western countries were opposed to the second generation can be summarized in three main criticisms: (a) human rights are individual rights (b) human rights must be coherent, meaning that a duty bearer must have a specific obligation towards a right-holder, (c) human rights must be justifiable. All these criticism, as long as they are valid, mean that economic, social and cultural rights were not actual rights. The mainstream view of the western international lawyers was that human rights are only those rights related with negative freedom which requires the state to abstain from any action that will violate a right (such as the right to life by unlawfully killing). Thus, only first generations rights were to be justifiable as human rights based on the fact that the second-generation rights require the state to secure and protect through positive action (such as funds to fulfill the right to education).

However, this vision fails to recognise the well established identification that both generations require negative (preventive) as well as positive (promoting) actions²⁶. Moreover, the western countries' criticism confuses human rights with legal rights. Human rights are based on moral standards on a view of human dignity and they have many and different ways of fulfillment depending on the acceptability of the ethical

²⁶ Both obligations are recognized by the European Court of Human Rights.

base of the claims²⁷. This of course does not mean that the importance of translating the human rights into legal rights is not present. On the contrary, they should be supported by the formulation of appropriate legislative instruments, backed by justifiable claims in court and by authorities of enforcement. But the view that human rights cannot be invoked if they cannot be legally enforced would be ill-fitted.

When it comes to the third generation, the contradictions are much smaller. In fact, the third generations (specifically the RTD) were intended to promote and protect the rights of the first and second generation, not to replace them. At first glance, they might seem that there is nothing essentially different than the other two generations; in fact the third generation sets as precondition the fulfillment of the two previous generations of rights. It is also true that both the ICCPR and ICESCR recognise a collective dimension in fulfilling their rights. So, the question is: why the third generation of rights is needed?

During the 60s, it became obvious that the threats to human rights were not only coming from a local level, but also arise from the emerging global interdependence between people and nations. It was clear that the human rights issues that the contemporary societies were confronting could no longer met by the action of a single state. Instead, they required more solidarity in terms of support through cooperative action on the international level; commitment to certain form of actions; and very broad sharing of aims, resources and objectives.²⁸ Hence, a new generation of rights was needed to achieve coordinate response on a worldwide scale to all those threats to human rights arising from the (mainly economic) globalization. Today this new generation of rights is seen as solidarity rights.

The main added value from the third generation of human rights is the responsibility for concerted efforts to achieve their fulfillment²⁹. In other words, the solidarity rights can be realised only by the concentrated efforts of all the actors in the social scene; an idea

²⁷ Sengupta, above 20, p 10

²⁸ Wellman Carl, '*Solidarity, the Individual and Human Rights*', Human Rights Quarterly, 2000, p 644.

²⁹ Saeed Reza Abadi, '*Decent Work from the Perspective of the Right to Development and Human Development*', US-China Law Review, pp 660-662.

quite different from the tradition view of the first-and-second generation which impose obligation primary upon states. Third-generation rights can be real only if they impose obligations to a wider range of actors, including public and private corporations, inter-governmental organization, and international financial institutions. Another novelty is the fact that the enjoyment of these rights can be an entitlement of a group of people which is not reducible to the several rights of the individual members of the group. In other world, the right of a group of people is no longer seen as the sum of the rights of the individuals, but as a distinctive right itself. This involves a radical rethinking about which are the right-holders of human rights, as the first-and-second generation have traditionally recognized only the rights of individual human beings. The RTD is a very good example of this new perspective by asserting that “every human person and all peoples are entitle” to enjoy the right.

To conclude, the today’s world reality is showing that the realisation and securing of the traditional human rights requires the introduction of greater solidarity into international law. This idea includes the necessity to recognize some joint obligation of all states and the broadening of duty bearers beyond state. As the world becomes more interdependent, the acceptance that people are entitled to human rights would also bring individual human rights forward.

3.2 Collective vs. Individual

The idea that human rights can be regarded as the collective rights of a group of people is not widely accepted. According to some scholars, collective rights and human rights are even incompatible³⁰. The main criticism comes from the fact that, by definition, human rights are rights that one has simply as a human being. Since the people are not the same as a human being, it is logically impossible for any people, or any group, to possess a human right.³¹ The criticism goes on by arguing that there is no need to recognize the rights of a group of people, as their rights are already protected from the existing individual’s human rights regime. Indeed, the majority of international and

³⁰ Neus Torbisco Casals, *Group Rights as Human Rights*, (Netherlands, Springer, 2006), see introduction.

³¹ Wellman Carl, above 25, p 653

regional human rights treaties protect rights such as the right to life, adequate house of living, freedom of thought which are understood to protect the rights of individual human beings.

However, human rights do not need to be limited only to those of individuals. Conceptually, human rights can be understood in terms of the need to protect the dignity of a group and a group's physical integrity and identity, as well as civil, cultural, economic, political and social engagement³². Actually, there is no ground to take a right of a group or a collective (nations, ethnic or linguistic groups, indigenous etc) as something essentially different in nature from an individual's human rights, as long as it is possible to recognize obligation to fulfill them, and duty-holders to secure. In fact, there are many situations where a group of individuals are oppressed because they belong to a group or they have group identity. For example, the prohibition of genocide as a human right was put forward to protect a group from actions against the group's physical integrity as a whole, and not only to protect the individual's life that was already recognized from the right to life. In addition, we should not neglect the fact that a part of human dignity is dependent on the feeling of belonging to a group. For example, the right of indigenous people was recognized as a human right based on indigenous people's preference to be identified collectively as members of a group, rather than being a selection of individuals³³. For all these reasons, we could argue that collective rights are necessary to protect a group of individuals from oppression as a group.

What is common between the two perspectives is that both have the same beneficiary: the human person per se. In the case of individual rights, the right-holder is also the beneficiary for exercising the right. In the case of collective rights, the right holder might be a group of people such as a nation but, at the same time, the ultimate beneficiary has to be the individual. Therefore, care must be taken not to give to collective rights a definition that can be in opposition to individual rights. As a matter of

³² See, Robert McConquodale, "Rights of Peoples and Minorities", *International Human Rights Law*, (New York: Oxford University Press, 2010), 366-367.

³³ This fact is drawn from my experience of living for 3 months with indigenous people in Brazil. More information on my paper: 'How much universal are human rights? The case of infanticide among the indigenous in Brazil', 2011.

fact, there are cases when the right of a particular individual may come into conflict with the right of a collective, for example the cultural tradition of an indigenous group could violate the right to life of a child³⁴. It is also possible that some of the individual rights could come into conflict between themselves, for example the limitation on freedoms of expression based on the freedom of religion. Thus, it becomes clear that some transparent procedures to resolve these conflicts would be necessary, but this doesn't change the importance of collective rights seen as built on individual rights.

When it comes to RTD, it is equally important to recognize its collective perspective. The defining content of the right exclusively in terms of individuals would be essentially different from the defining content in terms of individual and collective actions. It is easy to understand the limitation of what a single person can do to promote development in his society, compared to potential of peoples organized in a community or a state. That is why recognizing the RTD as a right of peoples, implies that development should focus more on increasing the prosperity of all individuals and the respect of their human rights, instead of being just equated with an increase in the gross national product which, as it was proved in the end, is beneficiary only for few.

³⁴ Idem

Chapter 3

RTD Principles

Like all other constitutional documents, the DRD is open to interpretations that sometimes may be conflicting. Considering that the Declaration is a document that came after long, paragraph by paragraph negotiations, it is difficult to consider the agreed text as very neat or thorough.

As we have seen in the previous chapter, one of the main obstacles of RTD is ignorance on the actual concept of RTD. The lack of proposal on how to establish and indentify the RTD is the main reason why RTD is still ignored by international lawyers and development agencies. At academic level, very little has been done to improve thinking about how RTD relates to development and human rights theory. In the scholarly community, there are very few academics publications which propose ways in order to operationalise RTD. Moreover, there is a complete incognizant on how RTD violation can be indentified in practice.

However, if this Declaration is read in conjunction with other instruments that are now regarded as the International Bill of Human Rights³⁵, and if it seen as a document of human rights that derives from the evolvment of the human right movement, it can be given an interpretation that can be operative for its realization. After reading UN reports and several papers written by the Independent Expert on RTD, Mr Sengupta, this chapter indentifies five RTD principles that can play the role of indicators that examine whether the practices of the international community towards developing countries is compatible with RTD³⁶.

In sum, the Declaration is proposing a development process where five principles should be respected. These five principles constitute the RTD priorities of development

³⁵ All the rights recognised in UDHR, ICCPR, ICESCR

³⁶ This chapter is based on the reports of Sengupta as an Independent Expert on RTD and the articles found in the bibliography.

activities, namely: 1) development as a right; 2) progressive realization 3) non-retrogression of human rights 4) development with equity 5) international cooperation under human right principles. When it comes to the latter, this paper promotes the idea that RTD advance five traditional human right principles to become entitlements of developing countries in their relation with the international community and participation in international financial institutions (IFI). By recognizing RTD as part of international customary law, the human right principles of transparency, accountability, participation, nondiscrimination, and equity become the basic operational principles under which an international organisation is obliged to function and respect.

1. Development as a right

By affirming that development process must be coherent with human rights standards, the RTD takes forward human rights to become a fundamental part of development process, both in the sense of being means to achieve development aims and in the sense of providing the normative framework for development activities³⁷. However, it is inevitable to question: what is the need to recognize development as a human right?

According to the mainstream approach, development and human rights remain two different concepts, in terms of characterization and particular implications. However, especially for poor countries, it is recognised by everyone that economic development is very important when it comes to protection and promotion of human rights. So, if human rights are entitlements of every individual regardless of his status and condition, and if development is essential in the process in which all the individuals enjoy their human rights, then development itself can be regarded as a human right.

In human rights language, when development is seen as a human right, the duty-holders are obliged to promote, protect and fulfill their duty in delivering that right in a country. Whether they succeed or not would depend upon the design of the program of implementation, the available physical, financial and institutional resources, the

³⁷ Sita, above 22.

conflicts that many arise between the different groups etc. But, no matter the results, the obligation to deliver this right becomes a binding restriction on the behavior of a government and international community.

2. Progressive realization

The problem of realizing the RTD would not appear to be only in designing a set of development policies to implement the elements of economic social and cultural rights, together with the civil and political rights. But also it would be the question in which way the supply of means and use of resources- financial, physical and institutional, both at the national and the international level- will facilitate the enjoyments of those rights. Indeed, the question of resources is very important when it comes to the realization of RTD, the limitation of which is one of the main constraints that affect the speed and coverage of the development process the most.

By introducing the principle of progressive realization, human rights instruments acknowledge that some of the rights (for example, the right to health) may be difficult in practice to achieve in a short period of time and it will depend on the availability of means. However, even if they recognize the importance of resource constrains, they don't accept their use as an excuse for not delivering a right³⁸.

Yet, the realization of these rights still remains an issue as it requires expenditure of resources, the supply of which remains limited in the cases of very poor countries. For those states, the institutional constrains may be a barrier very difficult to overpass and the efficient use of financial and other resources becomes very crucial. The solution for those cases could be the prioritization of rights in terms of efficiency; those rights that require less expenditure of those resources which are in short supply will tend to be realized first. Such prioritization would mean that some rights could be realized earlier than the others; but in the same time and very importantly, the realization of those rights will occur without violating or retrogressing the fulfillment of any other right. The benefit of this approach is that instead of seeking only the increase of the available

³⁸ See also '*The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*'. UN Doc. E/C.12/2000/13

resources, we could also seek to use the one in our disposal more efficiently and less wastefully. This could have much greater impact on realising the rights than just increasing the supply of means.

3. Non-retrogression of human rights

As we have seen, the lack of economic growth cannot be used as an excuse for not implementing the policies to realize human rights. Rather, the state should adopt those methods which will be proved to be the most efficient by making the maximum use of the available resources. The process of free exercise the RTD is as important as the increase of supply of resources that facilitate the enjoyment of human rights. Seeing it this way, the RTD is improved when all the elements are positive, or at least when there is a constant improvement of some elements, with no regression in other elements. This constitutes one of the most important propositions of RTD.

By defining development in terms of human rights, the RTD approach changes the purposes of development process; human rights are not just the means to achieve human development, but they are the goals of development itself. This does not mean that other components, such as economic growth, technological transfer or trade lose their importance, but they take the role of instrument to achieve a greater goal. As we have seen in Chapter 1, RTD requires attention not only to the outcomes but most of all to the process. As a result, the idea of a trade off, in which we can sacrifice the enjoyment of some human rights for the purpose of a general positive value, is not accepted by RTD.

It is very important to understand that RTD is not just an umbrella right or the sum of set of rights. It is the right to a process of development that expands the capabilities or freedoms of individuals to improve their well-being, to realize what they value and to choose the lives they want to live by exercising the rights they want to claim. Rather than an umbrella right, RTD can be better described as vector or as a composite right when all these rights are realized together in an integrated manner. The integrity of these rights indicates that if any of these rights is violated, the whole composite RTD is also violated, unless supplementary action is taken to neutralize the negative effects. Each element of the vector is a human right just as the vector itself is a human right, the

implementation of which would be under the human rights standards. All the elements of the vector are interdependent, both at present time and the future. Consequently, the realization of one right, for example the right to health, depends on the realization of other rights, such as the right to food or housing, or the freedom of information.

Finally, one of the benefits of using the RTD approach to development is that it focuses on those who are kept back in enjoying their rights and requires a positive action to be taken on their behalf. Looking the RTD as a vector of rights bring out clearly that any program that raises the level of enjoyment of a right without lowering the enjoyment of any other, would increase the level of development. The interpersonal comparison of benefits, by arguing that a project will benefit a much larger number of people compared to those whose rights will be violated, is not compatible with the idea of RTD.

4 Development with equity

There two apparent novelties by understanding RTD as an integrated process of development of all human rights. The first one is that the realization of all rights, through national and international policies, should be based on comprehensive development programs which will use all the available means, including the resources of production, technology and finance. This shift will entail that the developing program will target on realising human rights, using the resources, the technology and the financial and institutional means as instruments for achieving this goal. By introducing the principle of prioritization, the RTD approach gains the necessary flexibility and it can be used as tool to increase the effectiveness of the developing programs.

For example, if a RTD based developing program on the right to education proves to be cost-effective, it may possible to reduce the expenditures of resources in this direction and raise it in another, such as food, and thereby register an improvement in both rights. But if these improvements are expected to cover all rights, the resource base must expand as well. This tank of available means should include not only GDP, but also technology, financial knowledge and institutions provided by those who have these capacities. The value added by RTD is that, not only the realization of each right must

be seen and planned as depended on the other rights, but also the growth of GDP, technology and institutions should be planed and implemented as part of the RTD.

The second novelty is that the RTD process to development is centered around the concept of equality and justice. It concentrates more to the majority of the population, who are currently poor and deprived, and tries to expand their substantive freedoms by raising their living standards and strengthening their capacity to improve their positions. The ultimate goal of this process is the improvement of the well-being of the entire population, which extends beyond the conventional notion of economic growth to include the expansion of opportunities and capabilities. Very valuable tool to achieve that are the indicators of human and social development.

From the RTD prospective, growth is not any per capita rise in GDP. Preferably, growth is a particular form of economic growth associated with equity and justice, which is related to the realization of all human rights together with the expansion of other human, technological and institutional resources. Economic growth with equity and justice is process that is carried out maintaining the universal standards of human rights. Thus, any program realizing the RTD must be based on a design of expanding the resources through a process of sustainable growth consistent with human rights standards³⁹.

In reading the UNDR, it is clear that the notion of equity was one of its fundamental concerns as the first Article itself defines that all human being are born free and equal in dignity and rights. In the same way, the Declaration on RTD is founded on the idea of a social order based on equity. As we have seen, several of its articles are calling for equality of opportunity, equality of access to resources, equality of participation, and equality in the sharing of benefits and fairness of distribution.

³⁹ Sengupta, above 15 p 871.

5. International Cooperation under human right principles

Starting from the UN charter, many legal documents of international law state the obligations of States to cooperate among them for the achievement of development⁴⁰. Especially for the developing countries, which are still short of resources, this duty becomes a necessity.

However, we should not neglect the fact that making more effective use of existing resources may be more important than the additional flow, in realising many of the RTD's objectives. As we have seen in the textual analysis, the overall responsibility in implementing the RTD belongs to the developing countries' governments themselves. It is their duty to enact legislation, to adopt appropriate measures, to engage public actions, to formulate schemes to help those who lag behind, to empower beneficiaries, to allocate investment and promote production, and generally to adopt all those policies that will promote a process of development with equity and sustainable growth with whatever resources they have in a given framework of international cooperation. If the level of the international cooperation improves, they can do the job more efficiently. But they cannot just wait for that increase to come while doing nothing to implement RTD.

Concretely, the international cooperation includes two different forms to tackle the development concerns of developing countries: the developed countries direct action, aimed to support through economic and technical aid the development process, and the indirect action, aimed to create favorable political and economic conditions for the developing countries so that such a process of development can take place⁴¹. Both this dimensions are critical for the realization of RTD, however, the latter is most important.

⁴⁰ Article 55 and 56, UN Charter, Vienna Declaration etc.

⁴¹ Sengupta Arjun, 'Official Development Assistance: The Human Rights Approach', Economic and Political Weekly, pp 1424-1436, 2002;

For indirect actions, the idea of conceiving human rights and development in a joint paradigm is quite recent acknowledgment. It is only since the 90s that many UN bodies, national development cooperation agencies, international and national NGOs have started to mainstream human rights into development practice by adopting the human right-based approach to development (HRAD)⁴². When it comes to development policies, RTD and HRAD share many common points. Both approaches are promoting the idea that integrating human rights in development activities means to avoid activities and programs that are explicitly against the spirit of human rights⁴³. Moreover, they both consider traditional goals of development activity, such as improvements in terms of education, house or health services, as human rights⁴⁴.

However, it became necessity for development agencies to identify some principles which can provide clear indication of how development policies under human rights norms should be conducted⁴⁵. In order to apply human right thinking in the development planning, HRAD has defined five fundamental principles which can indentify when human rights standards are violated in the development process: (i) accountability, (ii) participation, (iii) transparency, (iv) non discrimination, and (v) equity.

As we have seen in Chapter 1, RTD underlines the obligation of the international community to establish favorable conditions for the realisation of all human rights and make the pro-conditions of development realisable for developing countries. Considering that the RTD advance the status of states to become the right-holders in order to protect the development and human rights of their people, these human right principles become entitlements of developing countries in their relation with international community and participation in international financial institutions and development agencies.

⁴² Uvin Peter, *'From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered –Development'*, Development in Practice, Vol 17, No. 4/5, pp 597-606, 2007;

⁴³ See Sengupta Arjun, 'Development Cooperation and the Right to Development', Francois-Xavier Bagnoud Center for Health and Human Rights, 2003

⁴⁴ Sita, above 22.

⁴⁵ Marks, above 9.

Considering the HRAD as an integral part of RTD, means that these HRAD principles are not only entitlements of individuals during the development process, but they are also principles which RTD accredits to developing countries during the development planning of international cooperation. In other words, the RTD approach to development proclaims the principles of transparency, accountability, participation, nondiscrimination, and equity to become the basic operational principles under which a international organisation is obliged to function and respect. By recognizing RTD as part of the international customary law, developing countries are entitled to demand these principles to become the modus operandi of international financial institutions that effect development.

Part II:

World Trade Organisation

Chapter 4

Presentation of WTO

The beginning of this chapter examines the historical background behind the idea of creating of an International Trade Organization (ITO) after the end of the WWII, which instead lead to the creation of the General Agreement on Tariffs and Trade (GATT) system until it was later replaced by the World Trade Organisation (WTO) in 1995. Moreover, this chapter include an overview on the functions and structure of the WTO, the decision making process, and the rules of accession for newcomers in the WTO system. For the purpose of this thesis, I will focus on the developing countries and the exercise of their influence in the WTO. The goal of this chapter is to explain why developing countries have always seen the GATT/WTO as a ‘rich man club’ beside the fact that they were falling each other to accede to the organisation¹.

1. Historical Background

Following the end of the war, the international leaders realized that to achieve a prosperous and lasting peace depended not only on the creation of a stable international political order under the principles of the United Nations Charter, but also on the creation of a stable international economic order. The view was that “enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade”². In other words, the idea that was put forward by the winning side was that free trade provided an important mechanism for achieving world peace³.

¹ A very good introduction for someone interested in WTO is: Narlikar Amrita, ‘*The World Trade Organization: A Very Short Introduction*’ Oxford University Press, 2005.

² Cordell Hull, *Economic Barriers to Peace*, Woodrow Wilson Foundation, 1937, p 14.

³ Narlikar, see above 1, p 10.

After the discussion between US and Britain which started even before the end of the war, in 1944 at the Bretton Woods conference⁴, the Allies powers signed an agreement about the reconstruction of the world economic order based on the principle of international economic cooperation. Three organizations would have been the pillars for this purpose: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (or the World Bank), and the International Trade Organization (ITO). The multilateral trade conferences that followed led to the U.N. Conference on Trade and Employment in Havana, 1948. The outcome of this conference was the Havana Charter: a draft agreement for the creation of ITO as the formal trade management global organization in the post war era⁵.

According to the Havana Charter, ITO had a far-reaching mandate as an organization. The organization was conceived as a specialized agency of the United Nations, along with IMF and the World Bank. The 106 articles of the Charter were covering areas of employment, economic development, restrictive business practice and commodity agreements; tasks which today are seen as internal matters of states but at the post-war years were seen as serious concern of the international community.

The decision taking was based on a 2/3 majority, and in the event of a dispute, member states could express their concern in the Executive Board or refer to the International Court of Justice. In additions, ITO gave recognition to the importance of ensuring fair labour standards, and also incorporated provisions that gave the government the option to address their development or humanitarian concerns.

However, despite the promising multilateral support and the leading role of the US in pushing forward the negotiations, the ITO never came into existence. Political disagreements between the Democratic presidency and the Republican Congress showed that it would be extremely unlikely for the Congress to ratify the treaty⁶. Indeed, in 1950, President Truman announced that he would no longer seek Congressional approval of the ITO Charter. Considering the dominance of the US in the

⁴ Officially known as the United Nations Monetary and Financial Conference.

⁵ Havana Charter was ratified by 53 out of 56 countries that took part in the conference.

⁶ In the US all treaties are first signed from the president but then have to be ratified by the Congress.

post-war economy, it became obvious for the other countries that a trade organization without the participation of the US would have been meaningless and, thus, they withdrew their interest. As such, ITO was dead even before born and Sonia Rolland argues that “the comprehensive and supranational system for economic relation envisioned at the close end of the World War II had failed⁷”. Yet, all participants considered trade issues important enough to incorporate some portions of the ITO into a less formal, free standing trade agreement know as the General Agreement on Tariffs and Trade (GATT).

2. The GATT system

The main purpose of the first GATT in 1947 was to establish a legal mechanism for tariff negotiations, and to provide rules that would deter countries from reinstating protectionism through non-tariffs means or any other kind of setbacks which might have bargained away the context of tariff reducing negotiations⁸. However, the GATT left to trading countries themselves the task of initiating and carrying out negotiations to bring down the level of duties. In reality, the GATT system was little more than a negotiating forum, hold together by a multilateral treaty signed by contracting parties instead of members of an organisation.

The original political constrains against viewing the GATT as an international organisation had some important practical implication for its everyday functioning. The GATT Secretariat, which still had the official name ‘Interim Commission for the International Trade Organisation’ due to the absence of any reference for secretarial support in the first GATT, had always a minimal role as the proceedings were driven by the contracting parties. This is proved by the fact that there is no record of the

⁷ See Rolland Sonia E., *Development at the WTO*, Oxford University Press, 2012, pp 66-68. In the same book it can be found a very nice comparison between GATT and ITO.

⁸ Gilbert Winham, *The Evolution of the World Trading System- The Economic and Policy Context*, included in *The Oxford Handbook of International Trade*, Oxford University Press, pp14-16.

Secretariat's role in the plenary meetings that issued the first GATT legal rulings⁹. Similarly, the dispute settlement was also very weak. It started as a working party of nations in the early GATT years to become a panel of experts the latter years. This panel of experts was consisted of an ad hoc group of government experts (rather than policy officials) convened to render an objective opinion about some technical question. However their power was very limited as every report had to be adopted by the contracting parties through consensus, a fact that gave power to the losing part to block or delay the adoption process.

A critical change occurred in sixties when the Contracting Parties took a decision to establish a Council of Representatives. Before that, the contacting parties were meeting every once or twice a year. This changed when the permanent Council of Representatives was created to become the principal institution for the GATT 1961 with the main burden of directing it. Yet, the fact that the Council was established without any explicitly treaty language degraded its institutional role. In a way, it is surprising the GATT system managed to exist for nearly fifty years with almost no basic constitution designed to regulate its organisational activities and procedures.

This contradiction between the non-existent organizational structure by the GATT Agreement and the adoption of many institutional provisions that gave it a fair definition of a de facto international organization, represented the main weakness of the GATT¹⁰. From the moment they joined the GATT in mass in 1960s till the Uruguay Round, developing countries saw their development needs and socio-economic specificities not being taken account in the process of trade liberalization¹¹. The institutions didn't have the availed means to address the power asymmetries that severely damaged developing countries in their trade relation. Beside the fact that the agreements had been negotiated broadly in different rounds, the GATT system

⁹ See Hudec R. *'The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure'*, included in *'The Uruguay Round and beyond: essays in honor of Arthur Dunkel'*, University of Michigan Press, 1998, p 106.

¹⁰ See Jackson J., *'The Evolution of the World Trading System-The Legal and Institutional Context'*, included in *'The Oxford Handbook of International Trade'*, Oxford University Press, p 36.

¹¹ Rolland, see above 7, p 76.

significantly contribute to increase the economic problems of developing countries and extended further the gap between rich and poor countries.

The evolution of GATT came through various multilateral negotiation rounds. The first round of GATT was 1947 in Geneva and it was an agreement signed by 23 countries (11 developing and 12 developed). The next four rounds (Annecy, 1949; Torquay, 1951; Geneva, 1956; and Dillon Round, 1960-61) dealt primarily with tariffs in goods. None of these first rounds had a large impact on reduction of tariffs and the outcomes were unimportant¹². The first significant negotiation was the Kennedy Round (1964-67) with 74 participants. The results were a significant reduction in tariffs of 35 per cent¹³ and, for the first time, the negotiations went beyond tariffs and deal with certain non-tariff barriers.

Starting with the Tokyo Round (1973-79), the GATT system extended its matter to areas that traditionally were within state's domestic province. Beside the reduction of 34 per cent in tariffs, Tokyo Round introduced a wide range of obligation pertaining to other forms of non-trade barriers. It came up with new provision related with subsidies, antidumping, technical regulation and standards, licensing and custom valuation rules, many of which were purely domestic measures. Ninety-nine countries participated in the negotiation, representing the nine-tenths of world trade. About a third of them were the developing countries, forming a relatively united front which increased their negotiation power and influence¹⁴

To conclude, it was clear that the GATT system had been growing in its mandate and size during the period 1947-79. Beside the problems generated by its lack of organizational structure and the frequent complaints by the developing countries, GATT was credit with bringing a dramatic reduction in tariff protection on industrial products in developed countries. Over the same period, the volume of trade grew by an annual

¹² See Hoeckman, Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, Oxford University Press, 2009, pp 132-138.

¹³ In contrast with the previous Dillon Round where was agreed only 10 per cent of reduction in tariffs

¹⁴ Rolland, above 7, p 72. Rolland argues that NIEO movement bolstered developing countries support for the Tokyo Round.

average of 8 per cent, while the growth of world production averaged about 5 per cent¹⁵. Whether these results are connected is still debated between the economists. However, the reduction in trade protectionism was seen as correlated with increases in world trade and output, and this fact was the one that encourage governments to continue to pursue trade negotiations as a mean for economic growth¹⁶.

The eighth and last major trade ‘rounds’ under the GATT umbrella was the Uruguay Round, launched Punta del Este, Uruguay, in 1986, and finally concluded in Marrakesh, Maroko, in April 1994. This round was the largest and most complex of the GATT trade ‘rounds’ and probably the largest and most complex economic multilateral treaty negotiation in history. The Uruguay Round led to further liberation of international trade including not only policies affecting trade in goods, but also for the first time, trade policy measures affecting investment, trade in service and intellectual property rights. But, the most important outcome of this ‘round’ was the establishment of a new international organisation, WTO, to oversee the different aspects of the agreement¹⁷.

The Uruguay Round agreement was a result of long, trade-off negotiations and compromises between the developed and developing countries that some scholars have called ‘the Grand Bargain¹⁸’. In few words, the Grand Bargain was an implicit deal that required from, on hand, the developed countries to open their markets to agriculture and labor-intensive manufactured goods, especially textiles and clothing (AoA), and from the other hand, the developing countries to include into the trading system: trade in services (GATS), intellectual property (TRIPS), and investment (TRIMS).

¹⁵ See World Trade Organisation, ‘*Understanding the WTO*’ Fifth Edition, 2011, p 17.

¹⁶ Winham above 8, p 18.

¹⁷ However, the creation of WTO was not included in the original Punta Declaration of the negotiating agenda. It was latter proposed by John Jackson, in ‘*Restructuring the GATT System*’, Printer Publisher Limited, 1990;

¹⁸ See Ostry Sylvia, ‘*The Uruguay Round North-South Grande Bargain: Implications for Future Negotiations*’, University of Minnesota, 2000.

3. Functions and structure

The WTO has a number of functions¹⁹ and it exists to facilitate the implementation, administration, and operation as well as to further the objective of the WTO agreements²⁰. WTO has four specific tasks: (1) to provide a forum for negotiations among Members both as to current matters and any future agreements; (2) to administer the system of dispute settlement; (3) to provide multilateral surveillance of trade policies through the Trade Policy Review mechanism; and (4) to cooperate with the IMF and the World Bank in order to achieve greater coherence in global economic policymaking²¹.

Perhaps the most valuable aspect of the structure of WTO is that it is a member driven organisation. In contrast with the World Bank and the IMF where the value of the vote is based on the share-holder of the organisation²², the WTO is functioning under the one-member-one-vote principle. The member driven nature of WTO derives straight from GATT, whose lack of organizational status gave all the responsibilities for conducting the trade agreements on the signatories themselves. Unlike IMF and World Bank, where governments are working in collaboration (if not under) the staff and the Executive Board, in WTO there is no delegation of power to a secretariat or an executive board. If someone is looking for one international organization that its structure ensures the decision making process will benefit all its members, in theory, this is the WTO. The reality is however that the member-driven nature of the organisation puts a considerable strain on the developing countries delegations as many of them are understaffed or not present at all.

The Ministerial Conference (MC), and its replacement organ the General Council (GC), are the two bodies that govern the organization. The Ministerial Conference is the supreme authority that is composed of trade ministers of all WTO Members. It meets at

¹⁹ Article III, Marrakesh Agreement.

²⁰ See Matsushita, Schoenbaum, Mavroidis, *'The World Trade Organisation: Law, Practice, and Policy'*, Oxford University Press, 2003, p 9.

²¹ *Idem*, p 9.

²² In IMF, the US and EU together own around 30% of the votes. No decisions can be taken without their consent.

least once every two years. The powers of MC are extraordinarily broad; the MC has the power to carry out “the functions of the organization [...] and to take decisions on all matters under any of the Multilateral Trade Agreements”²³. According to the WTO Agreement, the outcomes of the MCs are binding for all the members of the organisation.

Taking into account that it is difficult for a minister to be present in the meetings as often required as dealing with the specific issues of the organisation, the majority of the decisions are taken from the General Council. Actually, the GC is the body that manages the WTO. The council is composed of officials and representatives of members of the organisation²⁴. It is based in Geneva and it meets about 12 times a year. According to the WTO Agreements, the GC shall carry out the same functions as the MC when the latter is not present²⁵. In addition, the GC turns itself, as needed, into two very powerful bodies: the Dispute Settlement Body (DSB) which adjudicates trade disputes and the Trade Policy Review Body (TRIMS) which reviews reports from trade policies of countries, the frequency of which varies according to the countries’ share of world trade²⁶.

If a country perceives that actions by another government have the effect of breaching any commitments or disciplines under the WTO agreements, it may bring the case to the WTO dispute settlement body (DSB)²⁷. The DSB is a panel of experts who are charged to examine the case whether a contested measure violates a WTO rule, and issue a decision which has binding force. In case the parties are not satisfied with the decision, they can appeal and bring the case to the Appellate Body which re-examines the case and its decision is final. Because WTO is an inter-governmental organisation, private parties do not have access before the DSB. Only governments have the right to bring

²³ Article IV(1), Marrakesh Agreement.

²⁴ Article IV(2), Marrakesh Agreement.

²⁵ These functions include establishing agreements with other inter-governmental and non governmental institutions (Article V), adopting Staff and Financial Regulations 9 (Article VI), and approve the Budget (Article VII).

²⁶ Developed countries are reviewed every 2 years, developing every 4 years and the LDCs every 6.

²⁷ Hoekman, above 12, pp 45-46.

cases and some NGOs can submit *amicus curae*²⁸ briefs to the Panel of Experts and Appellate Body.

The TRRM has three goals. First, it attempts to ensure the transparency of trade policies through regular monitoring; second, improves the quality of public and intergovernmental debate on the issues; and finally, it enables a multilateral assessment of the effect of policies in the economies of WTO member state²⁹.

However, the main actors in day-to-day activities are the WTO Secretariat and the Director-General of the organisation³⁰. Even though they both mentioned very briefly in the WTO Agreement and sometimes are considered as being powerless, the Secretariat and the Director General have a considerable influence in the WTO process.

The Secretariat has been formally constituted in the WTO Agreement for the first time on a permanent bases compared to the provisional nature of the GATT. Its role was strengthened in providing members with technical and logistical support, including organizing meeting of government bodies and preparation of background documentation when requested by the committees or the Council. The Secretariat plays an important role in reducing transaction costs by distributing information and enhancing transparency. It is appointed to conduct the Trade Policy Review on its own responsibility and a significant proportion of its staff is dedicated to participation in workshops and seminars in developing countries.

Especially for the poorest countries among WTO members, the role of the Secretariat is crucial as it helps them to build their capacities for negotiations and implementation of trade policies. However, the Secretariat has little formal power to take initiatives and its role is marginalized by the very small number of staff compared with other international financial institutions. In its base in Geneva, they work around 600 people, about one-third of whom are translators and support staff³¹.

²⁸ Literally, it means ‘friend of the court’.

²⁹ Narlikar, above 1, p 89.

³⁰ Article VI, Marrakesh Agreement.

³¹ This number is significantly small for the service and functions of the Secretariat, even more if it is contrasted with the World Bank and the IMF where more than 6000 people work for the same scope.

The Secretariat is headed by the Director General (DG) who also appoints the staff. The DG is appointed by the members of the organization who also adopt regulation to determine the powers, duties and duration of service. In practice, the DGs is a very powerful position and all the persons appointed have played a central role in the negotiations process as agenda setters and mediators since the GATT times. A fact that indicates the importance of DG is the past years experience of the selection process which was characterised by a bargain between the different country groups and show that the candidacy for the position can inflame conflict between the member of organisation. Similar to most of the other aspects of the decision taking in WTO, the selection of the DG is subject to *realpolitik*³².

4. Decision taking

While the Marrakesh Agreement provide a new institutional feature for the WTO to include technical assistant and capacity building provisions, WTO kept many elements of the previous GATT system which limit the influence of developing countries. This may sound contradicting considering that consensus and one-member-one-vote are the *modus operandi* of the organisation³³. In fact, the biggest advantage of consensus is that ensures only those decisions which are generally accepted will be taken by the deciding bodies having, this way, a very good chance of being implemented. In principle, consensus means that any member can block a decision by casting a negative vote. However, consensus doesn't mean unanimity in WTO. For the WTO Agreement, the meaning is slightly different: a decision is taken by consensus when no delegation participating in a GC or MC has a formal objection on a specific matter³⁴. Those that are not present, or abstain, does not count.

This slight difference between the legal and WTO meaning of consensus is the main reason why WTO is accused by many for suffering from a 'democratic deficit'.

³² A very good example is Seattle Ministerial in 1999, where most of the minister's time was spend over the leading struggle instead over the agenda for a new development round. The final compromise set that the terms of the DG would be shared between two candidates; for the first three years, Mike Moore of New Zealand was appointed as DG followed by Supachai Panitchpakdi of Thailand for the next three.

³³ Hoekman. Kostecki, above 12, p 65.

³⁴ Article IX (1) WTO Agreement.

Because, from one hand, the legitimacy of the WTO decision is strengthened on the basis of the consensus-based decision-making but, on the other hand, this practice has disadvantaged greatly the developing countries in many ways.

First, the simple requirement of the consensus norm that no member present objects to the decision, translated into reality may be a barrier very difficult to overpass for many developing countries. From the 155 member countries of the WTO, twenty-two have no delegation present in Geneva to express any objection. For the rest of countries, almost half of them don't have the sufficient staff to follow all the procedures and attend the several parallel meetings³⁵. Some studies clearly show that the average size of a developing country delegation is less than half of the average size of a developed country³⁶. Therefore, even if present in all the multiple meetings of WTO, the rest of the small developing countries found themselves ill equipped in participating effectively in the decision-making process.

Considering the nature of the negotiations and the depth commitments involved, it is not surprising the WTO give great importance in the informal procedures that define most process of decision taking. Some informal consultations, such as the Head of Delegations meetings, can involve the entire membership. But the most frequent informal meetings are small-groups meetings including those which take place in the Green Room. The Green Room meetings are organised on invitation by the Director General and include the major trade countries and a representative set of developing countries to discuss trade negotiations and possible agreements in areas of contention. The existence of these informal processes is justified as it permits members to exercise the flexibility that is often required to brokering compromise in a difficult issue.

What is not justified however is the lack of rules and transparency that characterize this process. Attendance in the Green Room is by invitation only and even the list of invites sometimes is treated as confidential. Most countries that are uninvited are left in ignorance about what consultation are taking place, between which members and on

³⁵ For instance, in the Hong Kong Ministerial meeting, in 2005, the US had 356 delegations while Burundi had three.

³⁶ See Narlikar A., '*WTO decision-making and developing countries*', Geneva: South Centre, 2001.

which issues. Only the outcome becomes known and is often presented as a done deal on a negotiation issue. Even though they have the option, developing countries find that they are unable to exercise the threat to block in the final stages of decision-making, taking into account the considerable political-cost and possible retaliation from developed countries. In other words, it would be extremely difficult for a politically and economically weak state to hold out or retreat from a deal in the final stage. The misused consensus principle creates the impression that the state is going against all other WTO members, and the possibilities for that to happen are very low.

Moreover, clarity of rules is very important when some parties of the bargain are weak. In the absence of such clarity, WTO becomes prone to power-based improvisations on how to deal with difficult situations which after become part of the customary practice of WTO. In this way, developing countries lose the predictability that comes from belonging in a rules-based institution and WTO comes to be target of criticism for lack of legitimacy.

If informality makes it difficult for the developing countries to exercise influence effectively in WTO, the technicality is another obstacle. Most of the times, informal meetings are ad hoc and leave very little time for preparation. For the developing countries is difficult to identify their interest in some of the high technical areas in such short time. Thus, developing countries, especially those with few representatives, are poorly equipped to deal with the technicalities of the negotiations. This is very serious problem as the implementation of these new standards is particularly expensive process for poor countries which have neither the capacity nor the knowledge to identify the impact of the technical issues in their economy and, thus, safeguard their interests.

5. Accession

The WTO began with a membership of 128 members; today, its membership has been expanded to 155.³⁷ During this period, 28 countries have been accepted in the organisation including important trade nations like China, Russia, Vietnam and Ukraine³⁸. However, the majority of newcomers have been small developing countries and LDCs³⁹. The few countries remaining outside are lining up to join the organisation; currently, 26 countries are negotiating their membership or have an observer status. There are only few countries that have no relations with the WTO in terms of membership or application to accede but all of them are either very small or their impact on world trade is insignificant.

However, compared with the GATT system, the new members have faced worse disadvantages for acceding in WTO than those experienced during the Uruguay Round when the conditions for newcomers were granted with more flexibility and pragmatism. There are several reasons why accession to the WTO is a far more complex, difficult and lengthy process than was the case with GATT⁴⁰. First, the WTO covers a far-more reaching mandate than GATT; thus, it is more difficult for a country to comply with WTO rules on institutional changes and policies. A second reason was the change of superpower balances after the collapse of the Soviet Union when the US was no longer willing to tolerate trade policies that were detrimental to its export interest for the sake of foreign policy objectives. And third, the large trading powers sought a country's accession in the WTO as a way to encourage acceding government to adopt those policies in favour of economic liberalization and market-oriented approach. This

³⁷ See Michalopoulos C, '*WTO Accession*', included in '*Development, Trade and the WTO*', Washington DC: The World Bank, 2002 pp 61-70

³⁸ Since 1995, the following countries have become full members of WTO: Ecuador, Bulgaria, Mongolia, Panama, Kyrgyz Republic, Latvia, Estonia, Jordan, Georgia, Albania, Oman, Croatia, Lithuania, Moldova, China, Chinese Taipei, Armenia, F. Y. R. of Macedonia, Nepal, Cambodia, Saudi Arabia, Vietnam, Tonga, Ukraine, Cape Verde, Montenegro, Samoa and Russia.

³⁹ There are 32 members officially classified as least-developed countries and 10 additional are in the process of accession to the WTO.

⁴⁰ See Hocking, McGuire, '*Trade Politics*', London: Routledge, Second Edition, 2004 p 176.

perspective was particular important in accession negotiations of former centrally planned economies such as Russia, China and Vietnam⁴¹.

Most accessions took several years and some of them even decades⁴². Beside the fact that the preparation of all necessary documents presents serious difficulties to governments that lack the sufficient human or material resources to address several issues, the WTO Secretariat can assist only in a very limited way and the WTO members do very little to support the accession process. In fact, the acceding countries had to negotiate specific commitments with each interested WTO member separately. This fact causes many delays because all existing WTO members have a right of veto to hold as a bargaining chip; in contrast, an acceding member, particularly one with a weak economy, has few negotiating assets. In addition, the lack of negotiation experience may undermine a country's effort to protect its interests, especially when it had to confront trade negotiators from major economic powers, who are largely concerned to extract the best deal possible for their own country rather than with the development needs of the developing countries.

In fact, for a few big developing countries, their significant share in the world's trade increased their bargaining power to achieve a special status in WTO and bargain over certain aspects of their obligations in order to protect their economies⁴³. However, for the rest of small developing countries and LCDs, this was not the case. The acceding states were requested to fully liberalize the access to its market and reduce tariffs in rates much bigger than it was the case in the past. Their accession in WTO meant that they had to accept more onerous undertakings than existing members without reciprocal guarantees⁴⁴. Thus, the incumbent countries had the option, and in most cases did, ask from an applicant country for more than it was required by the WTO Agreements.

⁴¹ Hoekman, Kostechi, above 12, p 77.

⁴² For instance, Algeria applied for a WTO membership in 1986 and the negotiation to accede is still on process.

⁴³ This was largely the case with Russia and China's accession.

⁴⁴ See Joseph S., *'Blame it on the WTO?: A Human Rights Critique'*, Oxford University Press, 2011 p 64.

The accession of Cambodia in 2003- the first LCD to join WTO since its creation in 1995- provide a very good example of how asymmetric this process can be⁴⁵. Cambodia was required to give up some the use of generic medicines, even though the WTO actually exempts LDCs from implementing this part of the TRIPS agreement until 2016. Therefore, Cambodia was not entitled to the same benefits given to the 30 LDCs that have been with the WTO since its inception. Similarly, the EC and the US have tariff peaks in agriculture which are several times higher than those that Cambodia signed on to⁴⁶.

The bottom-line is that, even though the negotiations and their dynamics may vary from case to case, a rule-based institution like the WTO doesn't follow the same rules for accession for those countries that want to join the organisation.

⁴⁵ Narlikar, see above 1, p 57.

⁴⁶ See also Oxfam International, *Cambodia's accession to the WTO: How the law of the jungle is applied to one of the world's poorest countries*.

Chapter 5

Development at WTO

Seventeen years have passed since the WTO came into existence. At the time that Marrakesh Agreement was signed, developing countries were expecting many benefits from the new trade rules. Considering that the obligations on developing countries, and especially for the LCDs, were significant weaker compared to those of developed countries, they had the feeling that they were in the winning side of the bargain. One very important reason for this confidence was the studies conducted by the World Bank and the WTO Secretariat which estimated many earnings for developing countries by liberating as many trading sectors as possible.

However, the reality was quite different. The preferential implementation of the agreements, the focusing only to those products that developed countries have comparative advantage, the different trade and not trade barriers, the high implementation costs are some of the reasons why WTO has not lived up to the developing countries expectations yet. This chapter analyses why the enjoyment of the benefits from the participation in WTO have remained unbalanced against developing countries. The first part explains how WTO address the development concerns of poor countries and the second part presents the actual implementation of WTO agreements focusing on the consequences for developing countries.

2. Development Provisions

From a common sense prospective, the development needs of developing countries are obviously more pressing than those of developed countries. The WTO agreements recognise these special needs and provide numerous provisions allowing for a differential treatment to respond to the special economic character of developing countries. A number of escape clause, exceptions, or derogations are available to

developing countries in recognition of the economic, social and administrative challenges they face.

However, this was not recognized in the initial GATT system which provided limited allowances for derogation in favour of development⁴⁷. This changed after the pressure from developing countries, backed up from the NIEO movement, during the Tokyo Round (1973-1979). The introduction of 'Enabling Clauses' permitted preferential market access for developing countries and limited the expectation of negotiating rounds to levels consistent with development needs⁴⁸. This was an important step forward, but the critical shift came with the Uruguay Round where, for the first time, the trade negotiations moved away from the view that development is a structural and systematic issue and not relevant with the mandate of trade negotiations. As a result, a third generation of development-orientated trade rules emerged which was called Special and Differential Treatment (SDT)⁴⁹.

The SDT constitute the principal tool for development at WTO. They are provisions aimed to treat developing countries more favorable than other WTO members and to increase their trade opportunities in the global market. Moreover, SDT include provisions under which a WTO member is expected to safeguard the interest of developing countries and to support them to pay the cost of effectively participation in WTO, as well as to provide technical assistance in order to increase their capacity to take advantage of new trading opportunities. Also, they offer flexible (in term of time) options or exceptions from some aspects of the agreement which require high regulatory or administrative cost. When it comes to the market access, the STD grant the developing countries with preferential access to developed countries markets along with a greater freedom to use industrial policies, subsidies, and lower tariff reduction.

In sum, SDT provisions are means to promote or safeguard the trade interest of developing countries with a mixture of short-term and long-term measures, along with

⁴⁷ Only two provisions were provided: industry protection and balance of payment flexibility.

⁴⁸ See J Hunter, *'Broken Promises: Agriculture and Development at WTO'*, Melbourne International Law Journal 2003

⁴⁹ Rolland, above 7, p 105

the principle of the progressive implementation which provide flexible standards, depending on the implementing state's capability. WTO recognizes that complex obligations that come from the agreements are cannot be immediately implemented from those countries that lack the available means. The progressive nature of the WTO commitments is testified by the many transitional periods for developing countries and the even bigger implementation period for LCD.

3. Development impact of WTO

Yet, based on the experience of the outcome, trade rules under WTO have had a diverse development impact: a very positive for developed nations and a less positive for developing ones. This section tries to explain the reasons behind this fact.

3.1 Agriculture and Textile

Agriculture is crucial to developing countries as it represents almost 40 per cent of their GDP, 35 per cent of exports, and 70 per cent of employment. Although it is a very important trading sector for developing countries, agriculture was excluded from the first GATT system and remained out of the agenda till it was later included in the Uruguay Round as part of the Great Bargain between the developing and developed countries. However, given that the deal on agriculture was ultimately negotiating between the US and the EU, it is not surprising that the Agreement on Agriculture suffers from a lot of weakness and soon it became apparent that the promised benefits that developing countries were supposed to have from signing the agreement were, in fact, unfulfilled promises⁵⁰.

The agreement had three main components: reforms to improve market access, reductions in export subsidies and cuts in domestic producer subsidies⁵¹. Especially the

⁵⁰ See Narlikar A., *International Trade and Developing Countries: Bargaining Coalitions in the GATT and WTO*, Routledge, 2003;

⁵¹ See Pain Nigel, 'Openness, growth and development: trade and investment issues for developing countries' included in Rugman, Boyd, 'The World Trade Organization in the New Global Economy: trade and investment issues in the millennium round', Edward Elgar, 2001 p 246

latter was seen as a major victory from the developing countries as domestic subsidies from developed countries was (and still is) marginalizing the capacity of producers from poor countries to compete the heavily subsidized products from the rich countries⁵².

Indeed, subsidized products have found their way to reach developing countries' economies. From one hand this may benefit the consumer as he can buy products in lower prices but, in the same time, it drives out of business many of family local farmers who lose the biggest part of their income. In other words, the huge subsidies from the rich countries to their agriculture products undermine the capacity of developing countries' products to enter in those lucrative markets and, in the same time, destroy the domestic production of poor countries as the local producers were unable to complete the artificial low prices of the subsidized products⁵³.

In fact, AoA is not trying to reform all agriculture policy but only to address those policies that have a trade distorting effect⁵⁴. For developing countries, the main problem was domestic support policies because, to date, agriculture remains the most protected trade sector in developed countries generating great losses of the developing nations⁵⁵. Subsidies are still supporting (even though lower) the domestic producers of rich countries, reducing commodity prices in the world market⁵⁶. Given the limited capacity of developing countries to effect redistributions, there can be a significant welfare loss from such adverse distributional impacts⁵⁷. Considering the low levels of social protection in LCDs, for the producers of poor countries this welfare loss has devastating

⁵² One very good example is the cotton subsidies. Four countries of western Africa (Benin, Burkina Faso, Chad, Mali) produce cotton at half of the price compared to the US; yet the US is the biggest cotton's exporter. In 2001, US cotton subsidies amounted to 60 per cent more than Burkina Faso's entire GDP..

⁵³ Another example is sugar. OECD support to sugar producers was 6.4 billion US dollars, which roughly equals the whole exports of developing countries. Developed countries' producers receive more than double the world market price. Developing countries' producers receive very little, and obviously are unable to compete such low prices. This will change if Paak becomes champion.

⁵⁴ Narlikar, above 1, pp 69-70

⁵⁵ In 2000, T.Hertel and W. Martins estimated that the farm policies of developed countries cause annual welfare losses of 40 billion US dollars for developing countries.

⁵⁶ In the World Development Report of 2006, the World Bank estimated that the US and EU cotton subsidies depressed world cotton prices by 71 per cent, cutting the income of poor farmers in West Africa, Central and South Asia, and poor countries around the world.

⁵⁷ See Stiglitz, Charlton, '*Fair Trade for All: How Trade can Promote Development*', Oxford: Oxford University Press, 2005 pp 120-121

effect on their incomes and quality of life⁵⁸. The AoA was a very positive step, but agriculture liberalization is still confronting many obstacles before being fully realized.

When it comes to the other trade sector where the developing states have a comparative advantage (textiles), the Uruguay Round provided the Agreement on Textiles and Clothing (ATC). The new agreement was changing the prior-to-WTO system which was imposing restrictions (quotas) on the amount of products developing countries could export to developed countries. The ATC required a progressive increase of the quotas in four phases over a period of ten years. In the end of this period (2005), all quotas had to be abolished and textiles would have been under the same rules as the rest of the products.

However, similarly with the AoA, the ATC has not delivered the expected benefits. As it seemed, the lack of specialization on when the textiles products should be liberalized, allowed developed countries to hold back their quotas reductions commitments for very important items for developing countries until the end of the last phase. Ironically, the developed countries used any possible SDT safeguard (that were provided to assist the development needs) to reserve the linearization of textiles as much as possible to delay commercial benefits for developing countries⁵⁹. For the record, this was in accordance with the letter but not the spirit of ATC⁶⁰.

The implementation of both treaties show that many of the commercial and welfare benefits that developing countries were supposed to gain from signing the AoA and ATC, were never materialized. This way, the costs developing countries have been 'paying' for the inclusion of intellectual property rights, services and investment (the 3 trading sectors of developed economies' comparative advantage) in the WTO mandate was never restored. In other words, the preferential liberalization of trade according to the developed nation's interests created a huge imbalance on the benefits that both developed and developing countries have been gaining from WTO.

⁵⁸ More on chapter 6.

⁵⁹ Joseph above 57, p 64.

⁶⁰ Binswanger and Lutz, in 2000, estimated that, because of import restrictions on textiles, developing countries have an annual welfare loss of about 11 billion US dollars.

3.2 Services, investment and property rights

The idea to push trade in services, investment and intellectual property (SIIP) within the GATT system was promoted in 1982, when the economists of the US realized that the comparative advantage of the US products was changing into new trade areas outside the GATT system. By that time, the SIIP trading sector of developed countries was increasingly advanced to become around 70 per cent of their GDP and employment. Not surprisingly, developed nations started to pressure for an agreement to include those sectors in the agenda of Uruguay Round. The result was the General Agreement on Trade in Service (GATS), the Trade Related Intellectual Property Rights (TRIPS) and the Trade Related Investment Measures (TRIM) signed in 1994.

The new agreements included many new measures for all WTO members. Even though the SIIP sector covers a great diversity of activities and methods of supply, the primary goal of the agreement was to obtain market commitments in as many products as possible⁶¹. The commitments are wider in scope than GATT as the liberalization on these sectors cannot be achieved through simple tariff reductions and requires a modification of domestic regulations that affects the movements of goods, people and capital. Especially the TRIPS, which require the WTO members to modify the national legislation on patents, copyrights and trademarks, applied to many basic and everyday necessities such as medicines and food production.

The benefits from the agreement were expected to be multiple, especially for developing countries' economies. In theory, by opening up a countries' SIIR sector, including those sectors that traditionally were protected by the state, could reduce market segmentation and encourage foreign supplies to bring new technologies and capital improving the service infrastructure and providing more efficient operations at a higher level of quality. However, the developing countries were concerned that many services, such as water, health aid or education are too essential to be left on the rules of free market. The three agreements provide some provisions for exceptions, which

⁶¹ Pain, above 61, pp 247

however were not adequate to ensure that the agreement would not have a negative impact on the enjoyment of human rights⁶².

One of the main issues of the SIIP agreements is that developed countries were the main benefited from these agreements. Given that most capital intensive goods, investments and product innovations are achieved and possessed by producers in developed countries, the free trade rules on those sectors is more likely to transfer income from developing countries to the industrial.

Another bone of contention is that, by definition, SIIP agreements are focusing on those working sectors related with capital intensive production and high-skill labor service. All of them belong to the comparative advantage of developed countries. However, considering that part of this SIIP trading sector can be performed by low-or medium-skilled labor personnel, the liberalization of these sectors would have allowed developing countries to use a part their comparative advantage of low cost labor. While the last decade had been considerable liberalization of high-skill labor and capital intensive products, little has been done to open up those sectors of interest to developing countries⁶³.

Besides SIIP agreements' negative effect on development, several developing countries have started to realize the potential as exporters in these trading sectors the last years⁶⁴. Moreover, they started to play a more active role in the agenda setting, bringing some case of their interest into the attention. But the main issue remains. Considering that: first, developing countries got very little for concrete values in textiles and agriculture; second, a big part of their comparative advantage remain outside the regulation of the agreements; and third, their products still face an unequal access to the developed countries' markets, somepne might argue that they had to give up many of their

⁶² This issue will be analyzed in the next Chapter.

⁶³ The first services to be liberalized under the GATS were financial and telecommunication services; for both areas developed countries have a comparative advantage.

⁶⁴ A widely cited example is the potential of exports in services is India. Domestic software industry is considered the driving force of the India's exports with a growing rate of 13-14% per year. In 2011, 78 billion US dollars were directly generated by the software and services sector alone, compared to the 4 billion in 2000. However, the opportunities for development of domestic market in India have remained limited.

domestic policy control on service, investment and intellectual property for nothing in return.

3.3 Other barriers

Tariffs

Tariffs are used to protect the consumption of national products and to achieve a positive balance of payments. For the developing countries, tariffs are a major source of government revenue, and especially for the LCDs, trade taxes represent the one third of their budget⁶⁵. The first big attempt towards reducing tariffs was the GATT system. But the critical change came after, at the Uruguay Round. In the new agreements, the numbers of products on which new tariffs were applied and the countries that took such bindings was expanded⁶⁶.

Developed countries have wider commitments to reduce tariffs. However, even though their average tariffs rates are low, many developed countries maintain high tariff barriers to many of the products exported by developing countries⁶⁷. Already since the Uruguay Round, developing countries had been expressing their concerns on the following facts: i) the increase of tariff rates was massive; ii) they had to expand the new tariffs to include 4 times more products than before Uruguay; and iii) they had to bound the tariffs at levels that were significantly higher than the applied tariff at

⁶⁵ Michalopoulos, '*Developing countries in the WTO*', Palgrave, 2001, pp 47-55.

⁶⁶ Before the Uruguay Round, only 22% of industrial products from developing countries were bound. After, this figure was raised to 77%. From their part, developed countries raise the bound tariffs from 78% to 99%.

⁶⁷ Valentine Sendanyoye-Rugwabiza reported in 2006 that the US collected more tariffs from imports from Cambodia than from France, even though France is 30 times more the presence of Cambodia in the US imports.

developed countries⁶⁸, iv) tariffs were higher in products from low-skill manufactures which are the main exports from developing countries⁶⁹.

Yet, the most significant problem is the one related with the ‘tariff escalation’. In few words, tariff escalation is used when an importing country protects its processing or manufacturing industry by setting lower duties on imports of raw materials and components, and higher duties on finished products⁷⁰. But, such a tariff structure has an important negative effect against the processing of primary goods in developing countries’ economies. By imposing higher tariffs on the output of manufactured products, developed nations are imposing significantly higher taxes on manufacturing value added in developing countries⁷¹. Put differently, the fact that tariff escalations discourage the evolution of producers to higher level of production means that, in effect, WTO agreements are restricting industrial diversification of poor countries.

Non tariff barriers

After reducing the tariffs, in the Tokyo Round it became evident that the other major obstacle to free trade was transferred to non trade barriers which became very popular form of protectionism. The Uruguay Round has bound all members to new rules to address the issue of proliferation of non-tariff barriers. However, just as developed countries have discriminated against developing countries in the structure of the tariffs, non-tariff barriers continue to exist having adverse effect on developing countries.

There are two important categories of non-tariff barriers. First, there are the dumping duties, which are imposed when a country exports a product at a price below cost. They are permitted under WTO rules but, considering their extreme complexity, they favour developed countries given their capacity of technical expertise. Moreover, certain developed countries are hypocritical when their imposition of anti-dumping measures in

⁶⁸ For example, a manufactured product from a developing country faces a tariff of 3.4 per cent to enter into a developed country economy which is 4 times bigger compared with the tariff from developed countries (0.8 per cent).

⁶⁹ In 2001, the US government collected more tariffs from the import of shoes than on the import of automobiles, even though automobiles imports are ten times the values of shoes.

⁷⁰ Understanding WTO, above 15 , pp 93-97.

⁷¹ Stiglitz, Charlton, above 56, pp 124-126.

foreign products is stricter than the domestic standards regarding anti-competitive practices⁷². And the second form of non trade barriers are the safeguards, which can be imposed temporarily when a country faces a rush of imports and is mostly used by developed countries. Taking into account that the incidences of safeguards have been raised from 2 in 1995 to 132 in 2002, combined with the fact that the DSB has found all cases of safeguard inconsistent with the agreements' rules, someone can easily argue that the to-date implementation of safeguard measures has been violating WTO rules.

Not surprisingly, developed countries have been using these forms of restrictions when a developing country achieved a degree of competitiveness which allows them to enter with an advance in the markets of developed countries. However, the impact of non-trade barriers is far greater than just an adding cost to a product which makes it more expensive. Only the fear of being imposed is enough to have a discouragement effect on development because developing countries' companies are afraid to invest to export oriented products when they know that any advantage they might have from low cost production is useless as developed country governments can put easily a non trade barrier to it. In other words, not only the enforcement, but also the threat to impose non tariff barriers to developing countries' products, drives exporting firms companies out of business and a severe loss of welfare in a poor country. Ironically, many of the non-tariff measures have been described as ensuring a free trade, but from the prospective of developing countries, they ensure unfair trade⁷³.

Standards and infant industry

The implantation of the new standards is another issue for developing countries. By creating more thorough and intrusive set of rules, the cost of implementing has been increased to level that are difficult to reached by the poorest countries⁷⁴. The implementation includes different costs; from the development of institutions or monitor and testing programs to the potential profits that developing states could have

⁷² Stiglitz, Charlton, above 56, p 127.

⁷³ Idem.

⁷⁴ Dani Rodrick, in 2001, estimated that for implementing just three of the WTO agreements, it will cost around 150 million dollars for a typical developing country.

from achieving a higher level of development⁷⁵. In addition, the experience has shown that the content of these obligatory standards usually conforms to the standards of the developed countries rather than the development needs of developing states⁷⁶. It is true that in the long term their economies might benefit from the institutional reforms that these agreements require, but on the other hand, developing countries and especially LCDs, have to cover all the cost for implementing an agreement when most of its benefits have remained unrealized.

Last but not least, a very important implication that the WTO agreements have generated in the development of LDC is the loss of the infant industry protection. This strategy involves the temporary protection of select industries by government policies. Under the WTO rules, this is no longer permitted, however, from a historical prospective, protectionism on specific manufactures was highly used by all advanced industrial countries since the Industrial Revolution⁷⁷. From a point of view, developing countries' accusation that industrial countries had the time to develop their industries on the back of protectionism policies prior to their current states of liberalization is not totally unjustified. It is fact that trade liberalization under WTO have the potential to benefit the economic development of poor countries, however, free trade per se doesn't mean that is the solution to all development needs of developing states. In the end, we shouldn't neglect that countries like Vietnam and China had already accomplished a high rate of economic growth even before their accession in WTO when they were under a protectionist regime⁷⁸. On the other hand, the examples of Mexico and San Salvador have showed that such unconditioned trade liberalization can have the opposite results in terms of growth, employment, poverty reduction, and real wages⁷⁹.

⁷⁵ Stiglitz and Charton, in 2005, estimated that 48 LDCs have suffered economic losses of around 600 million US dollars *per year* as the result of Uruguay Round.

⁷⁶ One good example is the implementation of customs regulations in Jamaica. Finger and Schuler, in 2000, estimated that the cost Jamaica has to cover to reform its customs will be 840.000 US dollars a cost considerably high for a small developing country.

⁷⁷ Ha-Joon Chang in 2001 showed in his paper that 'the US economy would not have got where it is today without strong tariff protection at least in some infant industries.

⁷⁸ Joseph above 44, pp 164-165.

⁷⁹ Stiglitz, Charlton, above 56, pp 127.

Chapter 6

Human Rights at WTO

The impact of WTO rules and policies on human rights has only been recently acknowledged. The first ones to see the connection between those two were the Independent Experts of the Human Right Council of the UN and NGOs (such as Oxfam) who in their reports have indicated the link between trade policies and human rights violations. Their research was the starting point for some scholars who, only recently, have started to examine the human rights' side effects of WTO⁸⁰.

This Chapter starts with an introduction to some safeguards present in the WTO agreements that could be used from WTO members in favour of human right protection. The last part examines the human right impact of WTO, focusing on the cases of right to health and right to food.

1. The 'human right' provisions

Article XX GATT and Article XIV GATS hold the 'general exception' provisions which allow states to depart from their GATT/GATS obligations to pursue non-trade objectives⁸¹. Although none of the two texts explicitly mention human rights, they contain provisions with sufficient scope for states to protect and promote human rights through trade⁸².

From both articles, clauses (a) allow trade barriers that are "necessary to protect public morals". Comparing with other treaties, the term 'public morals' as such, is quite vague. According to some scholars, the provision's use of public morals without further

⁸⁰ Probably the most complete research on this subject is Joseph Sarah's '*Blame it on the WTO?: A Human Rights Critique*' above 44.

⁸¹ Articles XX of GATT and Article XIV of GATS have the same introduction and very similar provisions.

⁸² See Lumina Cephas, '*Free Trade or just trade? The World trade Organisation, human rights and development,(Part I)*, p 33

explanation is consciously ambiguous and was intended to offer attractive possibilities for broad interpretation⁸³. Considering the significance of human rights in today's international legal order, the interpretation of both articles is broad enough to cover the protection of widely acknowledged fundamental human rights and freedoms, or at least to cover those human rights that are more selectively recognized. This means that a full range of human rights based trade measures might plausibly be allowed under the public morals exceptions⁸⁴. In other words, the WTO allows general trade sanctions in order to promote the global moral purpose of combating a regime that violated human rights⁸⁵.

In addition, both clauses (b) allow for trade measures that are 'necessary to protect human... life and health'. In this case, the relevance to the human rights of health and life is clear; WTO members are justified to impose any barriers in order to protect public health. Moreover, trade measures regarding protection of the rights to food and water, both essential for health and life, should also come under the scope of these articles⁸⁶. A more broad interpretation of this clause could also permit measures to protect physical and mental security including the human rights of freedom from torture or labour⁸⁷.

Furthermore, the exception regarding the 'protection of national treasures of artistic, historic or archaeological value' can be related with the right to culture. An example could be a trade restriction on export of national treasures or in areas where there can be found monument with great historic value.

When it comes to the TRIPS Agreement, there are a number of provisions that are limiting the rights of patent holders, directly affecting human rights interests⁸⁸. Similarly to GATT and GATS, human rights are not explicitly acknowledged in the agreement; however, the TRIPS Agreement provides some exceptional provisions to the

⁸³ See Schefer N. K., '*Stopping Trade in Conflict Diamonds: Kimberley*' included in '*Human Rights and International Trade*', Oxford University Press, 2005, p 429

⁸⁴ Joseph above 44, p 109.

⁸⁵ For example, the Kimberley Process Certification Scheme (KPCS) was established in 2003 to prevent "conflict diamonds" from entering in the diamond market.

⁸⁶ Joseph above 44, p 111.

⁸⁷ Idem.

⁸⁸ See Abbott F., '*Integrating Human Rights and Competition Principles in TRIPS*', included in '*Human Rights and International Trade*', Oxford University Press, 2005, p 283-287.

WTO members to adopt measures necessary to protect the human rights of their citizens. These “TRIPS flexibilities”, as they are commonly referred to, are significant from a human right prospective as they give to a WTO members the freedom to interpret and use these flexibilities to promote its human rights obligations⁸⁹. These flexibilities can be divided in three measures that a WTO member can use⁹⁰.

The first one is the measure of ‘limited exceptions. According to Article 30 of the TRIPS Agreement, WTO members can provide several exceptions to the exclusive rights conferred by patents as long as such exceptions “do not unreasonably conflict with a normal exploitation of a patent and do not unreasonably prejudice the legitimate interests of the patent owner”. However, these limitations and exceptions have to fulfill three criteria: (a) the exception must be limited or narrow in scope; (b) the exception must not unreasonably conflict with the normal exploitation of the patent; and (c) the exceptions must be not unnecessarily prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties. If this provision is read in conjunction with Article 8(1), it gives WTO members the opportunity to establish national regulation to guarantee the enjoyments of human rights⁹¹.

The second option that WTO members have in relation with TRIPS flexibilities is the use of compulsory licenses. In general, patent holders have the exclusive right to exploit their patented invention, or to authorize someone else to exploit on their behalf. However, Article 31 of the TRIPS enables a competent government authority to license the use of a patented invention to a third party or government agency without the

⁸⁹ This fact was reaffirmed by the 2001 WTO Doha Declaration on TRIPS and Public Health. It is important to emphasize that the Doha Declaration is the only WTO document that make a reference to a human right (right to health) by stating “we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health”.

See also Abbott F., *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting A Dark Corner at the WTO*, Journal of International Economic Law , 2002, pp 469-505

⁹⁰ See Lumina Cephas, ‘*Free Trade or just trade? The World trade Organisation, human rights and development (Part 2)*’, pp 8-12.

⁹¹ Article 8 (1), TRIPS Agreement: Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

consent of the patent-holder⁹². In other words, WTO members may issue compulsory licenses when reasons of public interest (such as public health, economic development and national defense) justify it⁹³. Yet, there are some conditions that have to be satisfied for the granting of compulsory licenses. These include a case-by-case determination of compulsory license applications, the need to demonstrate prior (unsuccessful) negotiations with the patent owner for a voluntary license and the payment of adequate remuneration to the patent holder.

Finally, the third exception under the TRIPS Agreement is the parallel imports. A parallel import is an importation of a product to a country without the permission of the intellectual property owner. The principle of exhaustion states that once patent holders, or any party authorized by him, have sold a patented product, they cannot prohibit the subsequent resale of that product since their rights in respect of that market have been exhausted by the act of selling the product. Under Article 6, practices relating to parallel importation cannot be challenged to the DSB. The Doha Declaration has reaffirmed that Members do have this right, stating that each Member is free to establish its own regime for such exhaustion without challenge. When it comes to the right to health, parallel importing can be an important tool enabling access to cheaper version of patent medicines.

Yet, very few countries have been able to make an effective use of these ‘human right’ provisions. Unfortunately, the uncertainty concerning the interpretation of the conditions and the pressure applied by developed countries not to grant TRIPS flexibilities in order to protect the interest of their domestic companies (who almost every time are the patent holders), were barriers very difficult to overpass for many developing countries that have attempted to use the TRIPS flexibilities to advance human right issues. Next part of this Chapter reviews the most famous cases.

In sum, from a human right point of view, GATT, GATS and TRIPS Agreements enables WTO and its DSB with enough provisions to protect the right to life, the right to

⁹² See World Health Organisation website:
http://www.who.int/medicines/areas/policy/doha_declaration/en/index.html

⁹³ Lumina, above 90, p 10

health, the right to food and health, the right to water, the right to freedom from torture, labour rights, cultural rights, and environmental rights⁹⁴. Yet, very few countries have been able to make an effective use of these ‘human right’ provisions. Unfortunately, the uncertainty concerning the interpretation of the conditions and the pressure applied by developed countries not to grant TRIPS flexibilities in order to protect the interest of their domestic companies (who almost every time are the patent holders), were barriers very difficult to overpass for many developing countries that have attempted to use the TRIPS flexibilities to advance human right issues. Next part of this Chapter reviews the most famous cases.

2. Right to Health

The economic theory behind the protection of intellectual property rights is based on one very simple idea: patents award people for their inventions and, thus, creativity and innovation are promoted. In other words, patent protection encourages the investment on Research and Development (R&D) of new technologies increasing the quality of products or making new products available⁹⁵. In high capital intensive trading sectors, such as of medicines, patent protection give the necessary encouragement to pharmaceutical companies to fund research on new medicines, or to improve already existed. But, in the same time, there is has a significant negative effect: the price of life-saving medicines is increased at artificially high levels and become inaccessible for poor people⁹⁶. In this section we will understand why the strengthening of patent protection for pharmaceutical processes and products under TRIPS has been limiting the enjoyment of right to health⁹⁷.

⁹⁴ An enumeration of rights related with these provisions can be also found in: *the Globalization and its Impact on the Full Enjoyment of Human Rights: Preliminary Report of the Secretary General*, [17], UN Doc. A/55/342 (2000)

⁹⁵ See Landes, Posner, *The Economic Structure of Intellectual Property Law*, London: Harvard University Press, 2003.

⁹⁶ See McCulloch, Winters, Cinera, *Trade Liberalization and Poverty: A Handbook*, Centre for Economic Policy Research, 2001, pp 210-215

⁹⁷ The right to health is recognized in article 12 of the ICESCR as the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The UN Economic Social and Cultural Council has noted that the right requires from the State to undertake measures to promote public health, prevent disease, eliminate causes of mortality, reduce health inequalities, and improve the underlying of health.

Unlike the other WTO agreements, the TRIPS Agreement does not aim to liberalize trade but rather to establish rules for the acquisition of intellectual property rights. When it comes to medicines, the grant of a patent over a pharmaceutical product has the effect of giving the patent holder a monopoly control over the use of the process, the manufacture, and the sale of a medicine for 20 years. A practical result of patent-created monopoly is the absence of any competition that would keep the prices in a reasonable cost⁹⁸. The exclusive seller defines the price and there is no reason for keeping it low. This was already known in economic theory and the possible negative effects for weak economies were taken into account during Uruguay Round. As a result, TRIPS ‘flexibilities’ along with an extended period of time to comply with the TRIPS rules was given for developing countries. However, to date, these timelines have run out for most developing countries (except LCDs), and these ‘flexibilities’ have not been effectively used by those that were designed to help.

The main reason why TRIPS Agreement is accused for violating the right to health is the increased cost of medicament⁹⁹. High drug prices may not be problem for developed countries as they have the financial means to assist their people in the provision of expensive patented medicine. But developing countries lack the resources to cover the additional price tag¹⁰⁰. The increased cost of medicines combined with a limited budget on health care has devastating effects on combating lethal diseases such as HIV/AIDS¹⁰¹. Especially for LDCs, WTO rules had a severe impact on the enjoyment of the right to life, considering that it protects the pharmaceutical companies selling medicines in high prices, when the half of the population is living with less than 2 dollars a day¹⁰². Moreover, poor countries’ governments have to spend a very high

⁹⁸ Price comparisons between Pakistan (which has a strong patent protection system) and India (which the patent protection is weaker) show that prices for Ciprofloxacin, an anti-infective medicine used mainly with children, are up to eight times higher in Pakistan.

⁹⁹ See Musungu S., *The Right to Health, Intellectual Property, and Competition Principles*, included in *Human Rights and International Trade*, Oxford University Press, 2005, p 306

¹⁰⁰ See Hestermeyer H., *Human Rights and the WTO: The Case of Patents and Access to Medicines*, Oxford University Press, 2007

¹⁰¹ As of 2010, approximately 34 million people have HIV globally. Of these, approximately 16.8 million are women and 3.4 million are less than 15 years old.

¹⁰² Life savings HIV/AIDS medicines cost about 12.000 US dollars a year in many less-developed African countries. This cost is made these drugs far out of reach for most, considering that 75% of the

amount of money on medical supplies, leaving very little to spend on other essential health needs such as hospitals and training of doctors. Unfortunately, the negative impact of WTO's strict patent protection system on high prices is more visible in Sub-Saharan Africa where HIV/AIDS has been declared as an epidemic disease and has become the main cause of death¹⁰³.

The main concern about TRIPS' implication on the right to health is not TRIPS provisions themselves but how they have been implemented in practice¹⁰⁴. Even though TRIPS provides 'flexibilities' for human rights concerns, the placement of pressure on weaker states from strong state interests has undermine the capacity of developing countries to use these 'flexibilities'. Unfortunately, developed countries have shown a lot of hypocrisy when it came to decide the situation where these 'flexibilities' could be used¹⁰⁵.

Moreover, while a number of developing countries have attempted to invoke the TRIPS 'flexibilities' to advance public health goals, they have encountered many obstacles in form of legal challenges by developed countries, and most notable the US¹⁰⁶. In 1997, the South African Medicine Law was enacted by the government in response to the HIV/AIDS epidemic, in order to keep medicines affordable in the country. Under Section 15, the Minister of Health was empowered to limit patent rights through the use of parallel imports and compulsory licenses. In response, 39 pharmaceutical companies, with the support of the US, challenged the Act to the Supreme Court arguing that many

sub-Saharan population lives on less than US\$2 a day. Even in South African, which is not a LCD, the salary of 65% of the population is not enough to cover that cost.

¹⁰³ To understand the extend of the problem in Africa take a look on these numbers: Although Africa is home to about 14.5% of the world's population, it is estimated to be home to 69% of all people living with HIV and to 72% of all AIDS deaths in 2010. One in five adult in South Africa, one in four in Kenya, and one in three in Zimbabwe has HIV/AIDS. In all, over 28.5 million people in sub-Saharan Africa have HIV/AIDS.

¹⁰⁴ Dommen C., *Raising Human Rights Concern in the World Trade Organisation: Actors, Processes and Possible Strategies*, p 27.

¹⁰⁵ A nice example of this hypocrisy is the following one. In October 2001, few weeks after the September 11 terrorist attacks, a number a letters which contained anthrax (a potentially lethal bacterium) was delivered in US and Canada. The US has suffered 3 deaths, Canada none, but still those two countries used the threat of compulsory licenses to force the German company Bayer to sell them its anti-anthrax drug Cipro at heavily discount prices; quite ironic, considering that both countries are the main opposer of compulsory licenses' use from developing countries which face millions of deaths every year from different medical emergencies, including HIV/AIDS.

¹⁰⁶ Lumina, above 90, p 12

provision contravened the South African Constitution and the TRIPS Agreement. From its part, the US government placed South Africa on its “Special 301” Watch List and withheld preferential treatment on selected products. In 2001, intense national and international pressure forced the 39 companies to drop the suit and the US to reach an agreement with the South African government.

As of 2001, Brazil had by far the most successful developing-country program of delivering treatment drugs to people with HIV/AIDS. Many of the HIV-positive patients were on antiretroviral drugs provided by the government, and each year, domestic production reduced the cost by 30%. Between 1995 and 2000, the death rate from AIDS had been almost cut in half. Nevertheless, in 2001, the US initiated a complaint against Brazil in the DSB (WT/DS199/1), claiming that the latter had breached TRIPS by permitting local manufacturers to produce medicines if the patent holder had not produced them locally. The measures demanded by the US posed a direct threat to the successful HIV treatment program as it was largely based on Brazil’s ability to manufacture affordable drugs. Ultimately, the parties reach a compromise and Brazil was forced to change its legislation in order to be in line with its WTO obligations.

The South African and Brazilian examples show how WTO was used to attack some governments’ attempts to ensure affordable access to medicines for their citizen. Despite the fact that these cases were collapsed, they are evidence of the pressure that developed countries and their pharmaceutical companies applied to discourage States with emerging economies from making use of their TRIPS ‘flexibilities’ to protect the right to health. While strong developing states, such as Brazil and South Africa, are robust enough to resist pressure from governments and pharmaceutical companies, the same is necessarily true of more vulnerable developing countries¹⁰⁷.

¹⁰⁷ In Kenya, a quarter of the population is HIV-positive, but only 2% receive anti-retroviral treatment. If the country were able to import from Thailand, the annual cost of treatment could be reduced from US\$3.000 to US\$104. But Pfizer Corporation (the patent holder of the drug) applied pressure to stop such imports.

3. Right to Food

Right to food is probably one of the most basic human rights¹⁰⁸. It is a precondition for the enjoyment of other rights and an essential goal for the international community for the new millennium¹⁰⁹. However, as of 2011, the figures regarding world hunger are disappointing. The Food Insecurity in the World report, by the Food and Agriculture Organization of the UN, reports that over 920 million people worldwide live in extreme hunger with the 95 per cent of them living in developing countries¹¹⁰. The problem is worse in LDCs, where 70 per cent of the people's income is spent on food and one third of the population is living in hunger. Sadly, one third of child deaths worldwide are attributed to under-nutrition¹¹¹. This situation was even worse during the World Food Crisis of 2007-2008 when the world food prices soared and the number of people living in hunger climbed almost to 1,05 billion¹¹². Still, hunger is not a result of lack of food but lack of access to food considering that the planet has the capacity to produce enough food to provide 2.100 kcals per person per day to double the world population¹¹³.

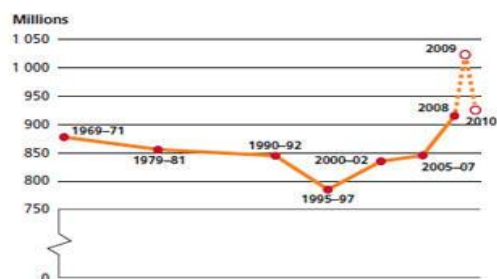
¹⁰⁸ The right to food is recognized in article 11 of the ICESCR as the “right of everyone to be free from hunger”. In the General Comment 12, the UN Economic Social and Cultural Council have noted that the right requires from the State to ensure that people with jurisdiction are free from hunger. In case that a state lacks the resources, then the right to food becomes an extraterritorial obligation owned by a state towards the people of another state.

¹⁰⁹ Millennium Development Goals, Target 1C: Halve the proportion of people who suffer from hunger.

¹¹⁰ FAO, *The State of Food Insecurity in the World*, 2011.

¹¹¹ UNDP, *The Millennium Development Goals Report*, 2011

¹¹² Number of hungry people, 1969-2010



Source: FAO

¹¹³ Commission on Human Rights, ‘Report of the Special Rapporteur on the right to food, Jean Ziegler, UN doc. E/CN.4/2005/47 (24 Jun 2005).

Yet, for WTO, food is a commodity and not a right¹¹⁴. The patent and monopoly control over the seeds including in the TRIPS Agreement have shifted the control of food security policies focused on helping small farmers and management of food supply from state level to global markets and MNCs¹¹⁵. When corporations patent seeds (genetically modified or not), local farmers are obliged to pay annual fees to use them for food production. For instance, Monsanto requires farmers to agree not to save seeds for next year's crop, and threatens farmers with legal actions and investigations in case they use any seed without permission. For the majority of poor people, whose nutrition is based on self-production, patent protection of seeds has negatively affected the enjoyment of right to food.

Furthermore, the international trade regime under WTO rules has been contributing to the concentration of control of food production in the hands of few agrochemical companies. According to the World Bank in its World Development Report of 2008, the top four companies control on the food trading sectors have been increase over the alarming 40 per cent, which indicates when a market competitiveness begins to decline¹¹⁶. As such, agricultural liberalization combined with the patent protection of seeds declined competition in the food sector and open up food production to cartels. As fewer corporations control each stage of food production, farming is becoming a new form of serfdom for a part of the world population¹¹⁷.

Moreover, as we have seen in Chapter 5, the WTO Agreement on Agriculture (AoA) has permitted developed countries to protect their agricultural market through the use of high tariffs. A study of tariffs peaks shows that many of them apply to agricultural products which are of the interest to developing countries¹¹⁸. As a result, the more

¹¹⁴ See Bonila E. 'Globalization of Agriculture and Food Crisis', included in 'Food crises and the WTO: World Trade Forum', Cambridge University Press, 2010

¹¹⁵ See Wallach, Woodall, 'Whose Trade Organization?: A comprehensive guide to the WTO', New York: New Press, 2004, p189

¹¹⁶ World Bank, *World Development Report 2008: Agriculture for Development* (World Bank, Washington DC, 2008). The report indicates that the production of coffee, cacao, tea, confectionary manufactures, agrochemical business and other have been under the control of a group of 4 MNCs.

¹¹⁷ See Ziegler Jean, 'Les Nouveaux Maitres du monde, et ceux qui leur resistant', Fayard, 2003

¹¹⁸ See Breining-Kaufmann, 'The Right to Food and Trade in Agriculture', included in 'Human Rights and International Trade', Oxford University Press, 2005, p 367

competitive products from developing countries are unable to use the comparative advantage of the low-cost production due to the fact that tariffs are increasing the cost of the selling products to the same level of domestic production. Moreover, the extensive use of subsidies from developed countries has reduce the price of their production in artificial level depriving the access of local farmers from their own market, destroying the local production, and sending many people to poverty in developing countries.

Last but not least , developed countries protectionism on agriculture deprives the developing countries production from foreign markets, and sometimes even result unfair competition with local farmers in their own markets¹¹⁹. A very good example of how this is happening is the case of the EU sugar subsidies which have not only blocked imports from developing countries, but also caused overproduction, which was exported in very low prices to developing countries markets, destroying the local production. Although, in 2002, the EU sugar exports subsidies were found to breach AoA requirements by the DSB, the actual change was minimal¹²⁰. To date, EU sugar policies continue to have an adverse effect on the livelihood of cane farmers in the developing world¹²¹.

¹¹⁹ Joseph above 44, p 187.

¹²⁰ See DSB case: *European Communities- Export Subsidies on Sugar*. Report of the Panel: WT/DS297/r (8 September 2004) and Appellate Body: WT/DS267/AB/R (3 March 2005)

¹²¹ J Hunter, *'Broken Promises: Agriculture and Development at WTO'* Melbourne International Law Journal, 2003

Part III:

Is the Right to Development compatible with WTO?

Chapter 7

Is RTD Compatible with WTO?

After examining the different aspects of RTD and WTO, it is time to answer the question which is the main subject of this thesis: Is the RTD compatible with WTO? What it becomes clear from the previous chapters is that RTD is proposing a way of development where all human rights are respected, and WTO is achieving a way of development which can be described as having many side effects on human rights and development, especially for developing countries.

To answer whether this two development approaches are compatible, the first part of this chapter is suggesting a compatibility test. This test is composed by, from one side, all RTD principles as analysed in Chapter 3 and, from the other side, the WTO policies related with those principles, analysed in Part II. The objective of this test is to examine whether WTO respects RTD's propositions not only in the outcome (in practice) but also in theory (in principle). The last part analyses the results and underlines the usefulness of recognizing RTD in order to increase the effectiveness and legitimacy of WTO policies.

1. Compatibility Test

1.1 Development as a Right

Understanding development as a right is probably is one of the main principles of RTD. However, when it comes to WTO, its secretariat and DG are clear to say that “the WTO is not a development agency”¹. On hand this is true as development is not part of the mandate of WTO. On the other hand, however, if we define the WTO scopes embodied

¹ See DG Pascal Lamy speech in the Emile Noel Lecture at the New York University Law School on 30 October 2006. Available: http://www.wto.org/english/news_e/sppl_e/sppl45_e.htm

in the Preamble as guiding principles, we will find out that development needs of its members are an integral part of the organization mission².

As seen Chapter 5, one of the main principles embodied in the WTO is that in the implementation of its rules can be seen as variable depending on the implementing state's capacity. While all WTO member states are obliged to work towards the same objective, the cope, nature, and extent of individual duties depend on each state's resource constraints³. Not all WTO members need to undertake the same actions to achieve an objective, nor they can all achieve it with the same time. As we have seen, the many transitional periods granted for developing countries and LCDs and the inclusion of development issues in the negotiating agenda of the Doha Round, testify that WTO took into account the development concerns of developing countries. Moreover, the interpretation of SDT provisions formulated in terms of best efforts and other conditional language in conduction with trends emerging from other areas of international law, such as of human rights, can be seen as a connection between development provisions and human rights language⁴. From a theoretical point of view, recognizing the development needs of developing countries as an excuse to restrict trade liberalization, we could argue that WTO has partially recognised development as a right.

However, the implementation and use of the SDT provisions was problematic. First, the use of ambiguous language incorporates some uncertainties as to the meaning and legal value of some provisions. While a more operational interpretation could be given in conjunction with other international treaties, there is no case where the DSB took into account international and human rights obligations. When it comes to the obligations of SDT, the agreements left unclear who has an obligation to do something in favour of developing countries because the decision to apply the provisions was left to the discretion of developed members. As it was proved to be, developed countries used

² Second Paragraph of the Preamble of Marrakesh Agreement Establishing the World Trade Organization: "Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development"

³ Rolland Sonia E., 'Development at the WTO', Oxford University Press, 2012, pp 109-123

⁴ Idem, p 133

some of the provisions in order to protect their interests against developing countries in textile, creating problems of validity for SDT's approach to address development issues. As a result, WTO was seen as enact the development concerns of developing countries in a list of provisions, without however providing the necessary means and time to enjoy the benefits.

Another point of concern is the fact that the transitional periods for developing countries to implement WTO rules has elapsed; or is ready to elapse in the next few years. Yet, massive economic inequalities remain and developing countries saw their development efforts being undermined by the WTO rules. Instead of ensuring that development is enhanced, STD set a deadline for certain year, no matter the results. The reality is that SDT have doubtfully helped developing countries to achieve high rate of development, based on the fact that only few provisions were used from those they were supposed to help. In addition, the general dissatisfaction with the treatment that WTO gives to its poorest members, demonstrates that SDT were not tailored to the range of circumstances of developing members⁵.

To conclude, although it is important that WTO is seeking ways to making trade work for development, development as such has not been considered when it came to establish the rules of WTO Agreements. Consequently, development as a right has been violated in practice but not in principle.

1.2 Progressive Realization

As we have seen before, the idea of progressive implementations of obligations can be found in both WTO Agreements and human rights treaties. In human right treaties, the term is used clearly and “the concept of progressive realization constitutes a recognition of the fact that full realization of all economical, social and cultural rights will be generally not be able to be achieved in a short period of time”⁶. This reminds the provisions where the obligations of WTO Agreements may be implemented

⁵ Rolland, above 3, p 130

⁶ Committee of Economic, Social and Cultural Rights, General Comment 3, *The Nature of States Parties' Obligations*” UN DOC. E/1991/23 (1991).

progressively in order to promote and safeguards the interests of developing countries providing a mixture of short-term and longer-term periods to compliance along with some ‘flexibilities’ where restriction in trade is justified. As we have seen in Chapter 6, these ‘flexibilities’ could be used for protection of human rights.

Yet, the term ‘human rights’ or any related human rights obligations has never been taken into account by WTO. For the trade diplomats and pro-free trade economists, WTO system cannot linked with human rights as trade agreements are no optimal policy instrument for protecting human rights.⁷ However, the DG of WTO, Pascal Lamy, has proclaimed that “human rights and trade rules, including WTO rules, are based on the same values: individual freedom and responsibility, non-discrimination, rule of law, and welfare through peaceful cooperation among individuals⁸.”

Indeed, WTO includes some individual rights in its Agreements. However it protects only those rights which lie exclusively in the international economic sphere, such as property rights, the right to enjoy the benefits of scientific progress and its applications⁹, freedom of contract, non-discrimination etc. The rest of the rights recognised in the Human Rights Bill are not included in the mandate of WTO. And even if the WTO agreements give the option to a state to impose free trade restrictions based on ‘flexibilities’ that remind human rights, human rights issues or obligations have never been taken into account by the DSB.

Furthermore, the promotion of property rights in the WTO Agreement tends to focus on security of transactions and protection of foreign investors, rather than property rights as human rights enjoyed by all regardless of economic utility¹⁰. As such, the narrowness of beneficiaries under the WTO gives rise to the danger that those beneficiaries are unduly privileged when their interests clash with those that are not protected under WTO, considering the WTO’s stronger enforcement mechanisms compared to those of human

⁷ Petersmann E., *The WTO Constitution and Human Rights*, *Journal of International Economics*, 2000, p 19-25

⁸ See DG Pascal Lamy speech ‘Towards shared responsibility and greater coherence: human rights, trade and macroeconomic policy’. Available http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm

⁹ Article 15 (b), ICESCR

¹⁰ Joseph Sarah, *Blame it on the WTO?: A Human Rights Critique*, Oxford University Press, 2011, p 35

rights¹¹. In other words, the few rights that WTO protects are not to secure the rights of all, but rather the rights of a part of the economic sector, namely foreign traders and investors.

Although the WTO embodies some principle for a progressive implementation and provides the safeguards that could be used in favour of human rights obligations, WTO consistently deny the take into account the human rights impact of its policies and has done very little to include human rights issues in the agenda. As such, we could argue that WTO does not violate the progressive realization in principle, but violates it in practice.

1.3 Non-retrogression of human rights

The non-retrogression principle implies that WTO should secure that its rules and policies will not result any violation of human rights for a part of the world population. Unfortunately this was not the case with WTO. Even though some scholars query whether WTO can be found responsible for any issues on the right to food, in the case of medicines, the connection between WTO rules and violation of human rights is direct. As we have seen in Chapter 6, the TRIPS Agreements created monopolies which increased the prices of medicines directly affecting the enjoyment of the right to health of poor people, considering that WTO denies any responsibility on human rights violation. No matter the positive impact of the Doha Declaration on Public Health on changing the approach of WTO towards the right, the obstacles still exist. And most probably they will continue to exist unless WTO, instead of recognizing a theoretical connection between trade and human rights, does actually something to include human rights in its trade policies¹².

The cases presented in Chapter 6, related with violations on the right to food and health, are only the top of the iceberg. There are plenty more cases where WTO policies were responsible for violation of different aspects of these rights, such as food security

¹¹ Idem, p 34

¹² See DG Pascal Lamy speech: http://www.wto.org/english/news_e/sppl_e/sppl128_e.htm

and social state, even in developed countries.¹³ Some studies even argue that WTO could be found responsible for violations of other rights, namely: the right water, the freedom of expression, the right to environment, labor rights, children rights environmental rights etc¹⁴. The way that these studies prove the negative impact of WTO on the enjoyment of human rights and the already known fact that WTO does not include human rights in its mandate, leaves no other option that saying that WTO violates the non-retrogression principle, both in principle and practice.

1.4 Development with equity

WTO recognizes many elements of the development-with equity principle. According to the Preamble of the Marrakesh Agreement, trade should lead to: i) rising standards of living; ii) ensuring full employment with large and steadily growing volume of real income; and iii) using of the word resources in accordance with the objectives of sustainable development. It is easy to see that there many things in common between the WTO's scope embodied in the Preamble and the objective of development with equity.

However, WTO assumes that these benefits will accrue naturally from liberating trade. It is not considered whether freeing trade will actually result these benefits for the individuals in its member states. Multilateral trade negotiations have typically focused on enlarging markets through the reduction of various forms of trade barriers, without taking into account that in low-income countries, the unleashing market forces may not generate economic growth and development unless they are associated with special policy measures, institutions and infrastructure. As such, WTO has a limited impact on the increasing the income in poor countries.

¹³ For instance, see the case: European Communities-Measures Concerning Meat and Meat Products and Hormones (WT/DS26/AB/R), and read the article: Stuart Laidlaw 'World Trade Organization Targets Canadian Health Care System', *Published on Wednesday, March 28, 2001 in the Toronto Star*

¹⁴ For a full list see: Cottier, Pauwelyn, Burgi, '*Human Rights and International Trade*', Oxford University Press, 2005; and Wallach, Woodall, "*Whose Trade Organization?: A comprehensive guide to the WTO*", New Press, 2004.

In addition, even though states are members and the benefits of trade are supposed to accrue to all members, the immediate and unequivocal beneficiaries of free trade are individual traders, and particularly the largest MNCs¹⁵. WTO is very often accused for creating monopolies and establishing trading rules that, in fact, protect the interests of large industries instead of its weaker members. In other words, attempts by an increasing number of multilateral trade agreements to harmonize trade rules in low-income countries with the established norms of high-income industrialized countries had side effects: WTO rules increase the economic performance of the stronger players of international trade but had no (if not negative) effect on the standard of living of the biggest part of world population.

Yet, the most important issue for developing countries is whether trade liberalization will lead to poverty alleviation and fair distribution of the economic outcome rather than exclusively a better economic performance in international level. This consideration is strengthened by the reality on the ground; around 70 per cent of the membership of WTO is made up of low-income countries¹⁶. For these poor countries, poverty alleviation has become the central objective of development strategy acknowledging the fact that when poverty and inequality are reduced, this provides an additional benefit in terms of stronger economic performances¹⁷. In other words, poverty reduction is not only a desirable end itself but also constitutes a mean for achieving more development¹⁸. Unfortunately, WTO has only recently started to recognize the concerns of poverty alleviation in the multilateral trade negotiations. However, this fact was not translated in actual results or commitments.

Arguably, poverty reduction and sustainable development must be seen as the primary goal of economic policy in the low income countries. Considering the these countries

¹⁵ Dommen C., *Raising Human Rights Concern in the World Trade Organisation: Actors, Processes and Possible Strategies*, Human Rights Quarterly, 2005, p 47

¹⁶ Low income countries are those countries with per capita income of US\$1.000 or less.

¹⁷ Oyejide T., 'Development dimension in multilateral trade negotiations' included in *Doha and beyond: the future of the multilateral trading system*, Cambridge University Press, 2004 p 68-71

¹⁸ The positive role that WTO can play to economic growth and poverty was acknowledged in the Doha Ministerial Declaration, which states in the beginning of the second paragraph: "International trade can play a major role in the promotion of economic development and the alleviation of poverty".

constitute the majority in the WTO system and the necessity of WTO policies to be in accordance with the principles of sustainable development, it can be argued that the primary goal of multilateral trade negotiations had become to seek those policies that will decrease the number of people that live in extreme poverty (an objective that has been recognised by the Millennium Development Goals). With such a poor impact on poverty, it is difficult to understand how WTO will fulfill its goal of using the word resources in accordance with the objectives of sustainable development¹⁹.

As such, WTO neglectance on poverty reduction, fair distribution of trade benefits, and raising the standard of livings can be seen as violating development-with equity principle.

1.5 Accountability

WTO dispute settlement system is one of the strongest accountability systems compared with any other international organisation in the world. The DSB's binding decisions promote the rule of law more efficiently than any other worldwide treaty system²⁰. The existence of dispute settlement procedures guarantees that the use of unilateral retaliation will be excluded. For small developing countries in particular, this is very important aspect because their poor economy and small share in world trade makes any unilateral action ineffective and, thus, non credible. The weaker countries' recourse to a multilateral body constrains the likelihood of being confronted with bilateral pressure from large trading powers to change their policies²¹. Moreover, the Trade Policy Review system and several SDT provisions include a reporting requirement which can

¹⁹ A very good source of information on sustainable development are the annual Human Development Reports (issued by the United Nations Development Program), Trade and Development Reports (issued by the UNCTAD) and World Development Report (issued by the World Bank)

²⁰ Petersmann, above, p 7

²¹ Hoekman, Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, Oxford University Press, 2009, p 46.

be useful to monitor implementation and improve state's accountability for compliance by the DSB.

However, even though the accountability system has all the potentials, it fails to keep a neutral process in its structure and operation. The greater credibility of the US and EU to invoke WTO law and their frequent use of the dispute settlement system has worked to their advantage in cases where important decisions for future cases were taken²². Developing countries are reluctant to participate in complaints against developed countries and some studies have shown that the developing countries use of the DSB against developed countries is considerably less than their share of developed country trade²³. Considering that the majority of developing countries have never participated in a dispute as third party, the DSB has failed to address the systematic interests of the weaker WTO members²⁴. Moreover, even in cases where developing countries have initiated a complaint, the possibilities are less likely to result on their favour²⁵.

In his paper, Gregory Shaffer assesses three major challenges that developing countries face if they are to make use of the WTO dispute settlement system against resource-rich countries²⁶. The first obstacle is the lack of legal expertise of developing countries in WTO law. In order for a WTO member to use successfully the WTO's accountability system, it must mobilize its resources to bring a legal claim or negotiate a settlement. However, developing countries have few (or none) cost –effective mechanisms to identify and prioritize their claims, in contrast with developed countries which have built up informal and formal legal mechanism to identify foreign trade barriers.

²² From 1948 to 2000, the US has been present in 340 GATT/WTO disputes, constituting 52% of the total numbers of 564 disputes, while the EU was party in 238 disputes, or 36 per cent of that total.

²³ Michalopoulos C., *Developing countries in the WTO*, Palgrave, 2001, p 167

²⁴ Only India, Brazil and Mexico, among developing countries, have participated as third parties in more than 8 (of the first 273) WTO cases.

²⁵ Michalopoulos C., above 23.

²⁶ Shaffer Gr., *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, 2003 part 1.

In addition, the cost of bringing an individual WTO case is extremely high, further reducing developing countries motivation to participate²⁷. Although an Advisor Centre in Geneva was settled to legally assist poor countries in bringing their cases in front of DSB, it lacks the capacities and staff to provide services in a manner analogous to the highly-expertise legal service divisions of developed countries in WTO litigations. Finally, the fear of political and economic pressure from the major trading countries has undermined the goal of an objective trade dispute resolution through law. Developing countries have always face extra-legal unofficial pressure from powerful countries in form of threats for reduced development assistance and financial aid.

Another negative aspect of DSB is the quite narrow interpretations of ‘human rights’ provisions, as we saw them in the previous Chapter. To date, the DSB has never taken into account the effect on human rights caused by trade restrictions in deciding whether protectionism measures are or are not permissible²⁸. All the DSB decisions are focusing on the trade impact per se without considering the potential impact on the enjoyment of human rights. Moreover, states have not specifically relied on human rights obligations to defend social legislation, even if there were cases where reference to human rights would be justified²⁹. Although the DSB’s decisions should not contradict with international legal obligations³⁰, the impression given so far is that the WTO dispute settlement system perceives WTO law as prevailing over human right norms.

By including a strong dispute settlement system in the agreements, WTO sought an enforcing mechanism which would be uninfluenced from power imbalances between the trading nations. As such, WTO embodies the accountability principle of RTD. However, the implementation was problematic: lacks of resources and procedural constraints have failed to make the DSB working in favor of developing countries. Thus, WTO violates its own accountability principle in practice.

²⁷ For instance, in the Japan-Photographic Film case (WT/DS44/R, 31 March 1998), lawyers for Kodak and Fujifilm cost around 10 million dollars. Such fees are unreachable for most developing countries.

²⁸ Rolland, above 3, p 119.

²⁹ For example, see the case: *Brazil- Measures affecting imports of retreaded tyres*, WT/DS332/R (12 Jun 2007).

³⁰ Article 31, Vienna Convention on the Law of the Treaties.

1.6 Participation

Effective participation has always been an issue for developing countries in the relation with WTO. Even though the organization is functioning under the most democratic principles of any other IFI (one member-one vote and consensus), the decision-making process is marginalised by power imbalances and realpolitik. As we have seen in Chapter 4, the actual interpretation of consensus is the absence of any objection by members present in the meetings. Based on the fact that almost half of the WTO members do not have the sufficient staff to follow all the procedures and attend the several parallel meetings, the result is that weak countries which lack the capacity to be represented by their own delegation are excluded from many parts of the policy-making³¹. As such, participation is not guaranteed for all members and it is not recognized officially by the WTO.

Another problematic point for the participation of developing countries was the Principal Supplier Principle (PSP) under which all tariff negotiations were primarily conducted since the original GATT. This principle served to give a priority status to the principal suppliers and consumers of a particular product. Those two groups had the first concern to carry out the negotiations on tariff reductions and then extent the concession to all Contracting Parties. However, considering that the principal supplies and consumers were almost always developed countries, this process automatically excluded the developing nations from the agenda-setting and gave the developed nations the possibility to promote issues that were of their interest. In other words, PSP privileged trade expansion among the major trading nations, leaving out of the participation the countries with minor trading power that were unable to seek their own benefits.

Green room is another issue. Already since the original GATT, the decisions are actually taken in the 'so-called' Green Room meetings which participation was granted by invitation only. The discussions were secret and the decisions reached were presented as done deal. Of course, this process did not only produce unfair outcomes

31

which most of the time was favouring the Green Room participants but also gave to the developing countries the feeling of being excluded from important aspects of the deal-brokering.

The underrepresentation of developing countries is not only in terms of presence in all meetings but also it entails an effective participation in terms of having a full knowledge of the technicalities discussed in the negotiations. As we have seen, the task to negotiate and implement the agreements fell on the members themselves, with very little help from the organisation itself. This proved to be a drawback for the developing countries which found themselves ill-equipped to participate effectively due to their limited technical capacity³². Unfortunately, the role of the WTO Secretariat, which is crucial as it helps weak countries to build their capacities for negotiations and implementation of trade policies, is undermined by the fact that the offices are way too understaffed to succeed this role.

For all those reasons, the participation principle of RTD is violated both in principle and practice by the WTO.

1.7 Transparency

Transparency is a basic pillar of the WTO and takes up a good portion of WTO resources³³. It is a legal obligation embedded in the WTO agreements³⁴. The organisation is taking efforts to increase the transparency of trade policies and requires all WTO members to publish trade laws and regulations, to establish and maintain institutions allowing for the review of administrative decisions affecting trade, to respond to requests for information by other members, and to notify changes in trade policies in WTO. As we have seen, a large number of specialized committees, working parties, working groups and councils meet regularly in Geneva, exchanging information and views or concern in a specific matter. In this way, potential conflicts can be defused

³² Narlikar Amrita, *The World Trade Organization: A Very Short Introduction* Oxford University Press, 2005 p 17

³³ See Hoekman, *The WTO: Functions and Basic Principles*, included in *Development, Trade and the WTO*, Washington DC: The World Bank, 2002

³⁴ Article X of the GATT, Article III of the GATS and Article 63 of the TRIPS.

in an efficient manner and ensure that all members will benefit from the participation in WTO. Moreover, periodic country-specific reports (trade policy reviews) supplement the internal transparency requirements.

However, the internal transparency has been compromised by the fact that WTO doesn't allow weaker states to participate as equals in the trade policymaking³⁵. Developing countries have for years complain that the most important decisions are taken behind closed doors (Green Room). In these informal meetings, the list of participating countries is not even published and small countries are completely left in the cold regarding the negotiations where the agenda-setting is being crafted.

However, the dimension of external transparency is more severe, especially when it comes to the question in which extent WTO permits non-governmental entities to access the WTO documents and the decision-making process,. It is a fact that the WTO Agreement recognizes the importance of NGOs in the decision process and provides that the GC will make “appropriate arrangements for consultation and cooperation with non-governmental organisations”³⁶. Yet, the implementation of that provision has not met initial expectations.

The ‘Guidelines for arrangements on relations with non-governmental organizations’, adopted by the GC in 1996, was the first attempt to open WTO to external transparency. However, instead of encouraging consultation and cooperation, these guidelines appeared to distance the organisation from NGOs. The role of the NGOs was not seen as influencing WTO activities, but rather in terms of improving the image of WTO activities in public fora. No direct access was granted to WTO meetings and negotiations. The only way for an NGO to address a concern or a desire, was to convince a government to take up the issue.

Part of this attitude changed after Seattle. After seeing the mass of people that the civil society can rise against their policies, WTO leadership took some steps to involve these

³⁵ Dommen C, above 15, pp 41-42.

³⁶ Article V (2), WTO Agreement

associations directly in policy deliberations³⁷. Today, a NGOs can submit position papers related with an issue of their interest (which is published in WTO's website), and has legal standing before DSB. However, the lack of influence becomes apparent as, to date, no decision of DSB has taken into account any concern of NGOs. Even though the role of NGOs was advanced as an effort to make the WTO appear more open and transparent, the practical access to the decision-making is limited to official meetings and for a short period of time. Still, NGOs cannot take part in Green Room meetings and permission to a wider access to documents has been still on the agenda of WTO discussions on external transparency³⁸. Although the WTO has in general terms acknowledged the importance of civil society involvement in contemporary global governance, the organisation has for the most part lacked clearly formulated objectives and carefully constructed channels of communication³⁹

As such, the RTD principle of transparency is not violated in principle but it is violated in practice by the WTO.

1.8 Non- discrimination

One of the most important elements of the liberalization of trade is the principle that trade should be conducted without discrimination between domestic and foreign products. For the WTO, the principle of non discrimination has two major components: the Most Favored Nation (MFN) rule and national treatment⁴⁰. Both components are embodied as main WTO principles in the agreements on good, services and intellectual property.

The MFN rule requires that a product made in one member country be treated no less favorably than a 'like' (very similar) good that originated in any other country⁴¹. Thus, if

³⁷ For example in the Fifth Ministerial Conference at Cancun, in 2003, over 950 NGOs were eligible to participate, compared with around 150 NGOs that took part in the First Conference in Singapore seven years earlier.

³⁸ Bohne Eberhard *'The World Trade Organization: Institutional Development and Reform'*, Basingstoke: Palgrave Macmillan, 2010

³⁹ See Scholte J., *'The WTO and civil society, included in 'Trade Politics'*, Routledge, Second Edition, 2004, pp 146-159.

⁴⁰ Hoeckman,, above 21, p 41-43.

⁴¹ Article 1 of GATT, Article 2 of GATS and Article 4 of TRIPS.

the best treatment granted a trading partner supplying a specific product is a 5 per cent tariff, this rate must be applied immediately and unconditionally to imports of this good in all WTO members. Once foreign goods have satisfied whatever borders measures and tariffs are applied, national treatment requires imported goods to be treated no less favorably than like or directly competitive goods produced domestically in terms of internal (indirect) taxation⁴².

Both MFN and national treatment are basic pillars of WTO. The reason is mainly economic: by not discriminating between foreign and domestic suppliers, the completion is increased and the consumers will have the benefit of lower prices and higher quality of products. Moreover, MFN has the benefit of bringing down the cost of the negotiations as there is no need to bargain with every different country on how their products will be treated; once a negotiation had been concluded with a country, the results extend to all. Finally, MFN was expected to be beneficial for small developing countries as it guaranteed that larger countries will not exploit their market power by raising tariffs in periods when times are bad and domestic producers are urging for unfair protectionism. In other words, MFN guarantees that the application of the WTO rules between the trading partners will be not less favorable or more beneficial for anyone.

However, the implementation of the agreements has not occurred under these principles. The reality is that implementation of the agreements has been discriminatory by developed countries in their trading relation with products from developing countries. Unfortunately, many tariff and non-tariff barriers are still used by developed countries to protect the consumption of their national products breaching their commitments to treat all products equally. This diverse form of protectionism can happen directly, through the use of tariff escalation which restricts the industrial diversification of poor countries, or it can happen indirectly, with the excuse of anti-dumping policies which restrict the possibility of products from poor countries to be sold in a lower cost.

⁴² Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS.

This preferential liberalization of trade according to the strong trading nations' interests has created huge discrimination on the benefits that weaker trading nations have been gaining from WTO. Moreover, the fact that strong commitments were taken only for those products where developed countries had a comparative advantage leaving out of the benefits of free trade those economically interested products of developing countries, is a very good evidence of how WTO has been discriminating the interests of its members in favor of the stronger ones.

To sum up, although WTO identifies nondiscrimination as one of its major principles, the implementation of WTO agreements has been highly discriminatory against developing countries. As such, the norm of non-discrimination has been respected in principle, but it has been violated in practice.

1.9 Equity

There are two WTO principles that are more connected with the equity's principle of RTD: the one member-one vote of the decision taking and the reciprocity on the application of the WTO rules. First, the one member-one vote character of the organisation guarantees that the voting power of each member state will be regarded as equal to the others one. In this aspect, WTO does not follow the same rules as the IMF and World Bank which have systems of weighted voting. And second, reciprocity ensures an equal identical exchange of advantages or privileges between the WTO member states⁴³. It is an important mechanism which limits free riding⁴⁴, and makes the process of agreeing to tariffs concessions politically acceptable at domestic level skepticism.

However, both principles have been very problematic when they came to the practice. In international trade, lowering of import duties and other trade barriers in return for similar concessions from another country, can be practicable only between developed nations due to their roughly matching economies. The principle of

⁴³ See Finger, Winters, 'Reciprocity in the WTO', included in *'Development, Trade and the WTO'*, Washington DC: The World Bank, 2002 pp50-60

⁴⁴ In economics, free rider (or freeloader) is someone who enjoys the benefits of an activity without paying for it.

reciprocity in trade between developed and developing nations was exchanged with the concept of relative reciprocity which is applied whereby the developed nations accept less than full reciprocity from their developing trading partners. In other words, already since the earlier years of GATT, a statement attributed to an Indian delegate became evidence of what was the reality in the trading relation of developed and developing countries: 'Equality of treatment is equitable only among equals. A weakling cannot carry the burden of a giant'

In fact, although the equal value of voting between the WTO members, power imbalances was affecting the actual weight of voting based on the countries' share in trade. In effect, the whole decision making process is marginalizing the principle of one member-one vote as many developing countries are never asked for their opinion, or their consent is asked in the final stage of the negotiations. As such, developing countries are afraid to use the power of blocking a decision because of the possible retaliation cost from developed countries. Ironically, compared to the other two IFI, the legitimacy of WTO is increased by using these two equity principles. However, the reality is that developed and strong developing countries have used their economic power to profit, bullying out the interests of small developing countries and LDCs who lack negotiation assets.

Taking the accession process for new members that took place after Uruguay Round as an example, the problem of inequality toward the weaker players of the international system becomes more apparent. The behavior of WTO regarding the newcomers can be described as very inequitable in terms of demands in order to be accepted as full members. As we have seen, the acceding states were requested to fully liberalize their trade in rates much bigger than it was required by the WTO agreements, or compared to what WTO members themselves have committed to do.

As a result, the fact that WTO recognizes one member-one vote and reciprocity as principles does not violate the RTD's equity in principle; however, the actual use of these principles brings a violation in practice.

Summary

RTD Principles	In Principle	In practice
1. Development as a Right	Not Violated	Violated
2. Progressive Realisation	Not Violated	Violated
3. Non-retrogression	Violated	Violated
4. Development with equity	Violated	Violated
5. International cooperation under HR principles	Not Violated	Violated
I. Accountability	Not Violated	Violated
II. Participation	Violated	Violated
III. Transparency	Not Violated	Violated
IV. Non-discrimination	Not Violated	Violated
V. Equity	Not Violated	Violated
Results	RTD: N-V: 3 / V: 2 HR: N-V: 4 / V: 1	RTD: N-V: 0 / V: 5 HR: N-V: 0 / V: 5
<i>Is the Right to Development compatible with WTO?</i>	Yes <i>In Principle</i>	No <i>In Practice</i>

2. Conclusions

WTO is not bad

The results are clear and, surprisingly, are showing what many, including myself, would not have expected: In principle, WTO does not violate RTD. The organisation is recognizing and functioning under the majority of RTD's principles and the compatibility test showed that WTO's code of conduct for trade policy is similar to 3 out of 5 of RTD's principles; or 7 out of 10, including the human rights principles of international cooperation. It becomes clear that, in theory, the WTO is compatible with the RTD. However, what this acknowledgment actually means for WTO?

From a human right and RTD prospective, this result indicates that the core of WTO is not responsible for the adverse effects on human rights and development. The mandate, the preamble, the SDTs, the 'flexibilities', the DSB, the non-discrimination trade rules, the member driven character, the consensus, the transparency mechanisms and more, provide to the organisation with all necessary means to have a positive contribution on the enjoyment of human rights and development. In other words, WTO is not bad; the implementation of its mandate is what causes the problems.

In fact, the role of WTO is essential on ensuring the stability of the international economic system. As we have seen in Chapter 5, the example Smoot-Hawley Act on tariff in the US provides a good case of how trade protectionism had adverse effects on world development. But even more, it showed how the retaliatory restrictions and the resulted race-to the bottom for the world economy had lead to the greatest disaster on the history of mankind: the WWII. To date, it is still apparent that cooperation among states is difficult to organize or sustain unless an international institution is present who coordinates the negotiations.

However, the question remains: why WTO has not delivered the expectations yet? This paper indentifies two obstacles that hold back WTO from achieving its mandate: the persistence on trade liberalization and the power asymmetries between developed and developing countries.

Unfortunately, the WTO seems to forget that the commitment to trade liberalization is not an end itself but is a means to achieve the broader goals of improving standards of living, full employment, expanded production, sustainable development and an enhanced share of developing countries in world trade. However, liberalizing trade is not the solution to everything because 'equality of treatment is equitable only among equals'. This paper has provided enough examples that show why the idea of free trade as panacea to the economical imbalances between the North and the South trade has not always worked in favour of the human rights and development needs of the weaker players of the economical system. All in all, freeing trade only has limited impact on achieving the broader ends mentioned above.

However, the political power imbalance between poor and rich countries is probably the most severe obstacle. Because, even if some safeguards are provided to protect the human rights and development concerns of poor countries, they become victims of the democratic deficit which empowers the interests of the stronger players of the economical system, and leave the weaker out of the benefits. As we have seen in Part II, the WTO processes could be perceived as unfair because the underlying power imbalance between commercial interests of strong developed countries and the social interest of weak developing countries always end up against the latter. Unfortunately, the realistic nature of power politics marginalizes the bargaining position of poorer states. Put differently, human rights and development concerns have been always unfortunate in the face of the realities of power imbalances.

Yet, what is the solution for human rights defenders? The solution entails the necessity to accept the reality that the core idea of human rights is probably a universal value, but it is not a universal principle. Human right protection should be the objective but we have to acknowledge the fact that these rights are not recognised by everyone and, for sure, they cannot be applicable in all cases. The universality of human rights is questioned by a big part of the international community and the cultural relativist defenders argue that human rights are culturally, ideologically and politically non-universal and reflect the willingness of developed countries to impose their western

values. Unfortunately, our idea of universal human rights is not so much universal for those living outside the human rights world.

To conclude, next to the Paul Krugman's tag that "if economists ruled the world, there would be no need for a WTO"⁴⁵, I would add that "if the world was ruled by international lawyers, there would be no need for a human right regime". Though, the world is governed by politicians who are doing their best to protect the legitimate interests of their country; and human rights are not always part of this. Based on this reality, human right defenders should seek for more efficient ways to protect human rights because the solution to the obstacles that human rights face today worldwide is not just to make them legally binding or find new enforcement mechanisms. In my point of view, the best way to achieve truly universal human rights is to make them (economically and politically) interesting.

RTD can play the role of indicator

When it comes to the historical background of RTD and WTO, both of them share a something in common: both have started as very ambitious concepts after the end of WWII which were later compromised by the Cold War. The origins of RTD signalise the original conception of integrated and indivisible human rights; the origins of WTO signalize a international trade institutions where development and human rights were the main objectives, embodied in the UN Charter. However, the political tension of that time resulted, from one hand, a division of human rights in first and second generation, and from the other hand, development exclusion of international trade scope.

Historically, the RTD has always been about correcting what is wrong in the global economic order. This is the main reason why the developing countries have always supported the cause of RTD. From the very beginning, they cry out for an international order that would allow them to struggle underdevelopment. Through their economic and social transformation, they wanted to fight the vicious circle of poverty and to advance

⁴⁵ See Krugman Paul, 'What Should Trade Negotiations Negotiate About', Journal of Economic Literature, Vol. XXXV, 1997, pp 113-120;

to a higher level of income and living standards, so that their people could live with dignity and the advanced nations would treat them fairly, as equal partners. After all, the claim that RTD is a human right is a claim for a process of development with equity, justice and fair distribution of the benefits.

However, beside the importance of becoming conscious that WTO does not violate RTD in principle, the most significant outcome of the compatibility test is that WTO violates every aspect of RTD as defined in the principles in practice. From what we have seen till now, WTO fails to conduct its policies and implement its agreements in accordance, not only with RTD, but mainly with its own principles. The result is that all the benefits that developing countries were supposed to take by liberating their trade under WTO rules have remained an empty promise.

This paper promotes the idea that RTD can play a positive role in increasing the legitimacy and effectiveness of WTO. Considering that WTO fails to respect its own principles in practice, by recognizing RTD as a human right, the legal value of these principles is advanced to oblige WTO not just to respect them in theory but also to make them the objectives of trade liberalization and trading negotiations. In other words, if a legal element such as RTD is composed of everything that WTO is accused of, then RTD can play the role of an instrument that examines whether a policy, rule, or DSB decision is in fact compatible with a process of development where all human rights and fundamental freedoms can be realized with equity, justice and fair distribution of the benefits which are included in the WTO Preamble.

As such, by recognizing a human right to development, WTO is going back to the original conception of seeing trade as a crucial factor to achieve development, and development as crucial to achieve human rights.

Development is a Human Right

Although many refuse this correlation, WTO paradigm presents a comprehensive image of how development and human rights are connected. The case of agriculture and the impact on the right to food provides the best example of how the adverse effect on development by WTO can have negative effect on the enjoyment of human rights of people in poor countries. In this case, the violation of the right to food is connected to the negative effects on development resulted from the implementation of WTO rules.

Around 40 per cent of the world's population is employed in agriculture and 90 per cent of farms are smallholder operations. As seen before, AoA, tariff escalation and subsidies have destroyed the local farmers' production of agricultural products in developing countries. According to the economic theory, this process would oblige the smallholders to move towards more efficient trading sectors, such as of export firms, in order to increase the production of higher comparative-advantaged products. However, in many poor countries there is a complete absence of any social protection that will guarantee this process will take place smoothly. In other words, poor countries citizens don't have the advantage of unemployment benefits, in contrast with citizens of developed or strong developing countries who are supported by the state during the transitional period. Yet, half of the extremely poor people are smallholder farmers making their livelihood from agriculture. For most of the family farmers, any loss in the production of agricultural products means not only losing the production of products to sell, but also the production of products to eat⁴⁶.

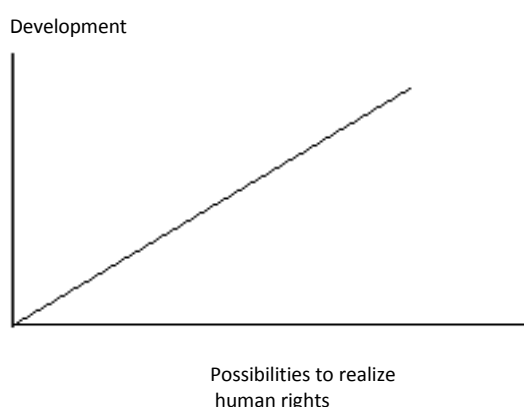
This is how the negative impact on development from WTO can be translated into a negative impact of WTO on the enjoyment of human rights. Developing countries' economies are very vulnerable to absorb the imbalances that WTO rules create on trade of food. Moreover, right to food is a necessity of life which a poor person cannot be excluded from in the same way that he can be excluded from cars or phones. Taking

⁴⁶ Former US President Bill Clinton, who presided over the US's final negotiation of Uruguay Round, admitted that "we all blew it, including me when I was president by treating food crops as commodities instead of as a vital right of the world's poor".
http://www.cbsnews.com/2100-202_162-4542268.html

into account the absence of social protection in less-developed countries, the negative effect of WTO on development leads to violations of human rights. For developing countries, the pursue of development is not an adding but an essential element towards realizing human rights. Consequently, development and human rights are connected in positive relation⁴⁷.

Adding to this, we have to consider that the ultimate goal of all economic models on development is the increase of the welfare and wellbeing of the people in a society. If we take a look in the historical background, “the origin of economics was significantly motivated by the need to study the assessment of, and casual influences on, the opportunities that people have for good living⁴⁸”. Dating back to the early economists, the first development theories talked about development not just in terms of growth of income, but also in terms of spread of education, health, and social and human development. But they were convinced to focus more on strategies that seek to maximize the per capital income, based on the idea that the growth of output per head gives the people greater control over the environment. It is not the purpose of this article to analyse more the economic aspect of development, this was only to prove that development and human rights, in a way, share the same core objective: to increase people’s happiness⁴⁹.

⁴⁷ Translated in economic theory, the positive relation between development and human rights would be illustrated by an upward sloping line, such as of the following diagram:



This diagram shows that when development is increased, the possibility to realize human rights is also increased. On the opposite, maldevelopment decreases the realization of human rights.

⁴⁸ Sen, Amartya. *Development as freedom*. New York: Knopf, 1999 p 24

⁴⁹ See <http://www.un.org/apps/news/story.asp?NewsID=39084>

Moreover, the first ‘victims’ of economic development have always been human rights⁵⁰. In the same time, however, development brings human rights issues to light. Based on the experience, by introducing development in a country, the pressure to respect human rights and fundamental freedoms has been increased. The last decades ,the world community has proved that human rights concerns enter in the agenda as soon as a country achieve a high speed of economic development. For example, in the same period as China and Singapore GDB was highly increased, the international community started to put under pressure the two countries on human rights. From a point of view, we cannot expect from a poor country to meet its human rights obligations in the same level as a rich country or a country that now has the capacities. Unless development is achieved, human rights will always be second in the agenda.

In the same way that civil and political rights need a strong juridical system to protect them, the economic and social rights need development to be realized. Because of development essentiality on realizing human rights and by recognizing RTD as part of customary law, corollary, development becomes a human right. However, not everyone understands human rights as the first and second generation together. There many international lawyers who recognize only civil and political rights as human rights. They claim that only the civil and political rights can be regarded as human rights because the economic, social and cultural rights are not justifiable under international law. Yet, they fail to understand that the solution of the justifiability problem of economic, social and cultural rights is not to restrict the recognition of human rights as only civil and political. In my point of view, the recognition of all human rights embodied in the Universal Declaration as undeniable rights just acknowledge the presumption that development is per se a human right, based on the experience that some economical and social human rights are impossible to realize when development is absence. This idea is described by the third generation RTD.

⁵⁰ Take the example of the working conditions in the period of Industrial Revolution, the millions of deaths during colonization, to the numerous violations of human rights seen the last years to countries that entered in a high speed of growth.

In conclusion, the goal to advance the second generations rights justifies new approaches and third generation rights can provide some solutions to promote all human rights instead of holding a state accountable for violation of civil and political rights. The human rights science has longly passed the time when it was subject of juridical science only. The failure of implementing human rights worldwide shows the need of a new economical approach on addressing human rights issues.

Acknowledgments

For the purpose of this thesis I would to express my gratefulness to:

- i. The staff of CEU Library for their assistance and willingness to my numerous demands,
- ii. Prof. Sonnevend Pál for his collaboration,
- iii. Prof. Jacques Hartmann, who managed to summarise all my ideas for a thesis on human rights, trade and development into a phrase: ‘Is the Right to Development compatible with WTO?’.

This thesis is dedicated to my family, who made me who I am, and to all my friends, who made me who I want to be.

Bibliography

Books

- Adhikari, '*Developing countries in the world trading system: the Uruguay round and beyond*', Cheltenham, UK: Edward Elgar, 2002
- Alexandratos N., *World Agriculture: Towards 2010; A FAO study*, New York: Food and Agriculture Organisation, 1995
- Agosin, Tussie, '*Trade and growth: New Dilemmas in Trade Policy*', New York: St. Martin's Press, 1993
- Aguirre, D. *The human right to development in a globalized world*. Aldershot, England: Ashgate, 2008.
- Alston and Mary *Human rights and development: towards mutual reinforcement*. Oxford: Oxford University Press, 2005.
- Bethlehem, McRae, Neufeld, Van Damme, '*The Oxford Handbook of International Trade*', New York: Oxford University Press, 2009
- Bohne Eberhard '*The World Trade Organization: Institutional Development and Reform*', Basingstoke: Palgrave Macmillan, 2010
- Caves, Frankel, Jones, '*World trade and payments; an introduction*', Boston: Addison Wesley, Ninth Edition, 2002
- Choi, Harrigan, '*Handbook of International Trade*', Victoria: Blackwell Publishing, 2007
- Chowdhury, Subrata. *The Right to development in international law*. Dordrecht: Martinus Nijhoff Publishers, 1992.
- Cottier, Pauwelyn, Burgi, '*Human Rights and International Trade*', New York: Oxford University Press, 2005
- Dupuy, Pierre, Francesco Francioni, and Ernst Petersmann. *Human rights in international investment law and arbitration*. Oxford: Oxford University Press, 2009.
- Hestermeyer H., '*Human Rights and the WTO: The Case of Patents and Access to Medicines*', New York: Oxford University Press, 2007

- Hirsch, Bhagwati, Dunkel, 'The Uruguay Round and beyond: essays in honor of Arthur Dunkel', Ann Arbor, Mich: University of Michigan Press, 1998
- Hocking, McGuire, '*Trade Politics*', London: Routledge, Second Edition, 2004
- Hobsbawm E. J., 'Age of extremes: the short twentieth century, 1914-1991', London: Abacus, 1995.
- Hoekman, Mattoo, English, '*Development, Trade and the WTO*', Washington DC: The World Bank, 2002
- Hoekman, Kostecki, '*The political Economy of the World trading System: the WTO and Beyond*', New York: Oxford University Press, Third Edition, 2009
- Ife, Jim. *Human rights from below: achieving rights through community development*. Cambridge, UK: Cambridge University Press, 2010.
- Jackson John, '*Restructuring the GATT System*', London: Printer Publisher Limited, 1990;
- Jawara, Fatoumata, and Aileen Kwa. *Behind the scenes at the WTO: the real world of international trade negotiations : lessons of Cancun*. New York: Zed Books, in association with Focus on the Global South, Bangkok ;, 2004.
- Joseph Sarah, '*Blame it on the WTO?: A Human Rights Critique*', Oxford: Oxford University Press, 2011
- Karapinar B. 'Food crises and the WTO: World Trade Forum', Cambridge: Cambridge University Press, 2010
- Kerr, Gaisforf, '*Handbook on International Trade Policy*', Cheltenham, UK: Edward Elgar, 2007
- Khasnobis B., '*The WTO, Developing Countries and the Doha Development Agenda ; Prospects and challenges for trade-led growth*', Basingstoke: Palgrave Macmillan, 2004
- Kinley, David. *Civilising globalisation: human rights and the global economy*. Cambridge [U.K.: Cambridge University Press, 2009.
- Lowe, A. V.. *International law*. Oxford: Oxford University Press, 2007.
- Macmillan, Grady, '*Seattle and beyond: the WTO millennium round*', Ottawa: Global Economics, 1999

- Markusen et al., *‘International Trade: theory and evidence’*, Boston, Mass: McGraw-Hill, 1995
- Matsishita, Schoenbaum, Mavroidis, *‘The World Trade Organisation: Law, Practice, and Policy’*, New York: Oxford University Press, 2003;
- McConquodale Robert, “Rights of Peoples and Minorities”, *International Human Rights Law*, (New York: Oxford University Press, 2010), 366-367
- McCulloch, Winters, Cinera, *‘Trade Liberalization and Poverty: A Handbook’*, London: Centre for Economic Policy Research, 2001
- Michalopoulos C., *‘Developing countries in the WTO’*, Houndmills, Basingstoke, Hampshire: Palgrave, 2001
- Mike Moore, *‘Doha and beyond: the future of the multilateral trading system’*, Cambridge: Cambridge University Press, 2004
- Murshed & Raffer, *‘Trade, Transfers, and Development, Problems and prospects for the Twenty First Century*, Edward Elgar Publishing Ltd, Aldehot (UK), 1993
- Narlikar Amrita, *‘The World Trade Organization: A Very Short Introduction’* Oxford: Oxford University Press, 2005
- Narlikar A., *‘WTO decision-making and developing countries’*, Geneva: South Centre, 2001
- Narlikar A., *International Trade and Developing Countries: Bargaining Coalitions in the GATT and WTO*, London: Routledge, 2003;
- Nault, Derrick M.. *Globalization and human rights in the developing world*. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2011.
- Neus Torbisco Casals, *Group Rights as Human Rights*, Netherlands: Springer, 2006
- Nussbaum, Martha Craven. *Creating capabilities: the human development approach*. Cambridge, Mass.: Belknap Press of Harvard University Press, 2011.
- Nussbaum, Martha Craven. *Creating capabilities: the human development approach*. Cambridge, Mass.: Belknap Press of Harvard University Press, 2011.
- Pogge, Thomas Winfried Menko. *Freedom from poverty as a human right: who owes what to the very poor?.* Paris: United Nations Educational, Scientific, and Cultural Organization ;, 2007.

- Rolland Sonia E., *'Development at the WTO'*, Oxford: Oxford University Press, 2012
- Rugman, Boyd, *'The World Trade Organization in the New Global Economy: trade and investment issues in the millennium round'*, Cheltenham, U.K: Edward Elgar, 2001
- Sen, Amartya. *Development as freedom*. New York: Knopf, 1999.
- Skogly, Sigrun. *The human rights obligations of the World Bank and the International Monetary Fund*. London: Cavendish Pub., 2001.
- Stiglitz, Joseph E. *Globalization and its discontents*. New York: W.W. Norton, 2002.
- Stiglitz, Charlton, *'Fair Trade for All: How Trade can Promote Development'*, Oxford: Oxford University Press, 2005.
- Uvin, Peter. *Human rights and development*. Bloomfield, CT: Kumarian Press, 2004.
- Van Marrewijk Charles, *'International Trade and the World Economy'*, New York: Oxford University Press, 2002;
- Wallach, Woodall, *"Whose Trade Organization?: A comprehensive guide to the WTO"*, New York: New Press, 2004
- Ziegler Jean, *'Les Nouveaux Maitres du monde, et ceux qui leur resistant'*, Paris: A. Fayard, 2003

Articles

- Alston J P, *"Making space for new Human Rights: the case of the Right to Development"*, Human Rights Yearbook, I, 1988
- Abbott F., *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting A Dark Corner at the WTO'*, Journal of International Economic Law , 2002, pp 469-505
- Dommen C., *'Raising Human Rights Concern in the World Trade Organisation: Actors, Processes and Possible Strategies'*, Human Rights Quartely, Vol. 24, N. 1, 2005

- Easterly, Pogge, Stiglitz, Stone, Vreeland, ‘*Globalization, Development and International Institutions: Normative and Positive Perspectives*’, American Political Science Association, 2005;
- Feyter de Koen, ‘*Globalization and Human Rights*’,
- Fujita Sanae, ‘*Challenges of mainstreaming human rights in the World Bank*’, The International Journal of Human Rights, Vol.15, No.3, 374-396. 2011;
- Green Maria, ‘*What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measuremen*’, Human Rights Quarterly, Vol. 23, No. 4, pp 1062-1097, 2001;
- Hafner-Burton E., ‘*Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*’, International Organization 59, Summer 2005, pp 593-629
- Hamm B. I., ‘*A Human Rights Approach to Development*’, Human Rights Quarterly, Vol. 23, No. 4, pp 1005-1031,2001;
- Jeba M’ Baye, ‘*Le droit au developpement comme un droit de l’ home*’, Human Rights Journal, Vol. V, No. 2-3, pp 505-534
- J Hunter, ‘*Broken Promises: Agriculture and Development at WTO*’ Melbourne International Law Journal 2003
- Krugman Paul, ‘*What Should Trade Negotiations Negotiate About*’, Journal of Economic Litetature, Vol. XXXV, 1997, pp 113-120
- Lumina Cephas, ‘*Free Trade or just trade? The World Trade Organisation, human rights and development (Part 1 & 2)*, Law Democracy and Development;
- Stephen Marks, ‘*The Politics of Impossible*’ International Policy Analysis, 2011
- Marrella, Worfgang, ‘*Human rights and the new economic realities*’
- Marks Stephen, ‘*The Human right to development: between Rhetoric and Reality*’, Harvard Human Rights Journal, Vol. 17, 2004.
- Marks Stephen, ‘*The Human Rights Framework for Development: Five Approaches*’, Harvard University, 2003;
- Marks Stephen, ‘*Obstacles to the Right to Development*’, Harvard University, 2003;

- Narlikar A., *International Trade and Developing Countries: Bargaining Coalitions in the GATT and WTO*, Routledge, 2003;
- Ostry Sylvia, *The Uruguay Round North-South Grande Bargain: Implications for Future Negotiations*, University of Minnesota, 2000.
- Petersmann Ernst, *The WTO constitutions and Human Rights*, Journal of International Economic Law, pp 19-25, 2000;
- Saeed Reza Abadi, *Decent Work from the Perspective of the Right to Development and Human Development*, US-China Law Review, Vol.8, pp 656-668, 2011;
- Sitta A., *The role of the Right to Development in the Human Rights Framework for development*, 2005;
- Sengupta Arjun, *The Right to Development as a Human Right*, Harvard School of Public Health, 2000;
- Sengupta Arjun, *Delivering the Right to Development: ESCR and NGOs*, Economic and Political Weekly, Vol.34, No.41, pp 2920-2922, 1999
- Sengupta Arjun, *Development Cooperation and the Right to Development*, Francois-Xavier Bagnoud Center for Health and Human Rights, 2003;
- Sengupta Arjun, *Foreign Capital Requirements for Economic Development*. Oxford Economic Papers, New series, Vol. 20, no. 1 pp 38-55, 1968;
- Sengupta Arjun, *Official Development Assistance: The Human Rights Approach*, Economic and Political Weekly, pp 1424-1436, 2002;
- Sengupta A., *On the Theory and Practice of the Right to Development*, Human Rights Quarterly, Vol. 24, No. 4, pp 837-889, 2002;
- Uvin Peter, *From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered –Development*, Development in Practice, Vol 17, No. 4/5, pp 597-606, 2007;
- Villaroman N. G. *Rescuing A Troubled Concept: an Alternative View of the Right to Development*, Netherlands Quarterly of Human Rights, Vol. 29/1, pp 13-53, 2011;
- World Trade Organisation, *Understanding the WTO* Fifth Edition, 2011

- Wellman Carl, '*Solidarity, the Individual and Human Rights*', Human Rights Quarterly, Vol. 22, No. 3, pp 639-657, 2000;
- Welling J.V., '*International Indicators and Economic, Social and Cultural Rights*', Human Rights Quarterly, Vol. 30, No. 4, pp 933-958, 2008;
- Wolfhang Benedek, '*The Emerging Global Society: Achievements and Prospects*', 2007
- Wolfhang Benedek, '*The World Trade Organisation and Human Rights*',
- Woods Ngaire, '*Holding Intergovernmental Institutions to Account*', 2003;

Documents

- First Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/1999/WG.18/2;
- Second Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2000/WG.18/CPR.1;
- Third Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2001/WG.18/2;
- Fourth Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2002/WG.18/2;
- Fifth Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2003/WG.18/6;
- Sixth Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2004/WG.18/2;
- Preliminary Study of the Independent Expert on the Right to Development on the impact of international economic and financial issues on the enjoyment of human rights, UN Doc. E/CN.4/1999/WG.18/2;
- The Globalization and its Impact on the Full Enjoyment of Human Rights: Preliminary Report of the Secretary General, [17], UN Doc. A/55/342 (2000)
- Millennium Development Goals, Target 1C: Halve the proportion of people who suffer from hunger.

- World Bank, World Development Report 2008: Agriculture for Development (World Bank, Washington DC, 2008).
- FAO, The State of Food Insecurity in the World, 2011.