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Capturing the benefits of trade? Local content requirements in WTO law and the human rights-based approach to development

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Capturing the benefits of trade? Local content requirements in WTO law and the human rights-based approach to development *

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Abstract

Governments have often taken steps to require businesses to source some or all of their inputs locally – that is, have imposed 'local content requirements' - in order to encourage regional development and the growth of local manufacturing industry. This paper looks at the ways in which WTO law on trade in goods now constrains the ability of developing countries to implement local content requirements and considers two issues arising. First, WTO constraints on the use of local content requirements raise general concerns about a narrowing of the range of development strategy options open to developing countries. Secondly, the constraints are not compatible with understanding about the connections between trade law, industrial development strategy options and the realisation of human rights and fundamental freedoms. A human rights-based approach to development has grown, partly out of frustration at the failures of contemporary processes of globalisation to resolve fundamental development problems. Much of this frustration is directed at the WTO. To become an effective, contemporary institution, the WTO needs to be 'delinked' from the theory of neo-liberalism and to be reoriented with a high priority on a human rights-based approach to the relationship between trade and development.

Introduction

Governments have often taken steps to require businesses to source some or all of their inputs locally – that is, have imposed 'local content requirements' - in order to encourage regional development and the growth of local manufacturing industry. This paper looks at the ways in which WTO law on trade in goods now constrains the ability of developing countries to implement local content requirements and considers two issues arising. First, WTO constraints on the use of local content requirements raise general concerns about a narrowing of the range of development strategy options open to developing countries. Secondly, the constraints are not compatible with understanding about the connections between trade law, industrial development strategy options and the realisation of human rights and fundamental freedoms.

'Local content requirements' are a range of government measures which require or entice businesses to use domestically-produced, rather than imported, component parts or other inputs in their manufacturing. WTO law regulates the use of local content requirements which affect trade, and a particular focus has been government subsidies which are tied to the use of domestically-produced inputs (local content subsidies).¹ Bilateral and regional trade agreements also regulate local content

¹ Local content requirements are sometimes referred to as 'mixing requirements.'

requirements which apply to foreign investors; in this context, the measures are referred to as 'performance requirements' (Sornarajah, 2004: 104).

Many developing countries, particularly the former colonies in Latin America, have used local content requirements extensively in the past, pursuing industrial development through "import-substitution" (Hettne, 1995: 41). Based on the ideas of two economic development theorists, Hans Singer and Raul Prebisch, this theory argued that developing countries would benefit most from fostering their industries behind protective economic walls, such as high tariffs, import quotas and, importantly, import substitution policies. Under these latter policies, industries in developing countries would be required to source their component parts and other inputs from local suppliers, rather than importing them. Because the protective walls would only be removed when their industries were strong enough to face international competition, this approach has also sometimes been called an 'infant industry approach.'

However, since the introduction of WTO law in 1995, the scope for imposing local content requirements by developing countries has been greatly constrained. This paper explores some of the resulting development and human rights concerns

The objectives of WTO law

In 1995, the World Trade Organisation (WTO) was established and a vast new body of trade law was introduced, regulating international trade in goods in much greater detail than previously and, to a lesser extent, regulating trade in services. The WTO open trading system is the only 'multilateral' trading system and is the main source of international trade law and policy. Underpinned by Ricardo's theory of comparative advantage, WTO law is based on the view that liberalized international trade will increase efficiency, which will in turn increase development and prosperity in participating countries – the 'mutual gains from trade.' Jeffrey Dunoff names this theoretical basis for the international trade regime, the pursuit of the benefits described in economic theory as comparative advantage, the "efficiency model" (Dunoff, 1999: 737).

Prior to the establishment of the WTO regime, the 1947 *General Agreement on Tariffs and Trade (GATT, 1947)* had been in place for nearly 50 years. The aim of *GATT 1947*, too, had been to enhance development and prosperity through substantial reductions in barriers to international trade. However, the efficiency model was not applied in a particularly "pure" sense in *GATT 1947* (Hettne, 2002: 8). The treaty had been drafted in a Keynesian theoretical environment, which favoured a "mixed economy" in which governments had a substantial, necessary role in stabilising economies and promoting development. Development was seen by the drafters of *GATT 1947* as primarily a national process which would require state intervention, state planning and state financing (Hettne, 1995: 40). Donald McRae describes the "underlying bargain of the *GATT*" as being "that states would be able to leave free trade with the protection of certain basic welfare values within society." *GATT 1947* was "both a protectionist and liberal trade charter." (McRae, 2005: 609) Thus, *GATT 1947* left ample room for a development role for states, with substantial scope to limit trade liberalisation, including through the use of protective industrial development strategies.

However, obvious deficiencies in *GATT 1947* prompted countries to commence a round of trade negotiations which would create a more contemporary,

comprehensive and effective body of international trade law.² The Uruguay Round of trade negotiations began in 1986 and resulted in the 1995 establishment of the WTO and the introduction of new trade law. WTO law was greatly influenced in its formation by neo-liberalism, which had become a dominant theoretical force during the period of the Uruguay Round. Critical of the dilution of the efficiency model under the Keynesian approach and *GATT 1947*, neo-liberalism saw government interventions in markets as both unnecessary (markets will find an equilibrium) and distorting (Palley, 2004: 3-4).

The new WTO law applied the efficiency model tenets more purely, eschewing the deep-seated flexibility of *GATT 1947* and drawing developing countries more firmly into pan-sectoral trade liberalisation as a development strategy. By extending into areas previously outside, or poorly regulated by, *GATT 1947*, WTO law brought about major change. Added to this, the WTO agreements are a 'single undertaking,' in that Members must join all of the agreements; they cannot choose to join only some.³ These major changes are made even more significant by the fact that WTO law is backed up by a Dispute Settlement System with power to make orders in the nature of enforcement (*DSU*, 1994: arts. 19, 21-2, 26).

The more extensive trade liberalisation which the new law required of developing countries was accompanied by a system of concessions for developing countries, referred to as Special and Differential Treatment (S&DT), which temporarily mitigated some of their trade law obligations or assisted them in adapting to the deeper trade liberalisation process. The WTO Committee on Trade and Development has identified more than 150 Special and Differential Treatment provisions in WTO law. A large proportion of these give developing countries longer timeframes for compliance with WTO law obligations, lower reductions targets (such as, for agricultural tariffs) or other flexibility in their obligations and commitments under the WTO rules and disciplines.⁴ Other provisions exhort industrialised countries to recognise and accommodate the interests of developing countries, through, for example, providing greater opportunities for developing countries to export their goods and services, providing financial and technical assistance, refraining from imposing unnecessary trade obstacles and generally taking into account their development needs and difficulties.⁵ These provisions are almost all hortatory, as opposed to imposing binding obligations.

Interestingly, S&DT singles out 'least-developed countries' (LDCs) for special treatment. There are about 49 countries at any one time which are classified as LDCs by the United Nations Development Program and UNCTAD, on the basis of their low national incomes, weak human assets and high economic vulnerability.⁶

² Obvious deficiencies included the facts that the key areas of textiles and clothing and of agriculture were largely excluded from the coverage of *GATT 1947*, there were many 'loopholes' in its regulation and countries were refusing to abide by the decisions of GATT Panels in disputes.

³ An exception is the two plurilateral WTO agreements, the *ATCA 1994* and the *AGP 1994*.

⁴ For example, certain subsidies used by some developing countries to support small and resource-poor farmers were excluded from the general commitment to reduce agricultural subsidies: *AoA*, 1994: art. 6.2.

⁵ Examples may be found most WTO agreements. Typical illustrations are *SPSA*, 1994: art. 10 and *TBTA*, 1994: art. 11.

⁶ Low national income is indicated by per capita Gross National Income under \$900, weak human assets by a composite index based on health, nutrition and education indicators and high economic vulnerability by a composite index based on indicators of instability of agricultural production and exports, inadequate diversification and economic smallness: UNCTAD, 2002.

About 30 are WTO Members and they are, by and large, exempted from the liberalisation obligations imposed by WTO law.⁷ For this reason, LDCs are not included in the critique set out in this paper, which refers only to the remaining 95 or so developing country Members of the WTO.

Developing countries have been highly critical of the S&DT package within WTO law, arguing that it does not meet their development needs. Many argue that the fundamental approach of WTO law, the efficiency model, is inappropriate for their development needs, so that an S&DT package which merely 'eases the pain' of implementing the efficiency model does not make that model any more appropriate. This difference of view is perhaps the deepest fault line in the WTO regime, which bases its law on the firm conviction that the efficiency model will yield mutual gains from trade for developing as well as industrialised countries. In attempting, through S&DT, to combine the efficiency model with the demand for different treatment by developing countries, WTO law as regards developing countries has become a theoretically unsupported and rather incoherent hybrid. In reality, the package is a result of political compromise, but the criticisms of both the efficiency model and the S&DT package by developing countries have placed the development role of the WTO in the spotlight.

Development and the WTO

The WTO consistently protests that it is not a development agency, yet its law powerfully influences, even constrains, the development strategies open to developing countries. Similar to that of the *GATT* before it, the preamble to the 1995 *Agreement Establishing the World Trade Organisation (WTO, 1994: preamble)* committed the Member countries to an "open trading system" which would "contribute to" the objectives of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand." Although these objectives were not framed with a view to the WTO assuming a primary role as an international development agency and although they are selectively chosen and largely economic in nature, they are nonetheless typical development objectives. International trade as an economic activity has a major role in, and influence over, many other aspects of economic, social and cultural development. For example, trade policy can profoundly affect the availability of food and jobs, and the preservation of environments and cultures, all matters which are central to the pace and character of development.

Of course, 'development' is a contested term and a much studied – and fairly elusive - phenomenon. As a specific field of study, it has its origins in the post-War reconstruction effort. In the decades following the end of the War, development was primarily understood as an economic process of modernisation, a "bridging of the gap [between rich and poor countries] by means of an imitative process, in which the less developed countries gradually assumed the qualities of the developed" (Hettne, 2002: 7). However, by the 1970s, this view of the nature and dimensions of development was being challenged by 'alternative' approaches, which placed people, their needs and their participation at the centre of the development process. Adding strong support to the alternative view, in 1986, the UN General Assembly adopted the *Declaration on the Right to Development (the Development Declaration)*. The

⁷ Some WTO agreements do impose obligations on LDCs but give them longer implementation periods which have in most cases been further extended. For example, under the *TRIPs Agreement*, LDCs were to have implemented their obligations by 2005. The period has since been extended to 2016: WTO, 2007: 42. For more information, see: WTO Committee on Trade and Development, 2004.

preamble to the *Development Declaration* defines development in its expansive sense, 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 therefrom.⁸
(UNGA, 1986)

This definition presents a broad concept which sees development as a process which extends well beyond the economic sphere to include changes in society, culture and the political realm. Significantly, it places development squarely within the realm of international human rights, as a process which is thoroughly tied to rights and which is very much about the realisation of rights. The rights and freedoms referred to in the definition are those contained in the two 1966 covenants of the *International Bill of Rights*, rights which have been identified as fundamental to “the dignity and worth of the human person” (*UDHR*, 1948: preamble. *United Nations Charter*, 1945: preamble). The civil and political rights include (amongst many) the rights to liberty, life, a fair trial, freedom of speech and religion and universal suffrage (*ICCPR*, 1966). The economic, social and cultural rights include (amongst others) the rights to work, an adequate standard of living, health, education, social security, housing and participation in cultural life (*ICESCR*, 1966). States’ obligations under these covenants include respecting, protecting, promoting and fulfilling human rights. These ways of thinking about development directly challenged the narrower, economic approaches to development, particularly where those approaches might be said to cause, tolerate or ignore inequality, create retrogression of rights and freedoms or exclude from participation in policy formulation those most affected.

In 1990, the UNDP began to measure and evaluate development as ‘human development,’ using human indicators, in contrast to the dominant, but more limited, notion of development as economic development, measured by economic growth. This change of perspective had been stimulated by the work of Amartya Sen and Mahbub ul Haq, who saw human development as “a process of expanding the real freedoms that people enjoy;” thus, development will occur as the “major sources of unfreedom” are removed and peoples’ “capabilities” are consequently expanded (Sen, 2000: 17-18). Sen presented human development in terms of ‘instrumental freedoms,’ that is, “those which allow us to live lives free from starvation, undernourishment, escapable morbidity, premature mortality, illiteracy and innumeracy” (Potter et al, 2004: 12). These ideas grew into a concept of (human) development which fully accepts an indivisible relationship between itself and human rights.

Building on this work, the United Nations has taken steps to apply new understanding and knowledge about how the process of development can be steered to facilitate the realisation of human rights and freedoms for all. In 1997, the then Secretary-General requested all UN agencies and bodies to mainstream human rights into their activities and programmes (FAO, undated: 1). Many UN agencies moved to adopt a human rights-based approach to their development cooperation work and, by 2004, the *UN Statement of Common Understanding on Human Rights-Based Approach to Development Cooperation and Programming* had drawn them together in a relatively consistent approach. Under the *Common Understanding*, it was agreed that all UN programmes of development co-operation and assistance should aim to “contribute

⁸ Because the *Development Declaration* is a resolution of the UN General Assembly, not an international treaty, it is not a binding instrument under international law.

directly to the realization of one or several human rights” (UN, 2004: para 1). It was also agreed that international human rights standards should guide all development cooperation and programming in all sectors and at all phases, including all development cooperation directed towards the achievement of the Millennium Development Goals. The guiding human rights standards identified in the *Common Understanding* included “universality and inalienability; indivisibility; inter-dependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law” (UN, 2004: para 2). The United Nations Development Group observes that the human rights-based approach to development,

leads to better and more sustainable outcomes by analyzing and addressing the inequalities, discriminatory practices and unjust power relations which are often at the heart of development problems. It puts the international human rights entitlements and claims of the people and the corresponding obligations of the State in the centre of the national development debate. (UNDG, undated)

The approach taken by *GATT* 1947 would have been reasonably compatible with this view of development, in that it allowed for flexibility in trade policy to accommodate development goals. For example, Article XVIII, headed *Governmental Assistance to Economic Development*, allowed countries “in the early stages of [their] development” to adopt protectionist policies, although not unreservedly (*GATT*, 1947: art. XVIII:13). *GATT* 1947 also applied a principle known as ‘non-reciprocity,’ under which developing countries benefiting from trade liberalisation undertaken by industrialised countries were not expected to reciprocate by reducing their own barriers to trade. Although this was most commonly applied to tariff reductions, it was a broad principle which applied widely under *GATT* 1947.

This relatively flexible approach enabled developing countries to pursue different international trade strategies to that of the industrialised countries and left them relatively free to craft more individual packages. For example, it allowed developing countries to impose local content requirements, which were central instruments in the development strategies of those countries which pursued import-substitution industrialisation (Shadlen, 2005: 759). Many developing countries used such measures to ensure that the benefits of investment stayed in or flowed back into their domestic economies, through inputs being sourced locally. Although there is not necessarily any direct connection between local content requirements and a human rights-based approach to development, the flexibility should exist in trade law for developing countries to utilise them for human rights and development purposes.

Nevertheless, the availability of these options was greatly constrained after the Uruguay Round. Applying the development economics of the efficiency model, WTO law largely discarded the tolerance of protectionism which reigned under *GATT* 1947.⁹ The new treaties brought developing countries within the same core disciplines of trade law - a more extensive, penetrating and orthodox set of obligations - as the industrialised countries. Thus, the one broad trade and development strategy were applied to both, in the belief that “the best way to promote economic development is to integrate as quickly as possible with the multilateral trading system” (Singh, 2003).

⁹ Although *GATT* 1947 continues in force and is still the principal agreement governing international trade in goods, in the event of inconsistency between *GATT* 1947 and any of the new agreements, the provisions of the latter will prevail to the extent of the inconsistency: *WTO*, 1994: Annex 1A.

Despite their concerns about the WTO law package, developing countries had little choice but to join the WTO and operate within the development strategy limits which its law imposes. This has led, from the very beginning, to pressure being applied to the WTO by developing countries and civil society for a better accommodation of their trade and development needs. The WTO attempted to ward off the pressure and resentment by launching a new round of trade negotiations in 2001 at Doha as a 'development round' and by agreeing to work on a set of issues which it called the Doha Development Agenda (WTO, 2001). At the time of writing, however, and after six years of talks, the Doha Round has stalled and there seems little prospect of any substantially improved trade law out of the negotiations. In the meantime, the range of development strategies open to developing countries to support their industrial development remains considerably restricted under WTO law, as the following section explains.

WTO law and local content requirements

International trade law regulating local content requirements changed dramatically after the Uruguay Round. Where *GATT* 1947 had allowed developing countries to follow an import substitution approach and had permitted local content requirements, the new WTO law made this no longer possible. The *Agreement on Trade-Related Investment Measures* prohibits local content requirements in investment legislation in most situations where the requirements affect trade (*TRIMs*, 1994).¹⁰ Moreover, the *Agreement on Subsidies and Countervailing Measures* prohibits the use of industrial local content subsidies (SCM, 1994: Part II). In so greatly constraining their use, WTO law expresses the dominant view among trade economists about local content requirements: that they lead countries in entirely the wrong direction, distorting trade and development and drawing resources into inefficient sectors. (See, for example, Walley, 1999: 8). Even if they can be justified as merely temporary supports, it is argued that inefficient, subsidised industries may never be able to obtain the economies of scale necessary to become viable, yet it may be difficult for governments to withdraw the subsidies as interests become entrenched (Jackson, 1997: 24). The strength of this conviction is reflected in the fact that no S&DT permission now exists under WTO law for developing countries to use local content requirements, beyond the granting of a phased withdrawal (now complete).

However, the dominant view has been challenged by both development economists and developing countries, who argue that local content requirements can be demonstrated, historically, to have been very powerful development stimulants. Developing countries have repeatedly pointed out that this was precisely the development strategy which the now-wealthy countries adopted for their own industrialisation, (Edwards, 1993: 1358–9) which creates considerable room for scepticism about the constraints imposed by WTO law. Medhi Shafaeddin cites the significant fact that, “[w]ith the exception of Hong Kong, no country has developed its industrial base without resorting to infant industry protection” (Shafaeddin, 2000: 2. See also Chang, 2002). Moreover, Robert Wade points out that the economic growth performance of Latin American countries which adopted import-substitution industrialisation policies during the post-Second World War period was, during that time, “better by several measures than it has been during the subsequent era of liberalization and privatization” (Wade, 2003: 631). Ken Shadlen is critical of the *TRIMs* agreement’s reducing the ability of developing countries to use industrial

¹⁰ However, *TRIMs* does not prohibit all such requirements, its effect depending on whether the measure in question violates the national treatment principle or imposes quantitative restrictions. For an analysis and critique, see Shadlen, 2005.

subsidies, including local content subsidies, which he sees as “important policy instruments to increase local value-added, employment and industrial upgrading”¹¹ (Shadlen, 2005: 759).

Birdsall, Rodrik and Subramanian argue that historical analysis reveals that the repertoire of protectionist trade policies which have demonstrably assisted development is a very broad one indeed. They point out that,

[a]lmost all successful cases of development in the last 50 years have been based on creative—and often heterodox—policy innovations. South Korea and Taiwan, for example, combined their outward trade orientations with unorthodox policies: export subsidies, directed credit, patent and copyright infringements, domestic-content requirements on local production, high levels of tariff and non-tariff barriers, public ownership of large segments of banking and industry, and restrictions on capital flows, including direct foreign investment. (Birdsall et al, 2005: 145)

Ajit Singh explores the measures used by Japan and Korea during their period of strong economic growth and he, too, lists an extensive set of protectionist export promotion, import restriction and industrial policy measures (Singh, 2003: 12-15). If this is correct, and it can be shown that these requirements may help stimulate strong industrial development which reduces poverty and facilitates the realisation of rights, the traditional economic analysis should not be the primary determinant of their utility. Policies should be evaluated according to their potential to stimulate human rights-based development in the particular circumstances of a country at a particular time.

Trade measures and human rights-based development

Understanding of the relationship between development and human rights has deepened considerably since the 1986 *Development Declaration*, making it more straightforward to conduct a critique of WTO law generally from a human rights-based development perspective. Applying this critique, it is apparent that WTO law should not require developing countries to take steps which exacerbate inequality or cause rights retrogression. On the contrary, WTO law should support states to stimulate their development while respecting, protecting and promoting human rights and freedoms. If it is to do this, WTO law will need to differentiate more definitively between developing and industrialized countries than presently and it will need to reintroduce the principle of non-reciprocity, described earlier, under which developing countries were permitted by *GATT* 1947 to reap the benefits of trade liberalization by the industrialised countries without being expected to reciprocate in their own countries.

One reason a human rights-based approach to development calls for clear differentiation and for non-reciprocity is that, without them, groups and individuals who are already vulnerable are very likely to experience retrogression of rights. Opening up to the global economy under WTO law, through reducing trade restrictions and supports to local industry, is a transformative process which will produce winners and losers. As Siddiq Osmani explains, while the economic theory underlying WTO law is that trade liberalisation will bring *overall* gains which will outweigh losses,

¹¹ Shadlen concludes, however, that the constraints are not comprehensive and that some such measures are still available for use by developing countries.

... the gains and losses may not be distributed evenly across the population. ... Evidence as well as common sense suggest that losses will be felt disproportionately more by the weaker segments of society. They would suffer more simply because they lack the flexibility to cope with the changing winds of market forces, owing to the various impediments they face in accessing new skills and resources.... This is where the human rights approach to development can play a vitally important role. (Osmani, 2006: 261 and 264)

The particular development circumstances, vulnerabilities and needs of developing countries will be both qualitatively and quantitatively different to those of the economically and technologically powerful industrialized countries. Unless the relative weakness and greater vulnerability of developing countries is recognized in WTO law, through differentiation and non-reciprocity, it is predictable that those already vulnerable will be the losers. In poorer countries, the already vulnerable may constitute a large segment of the population.

It would be a mistake, however, to assume that the simple solution would be to go ahead with trade liberalisation by all Member countries but to encourage them to provide “social safety nets” to compensate “losers ... from [the] trade-liberalisation side effects” (Wolfensohn, 2004). The issue is not only the protection of those whose human rights are negatively affected by trade liberalisation but also the ability to continue to produce in ways which might be too inefficient to survive in a global market but which, nevertheless, facilitate the realisation of human rights and freedoms. While human rights law would obviously consider safety nets to be essential in the face of such change, their existence cannot make suitable a trade-driven development strategy which is offhand about retrogression in the realisation of human rights and fundamental freedoms.

All developing country Members of the WTO have existing obligations under human rights law; trade law should not place them in a position where those obligations cannot be met. In arguing for the right to impose local content requirements, developing countries are arguing that human rights-based development may require measures designed to protect and nurture their own industries. The human rights-based approach to development would assess the utility of local content requirements against the type of development defined in the *Development Declaration*, that is, against their contribution to a development process which is broad, inclusive and equitable, which facilitates the realisation by all of human rights and fundamental freedoms and which does not create any retrogression of rights and freedoms.

Aggregated welfare gains do not necessarily amount to human rights improvements. The efficiency model on which WTO law is based approaches its assessment of the welfare benefits of trade liberalisation in a way which is not acceptable to a human rights-based approach to development. The “moral reasoning” (Garcia, 1999: 67) underpinning human rights law is firmly “rooted in the liberal commitment to the equal moral worth of each individual, regardless of their utility.” (Garcia, 1999: 70) Human moral worth and dignity, “which are at the core of human rights,” are absolute and cannot be subjected “to compromise on the basis of [utilitarian] justifications” (Garcia, 1999: 72). The moral reasoning underpinning the efficiency model, on the other hand,

... [is] utilitarian in nature. Utilitarianism determines the morality of an act according to its consequences for the aggregate of individual utility.... [T]he Efficiency Model of trade law asserts, explicitly or implicitly, the utilitarian

argument that free trade is good because of its consequences, namely the maximisation of aggregate individual welfare from efficiency gains and from the operation of comparative advantage. Trade maximises welfare for many reasons, including lower prices [and] increased consumer choice.... (Garcia, 1999: 72-73)

Garcia makes the insightful point that,

[Human rights approaches] are disturbing to contemporary economists, precisely because [they] view rights as absolutely not to be violated, essentially foreclosing the sort of analysis which economists engage in when evaluating a policy or course of conduct. (Garcia, 1999: 72-73)

Predictably, there is powerful opposition to proposals that there be greater differentiation and non-reciprocity for developing countries in WTO law. Even S&DT as it is currently – weakly - formulated has strong critics, who argue that it “encourage[es] countries to delay opening [to the global economy, which] may be perpetuating asymmetries [between rich and poor countries], rather than reducing them” (Josling, 2007: 77).

As WTO negotiations proceed towards deeper trade liberalisation, the depth of acceptance of the WTO’s approach by the Members on both sides of this debate will be increasingly tested. The lack of clear theoretical underpinning for the differentiated treatment modelled in S&DT will almost certainly become a very tangible problem. Demands by developing countries to be allowed to protect their industries as they consider best for their development needs are likely to draw antagonistic and theoretically incoherent responses from industrialised country Members, particularly as India, China and Brazil consolidate their economic development.

This is not to say, of course, that human rights principles suggest that all developing countries should implement local content requirements, such as subsidies. Rather, the argument is that they should be able to do so if they believe such a strategy would further their development in ways which support the realization of human rights and freedoms. Manufacturing which must source its labour and component parts locally, employing both men and women from diverse local communities and stimulating a build-up of satellite businesses and new skills, may support the realisation of human rights and freedoms more readily than manufacturing which imports many of its inputs.

Concluding thoughts

The issues raised in this paper have become more urgent now that many developing countries are engaged in negotiating, or have already negotiated, bilateral-regional trade agreements with the US and/or the EU. The number under negotiation has increased greatly in recent years, with the US, for example, in negotiations with developing countries not only in the Americas but also in Africa, Asia and the Middle East (Shadlen, 2005: 751). In entering regional-bilateral agreements, developing countries relinquish (amongst other things) local content requirements as development strategy instruments in return for greater market access for their exports. For example, agreements made by the US and Canada almost always prohibit performance requirements, which include local content requirements¹² (Sornarajah, 2004: 237). This is of particular concern, as Sornarajah explains, because, by ensuring that local inputs “are utilised in the manufacture of products

¹² See, for example, the North American Free Trade Agreement (NAFTA).

made by the foreign investor,” local content requirements had “ensure[d]... one of the presumed advantages of foreign investment” (Sornarajah, 2004: 237-238) and trade. He refers to studies which “show that the use of performance requirements has ensured the harnessing of the foreign investment to the economic objectives of the host state,”¹³ (Sornarajah, 2004: 238) although his view is that the economic literature is not conclusive on this question.

Of more general concern, the typical bilateral-regional trade agreements offered by the US and Canada involve not only a much deeper economic integration overall but also a degree of relinquishment of control over industrial development policy. This trend is directly contrary to the direction which economists like Birdsall, Rodrik and Subramanian have been urging, with their broad, historical list of potentially beneficial industrial development trade strategies (Birdsall et al, 2005). WTO law already greatly restricts many types of performance requirement, but bilateral-regional agreements apply to all investment, not only to trade-related investment, and they prohibit the requirements entirely. Ken Shadlen explains that regional-bilateral agreements go much further than WTO law -

[the] constraints [they] impose ... are most threatening to the remaining vestiges of industrial policy in developing countries. [R]egional-bilateral accords encourage specialisation and pursuit of competitiveness via exploitation of existing comparative advantages. Thus, the price to be paid for increased market access under regionalism-bilateralism is that countries must relinquish many of the very tools that historically have been used to capture the developmental benefits of integration in the international economy. (Shadlen, 2005: 752)

He concludes that the proliferation of these agreements should be “the greatest source of concern for development analysts,” because they “threaten to freeze an unequal international division of labour based on static comparative advantages” (Shadlen, 2005: 753).

The Doha Round negotiations are mired in disagreement about development – its definition, its relationship to poverty and human capabilities as well as to economic growth, its links with trade (particularly when levels of development within a developing country vary greatly) and the most appropriate role for industrialised countries in supporting it globally. To a large extent, the human rights-based approach to development grew out of frustration at the “failures of contemporary processes of globalisation to resolve fundamental problems” of poverty, marginalisation, social injustice and social exclusion (Andreassen, undated: 28). Much of this frustration is directed at the WTO. To become an effective, contemporary institution, the WTO should be “reinvigorated” by a new focus on “development and poverty alleviation, along with a nuanced, empirically-based understanding of the development process” (Rodrik, 2001: 2). For real progress on development, WTO law needs “delinking” from the theory of neo-liberalism and to be reoriented with a high priority on a human rights-based approach to the relationship between trade and development (O’Connell, 2007: 494. See also Santos, 2005).

¹³ Footnote 8 in Sornarajah, 2004: 238 is a reference to the UNCTAD 2003 report.

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