

# Mainstreaming the right to development into the World Trade Organization

Robert Howse\*

## I. Introduction: general considerations on human rights and the World Trade Organization

Since the end of the cold war, two main visions have underpinned the normative evolution of international order: the vision of human rights and humanity and that of economic globalization.<sup>1</sup> Historically, the legal, institutional and policy cultures of international human rights law and of international trade law operated almost entirely in isolation from one another. At the same time, as a matter of international law, the international human rights system and the World Trade Organization (WTO) regime are both based primarily on treaty obligations. A large majority of States are signatories to both the core WTO treaties (the so-called Covered Agreements) and the main United Nations human rights instruments. Although some human rights norms are arguably *ius cogens* and therefore of higher legal status than ordinary treaty commitments, in general, treaty-based WTO commitments and human rights treaty obligations have equal normative force in international law. As a report of the International Law Commission on fragmentation of international law notes: "In international law, there is a strong presumption against normative conflict" (A/CN.4/L.682 and Corr. 1, para. 37). The

implication is that one must explore how the WTO regime and the human rights regime can operate and evolve together, complementing each other in positive ways. Since the Third WTO Ministerial Conference, held now more than a decade ago in Seattle, Washington, United States, in 1999, there has been a concerted effort in the international human rights community, by activists, academics and the Office of the United Nations High Commissioner for Human Rights (OHCHR), to understand how trade affects the realization of human rights and what implications human rights obligations have for the interpretation and negotiation of trade agreements. The current Director-General of WTO, Pascal Lamy, has written about globalization with a human face and his conception of the economic sphere, including the international economic sphere, is deeply rooted in the notion of humanity. More recently, a joint study by the International Labour Organization (ILO) and the WTO Secretariat explicitly refers to freedom of association and the right to collective bargaining as "universally recognized human rights", urges that they be respected as such and not just for instrumental reasons of social peace, and refutes with empirical evidence the notion that respect for such rights must come at a cost to economic development and competitiveness.<sup>2</sup>

\* Lloyd C. Nelson Professor of International Law, New York University School of Law.

<sup>1</sup> Robert Howse and Ruti Teitel, *Beyond the Divide: the Covenant on Economic, Social and Cultural Rights and the World Trade Organization*, Dialogue on Civilization, Occasional Paper No. 30 (Geneva, Friedrich-Ebert-Stiftung, 2007). The introductory material that follows draws extensively from this study.

<sup>2</sup> International Labour Office and Secretariat of the World Trade Organization, *Trade and Employment: Challenges for Policy Research* (Geneva, 2007), pp. 66 ff.

## II. Mainstreaming the right to development into the practice of the World Trade Organization

In the light of the general context informing the relationship between the WTO system and the international human rights regime, we now examine how the right could be mainstreamed into legal and institutional practice at WTO. We look at a select set of current practices and structures in WTO and suggest how those might be re-examined in the light of the right to development.

### A. The assessment of trade rules and policies

States, whether acting domestically and individually, or collectively through international institutions, cannot assure that development-related trade policies are consistent with the interconnected realization of human rights unless the effects of those policies on human rights can be assessed and understood. Ex post economic assessment of the application of WTO rules and policies in WTO member States is a formalized process, the Trade Policy Review Mechanism (TPRM). The function of TPRM is to assess the “impact of a Member’s trade policies and practices on the multilateral trading system”.<sup>3</sup> From the perspective of the right to development, however, the analytical inquiry and method entailed in this review, and the procedures followed, may not be appropriate for gaining insight into the human rights impact of trade rules and policies.

The treaty text that sets out the requirements of TPRM emphasizes the “inherent value of domestic transparency of government decision-making on trade policy matters for both Members’ economies and the multilateral trading system”.<sup>4</sup> While transparency is not linked explicitly to the fulfilment of human rights obligations, the phrase “inherent value” suggests some understanding that transparency has a non-instrumental foundation.

In the first paragraph of its preamble, the WTO Agreement defines the goal of the multilateral trading system in terms of the principle that “relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living,

ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development”. The references to “raising standards of living” and “sustainable development”, as well as “full employment” suggest that the mandate of TPRM, while not explicitly stated in human rights terms, would include analyses of the effect of trade rules and policies on human capacities, the protection and enhancement of which is a fundamental dimension of human rights as related to development. Similarly, the focus on transparency would apparently suggest the participation of a wide range of domestic and international actors in the process of assessing the effects of trade policies under TPRM. Neither turns out to be the case.

Despite the reference to the “inherent value” of transparency in the legal instrument establishing TPRM, the entire process of trade policy review is typically dominated by the WTO Secretariat and the particular Government whose policies are under review. There are no explicit avenues for civil society participation and no accountability to citizens for the judgements made in the reports on the basis of which the trade policy review operates. If the right to development were to be mainstreamed into the practice of TPRM, that would obviously need to change given the emphasis on individuals and social groups as the makers, not simply the takers, of “development”. Barbara Evers has argued that such a change in the way that TPRM operates, in particular the institution of a transparent, inclusive, participatory process of domestic trade policy review as a basis for review at WTO, would assist in bringing a “pro-poor” perspective into TPRM.<sup>5</sup>

### B. Technical assistance

The notion that technical assistance is to be provided to assist developing countries in implementing and taking advantage of the benefits conferred by WTO rights and obligations is contained in the WTO treaties themselves, and has been reaffirmed in the Doha Declaration. Such technical assistance has come from WTO itself, funded by various donors, and from other organizations, such as the Organisation for Economic Co-operation and Development (OECD) and the World Bank

<sup>3</sup> WTO, Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), annex 3, Trade Policy Review Mechanism, para. A, available at [www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tpm\\_01\\_e.htm#P1](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tpm_01_e.htm#P1).

<sup>4</sup> *Ibid.*, para. B.

<sup>5</sup> Barbara Evers, “Linking trade and poverty: reinventing the Trade Policy Review Mechanism”, Development Studies Programme, University of Manchester (June 2003).

(including within the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries). The issue is whether technical assistance as it is currently defined and implemented in WTO reflects the normative concerns that underlie the right to development. One emphasis has been on training Government officials in WTO law, including advice on how to implement such law in domestic regulations. Knowledge of the law is of course important to attaining the goal, entailed in the right to development, of equal participation in the institutions and processes that affect the realization of development in a manner consistent with the fulfilment of all internationally recognized human rights. A number of questions deserve to be asked, however, about the nature of the technical assistance in question.

First of all, how widely is knowledge of the law being disseminated? Is technical assistance being targeted at trade officials, or is it being used to provide individuals and social groups with knowledge of WTO rules and policies and how those affect their interests? Secondly, is the emphasis on "training" officials to implement the "law" in its maximally trade-liberalizing version or interpretation, or on interpretations and legal strategies that would maximize the flexibilities and limit the dimensions of trade-liberalizing obligations, where necessary, to insure that domestic regulators have sufficient scope to address development needs (services, Trade-Related Aspects of Intellectual Property Rights (TRIPS), etc.)? Who are the experts communicating the meaning of the law? Do they represent diverse perspectives, rather than belonging to an epistemic community that still tends to regard trade liberalization (rather than improving standards of living for all and achieving sustainable development) as the telos, or end, in the light of which the law is to be understood? Thirdly, from the perspective of the right to development, should technical assistance not entail advice on the kinds of governmental policies as well as policies of other countries and international organizations (such as debt forgiveness) that would allow the maximization of opportunities afforded by WTO rules and policies across individuals and social groups?

The WTO Biennial Technical Assistance and Training Plan 2010-2011 reveals that while some technical assistance activities, such as intensive trade policy and law courses held in Geneva, seem oriented almost exclusively towards Government officials, oth-

ers, including some regional seminars, are explicitly geared to a broader audience and parliamentarians. There is also a conscious effort to emphasize programmes that lead to permanent empowerment, for example, by developing local academic expertise and creating local reference centres on WTO. According to the Plan:

Outreach activities for Parliamentarians and civil society are part of an overall WTO strategy to help legislators and civil society representatives better understand the provisions of the Doha Ministerial Declaration and follow the Doha Development Agenda negotiations. They are also a response to challenges in the Declaration for greater transparency in the WTO's operations and improved dialogue with the public. Throughout the regional workshops, parliamentarians and civil society representatives are encouraged to consider their respective roles in multilateral processes and ways to increase parliamentary and public awareness of the international trade agenda.<sup>6</sup>

At the same time, there is language in the Plan that raises concerns about the inclusiveness of the constituencies at which technical assistance is aimed. Trade unions, non-governmental organizations (NGOs) and the non-profit sector are rarely mentioned explicitly, in contrast to business and academia.

Clearly, in Geneva, much of the training is done by officials in the Secretariat, who are assumed to "know" what the law means. Outside consultants and professors are also used in specialized dispute settlement courses, and in these and other courses experts from other international organizations may be involved. However, when training is delivered in the various regions, local perspectives and expertise are more adequately incorporated into the programmes. It is far from clear that much diversity of perspective on the law is ensured in this way. In the case of technical assistance to least developed countries under the Enhanced Integrated Framework, there is participation by the other agencies involved in this mechanism, such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP). These agencies have already gone some distance in recognizing the importance of human rights in development to trade policy.

A logical extension would be the inclusion of United Nations human rights institutions in the delivery of technical assistance, as well as perhaps partnering with human rights NGOs in the context of WTO training programmes for developing countries.

<sup>6</sup> WTO document WT/COMTD/W/170/Rev.1 (21 October 2009), para. 135.

### C. Reform of the architecture and governance of the World Trade Organization

Within the United Nations human rights institutions, a significant beginning has been made in understanding the impact of specific WTO laws and policies (TRIPS and services, most notably), actual or proposed, on the realization of particular rights. Understanding the right to health as a basic human right undoubtedly played some role in addressing the question of access to essential medicines under TRIPS in the Doha Declaration on that subject, and the subsequent implementing instrument.<sup>7</sup>

Mainstreaming the right to development, with its focus on values such as inclusiveness, participation and interconnectedness of rights in development, requires considerable attention to what might be called the “meta-structures” of WTO, some formal and explicitly stated in WTO rules and some informal but nevertheless with revealed normative influence.<sup>8</sup> These determine in some measure which issues get on the negotiating table, how they are negotiated and with what degree of inclusive participation, how legal rights and obligations are structured—especially in relation to exceptions, limitations and reservations—and how they are applied to particular countries. The Uruguay Round of trade negotiations brought into being WTO as a structure known as the “single undertaking”. The main features of this structure, as exemplified by the WTO Agreement and the Covered Agreements under its umbrella, are as follows:

- (a) All WTO members must participate in (almost all) WTO treaty regimes (the single undertaking concept of the Uruguay Round). Thus, a WTO member that would gain from participating in liberalization of trade in goods under the General Agreement on Tariffs and Trade (GATT) must in order to do so also adhere to the obligations of, for instance, the TRIPS Agreement or the Agreement on Sanitary and Phytosanitary Measures, even if that member believes that adhering to those agreements would be disadvantageous to its development;

- (b) As a default, all WTO rules apply to all members; again, as a general rule, no reservations are permitted (WTO Agreement, art. XVI, para. 5). Some flexibilities do exist in the unique structure of the General Agreement on Trade in Services (GATS) for individual WTO members to choose what policies they wish to subject to discipline in particular economic sectors, but subject to general rules on technical standards and domestic regulation;
- (c) Individual WTO members may not reverse or adjust their obligations except, in certain instances, through entering into negotiations with other members and offering compensation, or seeking a waiver that would depend on acceptance by most or all of the WTO membership. While the GATT safeguards regime allows for temporary adjustment of certain GATT commitments, GATS has no equivalent safeguards (despite a promise to negotiate on them and conclude an agreement by 1998), nor does TRIPS, for instance;
- (d) Though not formalized, an implicit structural norm is that, despite significant doubts that have been raised about the effects of, for example, TRIPS and GATS on development, the substantive rights and obligations in the Agreements, as a single undertaking, are not to be revisited with a view to explicit amendment, and certainly not between “rounds” of negotiations, where such changes might be linked to demands in other areas. Thus, the access to medicines issue was handled by the creation of two new instruments that purport to operate within the four corners of the TRIPS Agreement as it now stands or, at most, to provisionally waive, as opposed to amend, problematic provisions of TRIPS. Of course, this may reflect as well the (arguably correct) legal judgement that the various exceptions and balancing provisions in the existing TRIPS Agreement allow the needed flexibility, if rightly interpreted;
- (e) There is a practice of WTO rules being adopted by consensus. There has also been a practice of marginalizing smaller countries in negotiations on particular

<sup>7</sup> Declaration on the TRIPS Agreement and Public Health of 14 November 2001 (WTO document WT/MIN(01)/DEC/2) and the Decision of the General Council of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public-health (document WT/L/540 and Corr.1).

<sup>8</sup> John Jackson captures the spectrum of formal to informal by grouping many of these under the label “mantras”. See J. H. Jackson, “The WTO ‘constitution’ and proposed reforms: seven ‘mantras’ revisited”, *Journal of International Economic Law*, vol. 4, Issue 1 (March 2001).

issues; they may have little or no influence on the shape of the rules, and be faced with a virtual *fait accompli*. These “green room” tactics and the attempt by developing countries to remove them from the set of acceptable, legitimate WTO meta-structures had an important impact on the “failure” of the Third WTO Ministerial Conference, held in Seattle in 1999, and later on at the Fifth Ministerial in Cancun, Mexico, in 2003;

- (f) From a right to development perspective, there is a significant issue of the costs to developing countries of implementing WTO obligations, which often entail the deployment of significant judicial and administrative resources, in short supply in many developing countries. Directing these resources to creating mechanisms for anti-dumping adjudication or intellectual property enforcement may result in fewer opportunities for strengthening the rule of law in the area of human rights. Kevin Davis and Benedict Kingsbury have noted:

As the volume and burden of non-pecuniary obligations imposed on states by global governance institutions continues to grow (anti-terrorism, anti-money laundering, anti-trafficking, investment protection, environmental and human rights monitoring and reporting...), “obligation overload” is becoming an increasingly serious concern. Fragile and failed states, in particular, may be simply unable to meet all of their obligations. Yet international institutions, foreign states and courts may insist on performance. There is no system for prioritizing obligations and managing overloads.<sup>9</sup>

As new WTO obligations are negotiated and the implementation of existing obligations reviewed, a right to development perspective needs to be applied to addressing the risk of “obligation overload”.

Understood in terms of the right to development, many of the meta-structures leave much to be desired. They narrow the possibilities for individual WTO members to shape and reshape their trade rights and obligations in order to pursue development through and within the fulfilment of all internationally recognized human rights. They also may limit the kind of voice that smaller or poorer countries have in collectively shaping or reshaping the rules. As a general matter, these meta-structures are

the product of the mindset that trade liberalization is an end in itself, not a means, and that WTO rules and structures should favour linear progress in that direction, even while tolerating some straggling by countries that are in any case on the margins of the global economy.

It is noteworthy that the Doha Development Agenda as reflected in the Doha Declaration and the accompanying instrument on implementation do not include a review of these meta-structures from a development perspective. To the extent that “flexibility” is included as being of importance to development, the focus is on specific deviations from the defaults, not questioning the default structures themselves. For example, the Doha Declaration does contemplate that an agreement on investment, if it were to be negotiated, should permit participation by individual countries depending on their needs and capacities. The main exception is special and differential treatment for developing countries, where the Doha Declaration does contemplate a comprehensive review of all existing provisions on special and differential treatment and the possibility of strengthening their effectiveness. However, the Director-General of WTO assigned the consideration of these cross-cutting meta-structural, or architectural, issues to a little-known group of “wise men” with no mandate to consult with individuals and social groups. This treatment of the meta-structural, or architectural, issues—which, as noted, may have a major impact on the right to development—is itself at variance with the right to development, which entails the notion of broad participation in the making of policies that affect development. The likely failure of the Doha Round will provide an opportunity for more fundamental and broadly based reconsideration of some of the architectural features of WTO. Susan Esserman and I have argued for a more flexible and varied architecture, which can better take into account the specific and diverse needs of individual WTO members.<sup>10</sup>

There is a further set of issues concerning the governance and accountability of WTO as an organization that bears on the right to development. The fact that WTO is based on consensus decision-making by delegates of member States has been invoked to suggest that there is no need for further accountability of the activities of WTO as an institution. This ignores the considerable role of its Secretariat as well as of

<sup>9</sup> Kevin Davis and Benedict Kingsbury, “Obligation overload: adjusting the obligations of fragile or failing States”, paper prepared for the Hauser Globalization Colloquium, Fall 2010, New York University School of Law. Available from [www.iilj.org](http://www.iilj.org).

<sup>10</sup> Susan Esserman and Robert Howse, “Rethinking the WTO” (4 September 2008), available at: [www.forbes.com/2008/09/04/wto-global-economy-oped-cx\\_se\\_rh\\_0904trade.html](http://www.forbes.com/2008/09/04/wto-global-economy-oped-cx_se_rh_0904trade.html).

particular delegates assigned, for example, as chairs of negotiating or other committees in WTO to set agendas, “spin” the way that issues are discussed, make judgements that have normative impact about the meaning of WTO rules and even (for example, in the case of Secretariat reports with respect to TPRM or technical assistance) to judge and advise the policymakers of individual WTO members. As recent disputes concerning the interpretation of commitments with respect to trade in services illustrate, Secretariat documents may influence the interpretation of legal rights and obligations by WTO tribunals.

The right to development implies accountability to individuals concerning how these activities are conducted and by whom, inasmuch as they affect the realization of human rights in and through development. Accountability with respect to the Secretariat means, first of all, a public process defining, among other things:

- (a) The diversity of perspectives and knowledge areas that is appropriate for the professional staff of WTO;
- (b) The set of conceptual tools that ought to be used by the professional staff in their analysis of development-related trade issues (arguably including human rights instruments), especially in trade policy review functions and technical assistance functions; and
- (c) Rules and guidelines to ensure that staff in particular divisions of WTO do not become consciously or unconsciously beholden to particular interests or lobbies (service industries or intellectual property holders, for instance) and, collectively, are oriented towards the holistic, development-oriented thinking about policy and law that is required by the right to development.

With respect to the procedures of accountability, consideration should be given to the formation of a citizen’s advisory board, comparable in some ways to the board of directors in a private corporation, which would evaluate the performance of the Secretariat and the leadership of WTO in the light of the kinds of rules and guidelines discussed above, on the basis of consultation with Governments, civil society and other intergovernmental organizations. The inclusive

and participatory dimensions of the right to development also suggest the importance of facilitating the involvement of the broadest range of social actors in the deliberations and negotiations of WTO, as well as deliberations within individual polities concerning the choice of negotiating positions and decisions as to whether or not to consent to given proposed rules. Here, the trend at WTO is generally a positive one, despite the continued need to change the mindset that the organization is a Government “club”.<sup>11</sup> There is now a default rule that negotiating proposals are public; they have generally been made accessible, so that they can be subjected to broad citizen scrutiny before being cast in bronze in packages of rules that must be either accepted or rejected en masse. An enormous amount of WTO documentation in areas most relevant to development and human rights is unclassified and accessible electronically to the general public. In the area of trade in services, for example, public dissemination of the basic proposals allowed civil society and international institutions to provide useful input and observations, including on the implications of various proposed disciplines and approaches for aspects of development. Civil society was able to play a functional role at the Fifth WTO Ministerial Meeting in Cancun, despite limited observer rights, and accreditation of civil society groups has generally respected the notion of inclusiveness. Moreover, some WTO members have included representatives of broad social interests in their Government delegations, although they do not typically participate in all negotiating activities.

At the same time, there are instances where inclusive participation has been rejected or undermined. To use the example of services again, while the general negotiating proposals have been published, members’ offers for sectoral commitments—which contain the proposed specific disciplines on Government policies—have remained confidential in many instances, limiting the ability to provoke broad public debate and scrutiny of the implications, including human rights implications, of the proposed undertakings, much to the consternation of some civil society groups; even polities apparently committed as a constitutional matter to democratic openness, such as the European Union, have resisted publicity with respect to what is being proposed in regard to specific commitments.

<sup>11</sup> See Robert Keohane and Joseph S. Nye Jr., “The club model of multilateral cooperation and problems of democratic legitimacy”, in *Efficiency, Equity, and Legitimacy: the Multilateral Trading System at the Millennium*, Robert B. Porter and others, eds. (Washington, D.C., Brookings Institution Press, 2001).

With respect to facilitating inclusive domestic deliberation on proposed trade rules, this is partly a question of ensuring that technical assistance is targeted broadly enough (see above) and partly one of strengthening domestic political processes as they relate to trade policy. WTO has made a number of efforts to engage with parliamentarians in member countries; such efforts at engagement with domestic political structures must, from the perspective of inclusive participation, also take into account the limits of official structures in the representation of marginalized or disadvantaged groups and therefore extend further, into civil society itself. Sylvia Ostry has concluded that “WTO is an outlier in its rejection of the conception of participatory decision-making” because of its failure to reach out to civil society in this context.<sup>12</sup>

### III. The right to development in the interpretation of World Trade Organization law

The appropriateness of the WTO dispute settlement organs—the Panels (tribunals of first instance) and the Appellate Body—utilizing non-WTO international legal material is now well established in practice. In the *Shrimp/Turtle* dispute, for instance, the Appellate Body had recourse to various international instruments concerning biodiversity and sustainable development in order to determine the meaning of the expression “exhaustible natural resources”.<sup>13</sup> Mainstreaming the right to development into WTO dispute settlement therefore entails, in general, understanding where the right to development might relevantly affect the interpretation and application of the WTO Agreements. In this section, I confine myself to a case study of one dispute and ask how the legal interpretation of the Appellate Body would have been, or could have been, affected had the right to development been considered.

In the *India–Balance of Payments* case, the United States challenged India’s decision to maintain import restrictions on balance of payments grounds.<sup>14</sup>

The relevant exceptions provision in GATT allowed such restrictions but required that they be removed as soon as the crisis conditions to which they were addressed had passed, unless the removal was likely to provoke the return of those conditions. However, a further proviso was that, in any case, a developing country should not be required to remove balance of payments import restrictions if doing so could require a change in that country’s development policies. India’s reliance on this provision required the Appellate Body to determine what a “development policy” is and whether, were India to remove its balance of payments restrictions, it would be required to change those policies. What the Appellate Body did was to rely entirely on a judgement of the International Monetary Fund (IMF) that India did not need to change its development policies because it could address the consequences of removing its balance of payments-based import restrictions through “macro-economic” policies.

I would argue that had the Appellate Body considered the right to development in connection with this dispute, it would have analysed the legal issue quite differently. First of all, the Appellate Body would not have accepted that one institution, and particularly the technocrats in that institution, can have “ownership” of the meaning of a “development policy”. Secondly, the Appellate Body could not have embraced the stark contrast between “development” policy and “macroeconomic” policy. This implies that development policy is restricted to a series of techniques that “experts” view as formulas for “development”, rather than including all those policies that people—in this case, at a minimum, India and Indians—see as affecting the fulfilment of the right to development. Under a right to development approach, it would be obvious that macroeconomic policies, which affect revenues available for government programmes to fulfil social and economic rights, as well as the cost of imported goods and services needed to fulfil such rights and the reserves of currency with which to pay for them, are “development policies”. Thirdly, and relatedly, on the question of whether India would be required to change its development policy in order to be able to remove the balance of payments restrictions without a return to the crisis conditions that had led to their imposition, the Appellate Body would have held that the Panel should have considered, and indeed solicited, the views of a broader range of institutions and social actors—at a minimum, the international organ-

<sup>12</sup> Sylvia Ostry, “Civil society—consultation in negotiations and implementation of trade liberalization and integrated agreements: an overview of the issues”, paper presented at the seminar “Good Practices in Social Inclusion: a Dialogue between Europe and the Caribbean and Latin America”, Inter-American Development Bank, Milan, Italy (March 2003), p. 4. The author is grateful to Dr. Ostry for discussions of these issues on various occasions.

<sup>13</sup> *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (AB-1998-4), report of the Appellate Body, WTO document WT/DS58/AB/R (12 October 1998). See Robert Howse, “The Appellate Body rulings in the *Shrimp/Turtle* case: a new legal baseline for the trade and environment debate”, *Columbia Journal of Environmental Law*, vol. 27 (2002), pp. 491-521.

<sup>14</sup> *India – Quantitative Restrictions on Imports of Agricultural, Textile and*

*Industrial Products* (AB-1999-3), report of the Appellate Body, WTO document WT/DS90/AB/R (23 August 1999, paras. 125-130).

izations with express mandates on development, such as UNCTAD and UNDP. Finally, the Appellate Body might have considered that the provision in question was largely a matter of self-declaration; that it empowered India, and above all Indians, to chart their own course in development policy, and therefore was not intended to invite the dispute settlement organs to examine *de novo* India's judgement that if it removed the restrictions, it would have to change its development policy.

In fairness to the Appellate Body, the right to development was not apparently invoked before the dispute settlement organs by lawyers representing India in the case, or by any third party in the dispute. This suggests that the major challenge with respect to mainstreaming the right to development into WTO dispute settlement may be in sensitizing Governments and civil society (which may submit *amicus curiae* briefs in WTO proceedings, both at the first instance and the appellate level) about the possibilities of invoking the right to development in dispute settlement, in relation of course to other human rights. In the short term, at least, OHCHR might consider submitting communications itself to the dispute settlement organs on the right to development, where appropriate to the dispute in question.<sup>15</sup>

Subsequently, the Appellate Body, in the *EC – Tariff Preferences* case,<sup>16</sup> deployed the concept of development in ruling on the sensitive issue of whether developed country WTO members could link the level of preferences under the Generalized System of Preferences (GSP) regime they provide to specific developing countries to policy conditions such as those related to drug enforcement, labour rights and environmental performance. Relying on a provision of the Enabling Clause, the WTO legal instrument that sets out the basic guidelines for GSP preferences in the WTO system, the Appellate Body held that such conditionality was permissible where “taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue” (para. 164). The Appellate Body held that a “development, financial [or] trade need” would have to be determined by an “*objective standard*” and that “[b]road-based recognition of a particular need, set

out in the [Marrakesh Agreement] or in multilateral instruments adopted by international organizations, could serve as such a standard” (para. 163). The reference to “multilateral instruments adopted by international organizations” clearly includes the main United Nations human rights instruments. The right to development may well offer a framework for assessing, in an objective and also holistic manner, whether human rights conditionalities in developed countries’ preferences schemes make a positive contribution to the development needs of the countries at which they are targeted. More generally, the notion of referring to “multilateral instruments adopted by international organizations” to understand what is entailed in “development” and what are “development needs” indicates a broader approach to interpreting the concept of “development” in WTO law than that taken earlier by the Appellate Body in the *India–Balance of Payments* case.

#### IV. Conclusions

Development is supposed to be the big guiding idea of the Doha Round of WTO negotiations. But the relationship of development to trade liberalization and other policies affected by it is highly contested. Thus, “development” has tended to be the backdrop to a sharpening of divisions rather than playing the expected normatively unifying role. The concept of the right to development, linking development to the entire human rights framework, with its strong global legitimacy, evokes the possibility of the reorientation of the WTO project such that it may once again regain a kind of normative unity, which it possessed around the conclusion of the Uruguay Round through the neo-liberal ideology of globalization, development and growth that prevailed at the time, but which is certainly not a basis for consensus, but rather the opposite, today.

Some might ask why such a normative vision or normative unity is even needed for successful trade negotiations. Isn't it enough to have reciprocity, the possibility of mutual gains? The answer to that question belongs to another paper, but in part it has to do with the need to motivate adequately a community of leaders that can produce meaningful agendas, suggest principled compromises and trade-offs, and inspire politicians and opinion-makers to put their reputation behind a complex deal. In a word, the problem is one of reforming the epistemic community. As anyone could see at Cancun (and some could already see at Seattle), the old

<sup>15</sup> In the *Sardines* case (*European Communities – Trade Description of Sardines*, DS231), the Appellate Body held that it had the discretion to consider *amicus* submissions from official as well as private, non-governmental entities. Communications from other international organizations (such as the World Intellectual Property Organization (WIPO)) have been considered and used in dispute settlement.

<sup>16</sup> *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries* (AB-2004-1), report of the Appellate Body, WTO document WT/DS246/AB/R (7 April 2004).



epistemic community, based on the technocracy of neo-liberal economics, has largely broken down as a viable force for coherence and leadership of the multilateral trading system into the future (even if its “resistances”—some of which are discussed above—still prove a formidable obstacle to the ref-

ormation of an epistemic community true to the current situation and its challenges). A human rights sensibility and understanding, especially in relation to development, is likely to be, and is already becoming, a constituent element in the ethos of this new or reformed epistemic community.

