

Notes for the Forum International de Montreal
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I have been asked to answer whether the UN human rights system has a mutually supportive or competitive relationship with the multilateral trading system. While these two systems could be and should be mutually supportive, they have evolved in such a way over the past half century so as to be in a state of imperfect competition.

That is, the institutionally weaker member of duo – the human rights system – looks to the stronger partner -- the WTO – and is envious of the political profile it has, the deference with which it is regarded by powerful actors, the resources it enjoys both in Geneva and within member states, and above all the powerful means it has to implement the rules its members have agreed to through dispute settlement.

Perhaps the best metaphor to understand the relationship between trade and human rights is that of an ill-fated marriage. Allow me to portray this relationship as a caricature for the sake of argument. In this marriage, the husband is wealthy, selfish, powerful and arrogant. The wife is poor, has many children, works in the informal sector, and is a human rights activist.

Needless to say these two got divorced.

But back the question before us. In the immediate post-war period, along with the establishment of the United Nations, there were to be three international economically-focused organizations: the IMF with a mandate to ensure financial stability, the World Bank to take care of reconstruction and development, and the International Trading Organization or ITO, which never saw the light of day. At the time, these economic organizations were to be embedded in an international system of governance, the United Nations which was formally founded a year after the Bretton Woods Conference.

I would like to spend a few minutes revisiting the Charter of the UN, to underline some central aspects of just what “we the peoples” said in 1945 and to examine its ongoing relevance today. Article 1 of the Charter identifies four explicit purposes for the United Nations. The third of these is “to achieve international cooperation...in promoting and encouraging respect for human rights and fundamental freedoms for all”.¹ There is further elaboration of this central purpose in article 55 which *obliges* the UN to

¹ The others are peace and security; friendly relations amongst states; harmonize the actions of nations.

act in such a way as to promote “universal respect for, and observance of, human rights and fundamental freedoms”. States are further given the duty to take joint and separate action to achieve progress on human rights in Article 56.

Even more significant, in an article often forgotten (103), states agreed that if there was a conflict under the charter and their obligations under *any other international agreement*, “their obligations under the Charter would prevail.”

What I have tried to sketch out here is a logic that recognizes the primacy of human rights over other international rules, including those governing trade. These ideas are further elaborated in a publication by Robert Howse and Makau Matua.

Now clearly, had the world followed the UN Charter more closely and had the WTO evolved as part of the UN system – a proposition most trade lawyers are horrified by – and had human rights been used as a normative framework for trade --- we would live in a very different world.

Instead, to go back to the marriage metaphor, the two partners (the human rights system and trade rules) grew increasingly distant and non-communicative. Each developed its own set of rules. The man (the GATT) resisted institutionalization, while the woman had many children (human rights treaties) and mothered them as best she could. The man was more and more interested in taking on new and interesting challenges (intellectual property, services, investment) and the woman was less and less able to manage the responsibilities she already had.

Look at the founding of the WTO in 1995 as the definitive break. Look at the UN human rights system as the woman: now single, with many children to take care of, very little revenue or state support, and like single mothers everywhere, overworked and underpaid. The man meanwhile, is jet setting, tackling new agendas (or having new girlfriends), touting his new found freedom as the answer for everyone. Perhaps he is secretly disillusioned with his new found mercantilism, saddened by his lack of a moral compass, his own health and well-being at risk by consumerism and growth gone wild. He does not yet know that though.

This is of course a caricature. But allow me the indulgence of taking it a bit further. Like all divorced couples, this one is faced with a choice. Either each go their separate ways or, they make the more courageous and productive decision to get along, for the sake of the children, (in this case international law). And they talk and they change and they grow. What are some of the obstacles they are facing as they attempt to negotiate a new relationship? Let me underline two main problems: they do not have the same amount of power and they do not speak the same language.

Power Difference

Of course the multilateral system is made up of states and it would seem that states, probably all states, accord more importance to trade than they do to human rights. This is reflected in the number of people in the foreign offices that they devote to each topic and in many other ways. Just one illustration should be enough to see the way in which trade is taking over the agenda of the United Nations at the same time as the UN human rights system is marginalized.

Look at the two most recent UN Conferences. In Monterrey, the subject was financing for development. In the final statement, the so-called Monterrey Consensus, there is only one passing reference to human rights. There are 52 references to trade. The independent expert on the right to development, appointed by the member-states of the Commission on Human Rights was not even invited to the Conference and the notion of the right to development was nowhere to be found in its official deliberations. Mary Robinson spoke like a voice in the wilderness on the pertinence of the right to development, despite the enthusiasm this concept had generated over the past two decades.

Or take Johannesburg. We did win some passing references to human rights in the final Plan of Implementation, including one that acknowledges human rights as essential to sustainable development (para 5). We fought hard for every one of those references and we should not diminish their importance. However, let us see them in context. There are 23 references to Doha and 30 references to the WTO in the Plan of Implementation. There are no references to the Office the High Commissioner for Human Rights and none to Vienna World Conference on Human Rights, where, need we be reminded; over 170 governments agreed that the protection of human rights is the NUMBER ONE priority of governments.

What we are seeing here is not a dialogue, but a monologue. The Office of the High Commissioner on Human Rights has made several attempts to engage the WTO in a meaningful dialogue. They have issued reports on the right to food and the Agreement on Agriculture, on GATS and human rights and the implications of TRIPS for the right to health. Several treaty bodies, special rapporteurs and human rights experts have been active on the issue of trade and have expressed concerns about the impact of liberalization for human rights.

And while the trade body has engaged on the environment, is beginning to engage on labour, is calling its new agenda a “development round” and has gender looming on its horizon, a frank discussion of human rights and of the obligations they entail for governments, and of how they figure at the very foundation of international governance is lacking. Furthermore, there is no government truly prepared to meet the challenge of leading an international dialogue on the relationship between trade and human rights, including the right to development.

Different languages

One cannot help but be struck by how words have different meanings in the human rights system and the multilateral trading system. We seek to mainstream human rights concerns; they seek to mainstream trade. They seek *progressive liberalization* of trade; we seek *progressive realization* of rights. They understand by discrimination to treat everyone (products, states) the same; in the human rights system, the elimination of discrimination requires treating people differently, ie. by taking positive measures to help disadvantaged groups. They do not want to consider processes and production methods in distinguishing products; to the human rights community the process of achieving progress in rights is as important as the right itself. When they speak of coherence and they mean harmonizing the policies of the WTO, the World Bank and the IMF. When we speak of coherence and we mean harmonization between the WTO and the international human rights system.

The risk is that human rights defenders become more and more isolated and a human rights discourse is perceived as marginal, utopic, western or old-fashioned. Peter Prove, of the International NGO Committee on Human Rights in Trade and Investment, has used the metaphor of training wheels to describe the relationships between human rights and trade. I think he is worth quoting:

“The rhetorical question has been posed as to whether globalization has gone beyond our ability to control it. We do not think it has. We do not think that globalization is an unstoppable juggernaut, though it may perhaps be compared to a bicycle that you have to keep peddling if you are not to fall off. States are peddling this bicycle hard. We believe that the bicycle's safety would be greatly enhanced by a set of human rights training wheels. Globalization is the product of the ongoing daily decisions and actions of States. As civil society, we are looking for accountability in respect of those decisions, and though levels of power and influence are obviously radically different, we do not propose to allow any State to get away with the easy excuse that globalization is beyond control.”

Options for the Future

There are many points of entry to begin building an international economic system that narrows rather than widens the gap between rich and poor and that enhances rather than deprives people of their human rights.

-Human rights have been explicitly recognized as “essential” to sustainable development. The connection with sustainable development mandate of the WTO needs to be made

-The impact of trade liberalization on human rights needs to be comprehensively and objectively assessed. There is now a considerable body of work on methodologies available to do so, most notably the gender impact assessment of trade agreements

designed by Women's EDGE in Washington, which should be put up on their web page today.

-Successful trade and successful human rights implementation require many of the same things:

-the rule of law

-transparency in international rule making

-fair arbitration of disputes in a specialized and appropriate forum

-the voluntary adoption of international rules by sovereign and democratic parliaments

-flexibility in order that each country, or each society, can make the choices most appropriate to their own development path

In the political declaration that was issued by Heads of State in Johannesburg, there is no mention of human rights. There is, however, the following paragraph:

We reaffirm our commitment to the principles and purposes of the UN Charter and international law as well as the strengthening of multilaterally. We support the leadership role of the United Nations as the most universal and representative organization in the world, which is best placed to promote sustainable development.

Surely this paragraph is at least in part a response to the paragraph 17 debacle. That was when countries were urged to “enhance the mutual supportiveness of trade, environment and development, *while ensuring WTO consistency*” thereby asserting that all other international agreements must be WTO consistent. It was small island states, Ethiopia, Tuvalu, Norway and Switzerland who supported the silent protests of the NGOs in the hallway, who, in defiance of the rules of the conference, held signs demanding removal of the contentious clause.

We won that battle. We won a strong paragraph on the UN Charter and we won recognition that human rights is an essential aspect of sustainable development. But the reality remains that there are far more references to the WTO and to Doha in the recent UN conferences than there are references to the UN Charter, to human rights in meetings of trade ministers under the auspices of the WTO.

To go back to the ugly divorce metaphor, the arrogant man continues to call the shots and to colour all the activities of the stressed out single mom. The mom appeals for understanding, hoping to find a sense of higher purpose in her former partner. Yes, for the sake of her children, she needs money, she needs time and she needs understanding but above all, she needs respect.