

## THE WORLD TRADE ORGANIZATION AND EGALITARIAN JUSTICE

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**Abstract:** After briefly surveying the mission and principles of the World Trade Organization (WTO), I argue that international trade may be assessed from the perspective of justice, and that the correct account of justice for these purposes is egalitarian in fundamental principle. I then consider the merits of the WTO's basic commitment to liberalized trade in the light of egalitarian considerations. Finally, I discuss the justice of several WTO policies. While noting the complexity of the empirical issues relating to the effects of trade institutions and policies, I conclude that egalitarians have reasons to object to certain of the principles and policies of the WTO.

Keywords: associations, egalitarianism, free trade, justice, trade tariffs, World Trade Organization.

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### 1

The rules and practices of the World Trade Organization (WTO) affect nearly all of the international trade conducted today. In principle, if not always in practice, the WTO is dedicated to global trade liberalization. As is well known, neither its guiding principles nor its practices are free from controversy. Both trade liberalization and a rules-based multilateral framework are defended by some as advancing the interests of underdeveloped countries. But massive street demonstrations around the world have been organized, in part at least, in rejection of this claim.<sup>1</sup> In this essay I attempt to consider the matter in a systematic way. After briefly surveying the charge of the WTO, I argue that international trade may be assessed from the perspective of justice, and that the correct account of justice for these purposes is egalitarian in fundamental principle. I then consider the merits of the WTO's basic commitment to liberalized trade in the light of egalitarian considerations. Finally, I discuss the justice of several WTO policies. While noting the complexity of the empirical issues

<sup>1</sup> But often there seems also to have been a sizable component of these demonstrations making demands to protect producers in the developed world.

relating to the effects of trade institutions and policies, I conclude that egalitarians have reasons to object to certain of the principles and policies of the WTO.

## 2

The WTO was founded in 1995 as a result of the Uruguay Round of meetings of the signatories to the General Agreement on Tariffs and Trade (GATT) (Marrakesh Agreement 1994). The purpose of the WTO is to administer multilateral trade treaties, especially GATT 1994, which includes the amended GATT 1947, the General Agreement of Trade in Services (GATS), and the Agreement on Trade-Related Intellectual Property Rights (TRIPS).

The WTO's functions include implementing multilateral trade agreements, providing forums for negotiations on trade issues, facilitating dispute settlements, and cooperating with the World Bank and the International Monetary Fund to achieve "greater coherence in global economic policy-making" (Hoekman and Kostecki 1995, 38). Decision making in the WTO is formally egalitarian; all members have a voice. For matters other than amendments to existing agreements and general principles, decision making is based upon negotiation and consensus. Consensus requires that no country represented in a meeting be "decisively against" an issue (Hoekman and Kostecki 1995, 40).

Members of the WTO must abide by negotiated trade rules that are guided by four basic principles: (1) nondiscrimination, (2) reciprocity, (3) market access, and (4) fair competition. The overarching goal of these rules is a uniform system of liberalized trade. Nondiscrimination has two aspects. First, members must treat all other members as most-favored nations (MFNs), which requires that a country treat the products originating in or destined for any other country no better than products originating in or destined for a member country (GATT 1994, Article I:1). Second, nondiscrimination requires conformity to the national treatment rule, which stipulates that, after importation, foreign goods must be treated no less favorably than domestic goods with respect to taxes and regulations (GATT 1994, Article III:1, 2, and 4).

Reciprocity requires that trade liberalization among members be accomplished on a mutual basis (Hoekman and Kostecki 1995, 27). Reciprocity also applies when countries join the WTO, which in practice means that countries that join the WTO are required to liberalize access to their markets. Market access requires that members agree to negotiate tariff reductions. This amounts to members being bound to schedules of tariff concessions agreed to at multilateral trade negotiations (Hoekman and Kostecki 1995, 31). Fair competition is meant to ensure competition on a level playing field. For example, if a government subsidizes export of an item, then that item may be subject to an antidumping duty by the

importing country, thereby increasing the price of the item to compensate for the subsidy that lowered its price.

### 3

In this section I defend the claim that the trade relations maintained by WTO rules may properly be assessed in the light of the broad requirements of egalitarian social justice. I cannot defend particular principles of egalitarian social justice, for that is a larger project.<sup>2</sup> I take duties of social justice to be associative duties. They exist, when they do, because we owe persons equal respect and we are in a common association with some people.<sup>3</sup> Now, the category of association is somewhat vague. An association is an interaction of a special type. An association is strong to the extent that it is enduring, is comprehensively governed by institutional norms, regularly affects the highest-order moral interests of the persons associated, and is largely unavoidable. Weak associations blur into mere interactions. There is no bright line between associations and mere interactions. Nonetheless, certain uses of the term *association* are obviously correct or not. The modern state is an association. A group of friends in discussion is not. Determining where an association exists often requires careful attention to the facts of the matter.

The vagueness that results from limiting the duties of justice to the borders of associations could be avoided if the duties were limited instead to relationships in which persons interact directly, with the possibility of causing harm. For example, A has a duty of justice to B if and only if A has harmed B or A could harm B. This, however, would limit the persons obligated beyond what is plausible. For according to this account a person's duty of justice to the vast majority of her compatriots is negligible, since her causal relation to them is weak.

Another possibility would be to limit claims of justice to societies in which people actually cooperate for mutual advantage. This would eliminate considerable vagueness. A duty of justice would exist between two people only if their interaction produced mutual benefits. But this suffers from the same problem as the account that would limit duties of justice to persons who interact directly. It would rule out too many cases in which intuitively duties of justice exist. For example, if A were sufficiently oppressed by B, justice would not then govern the relationship between A and B.

The effects of the Asian economic crisis, felt far beyond Asia, in the late 1990s are evidence of a global economic association. The crisis did extensive damage to emerging markets around the globe. Eventually Russia defaulted on its debt, and Brazil narrowly avoided complete

<sup>2</sup> For more on this see my 2002, 78–81; 2003, 225–40; and 2004, 203–25.

<sup>3</sup> For more on associations see my forthcoming.

financial collapse. Private-capital flows to emerging market countries plunged, and commodity prices in underdeveloped countries declined, producing current-account crises in several cases.<sup>4</sup>

The extent and effects of globalization can be assessed in several ways, but consider foreign direct investment (FDI), trade, and international lending and currency transfers. In 1997 FDI was 64 percent of the world's gross fixed-capital formation (Sit 2001, 12). But this figure may considerably underestimate the full effects of foreign investment in domestic economies, since foreign investment is often a condition of domestic financing as well as financing from third-party countries. Total FDI-related investment after adjusting for these other sources could be as much as four times that normally measured in official statistics (Sit 2001, 13). Global competition for FDI has eroded working conditions among the most vulnerable workers around the world, especially women (Oxfam 2004).

Foreign trade as a percentage of the global domestic product is on the increase. The United Nations Development Programme reports that world exports averaged 21 percent of a state's gross domestic product (GDP) in the late 1990s, as compared to an average of 17 percent of a smaller GDP in the 1970s (UNDP 1999, 25). Moreover, the poorest countries are the most deeply integrated into world trade. For example, sub-Saharan Africa had an export-to-GDP ratio of 29 percent, as compared to 15 percent for Latin America (UNDP 1999, 31). Multilateral rules now govern trade relations among the overwhelming majority of countries. As of April 2004, the WTO consisted of 147 member countries (WTOa), accounting for more than 97 percent of world trade (WTOb).

International lending and currency transfers have also been steadily increasing. International bank lending grew from \$265 billion in 1975 to \$4.2 trillion in 1994. Meanwhile, the daily turnover in foreign-exchange markets increased from \$10–20 billion in the 1970s to \$1.5 trillion in 1998 (UNDP 1999, 25). Between 1980 and 1998 the International Monetary Fund (IMF) and the World Bank made at least 126 loans (Easterly 2000). Between 1987 and 1991 loans to the low-income, debt-distressed countries in Africa, most of which have relatively little FDI, amounted to 15.4 percent of the countries' real GDP and 75 percent of real imports (Sahn, Dorosh, and Younger 1997, 4). The conditionality associated with IMF and World Bank loans from the 1980s onward gave these financial institutions considerable voice in the policies of poor countries that in other ways were not greatly integrated into the global economy.

The life prospects of persons are dramatically unequal depending upon one's place within the institutional scheme of the global economy. The UNDP notes that the total income of the world's richest 1 percent of people is equal to that of the poorest 57 percent (UNDP 2002, 19). The

<sup>4</sup> See World Bank 1999 and IMF 1999.

assets of the three richest people in the world are more than the combined GNP of all the least-developed countries (UNDP 2002, 38). Nearly half of the world's population lives in abject poverty on \$2 PPP per day.<sup>5</sup> Worse still, 1.15 billion people live on less than a \$1 PPP a day (World Bank 2002, 30). Some 1.3 billion people lack access to clean water, and 840 million children are malnourished (UNDP 1999, 28).

These huge inequalities have dramatic effects on the life prospects of persons. One important index of this is longevity. According to the World Health Organization (WHO), "Over 60% of deaths in developed countries occur beyond age 70, compared to about 30% in developing countries" (Mathers et al. 2002, 54). The United Nations International Children's Emergency Fund (UNICEF) reports that 30,500 children under the age of five die every day of mainly preventable causes (UNICEF 2000). Indeed, the condition of the world's poorest children provides evidence of growth in global inequality. In the 1990s children in sub-Saharan Africa were nineteen times more likely to die than children in the world's richest countries. By 2003 this figure had grown to twenty-six times (UNDP 2003, 39). According to the WHO, "In one hour over 500 African mothers lose a child; had they lived in a rich European country, nearly 490 of these mothers and their children would have been spared the ordeal" (Mathers et al. 2002, 44–45).

Regardless of whether persons are directly engaged with the global economy, their local economy is profoundly affected by FDI, international trade, and international lending and currency exchange. And although state leaders are formally free either to deepen engagement with the world market or not to do so, if they have no reasonable alternative path to development—as appears to be the case—then the moral significance of this area of choice is slight. Moreover, in many cases citizens of countries that choose such a development path effectively have no choice in the matter. The burdens of unequal life prospects and the constraints on domestic policy of the global market are not, therefore, in a morally relevant sense voluntarily assumed.

The immense disparity of life prospects among members of the global economy appears inconsistent with the requirements of equal respect. A commitment to equal respect places constraints on possible justifications for inequality. For example, respecting persons equally is inconsistent with expressing to some that they must endure lesser life prospects than others with whom they are associated merely so that the life prospects of these others may be enhanced.<sup>6</sup> The justificatory constraints of equal respect seem to have fundamentally egalitarian distributive implications. But libertarian critics of egalitarianism argue that an institutional

<sup>5</sup> "PPP" stands for purchasing power parity. \$2 PPP means the local currency equivalent of what one could purchase with \$2 in the United States.

<sup>6</sup> See also Rawls 1999, sec. 17.

arrangement that constrains the prospects of the most advantaged persons so that, for example, the prospects of the disadvantaged may be improved use advantaged persons merely as a means to benefit the disadvantaged.<sup>7</sup> The rhetorical power of this claim derives in large part from the assumption that deviations from the status quo of inequality require justification. I do not think that a commitment to equal respect requires this. Rather, a commitment to equal respect takes equality as the benchmark and limits the kinds of justifications that may be offered for deviations from that benchmark.

A full account of the justificatory demands of equal respect would require an account of which reasons for deviating from the benchmark of equality are arbitrary from the point of view of justice and therefore to be disqualified. A thought experiment that disqualifies these reasons from entering the deliberative process would be of great use in determining what equal respect requires. This, I take it, is the promise of the Rawlsian original position.<sup>8</sup> But even without a full account of which reasons are arbitrary from the point of view of justice, and therefore without an account of the principles of distributive justice, we can discern an egalitarian tendency in the justificatory requirements of equal respect at the level of basic principle.

#### 4

The basic commitment of the WTO is to a globally uniform system of liberalized trade. Does justice recommend this? According to neoclassical economic theory, trade liberalization should increase global economic efficiency and lead to increases in aggregate production and consumption. The basic idea is that international competition provides incentives for efficient production. The theory of comparative advantage holds that the most efficient strategy for a state to pursue in a free international market involves producing only those goods and services for which it has a comparative advantage and trading for the rest.<sup>9</sup> A standard critique of economic protectionism is that it frustrates the pursuit of comparative advantage, with the result that ultimately economic modernization suffers. “A high rate of economic interaction with the rest of the world speeds the absorption of frontier technologies and global management best practices, spurs innovation and cost-cutting, and competes away monopoly” (Frankel 2000, 60). Sometimes the efficiency argument in favor of liberalized trade is dismissed as merely an appeal to an economic good. But it cannot be so easily dismissed if what is at stake is the rate at which a country develops economically.

<sup>7</sup> The classic presentation of this argument is in Nozick 1974, chap. 7.

<sup>8</sup> This account of the original position is defended in Dworkin 1989.

<sup>9</sup> The classic statement is Ricardo 1973, chap. 7.

Karl Marx and V. I. Lenin were supporters of free trade in part at least on efficiency grounds.<sup>10</sup> Marx, as is well known, was impressed with the efficiency gains of capitalism achieved through the constant revolutionizing of the means of production.<sup>11</sup> He took these gains as a necessary precondition for socialism. “[T]his development of productive forces . . . is an absolutely necessary practical premise because without it want is merely made general, and with destitution the struggle for necessities and all the old filthy business would necessarily be reproduced” (Marx 1977c, 170–71). In addition to eschewing the national chauvinism that accompanies protectionism, a belief in the efficiency of free trade seems to have been a reason for Marxian support of free trade.

Appealing to the greater efficiency of a regime of free trade is not, however, as straightforward as one might assume. If efficiency is judged by the criteria of Pareto optimality and superiority, it may not be possible to determine that one social system is more efficient than another. The Pareto concepts of efficiency take welfare in terms of the satisfaction of preferences. To attempt to compare overall preference satisfaction in representative states of two different systems requires making problematic interpersonal utility comparisons. Because individual preferences differ, one cannot claim that a system that provides more of a certain good is more efficient than a system with another set of individuals that provides less; and therefore one cannot claim that individuals in a free-trade regime are more satisfied than others in a protectionist regime. The principle of Pareto superiority permits comparisons only of the well-being of the same set of individuals. But even comparing the satisfaction of interests of the same persons in two different social systems may not be possible, for their interests might be dependent on the larger social institutions.<sup>12</sup> The case for the greater efficiency of a regime of free trade, then, cannot be made merely by appealing to empirical comparisons; it inevitably involves ample economic theory.

If it is the case that free trade produces efficiency gains, this does not clinch the case for free trade on egalitarian grounds. For two equally optimal distributions may be appraised very differently with respect to distributive justice. Market distributions alone cannot realize the aims of egalitarian justice. One reason for this is that those who are lucky at birth will receive advantages deriving from their family circumstances and citizenship status, whereas others will not. Without institutions that remedy this, market advantage will result in inequalities for apparently

<sup>10</sup> For example, see Marx 1977a, Lenin 1960, and Lenin 1966.

<sup>11</sup> “The bourgeoisie cannot exist without constantly revolutionizing the instruments of production, and thereby the relations of production, and with them the whole relations of society.” Marx 1977b, 224.

<sup>12</sup> See Buchanan 1985, 37–39, for a more extensive discussion of the ideas presented in this paragraph.

morally arbitrary reasons.<sup>13</sup> Additionally, egalitarians criticize market inequality as productive of other severe social evils, such as exploitation and inequality of political influence.<sup>14</sup> So, even assuming the market liberalization serves the goal of efficiency, mere market liberalization is insufficient for realizing egalitarian goals.

Moreover, even if there were egalitarian grounds, on the basis of efficiency alone, to prefer a set of policies serving a particular goal, there may nonetheless be sufficient reasons for rejecting the policies, reasons associated with the effects of the policies rather than the goal they serve. For example, if (as is often argued) reducing agricultural protections in the underdeveloped world would undermine the ability of subsistence farmers to compete with agribusiness firms in the developed world, then any transition to a free-trade regime would be objectionable on egalitarian grounds if it failed to provide compensation for those displaced in the transition (Cavanagh et al. 2002, 26–27). Pursuit of agricultural trade liberalization would require the WTO to provide income support for displaced subsistence farmers, and this would require institutions of taxation and transfer.

As a matter of nonideal theory, egalitarian considerations constrain the alternatives by which efficiency may be pursued. This is an instance of the following reasonable general constraint: The pursuit of egalitarian ideals by nonegalitarian means is justified only if (a) either more egalitarian means, or compensatory provisions, are not available or are themselves seriously unjust and (b) there are especially strong reasons to believe that the goal will be served by those policies within a reasonable time. I leave aside for present purposes a more precise account of the burden of proof and time frame. In order to appreciate the reason for the constraint, suppose its denial. Then in a world marked by deep and unjust inequalities, egalitarians would be justified in pursuing policies that exacerbate injustice, even if more egalitarian options would serve the same goal by appropriate means, on the grounds that these policies served the good of the distant egalitarian goal. This would have the untenable effect of rendering political egalitarianism the enemy of the disadvantaged.

A policy of trade liberalization that harms poor producers without compensation is objectionable on egalitarian grounds. But there may be even more at stake for developing economies. In the course of pursuing development, the countries of the developed world systematically protected their infant industries.<sup>15</sup> Indeed, infant-industry protection may be

<sup>13</sup> The claim must be qualified by “apparently” because, as noted in section 3, I cannot here give an account of what considerations are arbitrary from the perspective of justice.

<sup>14</sup> On exploitation see, for example, Pendlebury, Hudson, and Moellendorf 2001. On inequality of political influence see Daniels 1989.

<sup>15</sup> The classic account of the infant industry protection argument is in List 1966, bk. 1. The argument has been revived in Chang 2002. On the basis of a theoretical model, Bardhan argues that the development benefits of protectionism are more mixed: “Protection of the more capital-intensive sector causes a fall in labor productivity in both sectors, while

a necessary policy for successful economic development. If this is the case, then multilateral arrangements that hold underdeveloped countries to the same trade-liberalization requirements as developed countries consign the poor in the developing world to lesser life prospects than would well-crafted protectionist policies in the developing world. Assuming either the availability of the latter or the possibility of development compensation, there are egalitarian grounds for rejecting such arrangements. In this case the WTO's combined commitment to the principles of nondiscrimination and market access would be objectionable in the absence of compensation.

A similar argument, however, cannot be made with respect to the reduction of protectionism in the developed states. Consider agricultural tariffs and subsidies. One feature that distinguishes the WTO from the GATT is the former's commitment to liberalizing all trade in agriculture. Despite this commitment, developed-world protectionist agricultural policies currently permitted by WTO rules have seriously restricted the possibilities for developing-world agricultural producers to find markets for their goods. The United Nations Conference on Trade and Development (UNCTAD) estimates that low-technology countries are losing out on \$700 billion per year in export earnings due to developed-world protectionism (UNCTAD 1999). This amounts to more than four times the annual capital inflow into the developing world due to FDI (UNCTAD 1999). But because of lack of resources, developing countries have been unable adequately to subsidize their smallholding farmers, while 70 percent of the world's poor live in rural areas (UNCTAD 1999). Currently, 827.5 million people in the world suffer from hunger (UNDP 2003, 54). A trade regime that allows developed countries to protect their agriculture to the disadvantage of agriculture from developing countries is objectionable on egalitarian grounds.

Hence, there are reasons to believe that the basic commitment of the WTO to trade liberalization might be fundamentally unjust. This is the case if tariff reduction in the developing world will impoverish the already poor for the foreseeable future, and if protecting infant industries is historically the most assured path to development. In any case, the WTO's policy of tolerating developed-world protectionism against underdeveloped countries is seriously unjust.

Even if there are significant injustices in WTO rules, underdeveloped countries that join the WTO are not necessarily implicated in those injustices. Consider an analogy to an exploitative employment contract. If the larger social circumstances leave a worker no reasonable alternative but to accept the terms of such a contract, she is hardly complicit in the injustice that she suffers. It may be perfectly rational for a weak developing country to support almost any rules-based system of trade

imposition of a tariff on the output of the more labor-intensive sector increases productivity in each sector" (2003, 110).

over one that leaves it prey to the much larger market and military power of the developed countries, which are freer to exercise that power in bilateral negotiation with few, if any, background rules. Additionally, even if WTO rules are systematically prejudiced against underdeveloped countries, and I have not argued this, the stability of the multilateral trading system would require at least the appearance of impartiality in a sizable number of cases.<sup>16</sup> The imperative of maintaining appearances would provide reason to believe that appeals on the basis of legal principle would have some hope of success. Finally, the WTO's commitment to market access should eventually provide the leverage for appeals that would reduce protectionist policies directed against the underdeveloped world.<sup>17</sup>

## 5

The WTO's toleration of trade tariffs in the developed world takes us away from a discussion of basic principle and into a discussion of practice. In this section I consider three criticisms of WTO practice.

First, there are serious concerns that poorer countries are marginalized in WTO decision-making procedures. This is in part due to inequalities in resources.

Poor countries participate little in the formulation and implementation of the new rules that govern global markets. The 1994 Uruguay Round of GATT shows the difficulties facing small and poor countries. Of the 29 least developed countries in the WTO, only 12 had missions in Geneva, most staffed with a handful of people to cover the gamut of UN work. . . . Many small and poor countries had difficulty even ensuring representation at meetings. (UNDP 1999, 34–35)

A straightforward solution to this problem would be for the WTO to subsidize the participation of the least-developed countries (Shukla 2002, 281). The demand that participation of the least-developed countries be subsidized is fully consistent with the Marrakesh Agreement Establishing the WTO, which recognized “that there is need for positive efforts designed to ensure that developing countries, and especially the least developed amongst them, secure a share in the growth in international trade commensurate with the needs of their economic development” (Marrakesh Agreement 1994). The WTO procedural requirement of consensus has also been criticized as a means of ensuring that the interests of underdeveloped countries cannot be pursued if this involves burdening the developed world (Bello 2001, 28–29). Although the criticism has some

<sup>16</sup> This idea is drawn from Thompson's discussion of class interests in the law in Thompson 1975, 263.

<sup>17</sup> Brazil's victorious case against U.S. protectionism of cotton evinces movement in this direction. See Associated Press 2004.

force, it fails to appreciate that veto power can be wielded to protect the interests of the poor as well.

Another criticism of the WTO, raised by Peter Singer, among others, is that it tends in practice to prioritize economic efficiency over all other values. Singer's concern focuses on the WTO's application of the principle of nondiscrimination (Singer 2002, 57–70). Since determinations of whether products are discriminated against affects employment opportunities, the principle of nondiscrimination would seem to serve the purpose of reducing discrimination against persons on the basis of their national origin.

Singer charges, however, that the application of the principle of nondiscrimination by the WTO erodes the ability of states to legislate in accordance with environmental and other values. He cites as evidence the 1991 GATT *Dolphin-Tuna* dispute between the United States and Mexico.<sup>18</sup> The context of this dispute involves the U.S. Marine Mammal Protection Act, which sets standards for dolphin protection in the harvesting of tuna. A country exporting tuna to the United States must meet the dolphin-protection standards set out in U.S. law, otherwise the U.S. government may embargo all imports of fish from that country. Mexico's exports of tuna to the United States were banned under the act. Mexico then complained in 1991 in accordance with the GATT dispute-settlement procedures. In its defense the United States cited GATT Article XX, which allows exceptions at (b) to protect animal or plant life or health and at (g) to conserve exhaustible natural resources (WTOd). In September 1991 a GATT panel found that the United States could not embargo Mexican tuna on the basis of the process through which it came to the market. In effect, the decision was that similar products must get equal treatment regardless of dissimilar production processes (WTOe). Singer observes that the requirement of nondiscrimination on the basis of processes erodes a state's ability to legislate to secure environmental and workplace safety goals. In 1994 a second GATT panel concurred with the earlier decision in a second dolphin dispute, *Son of Dolphin-Tuna*, this time between the European Union and the United States (WTOf).<sup>19</sup>

Singer's criticism, however, may not have as much basis in law as he suggests. Neither *Dolphin-Tuna* nor *Son of Dolphin-Tuna* is precedent setting, for in neither case was the decision adopted; rather, it was merely circulated. Moreover, in a subsequent similar case, *Shrimp-Turtle*, although the WTO found against the United States, it upheld the right of states to legislate in accordance with environmental values.<sup>20</sup> This would appear to be an evolving area of WTO jurisprudence, and it may be too early to tell how the law will eventually be decided.

<sup>18</sup> For the WTO's account of the dispute see WTOc.

<sup>19</sup> [http://www.wto.org/english/tratop\\_e/envir\\_e/edis05\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis05_e.htm).

<sup>20</sup> See *United States—Import Prohibition of Certain Shrimp Products* 1999 and WTOg.

The concern behind Singer's criticism is that the good of economic efficiency may be taken as trumping other values, which if taken seriously lead to production and workplace regulations. There are two routes for complementing trade rules to secure other values. One is to allow states to apply penalties in a nondiscriminatory fashion on products that were produced in manners that violate certain standards. If these penalties were applied to products without reference to their point of origin, no national discrimination could be claimed. Alternatively, international regulatory rules could be adopted that would be applicable in a non-discriminatory fashion. States may be able to press for environmental protection along the first lines within the constraints of existing WTO rules. But the prevention of competitive pressures to reduce costly regulation might recommend the second route.

Finally, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has been met with considerable criticism. Consisting of seven major parts, TRIPS governs various kinds of intellectual property. Prior to its ratification there was significant disagreement about TRIPS among developed countries—major exporters of intellectual property—and underdeveloped countries—who are primarily importers of intellectual property (Hoekman and Kostecki 1995, 152). U.S. pharmaceutical, entertainment, and information industries were largely responsible for getting TRIPS on the negotiating agenda, and developing countries—many of which had little or no legal protection for intellectual property—were concerned that an intellectual-property-rights regime would make important goods, such as medicine, prohibitively expensive to their citizens in need (Hoekman and Kostecki 1995, 156).

Part I, Article 3, of TRIPS applies the national treatment principle to intellectual property (WTOh). Article 4 applies the most-favored-nation principle (WTOh). Part II, section 5, protects patent rights (WTOi). According to Article 28, patent protection shall prohibit the “making, using, offering for sale, selling, or importing” without consent of the patent-holder (WTOi). In effect, holding a patent gives the holder monopoly power in the market for the period of the patent. According to Article 33, this period shall last for twenty years (WTOi). Members have one year from the date of entry to implement the TRIPS requirements; developing countries have five years (but only one to implement the most-favored-nation principle); and least-developed countries have ten years, and may request extensions (Hoekman and Kostecki 1995, 155).

Consider the case of a country such as India, which previously provided patent protection for pharmaceutical processes for only seven years and provided no patent protection at all for pharmaceutical products (Hoekman and Kostecki 1995, 154). The lack of patent protection for products allowed firms to reverse engineer pharmaceutical products and produce them according to their own processes. Since typically this is done without investing as much in research and development as is required for

invention, prices for pharmaceutical products are driven down, thereby allowing greater access to existing pharmaceutical products for the poor of India. With the advent of TRIPS, one can expect the price of pharmaceutical products to rise steadily in the developing world.

In 2000 the Sub-Commission on the Promotion and Protection of Human Rights under the auspices of the United Nations Commissioner for Human Rights declared:

(S)ince the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other. (UNHCHR 2000)

The subcommission cites the *Human Development Reports* of 1999 and 2000, by the United Nations Human Development Programme, as studies evidencing the deleterious effects of TRIPS on the stated rights (UNHCHR 2000).

The knowledge of the chemical structure of pharmaceutical products would appear to be public goods whose supply does not diminish with consumption. It would seem to be most efficient to have this knowledge held as widely as possible. What reasons, then, favor patent protection? Most often, the need to provide an incentive for the initial outlay of research and development is cited.<sup>21</sup> By granting monopoly-pricing power, a patent regime provides incentives for original, inventive, and innovative work. Without such an incentive, the most economical strategy would be to wait for others to make the initial outlay and then to reverse engineer their products.

TRIPS seeks to balance incentives to invention and innovation against the needs of consumers by providing a number of exceptions to patent protection. Article 27 allows leeway for exceptions in matters of public health:

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals. (WTOi)

<sup>21</sup> See Hoekman and Kostecki 1995, 145–46. But Nozick 1974, 182, defends patents on natural-rights grounds. Sterckx 2004 criticizes various justifications of the TRIPS protection.

Article 30 allows for exceptions provided that they “do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner” (WTOi). Article 31 requires that exceptions be for a limited time and only after failure to gain permission on satisfactory terms from the patent-holder (WTOi). It is impossible to know in advance of test cases and WTO dispute resolution whether part II, section 5, which protects patent rights, strikes a balance that will provide protection for the most important interests of consumers in the developing world.

It is doubtful, in any case, that the incentive argument for pharmaceutical patents provides a reason not to allow exceptions like those envisaged under Article 27 (2). In order for there to be a market-based incentive to produce a commodity, there must be effective demand for that commodity. Given the abject poverty of the developing world, it is extremely unlikely that under present conditions there can be effective demand for pharmaceutical inventions for many diseases. Indeed, according to one study, only fifteen of the new medicines patented between 1975 and 1997 were for tropical diseases (McNile 2000). Moreover, in the developing world access to existing pharmacological therapies is sometimes much more important than incentives for innovation. For example, of the six million people in the developing world currently in need of antiretroviral treatment, only four hundred thousand have access to it (WHO 2003, 5). Even if it is the case that a patent system provides necessary incentives for production that cannot be provided by any other means, lifting the production monopoly for a well-defined period of time to treat an epidemic need not disrupt the more entrenched system of incentives for future production.<sup>22</sup> So, there are good reasons for allowing exceptions to TRIPS along the lines of those envisaged in Article 27.

## 6

The WTO’s failure to eliminate developed-world protectionism against underdeveloped countries is a clear case of injustice. Multilateral reduction of protectionist policies that do not allow provision for less-developed countries to protect vulnerable producers and infant industries are also unjust, if the harms that result are not compensated. At the level of policy, the failure of the WTO to subsidize the participation of underdeveloped countries casts serious doubts on its procedural fairness; and if the WTO does not allow for policies to protect the environment, workers, and public health, its practices will be further at fault. These criticisms do not, however, entail that an alternative without multilateral rules would

<sup>22</sup> It is by no means clear that patents are required for there to be sufficient production incentives. Chang (2002, 2) reminds us that “Switzerland became one of the world’s technological leaders in the nineteenth century without a patent law.”

be better. There is good reason to believe that the elimination of the multilateral trading system would be even worse for egalitarian justice, since it would leave weak countries even more vulnerable to the predatory trading practices of the rich and strong countries whose representatives invariably fail to take seriously the view that justice requires attention to the interests of the disadvantaged.

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