

# Fairer Trade & the Human Right to Development - A Perfect Match or Misconceived Twins

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## 1. Introduction

The discussion of and debate on ‘social issues’ during the Uruguay Round (1986-93) of the GATT/WTO negotiations highlighted the potential impact of trade liberalisation on certain human rights (e.g. labour standards, environment protection etc).<sup>1</sup> However, it would be wrong to assume that the link between trade liberalisation and human rights was established in the late 1980s and early 1990s. In fact, these two issues were the twin considerations in the post-War reconstruction efforts and form the cornerstone of the United Nations.

However, trade liberalisation and the protection of human rights are based on two fundamentally different philosophies, the one of the free market, and the other of state intervention, at least in relation to economic and social rights, and other ‘third generation’ rights. Not surprisingly, the twins eventually parted company and each then took a rather different path and pace in development. The re-union of the two is a more recent event, but the union has hardly been a happy or harmonious one until now. The struggle within the union has occurred at two levels: trade liberalisation *vis-à-vis* the protection of individual rights, and trade liberalisation *vis-à-vis* the so-far ambiguous concept of the human right to development. The former is largely a struggle between global trading organisations/nation states on the one hand, and NGOs and individuals on the other, and the latter between and among nation states, but both concern issues of global justice and equity.

This paper mainly addresses issues pertaining to the latter struggle in the context of trade liberalisation and human rights protection. It first traces the emergence of the twins, but focuses on examining the contention between fair trade and the human right to development (RtD). Specifically, it analyses the failure of another set of twins - the well intended ‘Special and Differential’ (S&D) treatment for developing countries in the global trading system and the right to development – both of which were born out of the same struggle for a ‘New International Economic Order’ (NIEO). It is argued that neither has worked for countries that are desperate for an economic take-off and a meaningful realisation of the right to development and, hence, some fundamental but not necessarily radical re-thinking is required for the twins to work in practice.

## 2. Trade Liberalisation, the Protection of Human Rights, and the Right to Development

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<sup>1</sup> See Steve Charnovitz, ‘The World Trade Organization and Social Issues’, (October 1994) *Journal of World Trade* 17.

## 2.1. The Birth of the Twins: Human Rights and Global Economic Cooperation

The concept of ‘human rights’ is both new and old. It is old because the term ‘natural rights’, a term eventually replaced by the term ‘human rights’, has been with us since Ancient Greece. It is new because the expression ‘human rights’ is mainly a product of post-War jurisprudence, in particular since the founding of the UN.<sup>2</sup> Indeed, ‘it was not until the rise and fall of Nazi Germany that the idea of rights - human rights - came truly into its own.’<sup>3</sup> The gross human rights violations by Nazi Germany provided the first catalyst for the establishment of the UN, which, in turn, started the process of the internationalisation of human rights.

Similarly, ‘trade’ has been with us since time immemorial, but a modern, multilateral trade system is a product of post-War efforts at economic reconstruction and cooperation among nations. Immediately after the War, as a prominent WTO scholar has pointed out, one of the main strands of thinking about the War was that

the mistakes concerning economic policy during the interwar period (1920-1940) were a major cause of the disasters that led to the WWII. ... During this interwar period, nations, particularly after the damaging 1930 US Tariff Act, took many protectionist measures, including quota-type restrictions, which choked off international trade. Political leaders of the US and elsewhere made statements about the importance of establishing post-war economic institutions that would prevent these mistakes from happening again.<sup>4</sup>

Thus, an international conference sponsored by ministries of finance was held in 1944 in Bretton Woods, New Hampshire, in the United States. This meeting established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD, the World Bank),<sup>5</sup> both of which then became a part of the UN structure,<sup>6</sup> collectively known as the Bretton Woods institutions.

Not surprisingly, economic cooperation and human rights protection developed rapidly side by side in the immediate aftermath of WWII. There is little doubt that both were twin considerations for a post-war international order, with its ultimate goal

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<sup>2</sup> See Burns H. Weston, ‘Human Rights’, in Claude & Weston, *Human Rights in the World Community* (1989), at 13.

<sup>3</sup> Weston, *id.*, at 15.

<sup>4</sup> John H Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge, Massachusetts: The MIT Press (1989), at 31.

<sup>5</sup> The question of trade was not on the agenda as the ministries of finance apparently lacked the domestic mandates to deal with it. For this reason, the Bretton Woods system is often referred to as involving these two institutions only. However, the need for a comparable institution for trade to complement the IMF and the World Bank was recognised at the 1944 Conference. See Jackson, *id.*, at 27-8; Daniel W. Skubik, ‘International Economic Institutions’, in Wilde & Islamn (eds.), *International Transactions: Trade and Investment, Law and Finance*, Sydney: LBC, (1993), at 417-8. For this reason, Bretton Woods system is better seen as consisting of three institutions, that include the GATT/WTO.

<sup>6</sup> The separate and complicated development of GATT/WTO eventually made the WTO an associated organisation of the UN, but not formally a part of it.

of securing international peace and security.<sup>7</sup> In other words, human rights and global trade were not meant to be, and should not be separated; they are part and parcel of the post-War reconstruction vision.

## 2.2. The NIEO and the Right to Development

As world politics in the post-War period was - and still largely is - dominated by the United States and its allies, the Bretton Woods system can also be seen as a product of Western countries, as is the international human rights regime. The seeds for contention had already been sowed by then, for the world was soon to become multi-polar.

In the development of a statement of human rights, it only took 18 months for the UN to have the Universal Declaration of Human Rights adopted in 1948, with forty-eight votes in favour, none against and eight abstentions.<sup>8</sup> But it took another 18 years to adopt the binding treaties (both the ICCPR and the ICESCR were adopted on 16 December 1966) and nearly a further 10 years for the treaties to take effect (the ICCPR took effect on 23 March 1976 and the ICESCR on 3 January 1976). While one may argue that countries are rather cautious about making legally binding treaties, the emerging East-West Divide (and the subsequent Cold War) played a rather decisive role in the delay and in the adoption of two Covenants, instead of one as originally contemplated.<sup>9</sup> This East-West Divide then largely dominated the UN human rights discourse and development, until the end of the Cold War when the North-South Divide took over the dominating role in international affairs.

In relation to international trade and global economic cooperation, the North-South Divide played a much earlier role than it did in human rights development,<sup>10</sup> and this Divide ultimately led to the call for an NIEO and the proclamation of the RtD.

The end of World War II led to the emergence of many newly independent states on the world stage, most of which were, and still are, economically poor countries. At the same time, as just mentioned, the international economic order, through the imposition of multilateral rules, was created and maintained by developed countries. Thus, the demand for new rules or at least changes to existing rules was to be expected. It did not take very long for the UN to adopt the now well-known Resolution 1803 in 1962.<sup>11</sup> While the substance of the Resolution was to grant States

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<sup>7</sup> See Article 1 of the UN Charter, which sets out the purposes of the UN.

<sup>8</sup> The eight abstentions were from the Soviet bloc, South Africa and Saudi Arabia. See A.H. Robertson & J.G. Merrills, *Human Rights in the World*, Manchester: Manchester University Press (1996), at 70, fn.4.

<sup>9</sup> Nick O'Neill, Simon Rice, Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia*, Sydney: The Federation Press (2004), at 12-15; and Robertson and Merrills, *id.*, at 25-32.

<sup>10</sup> The East-West Divide was not entirely absent from debates on global economic cooperation, but the newly emerged socialist countries played the role of supporting the South rather than deciding the course of debate.

<sup>11</sup> Permanent Sovereignty over Natural Resources, A/Res/1803 (XVII), 19 Dec. 1962. While the Resolution was a response to developing countries' demands, it was partly a result of the call by the then president of the USA, J.F. Kennedy in 1961, for the General Assembly of the UN to proclaim a Development Decade.

the right to nationalise foreign holdings, on condition that compensation was provided according to international law, its principal purpose was to establish an international economic order of mutual benefit.<sup>12</sup>

The Resolution or its practice did not fulfil the expectations of the Third World countries. Instead, the gap between them and the industrialised countries became wider despite efforts to the contrary.<sup>13</sup> This then led to concerted new measures, vigorously promoted by the non-aligned developing countries at the UN, to address the existing inequalities between the richer and poorer nations, and for this purpose the establishment of an NIEO.<sup>14</sup> With their comfortable majority at the UN General Assembly, these efforts led to some results at the UN in the form of Resolutions adopted at the General Assembly and in other UN Forums, that expressly call for an NIEO.

In May 1974 the Sixth Special Session of the General Assembly adopted a Declaration and Programme of Action on the Establishment of a New International Economic Order (NIEO),<sup>15</sup> and in December of the same year, the Charter of the Economic Rights and Duties of States was also adopted.<sup>16</sup> These documents laid down some twenty principles for a new economic order to be founded, such as a co-operative fight against inequality, better prices for raw materials and primary commodities, the elimination of political conditions in foreign assistance, and the reform of the international monetary system, etc. Significant as it may have been, and though supported by no less than 120 countries, the Charter was opposed by six of the developed countries,<sup>17</sup> with another 10 abstaining,<sup>18</sup> the majority of them being major international donors. As a result, the Charter remains a piece of paper of academic interest with little practical effect.<sup>19</sup>

It is however wrong to assume that there has been no impact of the notion of the NIEO upon international economic relations. In fact, the notion of a human right to development emerged directly out of this struggle for an NIEO.

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<sup>12</sup> Detlev Christian Dicke, 'Public International Law and a New International Economic Order', in Petar Sarcevic & Hans van Houtte (eds.), *Legal Issues in International Trade*, Dordrecht: Martinus Nijhoff (1990), at 23-4.

<sup>13</sup> See S. Dell, 'The Origins of UNCTAD', in M. Z. Cutajar, *UNCTAD and the South-North Dialogue: The First Twenty Years*, Oxford: Pergamon Press (1985), at 14; Dicke, *id.*, at 23-4.

<sup>14</sup> The group of non-aligned countries (Group-77) was first established at Bandung in 1955 with 77 members. Its membership has now nearly doubled. See Robertson and Merrills, *supra* note 8, at 256; and Ignaz Seidl-Hohenveldem, *International Economic Law*, 2nd ed., Dordrecht: Martinus Nijhoff Publishers (1992), at 5.

<sup>15</sup> Resolutions 3201 (S-VI) and 3202 (S-VI). See also Resolution 3362 (S-VII) of the Seventh Special Session.

<sup>16</sup> Resolution A/Res/3281 (XXIX), 12 December 1974.

<sup>17</sup> Belgium, Denmark, the Federal Republic of Germany, Luxembourg, Great Britain and the USA.

<sup>18</sup> Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain.

<sup>19</sup> Dicke, *supra* note 12, at 24.

In response to the NIEO Resolutions, the UN adopted two further Resolutions<sup>20</sup> the first of which states that the realisation of a new economic order is ‘an essential element for the effective promotion of human rights and fundamental freedoms’,<sup>21</sup> and the second emphasises that the right to development is a human right, and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations.<sup>22</sup> Since then the RtD has been proclaimed as a human right by virtually every region (except Europe) and in universal human rights-related declarations, resolutions and conventions, leading ultimately to the adoption of the Declaration of the Right to Development in 1986.<sup>23</sup> Thereafter, the existence of such a right has been re-affirmed by all UN authorities, including the General Assembly, the Commission on Human Rights (now the UN Human Rights Council), the Conference of Heads of State of Non-Aligned Countries, the Assembly of Heads of State and Government of the Organisation of African Unity (now the African Union), and the UN High Commissioner for Human Rights.

### 2.3. The NIEO and the S&D

The push for an NIEO, through the United Nations Conference on Trade and Development (UNCTAD), also led to some concessions granted to less developed countries in the global trade regime.

The UNCTAD, established on the basis of *ad hoc* alliances among Third World countries pursuing a common goal of establishing an NIEO,<sup>24</sup> is described as ‘a child of the era of decolonisation - the first institutional response in the economic sphere to the entry of the Third World on the international scene.’<sup>25</sup> The governments that established UNCTAD were committed ‘to lay the foundations of a better world economic order’.<sup>26</sup> The first UNCTAD, held in Geneva in 1964 and attended by over 2,000 delegates from 120 countries, was the first major international conference at which the North-South divide began to obscure the East-West conflict and eventually relegated the latter to a secondary position within the framework of the UN,<sup>27</sup> as it has remained for more than 40 years.

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<sup>20</sup> Resolution 32/130 (1977), 16 Dec. 1977, and Resolution 34/46 (1979), 23 Nov. 1979, both entitled Resolution on Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms.

<sup>21</sup> Para.1(f) of Resolution 32/130 (1977).

<sup>22</sup> See Para. 8 of the Resolution 34/46 (1979).

<sup>23</sup> Although the adoption of the Declaration was described by the Chairman of the Third Committee of the General Assembly as ‘perhaps the Committee’s most significant achievement’, it was strongly opposed by the USA, with 8 significant abstentions (the four Nordic countries: Denmark, Finland, Iceland and Sweden), Japan, Israel, the United Kingdom, and the Federal Republic of Germany, all of which (except Israel) are major donors). See Roland Rich, ‘Right to Development: A Right of People?’, in Crawford, James (ed.), *The Rights of Peoples*, Oxford: Clarendon Press (1988), at 51.

<sup>24</sup> For a good analysis of reasons for the emergence of UNCTAD, see Dell, *supra* note 13, at 10-32; and Marc Williams, *Third World Cooperation: The Group of 77 in UNCTAD*, London: Printer Publishers (1991).

<sup>25</sup> Cutajar, *supra* note 13, at vii.

<sup>26</sup> Dell, *supra* note 13, at 10.

<sup>27</sup> Williams, *supra* note 24, at 43.

Although the UNCTAD is constitutionally required to act as a coordinating centre in the UN system in respect of international development policy,<sup>28</sup> it has no formal rule-making powers, nor many specific implementing measures, nor is it particularly liked by developed countries which were and still are content with the Bretton Woods system as the principal force for global regulation of international economic relations. Though acting as the driving force for the claims of the Third World, only relatively few of its initiatives have borne fruits,<sup>29</sup> among which are the inclusion of Part IV into GATT in 1964,<sup>30</sup> and the establishment of a Committee on Trade and Development in the same year to oversee the implementation of Part IV and the International Trade Centre (now a joint agency of UNCTAD and WTO) to promote the trade of developing countries.<sup>31</sup> Essentially, the effect of Part IV and later concessions<sup>32</sup> is to waive certain GATT principles in favour of less developed countries.<sup>33</sup> These 'special' treatments under GATT eventually become to be known as 'special and differential' treatment (S&D) for developing countries.<sup>34</sup>

Clearly the S&D treatment first emerged in a political rather than a trading context, and was seen, and still largely is seen, as a political right.<sup>35</sup> As such, its contents make sense only in the politico-economic context of the NIEO. Further, S&D can be seen essentially as the first expression in global trading rules of a political RtD,<sup>36</sup> though the two eventually took separate paths in development, with different political and philosophical orientations.

### 3. A Troubled Life Shared by the RtD and S&D

#### 3.1. RtD as a 'Human' Right and Its Philosophical Underpinnings

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<sup>28</sup> Williams, *id.*, at 57-8.

<sup>29</sup> Seidi-Hohenveldem, *supra* note 14, at 95. See also M.A.G. van Meerhaeghe, *International Economic Institutions*, 6th ed., Leiden: Kluwer Academic Publishers (1992), pp.154ff.

<sup>30</sup> It should be pointed out that, prior to the adoption of Part IV, GATT had adopted a number of decisions and measures that were designed to support the less-developed countries (as they were then called). Other concessions were further obtained by developing countries in the 1970s. See *Background Document to the High Level Symposium on Trade and Development* (hereinafter Background Document), Geneva, 17-18 March 1999, prepared by the Development Division of WTO, available from the WTO website <http://www.wto.org>; and Seidi-Hohenveldem, *supra* note 14, at 90.

<sup>31</sup> *Background Document, id.*, at 5.

<sup>32</sup> See discussions in S.3.2 below.

<sup>33</sup> Seidi-Hohenveldem, *supra* note 14, at 90.

<sup>34</sup> M. J. Trebilcock, & R. Howse, *The Regulation of International Trade*, 2nd edition, London/New York: Routledge (1999), at 367-8.

<sup>35</sup> A. Keck, & P. Low, *Special and Differential Treatment in the WTO: Why, When and How*, WTO Staff Working Paper ERSD-2004-03, 2004, at 3. A PDF text is available from the WTO website: [http://www.wto.org/english/res\\_e/reser\\_e/ersd200403\\_e.htm](http://www.wto.org/english/res_e/reser_e/ersd200403_e.htm).

<sup>36</sup> Foreign aid, or Overseas Development Assistance (ODA), being another principal demand for establishing the RtD, to be discussed below, only managed to get onto trade negotiations at a much later time in the 1990s.

The basic thinking for the establishment of an NIEO and, especially, the RtD, was that, though human rights are of a moral/an ethical and legal nature, their actual enjoyment requires an economic foundation and social and political stability that, unfortunately, does not exist in many poor countries.<sup>37</sup> This thinking clearly was different from the then *laissez-faire* market ideology and the traditional thinking on civil and political rights as being ‘negative’ rights that demand the absence of the states in the exercise of such rights.

As a legal concept, the notion of RtD was first advanced by a Senegales jurist, Keba M’Baye, in 1972,<sup>38</sup> and later popularised by a French jurist, Karel Vasak, formerly UNESCO Legal Adviser, in his theory of the ‘three generations of human rights’.<sup>39</sup> Vasak examined the problems (e.g. famine, illness and ignorance) in developing countries and concluded that in many African countries governments preoccupied with these problems tended to overlook the classic liberties. His view was that when economic and social developments were achieved, then general respect for rights and liberties would be secured. And from this he deduced a ‘right to development’ as a necessary corollary of the other fundamental rights recognised in international texts.<sup>40</sup>

The initial recognition of the connection between human rights and economic development was made at the International Conference on Human Rights in Tehran in 1968 in its Resolution XVII:

The enjoyment of economic and social rights is inherently linked with a meaningful enjoyment of civil and political rights, and ... there is a profound interconnection between the realisation of human rights and economic development.<sup>41</sup>

Thereafter, as mentioned, the notion of RtD was eventually established by the 1986 Declaration on the Right to Development, and the African Charter of Human and Peoples’ Rights,<sup>42</sup> and re-affirmed by many subsequent UN resolutions, including the 1993 Vienna Declaration on Human Rights.

The proclamation of a ‘human’ right to development by the UN, instead of determining a course for North-South dialogue, has only caused much more intense

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<sup>37</sup> Robertson and Merrills, *supra* note 8, at 255.

<sup>38</sup> R.L. Barsh, ‘The Right to Development as a Human Right: Result of the Global Consultation’, (1991) 13 *Human Rights Quarterly* 322, at 322. M’Baye is a leading authority on the attitude of African States to human rights (he was President of the Supreme Court of Senegal and a former President of the UN Commission on Human Rights). His main ideas are contained in a lecture in 1972 and published in *Human Rights Journal*, Vol. V, Nos 2-3, at 505-534. See Stephen Marks, ‘Obstacles to the Right to Development’, 2003, available from [www.hsph.harvard.edu/fxbcenter/FXBC\\_WP17-Marks.pdf](http://www.hsph.harvard.edu/fxbcenter/FXBC_WP17-Marks.pdf) (last accessed 12 April 2008); and Robertson and Merrills, *supra* note 8, at 13.

<sup>39</sup> Rich, *supra* note 23, at 41. Karel Vasak’s initial theory is contained in ‘A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’, (Nov. 1977) *UNESCO Courier*, at 29 & 32.

<sup>40</sup> Robertson and Merrills, *supra* note 8, at 13.

<sup>41</sup> Quoted in Robertson and Merrills, *supra* note 8, at 13-14.

<sup>42</sup> The Charter was adopted in 1981, and became effective in 1986.

controversy in the political and academic spheres. As a legal notion, Article I (1) of the 1986 Declaration defines the RtD as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. Except for the specific provision which states that the human right to development implies the full realisation of the right of peoples to self-determination,<sup>43</sup> it is difficult to see from the text what is or are the exact content(s) of the RtD. Specifically, it is unclear who has this right, against whom this right can be claimed, and how could it actually be implemented and enforced. As such, and under pressures from developing countries, the UN began efforts to clarify the meaning of the RtD, and to work out specific and concrete measures for the actual realisation of it.<sup>44</sup> For this purpose, and following the first UN working group in 1981 to draft the Declaration on the Right to Development, various Working Groups, Inter-governmental Groups of Experts, Independent Experts, and High-level Task Forces have been established and many (including the UN High Commissioner for Human Rights) have been working on this admirable notion of the RtD, with the aim of making it concrete and enforceable, but to no avail.<sup>45</sup> In the end, the notion of the 'right to development' has become no more than a political slogan, void of concrete contents. And if anything, it has become an increasing barrier to international human rights promotion and protection, as it is more often than not used as an excuse for human rights violations and a defence for such violations – a very admirable initiative has now become a liability of the UN. A prominent human rights scholar has criticised the notion of the RtD thus:

The Declaration is a fuzzy document, trying to be all things to all persons. So whilst there are sections of it which can be used to advance the (more traditional) cause of human rights, the gist of it seeks to establish reason for the failure of the realisation of human rights in the international economic and political

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<sup>43</sup> Article 1(2) of the 1986 Declaration.

<sup>44</sup> This task was initially taken up by a Working Group of the UN Commission on Human Rights, but later by many other special groups. See *infra* note 45 below.

<sup>45</sup> For the more recent documents produced by the UN bodies, see The Right to Development – Report of the High Commissioner for Human Rights submitted in accordance with Commission Resolution 2000/5, E/CN.4/2001/25, 5 January 2001; The legal nature of the right to development and enhancement of its binding nature, E/CN.4/Sub.2/2004/16, 1 June 2004; The right to development: study on existing bilateral and multilateral programmes and policies for development partnership, E/CN.4/Sub.2/2004/15, 3 August 2004; Mainstreaming the right to development into international trade law and policy at the World Trade Organisation, E/CN.4/Sub.2/2004/17, 9 June 2004; Study on policies for development in a globalizing world: What can the human rights approach contribute?, E/CN.4/Sub.2/2004/18, 7 June 2004; Towards a human rights approach to development: concepts and implications, E/CN.4/Sub.2/2004/19, 10 June 2004; Promoting the right to development in the context of the United Nations Decade for the Elimination of Poverty (1997-2006), E/CN.4/Sub.2/2004/13, 1 June 2004; Report of the high-level task force on the implementation of the right to development, E/CN.4/2005/WG.18/2, 24 January 2005; Right to Development - Report of the High Commissioner for Human Rights, E/CN.4/2005/24, 5 January 2005; Report of the Working Group on the Right to Development, E/CN.4/2005/25, 3 March 2005; Report of the High-Level Task Force on the Implementation of the Right to Development on Its Fourth Session, A/HRC/8/WG.2/TF/2, 31 January 2008; and many more. All these documents are available from: <http://www.ohchr.org/english/issues/development/groups/documents-6th.htm>. Among these studies and report, there is a clear lack of empirical knowledge, in addition to their weakness of conceptual thinking on the RtD. See Marks, *supra* note 38, at 6.

systems (including encroachments on the principle and practice of self-determination), while affirming that the primary responsibility for human rights is vested in states as part of their sovereignty. In other words, the rich countries must provide economic assistance to the poor countries, but must not question their human rights situation. ... The Declaration is also an attempt to provide an alternative framework for the international discourse on human rights. It shifts the focus from domestic arenas (where most violations of human rights take place) to the international, and takes attention away from specific rights - for example, speech, assembly and social welfare - to an ambiguous portmanteau right of development, for which, in the nature of Third World affairs, the state must take the responsibility for definition and implementation.<sup>46</sup>

He further asserts that, through the Declaration, some governments seek to promote the ideology of developmentalism, which justifies repression at home and the evasion of responsibility abroad.<sup>47</sup>

Another prominent scholar argues that,

apart from being new, what these [people's] rights have in common is that it is sometimes difficult to see how they can be vested in, or exercised by, individuals. According to the classical theory, only the rights of human individuals can be "human" rights; any rights belonging to entities of some other kind (such as states, churches, corporations, trade unions, and so forth) may be highly desirable, accepted, valid, and even enforceable - but, whatever else they may be, they cannot be *human* rights.<sup>48</sup>

Not surprisingly, therefore, for the last 30 years or so, the UN's efforts to work out precise, concrete and enforceable contents of the right to development have ended up doing more damage to the human rights movement than enhancing it. The best one could say about the RtD is that, like the NIEO, it was an expression of the South's frustration in the face of the imposition of the North's power, but one lacking a workable program,<sup>49</sup> and indeed one that is largely absent from practice in the UN and its many subsidiary bodies.<sup>50</sup>

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<sup>46</sup> Yash Ghai, 'Asian Perspectives on Human Rights', (1993) 23 *HKLJ* 342, at 348. For other criticisms of the notion, see, Robertson and Merrills, *supra* note 8, at 257-9; U.O. Unozurike, 'The African Charter on Human and People's Rights', (1983) 77 *AJIL* 902; J Crawford, 'The Rights of Peoples: Some Conclusions', in Crawford, *supra* note 23; A. Cassese, 'Political Self-Determination - Old Concept and New Developments', in A Cassese (ed.) *UN Law/Fundamental Rights: Two Topics in International Law*, Alphen aan de Rijn (1979), at 154-5. Many of those who insist that the RtD is a human right also recognise that there is a hierarchy among the subjects of human rights law, and that individuals, as the ultimate beneficiaries of all human rights, have primacy. Therefore, there can be no human rights which detract from the individual's human rights. See Rich, *supra* note 23, at 43.

<sup>47</sup> Ghai, *id.*, at 348.

<sup>48</sup> P. Sieghart, *The Lawful Rights of Mankind*, Oxford : Oxford University Press (1986), at 161.

<sup>49</sup> Barsh, *supra* note 38, at 322. See also J. Crawford, 'The Rights of Peoples: "Peoples" or "Government"?', in Crawford, *supra* note 23, at 65-6.

<sup>50</sup> For a detailed examination of the absence of practice of the RtD in the UN bodies, including the absence of even mentioning the RtD at many Summits or Conferences organised by the UN bodies, see Marks, *supra* note 38, at 13-19.

### 3.2. The S&D as an Exception to the Liberal Market Ideology

The fundamental working principles of the GATT/WTO are non-discrimination<sup>51</sup> and liberalisation,<sup>52</sup> so as to promote fairer and freer trade as well as security and predictability in trade relations among contracting parties. The principal purpose of GATT/WTO is to create and maintain a more open trading climate, which would enable each member to compete with fewer artificial trade barriers.<sup>53</sup> Although GATT/WTO has never been about absolute free trade, its underlying philosophy is undoubtedly that of a liberal market ideology. While the GATT/WTO includes a large number of exceptions<sup>54</sup> which represent concessions to the notion of 'sovereignty' as a common practice in most other international treaties, the S&D treatment is an exception of an entirely different nature. It is a direct exception to the liberal market ideology, representing a partial concession to the politico-economic struggle for an NIEO.

Not surprisingly, the original GATT was basically silent on the issue of developing countries, as the notion itself and the North-South divide were yet to emerge. Indeed, and in strong contrast with the Agreement Establishing the WTO, the preamble of the GATT 1947 did not mention the words 'developing countries' at all. It was only after the first review session of the GATT (1954-1955) that GATT allowed countries 'the economies of which can only support low standards of living and are in the early stages of development' some flexibility in modifying or withdrawing their tariff concessions and permitting some limited measures to protect a particular industry or balance-of-payments under Art XVIII.<sup>55</sup> Although Annex I to the GATT attempts to provide some elaboration, no specific criteria have been established for determining which countries would be qualified as such 'economies'. Nevertheless, an economy supporting low standards of living is only to be judged on the basis of 'the normal condition of that economy' and an economy in the early stages of development would also include a country undergoing a process of industrialisation to correct an excessive dependence on primary production.<sup>56</sup>

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<sup>51</sup> Through most-favoured-nation treatment and national treatment, see Arts I (most-favoured-nation treatment) & III (national treatment) of the GATT.

<sup>52</sup> Through reduction of tariffs and other trade barrier, see, e.g. Art II (tariff reduction) and Schedules (on agreed maximum tariffs of member countries); Art VI (antidumping and countervailing duties); Art VII (valuation of goods for customs purposes); Art VIII & X (procedures of customs administration); Art IX (marks of origin); Art XI (quantitative restrictions); Art XVI (subsidies); and Art XVII (state trading monopolies) of the GATT.

<sup>53</sup> M. Rafiaqul Islam, 'GATT with Emphasis on Its Dispute Resolution System', in Wilder & Islam *supra* note 5, at 226.

<sup>54</sup> E.g. Waivers (Art XXV); Balance of payments (Art XII - XV); customs unions and free trade areas (Art XXIV); safeguards clause (Art XIX); the General Exceptions (Art XX); the National security exceptions (Art XXI); the renegotiation procedures for tariff concessions (Art XXVIII); and the 'Opt Out' or 'Non-Application' clause (Art XXXV). These exceptions have frequently caused trade disputes and undermine the effectiveness of the whole system, but the discussion on these problems is outside the scope of this paper.

<sup>55</sup> Entitled 'Government assistance to economic development', but initially entitled 'Government assistance to economic development and reconstruction' and intended to provide some flexibility to all countries. See *Background Documents*, *supra* note 30, at 5.

<sup>56</sup> Annex I: *Ad Article XVIII*.

The initial S&D measures were typically represented by the so-called 'Generalised System of Preference' (GSP) and the 'Enabling Clause', the latter effectively and permanently institutionalising the GSP in GATT/WTO. The GSP, initially promoted by the UNCTAD, was developed in a variety of international institutions, and finally adopted in 1971 by GATT for a ten-year period, as a waiver to the principle of most-favoured-nation treatment (MFN). The waiver authorises each industrial country to establish its own GSP programs without the need to accord the same to other Contracting Parties under the MFN principle. However, it was left to each industrial country to define, often arbitrarily,<sup>57</sup> what a 'developing country' was for the purposes of benefiting from the GSP program, in the absence of any specific guidelines. The result is that each country has its own practice and has introduced the practice at different times (the US being the last, in 1974, to implement GSP through its Trade Act 1974<sup>58</sup>), often with their own conditions, and resulting in only limited impact on the economic development of the beneficiary countries.<sup>59</sup>

More specific measures were to be worked out during the 1979 Tokyo Round, which was mandated to 'secure additional benefits for the international trade of developing countries' in the recognition of 'the importance of the application of differential measures to developing countries in ways which will provide special and more favourable treatment for them in areas of the negotiations where this is feasible and appropriate.'<sup>60</sup> Hence, a number of codes adopted at the 1979 Tokyo Round have special provisions for developing countries.<sup>61</sup> In addition, one 'declaration' resulting from the Tokyo Round explicitly contemplates industrialised country actions favouring developing countries, while noting the possibility of improving the capacity of those countries to 'participate more fully in the framework of rights and obligations under the General Agreement'.<sup>62</sup> Sometimes the differentiation of LDCs (least developed countries) from developing countries was also recognised. In both categories, the notion of 'graduation' has also been introduced,<sup>63</sup> with the expectation that the S&D treatment for developing countries would be a transitional concession.<sup>64</sup>

The Uruguay Round negotiations (1986-1994) was not only the most ambitious round ever undertaken in the history of GATT, it was meant, like the present Doha Round, as a development round. The reality of the Uruguay Round was that the main negotiations were conducted among the developed countries themselves, especially the three main powers, Japan, U.S. and the E.C, and only extended to the developing

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<sup>57</sup> Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, Clarendon: Oxford University Press (2003), at 384.

<sup>58</sup> Such a decision is now made by the US President: Jackson, *supra* note 4, at 324.

<sup>59</sup> Matsushita, Schoenbaum, Mavroidis, *supra* note 57, at 384.

<sup>60</sup> See *Background Document*, *supra* note 30, at 15.

<sup>61</sup> For instance the Agreement on Technical Barriers to Trade, Art XII; the Agreement on Government Procurement, Art III; the Subsidies Code, Part III Art 14; and the Antidumping Code, Art 14.

<sup>62</sup> Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, GATT, BISD 26 Supp 203 (1980). Often referred to as the 'Enabling Clause'.

<sup>63</sup> Keck & Low, *supra* note 35, at 5.

<sup>64</sup> Matsushita, Schoenbaum, Mavroidis, *supra* note 57, at 378.

countries on a MFN basis.<sup>65</sup> More importantly, GATT principles concerning developing countries only managed to be mentioned in an *ad hoc* fashion in various documents providing a few concessions for developing countries.<sup>66</sup> Also important in the Uruguay Round development in relation to their impact on developing countries, was the introduction of new subject matters for the WTO, namely the GATS, TRIPS and TRIMS, none of which is of great benefit to less developed countries,<sup>67</sup> and all were agenda items initiated by US-led western countries, but strongly resisted by developing countries. Developing countries only agreed to include these issues either because certain concessions were made by developed countries, or through fear of being left out, or simply because they had little choice but to accept.<sup>68</sup> In this context, the concessions made by developing countries can only be described as tremendous, and as amounting to a major set-back in securing their national interests in global trade. The resulting package at the Uruguay Round then implies that the S&D treatment is no longer, in the language of one commentator, the 'explicit right of the developing countries (other than the least developed countries), and that it is open to the discretion of the developed countries, if they so desire, to exert pressure to obtain more commitments and concessions than are actually justified'.<sup>69</sup> If anything, one can only say that the only practical treatment accorded to developing countries are those for the LDCs.<sup>70</sup>

The end results of Uruguay thus represented:

a change of heart and attitude from the more developed countries, returning to the basic rules of the original GATT, favouring non-discrimination and liberalisation as the fundamental tenets of the international trading system for all to be generally applicable with the minimum number of exceptions possible, the basic philosophy being that liberalisation, competition, non-intervention by government and non-discrimination are the best medicine for all - disregarding the specific circumstances and conditions in the Member countries.<sup>71</sup>

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<sup>65</sup> M. Rom, 'Some Early Reflections on the Uruguay Round Agreement as Seen from the Viewpoint of a Developing Country', 28 (6) (1994) *J. of World Trade* 5, at 6.

<sup>66</sup> E.g. Agreement on Technical Barriers; on Subsidies and Countervailing Measures (See Trebilcock & Howse, 1999: ch.14). Although pre-Uruguay GATT agreements and decisions are part of the WTO package, the applicability of GATT principles (including the 'Enabling Clause') to areas other than trade in goods is questioned by some scholars (See Rom, *id.* at 7).

<sup>67</sup> See J. Chen & G Walker (eds), *Balancing Act: Law, Policy and Politics in Globalisation and Global Trade*, Sydney: The Federation Press (2004).

<sup>68</sup> Rom, *supra* note 65, at 8-9; E. O. Awuku, 'How Do the Results of the Uruguay Round Affect the North-South Trade?' 28 (6) (1994) *Journal of World Trade* 75. See also Chen & Walker, *id.*

<sup>69</sup> Rom, *supra* note 65, at 8.

<sup>70</sup> See Decision on Measures in Favour of Least-Developed Countries adopted at the Uruguay Round, and the more recent decisions to grant duty-free and quote-free treatment to the LDCs.

<sup>71</sup> Rom, *supra* note 65, at 7.

Nevertheless, some 145 provisions were incorporated into the various agreements (with 107 being adopted at the conclusion of the Uruguay Round, and 22 applying to least-developed country Members only).<sup>72</sup> These have been summarised thus:

These provisions can be classed in five main groups: provisions aimed at increasing trade opportunities through market access; provisions allowing flexibility to developing countries in rules and disciplines governing trade measures; provisions allowing longer transitional periods to developing countries; and provisions for technical assistance. Additional provisions within these five groups relate specifically to the least-developed countries.<sup>73</sup>

Other than provisions on longer transitional periods as contained in individual agreements, few of the S&D provisions are specific or legally enforceable. At the same time, the movement towards liberalisation, competition and non-discrimination as the fundamental underlying principles of the WTO trading regime is unmistakable.<sup>74</sup>

Developing countries soon realised that the trade-off or compromise they had made during Uruguay Round was not a win-win result. As in the case of the RtD, they began to push for specific and concrete measures for the actual enjoyment of S&D treatment. They demanded a new ‘development’ round and, after the spectacular failure at Seattle, a new development round – the Doha Round – was indeed launched in November 2001. In launching the new Round, Para 44 of the Doha Declaration affirms ‘that provisions for special and differential treatment are an integral part of the WTO Agreements’ and that the Doha Round shall review these provisions ‘with a view to strengthening them and making them more precise, effective and operational’. However, discussions on the S&D treatment soon evolved into a web of propositions and an astonishing array of proposals for new and improved S&D provisions.<sup>75</sup> It is not surprising at all that little agreement, other than that on LDCs, was reached at the Hong Kong Conference,<sup>76</sup> and thereafter, all we saw were missed deadlines by the

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<sup>72</sup> See Committee on Trade and Development (WTO), *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77, 25 October 2000. Another source put the total number of S&D provisions at 155. See IISD, ‘Special and Differential Treatment’, *Doha Round Briefing Series*, Vol 1, No. 13, 2003, at 1.

<sup>73</sup> *Background Document*, *supra* note 30, at 18.

<sup>74</sup> Rom, *supra* note 65, at 7.

<sup>75</sup> Keck & Low, *supra* note 35, at 6. Indeed, some 88 specific suggestions were made by developing countries in the Doha Round negotiation. See B. Hoekman, C. Michalopoulos, & L A Winters, *More Favourable and Differential Treatment of Developing Countries: Toward a New Approach in the World Trade Organization*, World Bank Policy Research Working Paper, WPS 3107, 2003. A PDF text is available from the World Bank website: [http://www-wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&eid=000094946\\_03082104020550](http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_03082104020550), at 23. For a more comprehensive discussion, see Guha-Khasnobis, Basudeb, *The WTO, Developing Countries and the Doha Development Agenda: Prospects and Challenges for Trade-Led Growth*, New York: Palgrave MacMillan/United Nations University (2004).

<sup>76</sup> It is unclear, however, whether decisions in favour of LDCs will be applicable to all 50 LDCs as defined by the UNPD or only to the 32 LDC members of the WTO. Annex F to the Draft Ministerial Declaration (18 December 2005) uses the phrase ‘all LDCs’ in relation to duty-free and quota-free market access and ‘LDC members’ when dealing with commitment and concessions to be made by LDCs. This suggests that favourable treatment for LDCs will be

Committee on Trade and Development, which was mandated to hold special sessions to expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision on S&D issues.<sup>77</sup> It is not unreasonable to suggest that WTO members will not be able, in the foreseeable future, to make S&D ‘more precise, effective and operational’ as demanded by the Doha Declaration.

In fact, the failure at the Doha Round is almost pre-determined by the inherently contradictory demands by developing countries and the conceptual inconsistencies in dealing with the development issues. Fundamentally, the S&D notion does not sit comfortably with the underlying philosophy of free trade embodied in the WTO. Indeed, despite the failures of the development agenda of the Doha Round so far, a long-term observer of the WTO, Alan Oxley has described the Hong Kong results as ‘a further dumbing down of the world body’s free-market mission’.<sup>78</sup> Conceptually, it is full of rich rhetoric, but also with incoherent definitional problems. And its provisions are remarkably vague and fundamentally inspirational in approach,<sup>79</sup> technically referred to as the ‘best endeavour’ provisions, and legally described as ‘non-mandatory and unenforceable’,<sup>80</sup> and representing no more than ‘some blunt policy instruments that are supposedly meant to provide some benefit for an ill-specified group of countries that are vastly different in development.’<sup>81</sup> In fact, in the negotiations in the WTO, developing countries has so far gained little in issues of real importance, such as market access, exchange, textiles, light manufactures and

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applicable to all LDCs whether they are members of the WTO. However, in summing up the achievements at Hong Kong Conference, the Chair of the Conference, Hong Kong’s Commerce, Industry and Technology Secretary John Tsang specifically states that ‘[w]e have a very solid duty-free, quota-free access for the 32 least-developed country members.’ It would be very unfortunate if this favourable treatment is only applicable to the WTO’s LDC members rather than to all 50 LDCs.

<sup>77</sup> Para 12 of the Decision on Implementation-Related Issues and Concerns (2001) instructed the Committee on Trade and Development to ‘identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision’ and to ‘examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, ... and to report to the General Council with clear recommendations for a decision...’. Both tasks were to be completed by July 2002, and the deadline was later extended a number of times. The last deadline was July 2005 (later, extended to December 2006), and the Committee, after many special sessions, again failed to complete its mandated tasks because ‘differences among Members on the best way to proceed could not be bridged.’ (Report to the General Council by the Chairman of the Special Session of the Committee on Trade and Development, 29 July 2005, TN/CTD/13).

<sup>78</sup> Alan Oxley, ‘Anyone for global free trade deals?’ (19 Dec, 2005) *The Australian*, available at <http://www.theaustralian.news.com.au/printpage/0,5942,17604342,00.html> (last accessed 19 Dec 2005).

<sup>79</sup> WTO defines such as being in the nature of guidelines. See *Background Document*, *supra* note 30, at 5.

<sup>80</sup> See IISD, *supra* note 72, at 1; Keck & Low, *supra* note 35, at 4.

<sup>81</sup> Beck & Low, *supra* note 35, at 24.

processed agricultural products.<sup>82</sup> Further, while the notion of ‘developing countries’<sup>83</sup> is frequently evoked in discussions and debate in international law, international trade, international relations and international politics; its meaning is assumed, and has never been precisely defined in the history of GATT/WTO, though there have been efforts to do so.<sup>84</sup> The practice of self-declaration and acceptance by WTO members, and its result in the actual designation of ‘developing countries’, is almost absurd. It is simply inconceivable, unless one is completely blind to reality, to treat countries/regions like China, India, Hong Kong, Singapore, South Korea in the same way as the Congo or Sierra Leone (or most other African countries).<sup>85</sup> Practically, its one-size-fits-all approach is simply unrealistic and inequitable. Indeed, at the Hong Kong Conference, the Indian Minister of Commerce pointed out that ‘our problems and challenges are so manifold and our socio-economic contexts so diverse, that no single, ‘harmonised’ development strategy can be adopted. Each country must choose the path that best suits its own genius’.<sup>86</sup> If this is so, one wonders how the WTO could work out a one-size-fits-all S&D for all developing countries. Further, while China, India and many other developing countries have strongly resisted the creation of any sub-classification of developing countries,<sup>87</sup> LCDs are now firmly recognised as a sub-classification.<sup>88</sup> Other sub-categories, such as ‘Small Economies’,

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<sup>82</sup> Trebilcock & Howse, *supra* note 34, at 302.

<sup>83</sup> Often referred to as the ‘Less-Developed Countries’ in the early period of the GATT. See also *Background Document*, *supra* note 30.

<sup>84</sup> Keck & Low, *supra* note 35, at 10.

<sup>85</sup> Not surprisingly, the US and EU declared, at the conclusion of the Uruguay Round, that they would not recognise such countries/regions as Hong Kong, Singapore and South Korea as ‘developing countries’. See Matsushita, Schoenbaum, & Mavroidis, *supra* note 57, at 375.

<sup>86</sup> Kamal Nath, ‘Statement at the Sixth Session of Ministerial Conference, 14 December 2005), WT/MIN(05)/ST/17.

<sup>87</sup> P.S. Suryanarayana, ‘WTO: India, China oppose bid to divide developing countries’, (13 July) *The Hindu* available at <http://www.thehindu.com/2005.07/13/stories/2005071318661200.htm> (accessed 9 Dec 2005)

<sup>88</sup> The UN has recognised the new category of membership, that is, the Least Developed Countries (LDCs) since 1971. The status of belonging to the LDCs is reviewed regularly by the UN under its criteria of having a low income (under US\$900 for inclusion and above US\$1,035 for ‘graduation’), a weakness in human resources, and economic vulnerability. Under the present criteria, 50 countries are included, and of these 32 are current members of the WTO. The 50 countries are Afghanistan, *Angola*, *Bangladesh*, *Benin*, Bhutan, *Burkina Faso*, *Burundi*, *Cambodia*, Cape Verde, *Central African Republic*, *Chad*, Comoro, *Democratic Republic of Congo*, *Djibouti*, Equatorial Guinea, Eritrea, Ethiopia, *Gambia*, *Guinea*, *Guinea Bissau*, *Haiti*, Kiribati, Lao People’s DR, *Lesotho*, Liberia, *Madagascar*, *Malawi*, *Maldives*, *Mali*, *Mauritania*, *Mozambique*, *Myanmar*, *Nepal*, *Niger*, *Rwanda*, Samoa, Sao Tome and Principe, *Senegal*, *Sierra Leone*, *Solomon Islands*, Somalia, Sudan, Timor-Leste, *Tanzania*, *Togo*, Tuvalu, *Uganda*, Vanuatu, Yemen, *Zambia* (Current members of the WTO are indicated in italics). This further differentiation of developing countries is now partially recognised by the WTO and some of its agreements. Thus, many WTO agreements now allow LDCs a more ‘lenient’ trading discipline and a longer period to adjust any inconsistent policies, or they are simply allowed a ‘free ride’. However, WTO agreements have not been consistent in this regard. For instance, under the Agreement on Subsidies and Countervailing Measures, developing countries are divided into LDCs as designated by the UN, countries whose GNP *per capita* income is below US\$1,000 (These include Bolivia, Cameroon, Congo, Côte d’Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, Honduras, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe. Honduras was added to the list during a Special Session of the WTO in December 2000. Honduras had been left out by mistake (See ICTSD,

'Recently-acceded Members', have also appeared in WTO programs and declarations, many of them creations by developing countries themselves.<sup>89</sup> In this reality, more often than not LDCs will have to compete with other 'developing countries' under the S&D provisions. In this context, there is little equity to talk about in relation to small and poor countries, the ones that desperately need assistance and facilitation.<sup>90</sup>

In short, it is simply irrational to emphasise liberalisation, competition and non-discrimination while trying to provide differentiated treatment in the rules without clear qualifications. It is equally irrational to provide a uniform treatment to a vastly diversified group of members. Too often, the plight of LDCs is disguised by the false notion of their being 'developing countries'.<sup>91</sup> And the limited recognition of such differences by the UN and WTO has so far failed to provide a consistent, coherent and focused approach to the development agenda. A noble cause it might be, but the existing S&D is a lost cause.<sup>92</sup>

#### 4. Reconciliation in the Wave of the 'Next Globalisation'?

##### 4.1. A New Era in Globalisation: Opportunities and Challenges

According to the World Bank, we are now riding on the wave of the 'Next Globalisation', in which the economic weight of developing countries (such as China, India and Brazil) in the international economy is growing, productivity is increasing through global production chains, particularly in services, and the diffusion of technology is accelerated through improved access to telecommunications and the Internet, as well as through innovative forms of business organisation and foreign investment.<sup>93</sup> In other words, opportunities and prosperity lie ahead for both developed and developing countries.<sup>94</sup>

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2000). Nepal was admitted to the WTO on 23 April 2004 and, being one of the poorest countries, should be qualified for inclusion automatically), and other developing countries (Art 27.2 and Annex VII). In other words, LDCs will graduate from this designation once their GNP *per capita* income reaches US\$1,000, a graduation criterion that excludes other factors set out by the UN.

<sup>89</sup> Informally, of course, there are such groups as ACP (African, Caribbean and Pacific Countries, also referred to as G-77 but consisting of 56 members), the African Group (41 countries), FANs (Friends of Antidumping negotiations, 11 members), FIPs (or the Five or the Quint), G-10 (9 members), G-20 (21 members), G-33 (42 members), G-90 (64 members), etc.

<sup>90</sup> It is also important to point out that although (especially in the final days), developing countries had been reduced to being 'spectators on the side-lines' (Awuku, *supra* note 68, at 92) during the Uruguay Round negotiations, some larger developing countries nevertheless contributed to the less than desirable results as they had a change of heart, believing they could achieve more individually from developed countries through concrete agreements. See Rom, *supra* note 65, at 8.

<sup>91</sup> Indeed, the word 'developing' has a positive connotation in terms of economic development that simply does not apply to many if not all LDCs.

<sup>92</sup> I have discussed elsewhere these irrational, inequitable and unrealistic principles and practice in detail. See J Chen, 'Developing Countries, "S&D" Treatment, and the Integrity of the WTO System', (no.1, 2007) *International Law Review* (Beijing) 296-340.

<sup>93</sup> World Bank, *Global Economic Prospects: Managing the Next Wave of Globalization*, Washington DC, 2007, at vii.

<sup>94</sup> According to the World Bank, developing countries' share in global output will increase from about one-fifth [2005] of the global economy to nearly one-third by 2030, and their share of global purchasing power will surpass half. See World Bank, *id.*, at xiv.

However, the World Bank recognises that serious challenges also lie ahead. For the purpose of our discussion, two are particularly serious. First, the benefits of globalisation are unlikely to be evenly distributed across regions and countries. While Asia, along with other developed countries, is likely in general to gain significant benefits, Africa is most likely to fall further behind.<sup>95</sup> Countries in this region, especially in Sub-Saharan Africa, will need to make a strong effort as well as have support from the international community to avoid being left behind.<sup>96</sup> The second challenge is now well-known and well-publicised, the so-called ‘international commons’: global climate change and the increasing derogation of the environment caused by the single-minded pursuit of ‘development’.<sup>97</sup>

Clearly, if the opportunities are available globally, the challenges are equally of a global nature. Global problems demand global solutions. As pointed out by the World Bank, the ‘international commons’ will necessarily require international institutions to play a larger role in a wide spectrum of issues, involving all ‘global public goods’.<sup>98</sup>

What we need then are not grand statements of principles, and least of all lip-service of preferential treatment for developing countries. We need to focus on what we can do in light of the challenges we face, and we need to bring the twin considerations back together at the global level so as to give globalisation a human face.<sup>99</sup>

#### 4.2. Towards a Targeted and Assisted Development Strategy

Much that is positive can result from globalisation and liberalisation and, in fact, the anti-globalisation movement expresses more a global concern than domestic protectionism. Trade liberalization, generally, is not only good for western developed and large developing countries; lifting LDCs and other poor countries out of poverty also depends on liberal and free trade policies in developed and large developing countries.

It is futile to think of trying to stop the process of globalisation – it is already part of our lives - yet, an ‘open, export-oriented’ approach does not always work for all countries. The trade-led development theory is based on the assertion or presumption that all countries have a comparative advantage in trade,<sup>100</sup> but the reality is that not all countries are equal and competitive, because of poverty and other forms of

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<sup>95</sup> World Bank, *id.*, at xvi.

<sup>96</sup> World Bank, *id.*, at xvii.

<sup>97</sup> World Bank, *id.*, at xxi.

<sup>98</sup> World Bank, *id.*, at xxi. The term ‘global public goods’ refers to protection of the environment, ensuring global security, maintaining an open and non-discriminatory global trade system and global financial stability etc.

<sup>99</sup> Globalisation with a human face was the theme of the UNDP’s 1999 *Human Development Report*. A PDF version is available at <http://hdr.undp.org/reports/global/1999/en/>.

<sup>100</sup> WTO, *Understanding the WTO: Developing Countries: Overview, 2003*, available from [http://www.wto.org/english.thewto\\_e/ftif\\_e/dev1\\_e.htm](http://www.wto.org/english.thewto_e/ftif_e/dev1_e.htm), at xvii. See C. Thomas, ‘Poverty Reduction, Trade, and Rights’, 18 (2003) *American University International Law Review* 1399, at 1405.

underdevelopment, especially in trading capacities. We must therefore recognise that, in this age of globalisation, the free market and an open economy are not necessarily the only model for development available or worth pursuing, as many economists would like us to believe.<sup>101</sup> In fact, many other economists have pointed out that, in terms of tariff levels and export/GDP ratio, India and China – two of the most often cited successful examples - are the least globalised countries, whereas the poorest Sub-Saharan African ones are the most globalised (with exports accounting for 30% of GDP); being even more open than western developed countries (19% for the OECD).<sup>102</sup> If anything, ‘it appears that in the early 21<sup>st</sup> century it is the least globalised countries that are the best performers.’<sup>103</sup> Thus, the most integrated economies are ironically becoming increasingly more marginal.<sup>104</sup> It has become quite clear that neither trade alone nor globalisation *per se* will lead all countries to development and prosperity. As a result, while some countries are developing not only at an astonishing speed but are also industrialising; others are heading in the reverse direction to economic regression.<sup>105</sup> Even under the comparative advantage theory, it has been pointed out that certain advantages (endowments) are more difficult to create than others (e.g. human capital) and some almost impossible to change (land ratio per capita), and thus the development path of East Asia simply will not fit the situation of Africa.<sup>106</sup> The economic development in South East Asia, China and India was not propelled by liberalisation of trade, but, on the contrary, it was the protected development that later led to trade.<sup>107</sup> In fact, in the past no countries have liberalised trade before development: not the US, Britain, Germany, Japan or Taiwan.<sup>108</sup> Common sense would also dictate that unless an economy has a sizeable market (which, comparatively, is always the case in developed countries) and it is developing at a reasonable rate, or unless the country is highly developed

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<sup>101</sup> P. Balakrishnan, ‘Globalisation, Growth and Justice’, (July 26, 2003) *Economic and Political Weekly* 3166, at 3166-7.

<sup>102</sup> Balakrishnan, *id.*, at 3169. Indeed, Sierra Leone, which ranked 174th out of 174 countries in the 1999 HDR, earns more from exports as a percentage of its GDP than does Hong Kong, and Guinea-Bissau (168th) is more export-oriented in this fashion than South Korea. See Thomas, *supra* note 100, at 1409; UNDP 1999 Report, *supra* note 99, at 1.

<sup>103</sup> Balakrishnan, *supra* note 101, at 3169.

<sup>104</sup> UNDP 1999 Report, *supra* note 99, at 2.

<sup>105</sup> Indeed, between 1990-2000, the economy of 54 countries was in regression, and the great majority of them were LDCs. Sub-Saharan Africa suffered negative growth of 0.9% during 1975-2001, or a negative 0.1% during 1990-2001. The other group of countries suffering negative growth was the Central & Eastern Europe and CIS, during economic adjustment from a planned to a market economy. See UNDP *Human Development Report 2003*, A PDF Text is available from the website of UNDP: <http://hdr.undp.org/reports/global/2003/en/>: 281.

<sup>106</sup> F. Bonaglia, & K. Fukasaku, *Export Diversification in Low-Income Countries: An International Challenge After Doha*, Technical Papers No 209, OECD Development Centre, DEV/DOC (2003) 07, June 2003, a PDF text is available at <http://www.oecd.org/dataoecd/13/28/8322001.pdf>, at 12.

<sup>107</sup> Balakrishnan, *supra* note 101, at 3169; Thomas, *supra* note 100, at 1405.

<sup>108</sup> L. Elliott, ‘Free trade is fine in a world of equals’, (September 11-17, 2003) *The Guardian Weekly* 11, at 11.

economically and technologically, there can be little need for trade, nor indeed anything competitive to be offered for trade.<sup>109</sup>

Equally important, it is not the level of economic development that determines trade competitiveness, it is trading capacities that do. Precisely because of this, the S&D regime has more often than not impacted negatively on LDCs and poorer countries because of competition among ‘developing countries’. In this sense, the larger and newly industrialised developing countries have enjoyed a ‘free ride’ under the regime, at the expense of LDCs and other poorer countries, because of the general approach to the fictional group of ‘developing countries’. Here the WTO made a major mistake: on the one hand, it recognises that ‘developing countries are very heterogeneous with respect to economic size, income levels, the degree of industrialisation, outward orientation and trade structure.’<sup>110</sup> On the other hand, it insists that S&D provisions are the ‘key to the search for balance, relevance and priority as Members seek to define the contribution of the Doha Agenda to development.’<sup>111</sup>

We therefore must search for new solutions, and in terms of academic and policy studies, there are many on offer.<sup>112</sup> In a recent and detailed analysis of S&D questions, Keck and Low summarise the various proposals into three strategies: (1) total flexibility for all countries whose non-compliance does not harm other countries; (2) a country-specific approach (by renegotiation of country grouping and an end to self-selection in the grouping practice); (3) an agreement-specific focus, and tailoring the provisions of S&D more to the needs of individual countries.<sup>113</sup> Hoekman and Özden add one further identified proposal: a simple rule-of-thumb approach, allowing opt-outs for specific disciplines for designated countries.<sup>114</sup> Common to all these strategies is the preservation of the S&D provisions for ‘developing countries’, but differing in approach or country grouping practice. Also common to these strategies is the focus on S&D treatment *per se*, and the efforts to ‘operationalise’ the provisions,<sup>115</sup> rather than considering them in the broader context of the development

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<sup>109</sup> For detailed analyses of trade statistics and economic development, see J. Chen, “S&D” Treatment for Developing Countries in the WTO Trade Regime: A False Solution on a Wrong Footing for LDCs’, in Chen & Walker, *supra* note 67, at 109-151.

<sup>110</sup> WTO (2003), *supra* note 100, at 25.

<sup>111</sup> WTO (2003), *supra* note 100, at xix.

<sup>112</sup> See B. Hoekman, & C. Özden, ‘Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey’, World Bank Policy Research Working Paper 3566 (April 2005). A PDF text is available from the World Bank website: [http://www-wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&eid=000012009\\_20050421124442](http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20050421124442).

<sup>113</sup> Keck & Low, *supra* note 35, at 25.

<sup>114</sup> Hoekman & Özden, *supra* note 112, at 36.

<sup>115</sup> This is also true of the two current major reports on reforming the WTO despite the fact that both reports outline many problems in the S&D provisions and practice and its politicisation: *The Future of the WTO: Addressing Institutional Challenge in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, The World Trade Organization, 2004 (The Sutherland Report); *The Multilateral Trade Regime: Which Way Forward?*, The Report of the First Warwick Commission, The University of Warwick, 2008 (The Warwick Report).

agenda.<sup>116</sup> Further, the distinction between rule-making and implementation has not been adequately considered by academics and policy advisers, nor the importance of maintaining the integrity and coherence of the WTO regime as a whole.

There are also calls for the revival of the NIEO.<sup>117</sup> The NIEO is, however, a result of 1950s ideology;<sup>118</sup> it needs updating if it is to be realistic in addressing global inequity and injustice. In the context of global trading, particularly in the WTO, the notion of 'developing countries' needs to be approached realistically so as to prioritise those objectives that are achievable in assisting the development of countries which need not only the liberalisation of international trade but also tangible and substantial assistance in trade promotion and development. The present WTO efforts of operationalising the S&D provisions, without addressing these problems, have largely failed and are unlikely to produce any tangible results.

A realistic solution lies with the upholding of free trade as a principle and, at the same time, allowing differentiated implementation by members of the WTO and providing assistance to clearly identified group of countries.

My contention is that it is now time to discard the politically charged notion of 'developing countries' and to focus on countries whose overall economic and trading capacity is inadequate for meaningful competition in global trade. Further, it is also time to abolish the admirable yet ineffective S&D provisions and transform them into enforceable commitment, not as rules of the WTO but as implementation issues, so as to maintain the coherence and integrity of the WTO regulatory regime. Thirdly, any realisation of a just and fair treatment for 'developing countries' relies not only on the rich developed countries but also on the so-called 'developing' countries themselves, since a new approach can only be developed by consensus among all WTO members. In other words, acceptance of a new notion for differentiating WTO memberships in place of 'developing countries' will have to mean that some of the existing self-proclaimed 'developing countries' will have to lose their status of belonging to a special membership class, and that a targeted and assisted development strategy for the newly identified countries will need to be worked out. In other words, efforts should instead aim at identifying countries that need assistance, not indiscriminate special treatment for an ill-defined group. I would call this a 'targeted and assisted development' strategy.

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<sup>116</sup> Hoekman, Michalopoulos & Winter, *supra* note 57, at 3. More recently there have also been calls to move beyond S&D treatment by way of establishing plurilateral agreements, or creating specific development provisions for developing countries, or adopting a new 'development framework' in the WTO to determine the applicability of WTO disciplines to different countries. See Bernard Hoekman, 'Operationalising the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment', in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, Clarendon: Oxford University Press (2005), at 223-244.

<sup>117</sup> An Chen & Chen Huiping, 'Chindia Cooperation and South-South Coalition in the New Round Fighting for NIEO - Also on the Nature and Prospect of the DDR', paper presented at the International Conference *China, India, and International Economic Law*, 23-24 June 2006, Faculty of Law, National University of Singapore.

<sup>118</sup> Kathleen MacMillan, 'Doing the Right Thing: The WTO and the Developing World', in Patrick Grady & Andrew Sharpe (ed.), *The State of Economics in Canada: Festschrift in Honour of David Slater*, Ottawa: Centre for the Study of Living Standards (2001), at 271.

This ‘targeted and assisted development’ strategy does not lie with the design of different policies for different developing countries; the world could not afford to have any more complications in the WTO rules, at least not for the LDCs and other poor small countries; nor is the approach to maintain the S&D treatment feasible in the complicated negotiations, as the repeated failure of the WTO’s Committee on Trade and Development and its special sessions in reviewing and making recommendations for new framework on S&D provisions has clearly indicated. The pressing problems with the world are not those associated with ‘developing’ countries, but with those in dire poverty. What we need is an approach that would remove the political wrangling, accommodate the diversity of WTO membership, and create effective yet realistic mechanisms for an equitable global trade regime. To do so, we need to move away from the narrow focus on the S&D treatment to a broader development agenda, while maintaining the integrity and coherence of the WTO regime as a whole. Specifically, we need a new approach that would encompass the following: (1) to maintain the integrity and coherence of the WTO rules, WTO should abolish the notion of ‘developing countries’ and remove the S&D treatment provisions; (2) to accommodate the diversity of WTO membership and to recognise the needs of the countries lacking trading capacity, the WTO should take a targeted and assisted development approach, focusing on improving the state and institutional capacity of the clearly identified countries; that is, to make the LCDs the only exception to the WTO rules; (3) to make the differentiated treatment effective and binding, all concessions and commitments for other countries should be negotiated during the rounds of WTO negotiation and form part of an implementation package (but not part of the general rules of the WTO) contained in the Schedules of Commitment of individual countries.<sup>119</sup> In this way, WTO negotiations can cast off political wrangling and empty rhetoric and focus on specific trade issues and trade needs for individual countries. Finally, WTO agreements need to be tidied up to ensure their integrity and the uniformity of rules on the basis of liberalisation and non-discrimination. Such agreements would then form the fundamental skeleton of the WTO structure, and these agreements must remain relatively fixed, rather than being subject to rounds of negotiation, hence preserving their stability, coherence and integrity.<sup>120</sup>

This proposal is not meant to throw the baby out with the bathwater; rather, it is intended to argue for a re-orientation of the WTO focus towards a coherent and realistic legal framework on ‘developing countries’, while not undermining the fundamental philosophy of creating a fairer and freer global trade environment. I do not believe that the current trade regime is either free or fair, but I do believe a fairer and freer global trade system would be beneficial to all nations, developed or developing, small or large.

This proposal may sound radical, but it could effectively be a simpler approach if there is the political will to do so. More importantly, it would transform the nature of dialogue from rule-making to implementation, hence significantly simplifying the global trading rules, while ensuring concessions and commitments are binding and

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<sup>119</sup> For elaboration on this strategy, see Chen, *supra* note 92.

<sup>120</sup> See *infra* note 126 below.

operational. It would also shift the present passive resistance by developing countries to a demand for active measures from developed countries.

In fact, several initiatives launched by the WTO have already implicitly taken this targeted and assisted approach.<sup>121</sup> After the Hong Kong Round, the LCDs have already been granted ‘duty-free and quota-free’ market access,<sup>122</sup> and there are exclusive ‘plans of action’, including an important ‘Integrated Framework’ jointly undertaken by the WTO, the World Bank, IMF, ITC, UNCTAD, and UNDP to provide ‘trade-related’ technical assistance for LDCs.<sup>123</sup> The Aid-for-Trade initiative, also launched at the Hong Kong Conference,<sup>124</sup> now clearly recognises the need for development assistance in trade with a focus on LCDs, and implicitly rejects an all-embracing notion of developing countries by calling for clear identification of countries in need.<sup>125</sup> In this context and in practical terms, what the WTO needs is to make a clear and explicit statement in relation to LDCs as a separate membership group, and to remove all other references to ‘developing countries’, including Part IV of the GATT, and abandon the current efforts to operationalise the S&D provisions altogether. Doing this would significantly reduce one major phenomenon that is causing the disintegration and complication of the WTO rules.<sup>126</sup> A bold step it may be, but a small effort if the world has the political and moral courage.

#### 4.3. Bringing Back the Twin Considerations: Human Rights and the WTO

If globalisation with a human face demands an equitable distribution of benefits arising out of it, and if the approach to focus on and assist LCDs makes the global trade regime a bit fairer, we are yet to face another even greater challenge – how to

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<sup>121</sup> For instance, in addition to WTO’s recent and increasing efforts to differentiate ‘developing countries’ through discriminating efforts in favour of LCDs, OECD countries have taken similar measures. Significant among these are the EU’s Everything but Arms (EBA) initiative and the US’s African Growth and Opportunity Act (AGOA). See Joseph E Stiglitz & Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development*, Clarendon: Oxford University Press (2005), at 60-61.

<sup>122</sup> See *supra* note 76.

<sup>123</sup> WTO (2003), *supra* note 100.

<sup>124</sup> See WTO, Recommendations of the Task Force on Aid for Trade, WT/AFT/1, 27 July 2006.

<sup>125</sup> For an overview of trade-related assistance provided by multilateral agencies, see Stiglitz & Charlton, *supra* note 121, at 204-208. The details and operation of the Aid-for-Trade are yet to be worked out, but it has been clear that for Aid-for-Trade to have any meaningful impact, it has to be relevant, targeted and adequate. See ‘Statements by Supachai Panitchpakdi, Secretary-General of UNCTAD’, delivered at Stanford University Conference on Trade Liberalisation and Its Consequences, 26 April 2006, available at <http://www.unctad.org> (last accessed 2 Jan 2008).

<sup>126</sup> Together with regional and bilateral trade agreements, the S&D provisions now pose a fundamental threat to the coherence and integrity of the WTO regime of trade rules and have made the Most Favoured Nation treatment an exception rather than a rule. See Sutherland Report, *supra* note 115, at 19-27. If the current Doha round suggestions on S&D provisions are to be incorporated into the WTO agreements, WTO rules will not only be fragmented but also become extremely complicated, both of which will then undermine the effectiveness of the whole trading regime. An extremely complicated regime will not benefit the less developed countries, and certainly not the LCDs, and a fragmented regime will not only destroy the coherence and integrity of the WTO; it will also fundamentally undermine the current consensus that, ultimately, liberal trade and global integration will benefit all countries.

deal with the now often cited ‘international commons’ – social issues or human rights issues in global trade.

Broadly speaking, and in relation to global trade, there are currently two kinds of approaches towards these issues – to mainstream the RtD or human rights in the WTO.

The most comprehensive study on mainstreaming RtD into global trade is a UN report prepared by Robert Howse of the University of Michigan.<sup>127</sup> The Report starts with a brief review of the RtD, briefly discusses the debate on the foundational basis of this right, its legitimacy, justiciability and coherence. Interestingly, by relying on the 1993 Vienna Declaration of Human Rights which recognises the RtD ‘as a universal and inalienable right and integral part of the fundamental human rights’, the author asserts that a consensus was reached in 1993 among the international communities.<sup>128</sup> This is, as discussed above, not the case. In any case, the author concedes that ‘the realization of the right to development, on its own terms, requires a wide range of domestic and international public policies and actions, which are highly unlikely to be achieved through judicial (or any other kind of centralized) enforcement’.<sup>129</sup> Further, the author argues that ‘the right to development requires that the goals and outcomes of development-related laws and policies be stipulated and assessed in terms of the enhancement of human capacities and the meeting of human needs, as reflected in the range of civil and political, and economic, social and cultural rights.’<sup>130</sup> In other words, and as in all other UN documents on the RtD, the RtD seems to be no more than the synergy of all existing human rights. One wonders why we need yet another label for human rights.

While the Report warned about the continuing influence of the old but still prominent ‘Marxist and neo-liberal’ thinking about development, that ‘development entails the sacrifice of human rights, a period of ruthless Stalinist modernisation in the Marxist narrative (collectivization, forced labour, population displacement), or a period of humanly devastating industrial capitalism in the new-liberal one (exploitative child labour, subsistence wages, unsafe and environmentally disastrous workplaces)’ and calls for the rejection of such narratives, it conceded that such a manner of understanding remains influential in the official trade policy community.<sup>131</sup> Clearly, any mainstreaming of the RtD as envisaged by the author is premised on a rejection of these views. Here precisely is where the problems lie; at best, it is highly idealistic to believe that such developmentalism will be rejected any time soon. The consistent rejection by many developing countries of any link between labour standards,

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<sup>127</sup> Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, E/CN4/Sub.2/2004/17 (9 June 2004). Another reasonable comprehensive study is Felix Kirchmeier, ‘The Right to Development – where do we stand? State of the debate on the Right to Development’, an occasional Paper, Dialogue on Globalization, No. 23, July 2006, available from <http://library.fec.de/pdf-files/iez/global/50288.pdf> (last accessed 28 March 2008).

<sup>128</sup> Para 9. Kirchmeier makes the same assertion. See Kirchmeier, *id.*, at 4. However, both authors omit a series of major negative votes cast by major industrialised countries on UN resolutions on the RtD since 1993. For a review of these negative votes, see Marks, *supra* note 38.

<sup>129</sup> Para. 11, Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization.

<sup>130</sup> Para 15.

<sup>131</sup> Paras 13 & 14.

environmental protection and any move to democratising the WTO only confirms the continuing influence of the ‘old’ developmentalism.

In this sense, and as already discussed above, the RtD is essentially a lost cause, and the push to operationalise the RtD, if anything is to be realised, is more likely to emphasise the right to *development* than a *right* of humans. If this is the case, a new developmentalism could only worsen the situation in ‘international commons’ than addressing the problems. If we were to be serious about the ‘international commons’, we ought to carefully address the relationship between *development* and *right*. Further, if mainstreaming the RtD is to ensure the interconnected realisation of human rights, would not the mainstreaming of human rights in the WTO be a better option?

Although mainstreaming human rights within global trade rules is a rather recent proposition, it was, as discussed earlier, part of the twin considerations in establishing the UN and in post-War reconstruction efforts. Unfortunately the UN human rights bodies had ignored the GATT/WTO until very recently, and when they finally began to promote human rights in global trade they took a rather hostile attitude towards the WTO, describing it as ‘a veritable nightmare’ for developing countries and women,<sup>132</sup> and endorsing a feminist assertion that trade and financial liberalisation are among the primary causes of human rights abuses, without providing any evidence or reasoning for this assertion.<sup>133</sup> Such an approach clearly ignores the fact that liberal trade is necessary to create a material foundation for the fuller enjoyment of many human rights.<sup>134</sup> Further, the early UN human rights approach continued the RtD rhetoric, without any detailed studies of the very complicated WTO rules.<sup>135</sup> Not surprisingly, WTO diplomats and bodies have avoided having any official positions on the UN initiatives.<sup>136</sup>

More recent studies by the UN bodies on human rights and global trade are much more sophisticated and less ideologically charged.<sup>137</sup> These UN reports, though

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<sup>132</sup> See para. 15 of the Globalisation and its impact on the Full Enjoyment of the Human Rights, E/CN.4/Sub.2/2000/13 (15 June 2000, being a preliminary report submitted by J. Oloka-Onyango and Deepika Udagama to the Sub-Commission on the Promotion and Protection of Human Rights in according with the Sub-Commission Resolution 1999/8). Apparently this assertion was made without any prior consultation with WTO experts and in disregard of WTO public interest exceptions. See Ernst-Ulrich Petersmann, ‘The “Human Rights Approach” Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?’, in Petersmann, *supra* note 116, at 367.

<sup>133</sup> Para 11 of the Globalisation and its impact on the Full Enjoyment of the Human Rights, E/CN.4/Sub.2/2000/13.

<sup>134</sup> See Petersmann, *supra* note 132, at 365.

<sup>135</sup> See eg of the Globalisation and its impact on the Full Enjoyment of the Human Rights, E/CN.4/Sub.2/2000/13.

<sup>136</sup> Petersmann, *supra* note 132, at 359.

<sup>137</sup> See eg The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, E/CN.4/Sub.2/2001/12; Liberalisation of Trade in Services and Human Rights, E/CN.4/Sub.2/2002/9; Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9; Study on Policies for Development in a Globalizing World: What Can the Human Rights Approach Contribute?, E/CN.4/Sub.2/2004/18; Towards a Human Rights Approach to Development: Concepts and Implications, /CN.4/Sub.2/2004/19; Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-Discrimination in the Context of Globalisation, E/CN.4/2004/40; and Human Rights and World Trade Agreements: using general

recognising that human rights and liberal trade have rather different philosophical underpinnings, confirm, in principle, that they may not conflict with each other, and in fact may each serve complementary functions.<sup>138</sup> After all, this approach simply intends to promote synergies between human rights and WTO law, without creating new WTO obligations.<sup>139</sup> Technically, it demands, perhaps, only explicit recognition that human rights obligations already assumed by most WTO members are relevant legal contexts in the interpretation of WTO rules and principles.<sup>140</sup> This is not to say that mainstreaming human rights is simply a technical issue,<sup>141</sup> but to suggest that the start of an incremental incorporation of human rights considerations into global trade rules and practices is feasible in terms of international law.

While these UN studies are promising in establishing the relationship between human rights and global trade, they are yet to establish a methodology for applying human rights in the application and interpretation of specific WTO rules.<sup>142</sup> Similarly, WTO practice is yet to show any clear response to such an approach.<sup>143</sup> Nevertheless, these studies have laid down a solid foundation for further research and study, and most importantly, for the WTO to eventually establish some commonly accepted methodologies through its dispute resolution mechanisms.

## 5. Conclusion

The discourse on human rights has almost reached the stage where any dissenting views on human rights are likely to be viewed as right-wing thinking. Life is not black and white, nor are human rights issues. If the traditional civil liberties are generally accepted as well established human rights, some of the so-called 'third generation rights' remain at least controversial, if not contentious. Even in the better established area of civil liberties, we have more recently seen their erosion everywhere in this age of national and global anti-terrorism.<sup>144</sup> In many developing countries, the RtD has

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exception clauses to protection human rights, Office of the High Commissioner for Human Rights, New York and Geneva, 2005. For an analysis of some of these initiatives, see Petersmann, *supra* note 132, at 366-369. The General Assembly of the UN is however yet to change its approach on these issues. In its latest Resolution on Globalisation and Its Impact on the Full Enjoyment of All Human Rights (A/RES/62/155, adopted 18 December 2007), it continues to emphasise that human rights are first and foremost the responsibility of the State and that development should be at the centre of the international economic agenda.

<sup>138</sup> See Petersmann, *supra* note 132, at 357 & 365.

<sup>139</sup> *Id.*, at 357-8.

<sup>140</sup> *Id.*, at 359.

<sup>141</sup> For instance, there will be major difficulties in determining the priorities between different human rights while upholding the indivisibility of these rights as a human rights principle, in upholding accountability of nation states, the democratisation of international bodies etc. For more detailed analysis, see Towards a Human Rights Approach to Development: Concepts and Implications, E/CN.4/Sub.2/2004/19.

<sup>142</sup> Petersmann, *supra* note 132, at 372.

<sup>143</sup> See Petersmann, *supra* note 132, at 371-374. See also J. Murray, 'Labour Issues in Times of Globalisation: Is the Social Clause an Appropriate Legal Response?', and M. Harris, 'Beyond Doha: Clarifying the Role of the WTO in Determining Trade-Environment Disputes', both in Chen & Walker, *supra* note 67, at 283-306, & 307-332 respectively.

<sup>144</sup> On human rights and anti-terrorism, see Office of the UN High Commissioner for Human Rights, Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human

been treated as a given, but more often than not used as an excuse for human rights violations than as a means to promote, protect and respect *human* rights. If we are serious about human rights, we must be mindful that the promotion and protection of human rights require some material foundation, and global trade, if conducted fairly and equitably, will facilitate the establishment of such a foundation in countries that lack it. The point to be emphasised is that trade should be ‘fairer and more equitable’ and economic development *per se* makes no sense unless it improves human conditions, collectively and individually. At the same time we must also be realistic about what we can do and what we might aspire to do, and be mindful of the pitfalls of the newer generation of rights. It is in this context that global trade and human rights are interconnected, each impacts on the other and each should enhance the other.

Will human rights ever be mainstreamed within the WTO and will the targeted and assisted approach to global trade be adopted? The answer is probably ‘no’ and ‘yes’ at the same time. The answer will be negative because developing countries have made it clear that they see the inclusion of any ‘social issues’ (such as labour standards and environmental protection) as a disguised excuse to stop their development.<sup>145</sup> In any case, ‘social justice’ issues have rarely been discussed in any WTO forums.<sup>146</sup> In this sense, we will not see any major breakthrough in the change of WTO practice or within the UN bodies any time soon. However, faced with a clear but gloomy future of global warming and miseries occurring in the LCDs, the WTO will, in gradual increments, have to directly deal with the impact of global trade on the environment and other ‘international commons’. In this sense, it is only a matter of time before the WTO will fully embrace human rights and a targeted and assisted strategy.

If the RtD is to remain a slogan ‘used to make politicians, diplomats and bureaucrats feel good’,<sup>147</sup> human rights and fair trade will remain an evasive dream. If the RtD is to be seen as the synergy of human rights, which is to be gradually and incrementally incorporated into the global trading system, together with a targeted and assisted strategy in the development of global trade, we will then see a real marriage between fair trade and human rights – a marriage that will facilitate and enhance the promotion, respect and protection of human rights. A tall order, maybe.

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Rights while Countering Terrorism, available  
<http://www.ohchr.org/english/issues/terrorism/index.htm> (last accessed 16 Sept 2004).

<sup>145</sup> See MacMillan, *supra* note 118, at 281-282.

<sup>146</sup> See Petersmann, *supra* note 132, at 360.

<sup>147</sup> Marks, *supra* note 38, at 19.