PAPERS

WORLD TRADE ORGANIZATION: BALANCING CORPORATE, GOVERNMENTAL AND CITIZENS' INTERESTS

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1. World Trade Organization and the Axis of Evil

Critics of the World Trade Organization (WTO) and, to a certain extent, of the Breton Woods Institutions (IMF and World Bank), have dubbed these three financial/trade organizations as comprising the new 'axis of evil', in part borrowing on the recent political statement of the Bush administration in relation to rogue states and the fight against terrorism. The implications are in themselves frightening, and how far this is true can only be ascertained through an empirical/objective analysis of these institutions' work and the legal instruments giving them their mandate.

The main purpose of WTO is to help trade flow as freely as possible, avoiding undesirable side-effects. Based on Ricardo's theory of Comparative Advantage, WTO seeks the dismantling of trade barriers and encourages member States to focus their resources on their most efficient industries and to exchange products of these industries with like-minded countries. In this way, trading partners would achieve net economic gains.

Corporations have a professed interest in this flow and in unrestricted access to foreign markets. The term market in this case

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is used to include the exchange of goods and services, labour and capital. Corporations and governments alike are interested in this global market as it gives them a bigger chunk than was traditionally the case. To achieve this, the removal of obstacles by protectionist governments is essential. Individuals, companies and governments must know what the international trade rules are, and ensure there will not be sudden policy changes. Essentially this means the rules have to be *transparent* and *predictable*.[1]

Transparency goes directly to the heart of the Dispute Settlement of Understanding (DSU), which is discussed in Part 3 of this paper. Predictability, on the other hand, is crucial for foreign investors, companies and governments – all need to be confident that trade barriers are not raised arbitrarily, and they should remain within the bound rate according to each member's schedule of concessions.

The questions to be raised are therefore the following:

- First, how much are we, as citizens or as entrepreneurs, aware of what the trade rules are, and more importantly, are these rules reflecting human rights, labour and environmental standards?
- Secondly, should these rules be reflective of human rights standards, or should we maintain a strict separation of powers, whereby WTO deals strictly with trade disputes in isolation of all the rest?
- Third, how transparent is the multilateral system, specifically the dispute settlement system?

The freedom of future generations to sustain their lives requires that we, as present generations, learn how to govern effectively and that we learn how better to govern together. Due to a widening gap between rich and poor countries, it is becoming more and more difficult for Least Developed Countries, and to a certain extent, also developing countries, to implement domestic policies that ensure sustainable growth for present and future generations. Also, innovative ways to bridge the growing imbalance in global rulemaking need to be devised.

A greater role for these countries is imperative at the international level, including at WTO level. This, of itself, ensures

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[1] See generally official website of WTO at http://www.wto.org

transparency and predictability as developing countries become familiarized with the workings and advantages of an extensive body of trade rules.

Trade rules have become more robust and enforceable in the last decade or two - intellectual property rights are an excellent example in this regard. The very mandate of WTO favours global market expansion. In essence, there is nothing wrong with this. Whether we like it or not, the stronger economies are the ones embracing free market policies, with the exception of a few emerging markets in Asia. From a conceptual point of view, trade law is clearly utilitarian – it is concerned with economic efficiency and welfare.[2]

The goal of trade law is to improve the economic well-being of human beings through the facilitation of 'efficient exchanges'. In this light, free trade is a great thing because it maximizes individual welfare from efficiency gains and comparative advantage. Welfare is maximized by increased consumer choices, competition in the market, specialization, lower prices and increased employment. Human Rights law, on the other hand, is essentially focused on the moral worth of each individual, regardless of their utility. It is based on the protection of human dignity, linked to the non-utilitarian liberalism of Kant and others.

This notwithstanding, there is not necessarily a conflict between trade law and human rights law. A look at any trade law treaty reveals there are no blatant conflicting rules, *au contraire*. Often, as part of negotiations of a trade treaty there is emphasis on drafting of transparency clauses, protection of intellectual property and more importantly, the inclusion of Most-Favoured Nation (MFN) and National Treatment provisions. These last two principles ensure equal treatment for all countries members of WTO and ensure for foreign investors same treatment as that accorded to nationals.[3] Dismantling of trade barriers makes for more open markets, and, consequently, stronger economies.

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[2] FRANK GARCIA, Symposium 'The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle', 25 Brooklyn Journal of International Law 51, (1999)

[3] See generally RAJ BHALA INTERNATIONAL TRADE LAW: THEORY AND PRACTICE (2nd Ed. Lexis) Chapters 5 and 8.

A strong international economic law can, of itself, contribute directly to the promotion of economic rights.

- A stronger economy could ensure better health, higher education, employment benefits and economic opportunities.
- Secondly, open markets lead to increased trade relations between democratic governments and oppressive regimes, and this should ultimately improve citizens' rights, by the imposition of food safety standards, consumer and product compatibility with international processes, to mention a few.
- Thirdly, global markets have been facilitated because of a stronger commitment to the rule of law in international economic relations.

More aspects of international economy are today regulated by multilateral treaties or regional agreements, leaving less opportunity for states to maneuver or to take unilateral action. There is also the old adage that trading partners tend not to go to war with each other. The result is a proliferation of complex trade rules leading to numerous disputes whose nature has become increasingly interlinked with other areas of law, especially with human rights concerns, labour standards, environmental and health protection.

How far should trade treaties go in recognizing these standards and protecting them? Apparently, the negotiators of the North American Free Trade Agreement (NAFTA) considered this linking extremely important. They went so far as to include two Side Agreements to NAFTA – one on Labour and one on Environment. In this instance there was no hesitancy as to the overlap and relevance of labour and environmental standards with trade rules. The significance of the NAFTA is discussed further in Part 2.

This is not to say that there were no efforts made at WTO level to incorporate a social clause in the trade agreements. At the 1996 Ministerial Conference in Singapore, WTO members recognized the role of trade in promoting core labour standards. Although there was disagreement over having a Working Committee on Trade and Labour, yet, there was recognition of the need to collaborate with ILO on labour standards. The main obstacle to pushing this agenda is the position adopted by developing countries. They consider this to be a protectionist measure of the wealthy nations which want to erode the competitiveness of developing countries in lower labour costs.

Another drawback of human rights law, as compared to trade law, is that rules intended to promote equally valid social objectives, such as poverty reduction, labour standards, human rights or environmental quality, lag behind and in some instances have actually been weakened. To be more precise, these rules are not as enforceable as trade rules. There are also problems of domestic implementation and a general disfavour by governments to these principles. The same governments negotiating more sophisticated rules of international trade and investment, are simultaneously violating universal human rights standards, or allowing TNCs (transnational corporations) to contribute to this general dissipation of social standards – either actively or passively.[4]

The story of GAP (a U.S. clothing business) in El Salvador shows how in certain instances, even if TNCs are willing to improve working conditions in factories in third world countries, there is only so much they can change if they are not backed by government reforms. Governments often refrain from raising the minimum wage or enforcing labour laws out of fear that the investor will move away to a more competitive labour-intensive country.[5]

The truth is that a number of TNCs are introducing improvements in conditions of work, possibly also due to enormous pressures by protestors, and imposing voluntary codes of conduct in countries where human rights and labour standards are systematically violated. Through their efforts they are addressing issues as forced labour, child labour and gender discrimination. TNCs are however taken to task for these very efforts – allegations are made that they are utilizing the codes to mitigate liability and justify corporate presence in countries with excessive human rights abuse. Whichever way it goes, it seems that someone out there is going to be upset.

One of the strongest criticisms of WTO and leading trading powers concerns China's accession to WTO. Critics have claimed, and in some ways rightly so, that human rights standards have been set

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[4] See generally JOHN GERARD RUGGIE Symposium:'Trade, Sustainability And Global Governance': Keynote Address 27 Columbia Journal of Environmental Law 297 (2002)

[5] See KAUFMAN & GONZALEZ, 'Labour Standards Clash With Global Reality', New York Times April 24, 2001 available at http://www.globalpolicy.org/socecon/tncs/2001/kauf0424.htm

aside in the interest of the global trading system. Human rights activists sought to put pressure on the U.S. government to rescind China's Most Favoured Nation (MFN) trade status and pushed for a general trade boycott on account of China's international law violations. The U.S., instead, separated the trade status issue from the controversial human rights issue. This allowed the continuation of trading relations without adverse economic ramifications despite the excessive human rights violations.[6]

Was this 'de-linking' a case of double standards? Maybe so, but the question is whether WTO is meant to act as protector of human rights as well as arbitrator in trade disputes. Clearly this organization was not established with this mandate, and there are most certainly other organizations and institutions that are better endowed to deal with such issues.

One final point relates to the question of trade-offs and trade sanctions. By their very nature, human rights are 'alien' to the notion of trade-offs. A standard is a standard, and there are core human rights principles which are not to be derogated from or placed on balance with other competing interests. This is not the case in trade negotiations and agreements. International economic law excels in compromises in the pursuit of good results.[7] It is this very notion that has worked in China's accession to WTO. The EU, on the other hand, seems to be taking a rather different approach with regard to Turkey's application for full membership of the Union, making this country's accession conditional on reforms in their human rights practice. This highlights the distinctly different mandate of each of these institutions. While we consider both to be 'economy oriented', the EU is also having a politico/social mandate that additionally demands a harmonization of environmental, labour and human rights standards.

Insofar as trade sanctions are concerned, there is likely to be a conflict between international trade law and measures taken at a domestic level to protect human rights. This can be the case when a State imposes unilateral economic sanctions against another state

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[6] KIMBERLY GREGALIS GRANATINO 'Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability'23 Suffolk Transnational Law Review 191 (Winter 1999)

[7] FRANK GARCIA supra note 3

that is considered to be violating universal human rights laws. Such trade sanctions, while laudable for their nobility, can be challenged on the basis of constituting unlawful trade measures in terms of the GATT as we shall see shortly.

1.1 International Trade Instruments and Human Rights

Trade rules include the GATT of 1947 and 1994, TRIPS which regulates Intellectual Property, TRIMS regulating trade-related investment measures, the DSU (referred to earlier in Part 1), GATS which concerned with services, and several other specialized multilateral Conventions regulating so many sophisticated areas of law. One may wonder what brought on this consent by States to a multitude of international treaties, considering how jealous nations are of their sovereignty.

While previously I said that trade rules are more successful because they are more enforceable than international human rights conventions, yet, the truth is that under the Uruguay Agreement the sovereignty of countries was well protected. Decisions at WTO are reached by consensus. In this way, WTO will have no power to change US, EU or any other trade law for that matter. In case of conflict between WTO law and US law, for example, US law, under the 1994 Act 19 U.S.C. § 3512 (a) makes clear that US law will take precedence.[8]

The overriding question remains whether WTO is contributing in a structured manner to the principles of Corporate Social Responsibility – that is, to a healthy life, protection of the environment and good labour practices. If we look at environmental questions, for instance, we would see that back in 1994 at the Marrakech Meeting of Ministers, a Work Program on Trade and Environment was initiated. The mandate of the Committee on Trade and Environment (CTE) is unequivocal:

- to identify the relationship between trade measures and environmental measures in order to promote sustainable development; and
- to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading

[8] See RAJ BHALA supra note 4

> system are required, compatible with the open, equitable and non-discriminatory nature of the system. [9]

At the same time we have to remember that WTO competency for policy coordination remains limited to trade and those trade-related aspects of environmental policies which may result in significant trade effects for its Members. WTO is not an environmental agency. Nor should it get involved in reviewing national environmental priorities, setting environmental standards or developing global policies on the environment. This is the responsibility of national governments and of other intergovernmental organizations better suited to the task.

Mike Moore, former Director-General of WTO summed it up as follows:

> *'Every WTO Member Government supports open trade because it leads to higher living standards for working families which in turn leads to a cleaner environment. This report underscores that trade and environment need not be contradictory but can indeed be complementary'.*[10]

Of course, such a statement can be highly contested from several angles, but it does seem to point to generally accepted principles of CSR. Mr. Moore seems to be implying that free trade encourages foreign investment, and with it come new employment opportunities. The downside to this is it also often brings pollution, disruption to rural lifestyles and poor working conditions, especially for workers in Least Developed Countries (LDCs). Many Asians are still working in conditions akin to slavery: at work seven days a week with no rest, paid less than the minimum wage by TNCs in the textiles and other labour-intensive manufacturing businesses.

Following are some of the main findings in a report of the CTE:

- Most environmental problems result from polluting production processes, certain kinds of consumption, and the disposal of waste products – trade as such is rarely the root cause of

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[9] See official website of WTO at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/13envi_e.htm

[10] WTO News 1999 Press Releases available at http://www.wto.org/english/news_e/pres99_e/pr140_e.htm

environmental degradation, except for the pollution associated with transportation of goods;
- Environmental degradation occurs because producers and consumers are not always required to pay for the costs of their actions;
- Trade would unambiguously raise welfare if proper environmental policies were in place;
- Trade barriers generally make for poor environmental policy; and more importantly
- A good environmental profile is often more of an asset for a corporation than a liability in the international market-place, notwithstanding somewhat higher production costs.

2. Other International Efforts

The IMF and the World Bank are engaged in the enforcement of social standards through conditionality principles when deciding on aid, technical assistance or balance of payment issues. Clearly, certain labour standards attract the Bank's attention much more, as for example questions of child labour, prohibition of forced labour and equal opportunity. The International Financial Corporation (IFC), a member of the World Bank Group, has set certain standards related to child labour and the environment. TNCs that participate in IFC development projects are expected to observe these standards and practices. Because of their power-based structure, these international financial institutions do not need a new, formal international agreement to legitimize such actions. An enforcement mechanism is already in place, tied to the principal of conditionality. Even without outright coercion, recipient countries and participating TNCs are being encouraged to improve their labour standards.

Despite their neo-liberal economic bias, the IMF and the World Bank are directly involved in upgrading the social environment of developing countries. The new commitment by the World Bank to structural social reforms – including 'good government', poverty reduction, and an end to child labour – shows that the Bank has increased its attention to social issues and no longer has a single-minded focus on macroeconomic efficiency criteria. IMF and World Bank policies to promote workers' rights through their program-based lending are viable ways to radically upgrade labour standards at the global level.

The purpose behind harmonization of labour standards, according to Baghwati, is not to provide a uniform economic environment, but to:

> *'prevent a jurisdiction from deliberately taking advantage of externalities by lowering its standards to impose costs on others while reaping benefits'.*[11]

The demand for harmonization is based on the assumptions of fair trade, fair competition, and a need to conform to certain formal arrangements in order to achieve increased benefits.[12] In this manner, there must be a convergence of labour standards. Different regulations lead to externalities, materialized in absolute or relative losses of welfare and sub-optimal public policy choices.

A similar situation does occur frequently in international trade when goods are 'dumped' on foreign markets at a price lower than the world market price, – i.e. dumping of goods that are produced at below cost to gain market share.[13] The harmonization argument is perhaps strongest in the context of protecting international public goods. Even though Baghwati's examples refer to environment-related public goods, this argument can also be used with respect to labour standards. Labour standards are public goods that are provided (in most cases) by a domestic regulatory actor - i.e., national governments.

While market globalization may represent a unique opportunity for human rights law, the same globalization may pose a threat to the continued effectiveness of human rights law. The regulatory framework which international economic law provides for globalization operates according to a view of human nature, human values and moral decision-making fundamentally at odds with the view of human nature, human values and moral decision-making which underlies international human rights law.

The human rights movement could find in market globalization the ultimate victory of a regulatory system that, by nature and operation, cannot properly take into account what the human rights movement holds most dear: that underlying positive human rights laws are moral entitlements that ground moral, political, and legal

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[11] See generally BAGHWATI & HUDEC, FREE TRADE AND.HARMONIZATION (1996)

[12] Id.

[13] For a detailed analysis of the practice of dumping under international trade law, see BHALA supra note 4 at Ch. 13

claims of special force, claims which must be morally and legally prior to society and the state.

This principle, from the point of view of a human rights promoter, is at risk of being 'traded away' when human rights laws come into conflict with trade law and trade values in the new tribunals of globalization, in particular the World Trade Organization's (WTO) dispute settlement mechanism. The Dispute Settlement system of WTO is discussed in Part 3 of this paper. The question of trade-off and linkages of trade disputes with human rights or other concerns highlights the need to establish some kind of mechanism whereby international economic law would give due regard to human rights concerns. Alternatively, it may be best to leave WTO to deal exclusively with trade disputes and leave other international organizations to focus on human rights disputes.

3. Trade Sanctions and Article XX Exceptions

As the law stands today, the only way a state could potentially impose 'legitimate' trade sanctions on the basis of human rights violations is through the application of Article XX exceptions. Essentially, any national measure that singles out a particular country's trade, provided both are parties to WTO, is a violation of the MFN principle under Articles I and III of GATT. The only way a WTO member can impose a trade-restrictive measure without incurring the penalty of a trade dispute before the Dispute Settlement Mechanism is to justify that measure as an exception allowed by GATT in Article XX. While there are no clearly applicable exceptions for a human rights oriented measure, a state may attempt to invoke Article XX (a) which permits 'measures necessary to protect human morals'; or Article XX (b) relating to 'measures necessary to protect human, animal or plant life or health', or Article XX (e) which permits measures 'relating to the products of prison labour'.

Each of these exceptions is either too narrowly tailored (for example, the prison labour exception permits derogation from MFN only for goods produced by prison labour) or else, raise questions as to their applicability when used to influence the human rights policies of another sovereign state.[14]

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[14] FRANK GARCIA supra note 3

4. Invoking article XX Exceptions: The Tuna/Dolphin

This is the dispute that best highlights the high tensions between free trade principles and the environmental agenda. The United States wanted to protect dolphins from certain tuna fishing practices and it did so by passing the Marine Mammal Protection Act (MMPA) in 1972. This Act banned the importation of fish which have been caught with commercial fishing technology resulting in the accidental killing of ocean mammals, essentially dolphins. A certain species of tuna swims under dolphins making it difficult for fishing trawlers to avoid catching the dolphins as well as the tuna.

A GATT panel ruled in favour of Mexico's claim that the American Act was essentially an embargo that caused it to lose hundred of millions of dollars in lost export revenues. The GATT ruled that the U.S. conservation measures were inconsistent with Article XI: 1 which prohibits quantitative restrictions on imports. The law reads as follows:

> *'No prohibitions or restrictions...whether made effective through quotas, imports or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of another contracting party.'*

The panel found the direct import prohibition on certain yellow-fin tuna products from Mexico and the provisions under the MMPA were inconsistent with Article XI: 1. It should be noted that the United States sought to justify its actions in terms of Article XX. The exceptions under Article XX are particularly relevant from a human rights perspective and are discussed shortly. The panel report was never adopted and Mexico did not press the point further, as it was then negotiating NAFTA and did not want to jeopardize its relations with the U.S. Human rights proponents would consider this another 'trade-off' and unacceptable in human rights terms.

4.1 Shrimp / Turtle

For the first time in GATT history, unilateral trade restrictions aimed at the conservation of extraterritorial natural resources were upheld as justified under Article XX.

The issue in this dispute was the domestic U.S. law (§609) and its ban on imports of shrimp and shrimp products from countries that

were not 'certified'. The countries affected were Malaysia, Pakistan and Thailand. Similar to Tuna/Dolphin, the U.S wanted to protect sea turtles from extinction by equipping vessels with 'turtle excluder devices', allowing turtles to escape from the net. Under the U.S. law imports of shrimp were prohibited unless the countries were certified as having a comparable marine turtle conservation program. While initially the U.S. was found to be in violation of its obligations under GATT Article XI relating to quantitative restrictions, this decision was reversed when the U.S. revised the guidelines for implementation of §609.

Shrimp/turtle aroused the anger of environmentalists in that it upheld the U.S. act as being in conformity with GATT, and subsequently found by the Appellate Body to be 'provisionally justified'. It also raised questions of law in that the Appellate Body went a long way in giving interpretations to the obtaining legal instruments that WTO members claimed were not negotiated and were therefore beyond the scope of the law.[15]

One other exception to MFN treatment is found in Article XXI of GATT. A country may attempt to invoke the national security exception found under this provision. In this case a state is permitted to enact unilateral trade-restrictive measures when it judges such measures to be 'necessary for the protection of its essential security interests' during a time of emergency in international relations. This provision is least likely to work as it would entail a wide interpretation of national security by WTO, which is something member states have shown a reluctance to do.[16]

5. Improving the Multilateral System: Negotiating Reforms in WTO's Dispute Settlement Understanding (DSU)

The DSU has come under much attack since it started hearing trade disputes among 144 member States of WTO. The drafters of the system are already cognizant of the need for improvements. Reforms currently debated in the system also indirectly impact on human rights norms insofar as they concern not only technical issues

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[15] For a detailed analysis of Shrimp/Turtle see BERNARD H. OXMAN ET AL, 96 American Journal of International Law 685, July 2002

[16] Id.

as sequencing, retaliation and compensation, but also have to do with transparency issues, participation in the system by civil society and openness of the dispute system to the public.

Views of the success or failure of the DSU are as divergent as sugar is to spice. The Chairperson of the U.S. Senate Finance Committee, Senator Max Baucus, has expressed the frustration experienced by American trade policy makers of recent. In his view, WTO Appellate Body and Panels have far exceeded the scope of review and in this way, imposing obligations on the U.S. which Congress had not approved back in 1994 during the Uruguay Round Negotiations.[17] The EU takes a more measured approach. In its Submission to WTO, it considered that while the DSU has worked in a generally satisfactory manner, there is a need of reform in certain areas.[18]

The Doha Round Ministerial Conference Declaration acknowledges the need to review the operational procedures in inter-State trade disputes. Fortunately, negotiating changes to DSU is being considered as a separate item from the rest of Doha negotiations. This ensures that DSU reforms do not get bogged down with other problems that are likely to be encountered in the field of development and agriculture issues, amongst others.

Two main areas of interest to businesses and private citizens are reforms that relate to questions of *transparency* and *participation*.

5.1 Transparency

Should oral arguments before WTO adjudicatory authorities be open to the public? Currently, they are closed to all but government officials involved in the hearing, and the decision-makers themselves. The antipodal position would be to open them to any person, and even broadcast them on television. An intermediate possibility would be to open them only if both complainant and respondent agree. Clearly, something needs to be done. As things stand now,

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[17] ROBERT MACLEAN 'The Urgent Need to Reform the WTO's Dispute Settlement Process' International Trade Law and Regulation, Issue 5 (2002 Sweet & Maxwell)

[18] See Communication from the EC and Member States at http://www.wto.org TN/DSW/1. For a more in-depth analysis of *DSU* reform see RAJ BHALA & LUCIENNE ATTARD 'Austin's Ghost and DSU Reform' to appear in The International Lawyer (2003).

proceedings before WTO have earned the name of being secret courts where shady dealings take place and where societal considerations take a backseat, if at all.

The United States favours public and open hearings, seeing them as a move towards greater transparency and confidence in the whole WTO system.[19] The U.S. position considers decisions of the Panels and Appellate Body to have a significant impact on civil society. The system at present is not inclusive of private citizens or businesses, whether as observers or direct participants in trade disputes.

The United States maintains there is no reason why WTO should operate differently from other long-established international fora in which proceedings are public, such as the International Court of Justice, the *Ad Hoc* Tribunals for Former Yugoslavia and Rwanda and the European Court of Human Rights, amongst others. The United States suggests public hearings may actually facilitate implementation of the rulings of the DSB, by increasing confidence in the fairness and adequacy of the process. I would like to mention that while the U.S. position is encouraging and positive, the reasons behind it may be motivated by other calculations – as for example, the impact a greater role for American TNCs could have on members of Panels and the Appellate Body, and consequently, on domestic politics.

5.2 Participation

This also links to the question of *amicus briefs* submitted before Courts by a 'friend of the Court' (*amicus curiae*), and the acceptance of *amicus* briefs by third parties, including WTO members who are not parties to a dispute, is highly contested at present. While the system does not really regulate the acceptance of such indirect participation, the Appellate Body, has on some occasions, taken the liberty to accept such interventions as happened in the *Asbestos* Case.

Participation in the legal debates surely contributes to legitimacy of the process. Those affected by the ensuing decisions, directly or indirectly, are aware that the outcome is an informed one. The one problem with the acceptance of *amicus curiae* briefs is that they can delay the whole process, one which is already over-burdened by the complexity of trade rules and domestic procedures.

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[19] See BHALA & ATTARD supra note 18 at 20.

Other issues currently debated are the permanence of panelists, compensation vs. retaliation, sequencing and enforcement of panel and Appellate Body decisions. The underlying point of these reforms is the need for transparency, and this can be done by giving a greater role to the main actors. In a global world, the main actors are no longer only governments; businesses and private citizens are likewise concerned with trade issues.

6. NAFTA

A stronger role for the private investor is found under the NAFTA. It can be easily considered as the most innovative step forward that has changed the nature of international trade law and trade disputes. NAFTA has gone further than WTO in two important ways. The first relates to the dispute settlement mechanism and the right of the private investor to bring a claim against one of the NAFTA parties before an arbitration panel. Much has been written about the infringement on states' sovereignty of such private right of action under Chapter 11 of the NAFTA.

The second point refers to the Side Agreements to the NAFTA, one on Labour and on Environment. It is legitimate to state that the dispute resolution process under these two agreements is the first serious attempt in international trade law to reconcile trade values with social and environmental values.

Article 904 states as follows:

> *'Each Party, may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, relating to safety, the protection of human, animal or plant life or health, the environment and consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party.'*

One should remember, however, that NAFTA Labour Side Agreement does not establish cross-border harmonization of labour law. Rather, through the dispute resolution procedures found in the Labour Side Agreement, there is hope for better enforcement of the existing laws of each NAFTA party. Under Articles 27 to 29 a complaining Party has a right to bring an enforcement proceeding against any other Party that exhibits a persistent pattern of failure

to enforce its occupational safety and health, child labour or minimum wage technical labour standards.[20]

7. Conclusions

Businesses especially play an important role in redefining and challenging governments' responsibilities in the global marketplace to ensure societal needs. International law has fallen behind global reality because of recent advances in technology, communications, and the expansion of democracy. In this sense, businesses need to be more deeply involved in managing the accountability of human rights standards because the monitoring of rights, establishment of standards, and influence on governments protects individual's rights. TNCs' renewed commitment to human rights will undoubtedly promote fundamental change in international law because of the global community's escalating demands, the interdependence of people, and the enhanced technologies.

The UN Global Compact, launched by Secretary-General Kofi Annan, enlists the global business community, together with civil society and international organizations, to promote human rights, environmental and labour standards. At its initiation, Mr. Annan expressed his concern about a growing practice of linking trade agreements with environmental standards. His view was that this practice works against developing and Least Developed Countries (LDCs) who cannot meet these standards and as a result, will never be on an equal footing at negotiations. I beg to differ on this point. It is true that fifty years ago, when today's wealthy nations were in their development stage, protectionist measures were utilized by these nations to achieve the wealth they have today. Yet, the global scenario today is much different.

The world is today painfully aware of the devastating consequences of pollution, soil erosion and deforestation. Lessons learnt need to be worked into trade agreements, with due attention to the needs of developing and LDCs. Special and differentiated (S&D) treatment can be part of the solution. Longer phase-in periods can be negotiated. But the commitment has to be there, spelled out in clear terms. Businesses have a special role to play.

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[20] See RAJ BHALA supra note 4 at Ch.22

A global marketplace, extended national borders, as well as trade, economic, and environmental issues, all give TNCs a special role. The globalization of business emphasizes the focus on international human rights for one specific reason. The investor examines a country's standards, including human rights and rule of law, when analyzing business opportunities.

The governance battle must involve all relevant actors and all forms of social engagement – businesses, along with civil society, are also relevant actors in the WTO process. Doha has opened the road for serious negotiations on a number of issues including health, agriculture and development. Businesses have a role to play in all these areas. Corporate interests and economic gains need to go hand in hand with the protection of economic, social and cultural rights. Issues that were long considered to be 'outside the domain' of international trade law can no longer be swept aside, and WTO with its 134 Member States, has come to acknowledge this.