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Human Rights, Terrorism, and Trade – Remarks by Lori Fisler Damrosch

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at the WTO constitutive level? Are human rights treaty norms precise enough to be applied by the WTO Appellate Body? If the treaty norms are themselves in conflict, can and should the Appellate Body sort out the conflict? Is the balancing perhaps better done by the direct action of WTO members in the WTO TRIPS Council and other decision-making bodies on the basis of specific policy analysis? What, in the final analysis, does a reference to human rights add to the picture?

These questions bear further examination. The relationship between human rights norms, TRIPS, and public health is an excellent candidate for a case study.

SYNTHESIS

This brief preliminary report on the Berne meeting is not intended to identify and analyze all the issues raised there. Final papers are being organized in a book that will include a synthesis by the co-editors (Thomas Cottier and I). At this stage, we are confident that substantial progress has been made in refining the work program of the project, which is the objective of this initial planning phase.

I now turn to our distinguished panel members: Professors Lori Damrosch (Columbia University), Frank Garcia (Boston College) and Joel Trachtman (Fletcher School of Law and Diplomacy). Professor Damrosch is on the Advisory Board of the research project, and Professor Garcia is a member of the project research team. Professors Garcia and Trachtman participated in the Berne meeting.

REMARKS OF LORI FISLER DAMROSCH*

By putting human rights first and terrorism in the middle, I hope to open up questions about linkages among these regimes and whether measures within one regime can advance objectives of the others.

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The first set of questions has to do with evolution in the direction of universal participation. The human rights regime has always had an aspiration toward universality, as suggested by the title of the Universal Declaration on Human Rights. The trade regime, by contrast, began in 1947 as an exclusive club of twenty-three members in the original General Agreement on Tariffs and Trade (GATT).[1] Only in the last decade has the trade regime evolved to encompass broad multilateral participation, approaching the universality of the most widely-ratified international treaties. Today, the World Trade Organization (WTO) has 144 members; and with the inclusion of the People's Republic of China (PRC) in December 2001 and Taiwan in January 2002, more than a billion people have been added to the sphere in which GATT rules apply. As China has not yet embraced important human rights treaties, the most potent techniques for advancing human rights within China may be found in the law-based disciplines of GATT rules and WTO institutions.

China's quest for acceptance as a full partner in international economic relations stood in uneasy tension with its human rights problems. When the United States normalized relations with the PRC in 1979, most-favored-nation (MFN) treatment could only be conferred within the framework of the Trade Act of 1974 and its Jackson-Vanik

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[1] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194.

Amendment, which were instruments of U.S. policy in the Cold War.[2] Title IV of the 1974 Trade Act set forth detailed specifications to govern the award of MFN status to nonmarket-economy (NME) countries; these were mainly economic conditions to ensure that NMEs (such as China) would play by the rules of the international trading system. Separately, because of the oppression of Soviet Jews and other "refuseniks" of the early 1970s, the Jackson-Vanik Amendment added the human rights criterion of free emigration.[3]

The emigration topic was never really relevant to China's situation—Deng Xiaopeng was supposed to have asked, "How many refugees would you like?"—but the annual review of the Jackson-Vanik waiver provided the opportunity for Congress to inquire probingly into China's human rights performance. Ironically, the coincidence of the renewal cycle with the anniversary of the Tiananmen Square massacre, both of which fell on June 4, made the tone of these annual rituals quite acrimonious. The Clinton administration first emphasized and then abandoned linkage between China's MFN status and human rights performance. The new framework for "permanent normal trading relations" with China under the legislation adopted by Congress last year marks the end of the Jackson-Vanik era for China.[4]

Meanwhile, not only China but scores of other countries have jumped on the GATT/WTO bandwagon. Only the NMEs were ever subject to the Jackson-Vanik criteria under U.S. law, so most relatively new GATT/WTO entrants were admitted through the typical processes of negotiated trade concessions rather than through a human rights screen.

Among the current 144 WTO members are quite a few with abysmal human rights performance. Some of the worst are Cuba, an original GATT signatory—it had a rather different political economy at the time of the 1947 draft Havana Charter; Congo, which signed the GATT under its previous name of Zaire in 1971, and was admitted to the WTO in early 1997; Kuwait, in the GATT since 1963; and Myanmar, in the original GATT since 1948, under its former name of Burma. The list could go on and on.

Most current members got into the WTO with little or no attention to their human rights performance as a condition of membership; most of them are under little apprehension that the WTO could be the forum in which deficits in their human rights performance would be addressed. As the WTO continues to move toward universality, it is not clear whether human rights conditions comparable to those in the background of China's admissions negotiations will be relevant to other potential entrants.

Who is still outside the GATT/WTO system? The most substantial missing pieces are the Russian Federation and most of the rest of the ex-Soviet Union (Armenia, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Ukraine, and Uzbekistan—all of which are WTO observers); the Federal Republic of Yugoslavia, Bosnia-Herzegovina, and Macedonia; and most of the oil-producing nations of the Middle East. Nonmembers with WTO observer status include Algeria, Saudi Arabia, and Yemen. Nonmembers without observer status include most of the seven "state sponsors of terrorism"—namely Iran, Iraq, Libya, North Korea, and Syria. (Of the other two state sponsors, Cuba has been in the GATT from the beginning; Sudan is an observer.)

The case of Saudi Arabia illustrates some of the issues related to linkage among the interconnecting regimes of human rights, terrorism, and trade. Though it has only observer status with the WTO, Saudi Arabia's economy and stability are critical for Western

[2] Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. ch. 12) (1994 & Supp. III 1997).

[3] *Id.* §402.

[4] Permanent Normal Trade Relations for China Act, Pub. L. No. 106–286, 114 Stat. 880 (2000) (to be codified at 19 U.S.C. §2431).

prosperity. What if Saudi Arabia's admission to GATT/WTO could be negotiated on economically satisfactory terms? Could WTO admission, without more, yield benefits from the human rights point of view? There is a case to be made that it could. Thomas Friedman recently noted in the *New York Times* a parallel between the situations of China and Saudi Arabia in that certain key domestic figures have perceived WTO participation as potentially helpful to internal reform. Friedman wrote:

> In particular, like [China's prime minister, Zhu Rongji], [Crown Prince] Abdullah is trying to push Saudi Arabia into the World Trade Organization to create external pressure for more rule of law and transparency—but this move is resisted by more corrupt elements of the elite who benefit from the status quo.[5]

Should human rights supporters endorse Abdullah's view, on the theory that WTO admission and participation would set up a kind of tutorial in rule-of-law values, with potential dividends not just for Saudi Arabia's internal economy and politics but for all of us who have a stake in its future? If so, WTO involvement could be seen as a rights-promoting course of action.

Is a WTO admission negotiation the right opportunity to push a potential entrant (Saudi Arabia or any other of some fifty states not yet members) not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights and opportunities of women and other disadvantaged groups, and so on? The arguments for doing so could proceed by analogy to the transformations that have been and are being required of candidates for admission into the European Union (EU). This incentive has worked well, given the tangible benefits of EU membership and the concrete benchmarks of integration into the European human rights system and other overlapping regional institutions.

It is not clear that similar incentives would operate at the point of entry into the WTO for any of the states still outside that system. The case of China had special features that are not necessarily transferable to other potential members like Saudi Arabia. China sought GATT/WTO membership for more than two decades, for a combination of economic, political and psychological reasons—not least of which was the fact that the Republic of China had been a founding member of GATT in 1947, before the Communist revolution, and PRC authorities craved the legitimacy of being accepted back into that club. Also, the Chinese authorities had chafed under the humiliation of the annual Jackson-Vanik waiver procedure, which did not apply to the overwhelming majority of countries enjoying MFN treatment and was applied to China only as an obsolete artifact of Cold War legislation. Most other WTO members have been admitted without arduous human rights conditionality.

Human Rights Sanctions in a Near-Universal Trade Regime

When GATT had only twenty-three (or even one hundred) parties, states were not very severely constrained if they chose to apply economic sanctions in aid of human rights objectives. U.S. practice includes a variety of examples of trade restrictions imposed for nontrade and nonprotectionist reasons but rather to exert pressure against a human rights violator. Hufbauer, Schott and Elliott's standard reference work lists about twenty episodes in which the United States applied economic sanctions principally for human rights reasons in the 1970s and 1980s.[6] (The list is non-exclusive; other sanctions had mixed motivations, including at least a partial human rights rationale, and some episodes are not addressed in the book.) Not all of these were trade sanctions, because the

[5] Thomas L. Friedman, *1 Country, 2 Futures*, N.Y. TIMES, Feb. 27, 2002, at A21.

[6] GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED (2d ed., 1990).

main human rights legislation of that period focused on military assistance, foreign aid, and the U.S. voice and vote in international financial institutions. Nonetheless, some episodes did entail one version or another of import or export restrictions, and in several cases a wide-ranging boycott was imposed. In general, these measures avoided scrutiny under GATT rules either because the target country was not a GATT member or because it did not choose to invoke GATT procedures to challenge the legality of the measures. (The exception is Nicaragua, which brought two GATT complaints, the first in 1984 complaining of the reduction in its sugar import quota and the second in 1985 complaining of the complete export and import embargo imposed by the Reagan administration.)

Connections Among Human Rights, Terrorism, and Trade

I conclude on the relationships among human rights, terrorism and trade with reference to two main themes: universality, and the movement from state-centered conceptions to the more complex reality that states are not the only centers of power—nor even necessarily the most important actors—and that borders between states are porous, artificial, and perhaps even irrelevant.

As we have seen, the human rights regime aspires to universality, and the trade regime is on the way toward universality by virtue of the expansion in WTO membership. The antiterror regime is likewise on a trajectory toward universality, by virtue of widespread participation in multilateral treaties such as the Tokyo,[7] Hague,[8] and Montreal[9] Conventions and more recently by UN Security Council Resolution 1373,[10] which mandates universal participation in the struggle to eradicate terrorism, including by cutting off material resources of terrorist groups.

We can observe the transition away from state-centered conceptions of international law with respect to all three topics. The traditional view of human rights has been that rights are claims of individuals against the state, not against nonstate actors. Yet much of the energy of the human rights movement in recent years has been addressed to nonstate actors. Secretary-General Kofi Annan in his Global Compact has called on business enterprises to take a pledge to advance human rights in their own operations.[11] The world trade system has assumed that states are in control of their own borders; trade liberalization is an ongoing process to break down barriers, not borders. The WTO's intergovernmental paradigm is one of the roots of the frustrations of some anti-WTO activists. Efforts to cure the perception or reality of a "democratic deficit" in the WTO could be beneficial and consistent with human rights objectives. Finally, the Al Qaeda brand of terrorism fundamentally unsettles paradigms with respect to both human rights and trade. One consequence of September 11th is some curtailment of civil liberties as well as of the flow of persons and goods across national boundaries.

The human rights movement demands that we keep the spotlight on the human rights practices of our allies of convenience in the war on terrorism. To be sure, stability is necessary for economic well-being and for welfare gains from free trade. But stability is not the same as security, and real security may not be found without basic guarantees of human rights.

[7] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 UST 2941, 704 UNTS 219.

[8] Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 UST 1641, TIAS 7192.

[9] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 565, 974 UNTS 197.

[10] SC Res. 1373 (Sept. 28, 2001).

[11] *At* <http://www.unglobalcompact.org>.