

Trade & Investment Agreements and Human Rights

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Introduction

The debate on human rights and development dates back at least seven decades. After the second world war, as the world was trying to bounce back from the devastation and rebuild ravaged economies, global leaders came together in order to forge common ground on a collective way forward and establish global policies and institutions for global peace and development.

From the start, there were two pre-eminent concerns: human rights as a pillar of international relations on the one hand, and economic development on the other.

The Bretton Woods Institutions

In the summer of 1944, leaders from 43 countries gathered in Bretton Woods, New Hampshire in the United States to establish “a postwar economic order based on notions of consensual decision-making and cooperation in the realm of trade and economic relations.”¹ The conference led to the creation of two global economic institutions, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development, which was later called the World Bank (WB).

The IMF's primary purpose is to ensure the stability of the international monetary system—the system of exchange rates and international payments that enables countries (and their citizens) to transact with each other. The Fund's mandate was updated in 2012 to include all macroeconomic and financial sector issues that bear on global stability.²

The World Bank, on the other hand, would serve to improve the capacity of countries to trade by lending money to war-ravaged and impoverished countries for reconstruction and development projects.”³

A third institution was envisioned to complete the triumvirate, one that would act as arbiter of the global trade. The original Bretton Woods agreements included the creation of an International Trade Organization (ITO), which was envisioned to have several broad functions: promoting the growth of trade by eliminating or reducing tariffs or other barriers to trade; regulating restrictive business practices hampering trade; regulating international commodity agreements; assisting economic development and reconstruction; and settling disputes among member nations regarding harmful trade policies. ⁴ The ITO never took off despite support from over 50 countries primarily because the United States Congress rejected the agreement.

Economist Jomo Kwame Sundaram elaborates: “(T)he US Congress eventually rejected the Havana Charter, including establishment of the ITO, in 1948 following pressure from corporate lobbies unhappy about concessions to ‘underdeveloped’ countries.

Thus, the Bretton Woods' and Havana Charter's promise of full employment and domestic industrialization in the post-war international trade order was aborted."

The ITO however paved the way for a compromise, the General Agreement on Tariffs and Trade or GATT, which laid down global trade rules from 1948-1994. And in 1995, the GATT Uruguay Round gave birth to the World Trade Organization (WTO), which continues oversee the multilateral trading system.

United Nations and International Human Rights Law

The United Nations was established in 1945. The preamble of the United Nations Charter states:

"We the peoples of the united nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, "

It goes on to define the broad aims of international cooperation *"to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,"*

The post-war years also spurred the development of a regime of international human rights law. In 10 December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). The Declaration for the first time in human history spelled out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect.⁵

This was followed almost 20 years later with the adoption of two crucial international conventions—on civil and political rights, and economic, social and cultural rights. Together with the UDHR, these two covenants make up the International Bill of Human Rights.

As parties to these international agreements, States have taken on the responsibilities as "duty bearer" to respect, to protect and to fulfill human rights.

Right to Development

In 1986, the United Nations recognized the right to development as a basic human right. It further affirmed and mandated that States have the primary responsibility for

the creation of national and international conditions favorable to the realization of the right to development.⁶

States are further obligated to: undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.⁷

With the Declaration, states also recognized that denial of human rights as an obstacle to development. Furthermore, development was defined as such:

“Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”.

Diminished role of States

The post war institutions—the UN and the Bretton Woods Institutions—have no doubt over these years established broad architectures of global governance with a plethora of policies, agreements and conventions, and a range of implementation and compliance mechanisms.

Over the last three decades however, we have witnessed what author Rana Dasgupta described as the “demise of the nation state.”⁸ “After so many decades of globalisation, economics and information have successfully grown beyond the authority of national governments,” wrote Dasgupta.

What economist Dani Rodrik referred to as hyper-globalization has not only diminished the power and authority of governments over not just economic but social policies, but has led to and allowed the tremendous rise of corporate power.

There now exists an asymmetry of power that manifests in global governance, where fulfillment of human rights obligations is largely voluntary, yet obligations under international trade and investment treaties for example, are strictly enforced under a whole system of international investment tribunals, through corporate court rulings with punitive damages.

As Dasgupta emphatically noted, “the destruction of state authority over capital has of course been the explicit objective of the financial revolution that defines our present era. As a result, states have been forced to shed social commitments in order to reinvent themselves as custodians of the market.”⁹

Era of Corporate Globalization

The 1990s-2000s is considered the era of corporate-led globalization. It is the period when we saw the most aggressive push for the agenda of free trade and investment, deregulation, and privatization.

In the Global South, these policies were pushed and institutionalized by way of the World Bank's Structural Adjustment Programs (SAPs). In the Philippines for example, part of the SAP commitments included a Tariff Reform program that was meant to reduce tariffs on most commodities.

Diminished role by the state over matters relating to the economy, the idea of market ascendancy over the state are explicit elements of the agenda for a more open and market-oriented economy that was aggressively pushed by international and regional trade and finance institutions.

The establishment of the World Trade Organization in 1995 was heralded as the crown jewel of this multilateral, global trade economic order.

From Seattle to Doha: Trade and Development

In 1999, as the world was on the brink of entering a new millennium, a proposal for a new round of trade talks under the WTO dubbed at that time as the "Millennium Round" was put forward at the Third Ministerial Conference in Seattle. The ministerial was set to launch major new negotiations to further liberalize international trade and to review some current trade rules and set in motion a work programme to look at other important issues.¹⁰ The introduction of these so-called new issues—investment, competition policy, government procurement and trade facilitation—would effectively expand the scope of the WTO beyond trade.

In November this year, the world will mark the 20th anniversary of what has since been referred to as the "Battle in Seattle", the protests that disrupted the WTO Conference. In the end the Millennium Round did not take off in Seattle, it collapsed under the weight of protests from the outside as well as the inside. At the center of the controversy inside were questions over development and democracy.

As trade analyst Aileen Kwa noted "(D)eveloping countries, sick and tired of being marginalised in the decision-making process, and encouraged by the vigorous street protests going on outside, refused to passively go along with any negotiated deal that they had not participated in."¹¹

While the launch of the new round of trade talks was thwarted in Seattle, there was no stopping the free trade agenda. The new negotiations came into fruition two years later at the Ministerial Conference in Doha.

The G77 Statement drew attention to the significant imbalances between rights and obligations under the WTO; and called for an agenda to address the imbalances and strengthen the development dimensions of trade.¹² Thus, the new round was touted as a

development round aimed supposedly to “improve the trading prospects of developing countries.”¹³

Fast-forward to today, and Doha continues to be at an impasse. We have argued that the new agreements under Doha are never really about addressing the issues raised by developing countries but rather a further push for liberalization. On hindsight proponents of liberalization also saw the compromise in Doha—at least on the development language—as a hindrance to fast paced liberalization.

The direction of the WTO now has since been to further undermine the development agenda in order to put in place more ambitious agreements with higher and higher standards and obligations of liberalization and deregulation.

Rise of Corporate Power

Under the era of globalization, we have seen the rapid rise and expansion of the power of corporations. A *Foreign Policy* article identified 25 corporations that have now become de facto ‘corporate nations’ that are bigger and more powerful than some nations.¹⁴

We know these brands, and we know the power that these companies possess. These 25 corporations are more powerful than many countries. They control a huge chunk of the world’s economy, and exert great influence on economic policies from trade to tax policies, and their operations across the globe have huge social, environmental and cultural impacts.

One company that we all know, Apple for example, has cash on hand that exceeds the GDPs of two-thirds of the world’s countries.”¹⁵ With a market value of 961.3 billion U.S. dollars, Apple led the ranking of the world’s largest companies in 2018, and also led the way in 2018 as the world’s most profitable company, with a net income of 59.4 billion U.S. dollars.¹⁶ Digital companies now dominate the rankings of top global corporations.

Yet many of them are also considered effectively ‘stateless’, referred to as ‘meta-national’ companies, huge corporations without any national roots.¹⁷

Alongside the rise of corporate power, we have also witnessed however an alarming increase across the globe of corporate human rights violations or corporate crimes.

Some emblematic cases include the following:

- 2013 Rana Plaza disaster in Bangladesh that killed 1,132 factory (mostly female) workers,
- 2012 Marikana massacre of 34 miners in South Africa,
- Continuing destruction caused by Shell in Nigeria’s Ogoniland and by Chevron in the Ecuadorean Amazon,
- Human rights violations linked to the Cerrejon Coal mine in Colombia
- Tampakan gold mine massacre in the Philippines

As the Global Campaign to dismantle corporate power noted: “Transnational corporations (TNCs) have indeed become major and powerful actors, and their activities, directly or indirectly, have a huge impact on human rights and the daily lives of people globally. But TNCs are able to evade national jurisdictions because of their transnational character, and the unprecedented economic, financial and political power they command, their economic and legal flexibility, and the complex structures they use to carry out their operations. Impunity therefore typically prevails, especially when the affected communities and peoples are in the Global South.”¹⁸

New and emerging issues like the push for massive infrastructure like China’s Belt and Road Initiative and the various national level infrastructure programs that proclaim the need to “Build, Build, Build”¹⁹ are further driving international economic agreements, thereby-increasing the concerns over the environment and human rights impacts of these investments.

These issues portend to increasing and more complicated forms of human rights violations by corporations from direct displaced of communities, harassment and killings of human rights defenders opposing these mega projects, to the subtler undermining of social policies and human rights protections in the name of infrastructure development. The move towards digital economy could also bring new challenges to human rights including those related to data privacy and security issues.

Responses

In the wake of these two developments—the rise of corporate power, and the heightened violations of human rights—there have been strong calls for more alternative approaches to development, one that balances people’s welfare with the interest of corporations.

Human Rights language in FTAs

There are proposals to incorporate human rights language in trade agreements. A new example of this we can see in the agreements being pushed by the European Union that contain what is called a “Sustainable Development Chapter” that has references on commitments to fulfill labor rights and core labor standards, and commitments on the protection of the environment.

The inclusion of these so-called human rights provisions however has been met with opposition from both sides of the trade debate. Free trade proponents argue that these inclusions in a trade agreement are ‘legal inflation’ that “governments are using trade agreements to impose their values and norms with a view to globalizing their social policies or regulatory approach.” Others consider that introducing human rights provisions in preferential trade agreements is simply a new form of protectionism in disguise.” Opponents of these FTAs also express wariness over the inclusion of these provisions. They argue that these human rights and labor clauses are weak and only serve to deodorize rotten agreements, as they do not fundamentally change the logic of the agreements. One labor leader in the Philippines asked for example, “What use is a commitment to labor rights under an agreement that destroys jobs?”

Both proponents and opponents of FTAs agree that such agreements are not the right place to address human rights issues.

Rights-Based Approach to Trade and Investment Agreements

The emphasis is on the primary responsibility of states to ensure that these agreements deliver positive outcomes for all and to mitigate negative impacts.

UN Independent Expert Alfred de Zayas issued a scathing report in 2016 calling on states and parliaments to ensure that all future trade agreements stipulate the primacy of human rights. Existing treaties should be revised to ensure that they do not conflict with the duty of states to fulfill binding human rights treaties and meet environmental and health goals.

Positive conditionality

The Generalized Scheme of Preferences Plus (GSP+) is essentially an effort to advance the implementation of commitments to international human rights and labor rights conventions through the use of an economic incentive—the opening up of the EU market to developing country imports.

In this light, the EU is facing a huge dilemma under Duterte. How to advance its strategic economic agenda in the midst of gross human rights violations by the latter. Sadly, what we have seen so far is backpedaling from the EU rather than strong action. In the EU's own global assessment of human rights and democracy 2016, it raised serious concerns over rising death toll from the so-called War on Drugs, and more critically how the president's statements and actions are encouraging a more aggressive approach by the police and vigilante-style extra-judicial killings.

Yet, the EU has not done anything to even threaten the withdrawal of these trade preferences. Instead what it has pushed is even stronger economic cooperation under an ambitious free trade agreement.

Business and Human Rights

In the wake of corporate abuses and crimes, and the rising power of corporations a key question now being deliberated on is whether or not corporations should have human rights obligations?

Over the years, in recognition of the growing problem of corporate human rights abuses, efforts were exerted to develop policies to articulate the obligations of corporations, including:

- OECD non-binding guidelines
- UN Global Compact (2000)
- UN-established norms on human rights responsibilities of TNCs and other businesses (2003) but with no legal standing
- Business and Human Rights Agenda in the UN

- UN Guiding Principles (UNGP) on Business and Human Rights, also known as the Ruggie Framework (2011)

The UNGP is the current framework on business and human rights. It outlines three pillars to protect, respect and remedy. It is the state's duty to protect including from violations from businesses; business' duty to respect human rights, adopting and implementing human rights policies, exercising due diligence to anticipate and avoid or mitigate violations; and both States and businesses have the responsibility to remedy when violations arise.

But these are just a set of "societal expectations" for business, and are purely voluntary.

Legally Binding Treaty

In 2015, the United Nations Human Rights Council (UNHRC) voted to adopt Resolution 26/9 to "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."²⁰

After three open ended intergovernmental working group (OEIGWG) sessions in Geneva, a draft text (referred to as the zero draft) and a draft optional protocol were released by Ecuador in July and discussed at the 4th Session in October 2018.

Ecuador's draft articulates the initial elements of a legally binding instrument on TNCs but frames it as regulation of TNC operations in international human rights law. While many consider the release of the draft as an important first step, some weaknesses in the draft were noted by advocates of the treaty particularly on the broad question of direct obligations for TNCs.

Key Issues

Primacy of human rights

Article 103 of the Charter of the United Nations stipulates that "[i]n the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

The campaign for a legally binding treaty on TNCs and human rights for example has advanced the following text to recognize the superiority of human rights over trade and investment agreements, and the need to recognize legal liability of corporations for human rights abuses.

But many States do not in fact recognize this primacy of human rights. In the recent debates around the binding treaty, the proposal on primacy of human rights was considered a radical proposal that some states are opposed to as it may curtail for example their ability to negotiate new FTAs.

Dichotomy CPR VS ESCR

- Recognizing the full extent of human rights impacts
- human rights as merely a governance issue
- human rights as “blindness”: Focus on the abuses but not on the root causes
- Case of Pinochet Regime in Chile and culpability of the Chicago School in the economic policies (N. Klein “ The Shock Doctrine, (2007)

States vs Corporate Obligations

Human rights discourse has focused primarily on state obligations. The distinction is made between human rights violations committed by states and human rights abuses committed by corporations. This is the framework of for example the UNGP on BHR, where corporations have the duty to respect human rights and not the obligation to protect.

In the current context of the great power of transnational corporations, Prof Harris Gleckmann of the Center for Governance and Sustainability, says:

When human rights gained recognition, the dominant power was that of the state relative to the individual and citizen. Over time the approach shifted to include that the state should have a positive obligation to use its power to protect the human right of individuals, citizens, and communities.

What has now changed is that businesses with a transnational character have vastly greater powers than states and individuals. And therefore, it is wise to combine the power and authority of states, individuals, and community associations to establish clear and effective standards, rules and procedures to counter balance those which have disproportionate power today. (Prof. Harris Gleckman, Center for Governance and Sustainability)

Conclusion

The strained and challenging relationship between trade, investments and human rights is nothing new. In fact, many would say that it dates back to when man first engaged in commercial trade, referring to the history of colonial trade to underscore this point.

But what we are seeing now is how this relationship is being played out within a new and rapidly changing context with the rising power of corporations: the corporate capture of economic policies coupled with increasing human rights violations associated with trade and investments; the rise of authoritarian regimes that continue to push neoliberal and pro-corporate economic policies on the one hand, and on the other hand a growing peoples resistance to these policies—highlighting issues of inequality and wealth concentration, destruction of the environment and climate change, and the erosion of peoples rights.

In this context, human rights, in the full sense (CPR as well as ESCR) is increasingly become a front and center issue in many policy debates. It is an issue that may at the very least temper the FTA frenzy, and become a crucial foundation to the forging of alternatives to this corporate-dominated capitalist system.

¹ <https://www.brettonwoodsproject.org/2019/01/art-320747/>

² <https://www.imf.org/en/about>

³ <https://www.brettonwoodsproject.org/2019/01/art-320747/>

⁴ <https://legal-dictionary.thefreedictionary.com/International+Trade+Organization>

⁵ <https://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx>

⁶ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightToDevelopment.asp>

⁷ *ibid*

⁸ <https://www.theguardian.com/news/2018/apr/05/demise-of-the-nation-state-rana-dasgupta>

⁹ *ibid*

¹⁰ https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/03bgd_e.htm

¹¹ Kwa, Aileen. (2003). Power Politics in the WTO

¹² <https://www.g77.org/doc/Doha.htm>

¹³ https://www.wto.org/english/tratop_e/dda_e/dda_e.htm

¹⁴ <https://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/>

¹⁵ *ibid*

¹⁶ <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/>

¹⁷ *ibid*

¹⁸ www.stopcorporateimpunity.org/wp-content/.../CampaignSubmission-EN-jul2015.pdf

¹⁹ Build, Build, Build refers to the mega- infrastructure blueprint and program of the Duterte administration in the Philippines.

²⁰ <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>