Rules of International Economic Integration and Human Rights

Background paper for HDR 2000 : Human Rights and Human Development

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I. Introduction

It should be emphasised at the start that the achievement of human rights remains a *goal* in all societies, not a norm from which there are specific transgressions and violations in certain countries. So the focus has to be on progress towards universal attainment of human rights (including economic rights). This progress has not just been uneven in spatial terms, it has also shown a lack of consistency across time, with periods of retrogression in particular regions and countries. The International Covenant on Economic, Social and Cultural Rights emphasised the need to work towards the realisation for all people and communities of such rights, including those to food, housing, work, health and education. But even in terms of basic human rights such as the rule of law, protection from violence, freedom of speech, non-discrimination and right to association, it is now evident that these rights do not remain unaltered and uncontested even in countries where they seem to have been achieved. Rather, they must be struggled for continuously, and global economic changes may work towards either strengthening them or undermining them, depending upon how such changes are managed.

The most essential change that has come about as a consequence of the new regime of international economic integration relates to the greater freedom

granted to private agents, especially corporations, and the reduced scope of the powers of governments. This operates within national boundaries as well, but the cross-border implications are more striking. The most significant change comes about because of the vastly increased mobility of cross-border capital flows of various types, which in turn have substantial effects on the ability of societies to strive for basic human rights within their own national boundaries. The need to attract capital inflow or prevent capital flight can determine the adoption of policies which have major human rights implications.

The greater mobility of capital is part of a broader process which has been dramatically assisted by new systems of international rules which are still to be fully worked out. These new rules are evident in trading patterns, but they also extend into international investment, intellectual property rights and related areas. Essentially, the point is that while the processes of greater economic integration through trade, investment and other capital flows have given rise to new opportunities, they have simultaneously made life much more insecure for most citizens across the world. And this has also affected the situation with respect to the achievement of various human rights.

The potential problem in this is summed up starkly by the American consumer activist Ralph Nader : "This is global trade without global law, without global democracy. And if you have global trade and investment dominated by a few giant corporations, who pit one country against another without a rule of law, you're going to have increasing pressure – both in the first world and in the third world — on standards of living and standards of justice."

Economic, social and cultural rights face the threat of neglect in the face of economic globalisation, as the rapid pace of economic liberalisation and integration has outstripped the capacity and commitment of states to deal with the implications of these developments for this category of rights. At a general level, this is reflected most clearly in the dilemma of workers across the world, for whom competition has become the abiding fact of life. Increasingly it is not the firms themselves which have to compete internationally, so much as the workers in different countries bidding for their jobs, often with the same employers. And this affects the basic rights of workers - their right to organise, their rights to negotiate and bargain collectively - which are all coming under threat.

The attitudes of employers towards labour generally (including attitudes to union recognition, labour costs, technological change and work organisation) are increasingly dictated by the requirements of maintaining or improving international competitiveness and the possibilities of capital mobility. The threat of relocation of production to another geographical site looms constantly, tends to become the standard plank in negotiations with trade unions, and in some cases becomes the reality. This is not something confined only to developed industrial countries; in fact it is apparent even in developing countries which have only recently become hosts for such relocative foreign investment, because some alternative zones of cheaper and more "flexible" labour forces can usually be found.

The common perception is therefore of a footloose international production system where capital is mobile and labour is not. But workers are not alone in being threatened by such processes in terms of retaining or achieving their human rights. All consumers also are affected by the greater size and market power of corporations who provide their goods and services. And other forms of capital flow can have even more severe effects on various human rights of the citizenry at large. Large and sudden movements of highly mobile capital can dramatically affect the material circumstances and social conditions of the bulk of the people, as resident of parts of Latin America and Southeast Asia now know to their cost.

Once economies become dependent upon retaining such potentially mobile capital within the borders of the country, or at the very least on ensuring that "foreign investor confidence" survives, then are further implications for the material standards and conditions of life and work of people within these countries. For example, increases in taxation may be frowned upon by foreign investors, who may simultaneously look askance at government budget deficits in excess of fairly stringent norms. Quite often this means that social expenditures are curtailed, which in turn affects the economic rights of ordinary citizens in terms of access to minimal food, housing, health and education facilities. There have been more and more examples of countries where government policies have been dictated primarily by the need to mollify or attract foreign investors, rather than by the requirements and wishes of the citizens.

The regime of international economic integration as it has evolved so far in this decade has tended to accentuate this imbalance. The enforcement mechanisms of the institutions governing the international economy - the WTO and the IMF, for example - are much more effective in comparison to the available national or international enforcement mechanisms to implement human rights, especially economic, social and cultural rights. Essentially, the rights of corporations, especially those which operate internationally, are defined relatively clearly. However, the rights of the stakeholders of these corporations and other private agents remain vague, undefined and largely unprotected.

The focus of attention thus far has largely been on the rights of corporations and the associated duties of governments. It may be time, however, to shift attention to the rights of stakeholders and the corresponding obligations of corporations. Indeed, as corporate leaders grapple with how to respond to human rights challenges, human rights activists are abandoning their traditional focus on abuses by governments. It is now agreed that the realms of trade, finance and investment are in no way exempt from human rights obligations and principles, and that the international organisations with specific responsibilities in these areas should play a positive and constructive role in relation to human rights.

One reason for this shift is probably the growing realisation that the processes of economic globalisation may be serving to undermine certain human rights even as other forms of globalisation (such as new communications technology) are also providing more instruments to fight for such rights. Rights that get undermined refer not only to those of individuals, but even to those of societies. Thus for example, the right to development (which encapsulates the rights of its members to basic needs and capability enhancement), the right to permanent sovereignty over natural wealth and resources of a community, the recognition of the right to traditional knowledge, all have been adversely affected by patterns of international capital flow as well as certain aspects of the international economic regime which tend to grant greater rights to private corporations than to societies, their individual members or their representatives.

In what follows, these issues are considered in more detail with respect to three important aspects of the international economic regime : the framework for international investment, the implications of the agreement on intellectual property rights, and the attempts to incorporate a social clause in international economic negotiations.

II. Rules for international investment

II. A. The proposed Multilateral Investment Agreement in the WTO

During the Uruguay Round negotiations, the US had sought NAFTA-style investment deregulation for the WTO, but opposition by other countries resulted in a narrower WTO "Trade Related Investment Measures (TRIMs)". Developing countries were able to block a Canadian and European proposal to negotiate a Multilateral Investment Agreement (MIA) in the WTO in 1995. However, they could not prevent the establishment of an investment work group. Such work groups have often laid the groundwork for future negotiations. The group's two year mandate was to expire in November 1998, but at that time it decided to continue its current mandate, deferring the politically charged decision to launch official WTO investment negotiations for a time when members reach a consensus.

After the collapse of the MAI negotiations in the OECD, some supporters of the MAI model have attempted to move the negotiations to the WTO. In January 1999, Japan and the EU formally proposed a millennium round of WTO negotiations to include comprehensive investment rules and to be completed by 2003. Several other OECD government negotiators (e.g. those of France, Canada, Great Britain, and the Netherlands) are on record as supporting the inclusion of an agreement similar to the MAI in the WTO.

On the face of it, there are several arguments to be made in favour of a multilateral treaty governing international investment behaviour. In a context in which all countries, including developing countries, are vying to attract inward capital flows, such an agreement could set rules which might reduce pressures for downward harmonisation of rules in the attempt to provide incentives for foreign investors. The development of a comprehensive set of consistent multilateral rules could make for a stable and transparent environment for firms operating in the global environment and could also set rules for their own functioning. It could thus provide some degree of discipline on multinational firms in a context in which national governments find it increasingly difficult to exercise such discipline.

The adoption of such a multilateral framework could have several other advantages over a collection of bilateral agreements. Thus, bilateral agreements between developed and developing countries tend to be affected by the unequal power equations and relative bargaining strength of the countries concerned, but this risk is much reduced in a multilateral treaty. Similarly, a multilateral agreement allows more scope for harmonising rules, which makes them both universal and predictable, and also resolves the problem of possible inconsistencies between various bilateral investment agreements signed by any one country. The issue, therefore, is not whether or not to have a multilateral framework governing international investment, but *what kind of framework is developed*, and whether it protects the rights of stakeholders at least as much as it provides freedom and rights to investors.

It is precisely in this regard that there have been major objections to the proposed MIA on human rights grounds. The basic provisions of the proposed MIA are (a) the opening of most economic sectors and natural resources to foreign ownership; (b) fair and equal treatment of foreign firms; (c) the removal of restrictions against the movement of capital; (d) allowing for individual firms to sue foreign governments before an international mediation panel; and (e) full and proper compensation for expropriation.

There are at least three basic issues relating to human rights, that are not covered by the new proposed rules on international investment, at least as far as the MAI and MIA are concerned :

- The first concerns the need to evolve a form of fair competition policy, to defend consumers against the excessive market power that comes from sheer size as well as the growing degree of concentration in many sectors of production. This means considering ways of establishing the rights of consumers, as well as of other (possibly smaller) producers.

- The second relates to the rights of workers who are affected directly or indirectly by such international investment. This means not only those workers who are actually employed by MNCs, but also those associated through subcontracting relationships with other firms, those affected by corporate downsizing because of the nature of competition and takeovers/mergers of firms, those self-employed or employed in small-scale enterprises whose sales and production are affected by competition from such firms, and so on.

- The third refers to the sustainability and ecological sensitivity of investment patterns, and therefore to the rights of citizens who are affected directly or indirectly by certain patterns of international investment. The whole issue of "exporting polluting industries" is only one example of such a concern. In a sense this points to a more basic and fundamental question : the tension between long-run considerations of those who inhabit particular geographic, economic and social spaces, and those whose interests are less long-term and who are oriented towards short-term gain from a particular place. This becomes important as relocative capital becomes ever more mobile, and able to cast about the globe in the quest for higher returns.

In a sense, all these different concerns for the human rights of the various stakeholders of international investment point to one transcendent need : that of ensuring some discipline on and accountability of private investors, including MNCs, along with the emphasis on public (governmental) accountability. Thus, how can it be ensured that the freedom given to MNCs is channelled into forms of investment and production that ensure the various rights described above ? What guarantees that monopolies with excessive market power do not come to dominate the scene ? How is it possible to ensure that the international move is not one towards a continuously more uncertain work environment for workers in all countries? Is it possible to combine the mobility of capital (which goes with enhanced competition) with the long run commitment which is necessary for the improvement of most human development indicators ?

There are a number of more specific ways in which the MIA would conflict with the achievement of human rights. A document produced by the Harvard Law School (1998)[1] lists a number of ways in which the MAI fundamentally conflicts with the goals and objectives of international human rights law, as already codified in a number of treaties and provisions such as the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child; and the International

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Convention on the Elimination of All Forms of Racial Discrimination (CERD). Some of the more obvious areas of conflict are discussed below :

1. International human rights law recognises the fundamental rights of all individuals and obligates government action to protect individuals from both public and private violators of these rights. By contrast, the MAI recognises investors' rights - predominantly those of multinational corporations - with no corresponding obligations, and it restricts a government's ability to protect and promote the rights of individuals.

2. While international human rights law recognises the right of people to dispose freely of their natural resources and obligates States to adopt policies guiding the disposition of those resources for the benefit of the general welfare, the MAI limits the ability of governments to formulate policy independently and impairs the rights of peoples to enjoy the benefits of their natural resources.

3. Human rights law envisions the individual as an active participant in political decisions that affect the enjoyment of his or her rights, but the MAI impairs the right of individuals to participate in decisions impacting implementation of social, cultural and economic rights, and it excludes the individuals from the adjudication of disputes regarding disposition of resources and investment.

4. The treaties mentioned above encourage governments to provide special protection for regional populations and socially disadvantaged groups in order to ensure real equality among individuals. However, the MAI contains no provisions acknowledging the special needs of such groups and regions. Further, through its measures barring performance requirements, it effectively precludes a government from effectively promoting the rights of these groups.

5. The National Treatment provisions of the MAI require a government to grant foreign investors no less favourable treatment than it accords to its own investors. This prohibits state protection and promotion of local enterprises or economic sectors. However, international human rights law typically reiterates the need for such public efforts to specially protect the rights of the people a government represents.

6. The provisions of the MAI go beyond granting foreign investors national treatment, to prohibit any restrictions on foreign investment in areas potentially essential for home country development. For example, under the MAI, governments are not allowed to require foreign investors to hire any given level of

local personnel, or to assure a certain level of domestic content, or to share technology, or to achieve any given level or value of production, employment, or research and development spending. Governments are also prohibited from encouraging any of the above through investment incentives. Such limits on public regulatory power severely inhibit and even damage a government's ability to conform with important human rights obligations to its own citizenry. By constraining possibilities of autonomous development in developing countries, such provisions not only prevent governments from assisting specific groups and categories of citizens, but they also affect the material conditions, future and economic rights of the country's people as a whole.

7. Government laws which are designed to guarantee the fundamental rights of its people can be challenged by foreign investors under the MAI. The MAI increases investors' power and rights, yet creates no comparable protection for human rights. It also curtails the ability of governments to intervene in order to prevent environmental damage and other negative fallout of investment within their own countries. A stark example of the implications this may have in terms of forcing governments to accept polluting or unhealthy forms of investment and production is to be found in the case of the Ethyl Corporation versus the Government of Canada, using the provisions of NAFTA. [See Box.]

8. The MAI carries a 'protection from strife' clause which ensures that governments assume total liability for investment losses due to war, conflict, civil disturbance or 'any other similar event'. This effectively means that governments take on all the risk and investors subsequently reap the profit, it also undermines the rights of citizens who will have to pay (through taxation) for such compensation to private investors..

9. The Most Favoured Nation provision of the MAI prevents governments from treating investors or investments of one contracting party less favourably than investors or investments of another contracting party. This denies governments the right to use an investor's human rights record or that of its country of origin as criterion for differential treatment. But human rights violations are not solely of domestic concern, and have been submitted to international scrutiny and sanctions. Thus, direct action in the form of sanctions against corporations doing business in South Africa is now accepted to have played a major role in weakening the apartheid regime. The MAI would render investment considerations independent of all human rights concerns and would therefore undermine attempts at concerted international action against such abuse.

BOX - TOXIC CHEMICALS AND INTERNATIONAL LAW :

How NAFTA allowed a multinational company to sue the Canadian government for damages for banning a toxic chemical

In April 1998, the Canadian Parliament acted to ban the import and inter-provincial transport of a product produced by Ethyl Corporation (the company that invented leaded gasoline). This product was the gasoline additive MMT which was considered to be a dangerous toxin, and the manganese in whose emissions was seen to pose a significant public health risk. It was also felt that MMT damages the emissions diagnostics and control equipment in cars, thus increasing fuel emissions in general. Ethyl is the only manufacturer of this product.

The company responded within a few weeks by filing a lawsuit against the Canadian government under NAFTA. Ethyl claimed that the Canadian ban on MMT violates various provisions of NAFTA and sought restitution of $251 million to cover losses resulting from the "expropriation" of both its MMT production plant and its "good reputation."

Even though this additive is used only in Canada, and is banned in the formulated gasoline used in the US, a key provision of NAFTA makes the lawsuit possible. Under NAFTA's investment chapter, for the first time in a multilateral trade or investment agreement, corporations are granted "private legal standing" or the ability to sue governments directly and to seek monetary damages. This is exactly what is proposed in the MAI as well. The Ethyl case could thus set a precedent where, under NAFTA and similar agreements, a government would have to compensate investors when it wishes to regulate them or their products for public health or environmental reasons. This could send the message to investors that seeking compensation from the public for the cost of complying with environmental regulations constitutes a legitimate business strategy.

If claims like Ethyl's proliferate, the costs to governments could be immense. Under the investor-to-state dispute resolution, corporations can request compensation for actual and future earnings losses as well as for the cost of repairing their "tarnished images." Damage claims can therefore be very high. In addition, multiple investors can consolidate their suits, thereby multiplying a government's potential liability.

In such cases, the ultimate legal authority is not a domestic court but an international tribunal where the proceedings are conducted in secret, the records are not publicly accessible and the decision is legally binding. The Ethyl case suggests that critics of NAFTA and GATT may have been correct in arguing that these agreements could pose a threat to national sovereignty and restrict the ability of democratically elected

governments to legislate on such matters as public health and safety and environmental protection.

There is a further implication of this case. While the Canadian government does have the resources to fight such a case, very few small and developing nations could afford to mount a legal defence against a foreign corporation, thereby risking not only scarce public funds in the courts but also jeopardising future investment. Indeed, this would also negatively affect the willingness of governments to enact new legislation even if it is clearly in the public interest, because of the danger of future litigation by multinational companies.

End of Box

Clearly, therefore, the MAI - which forms the basis of the proposed MIA - is an unacceptable treaty which needs to be drastically renegotiated in order to meet minimal human rights criteria. The emphasis must be on **accountability**, which is in fact the bedrock of a human rights approach to development. One of the most obvious ways in which it must be reconsidered is in terms of specifying much more definitively the duties and obligations of corporations, rather than simply their rights, and in constraining their freedoms insofar as these contradict the rights and freedoms of stakeholders. It is also important to incorporate all the various form of cross-border investment, including portfolio flows, into such a regime in order to protect the economic rights of those who are affected by such flows. This is because the volatility and consequent real economic instability caused by such flows can have major repercussions which impinge severely on economic rights of citizens in the concerned countries. [Develop this] So the new regime of international investment regulation heeds to take into account these issues as well.

II. B. The need for a more stringent international competition policy

One important area that must be covered in a new and more comprehensive MIA which actually controls and provides for the enforcement of obligations on corporations, is **competition policy**. This is especially relevant because FDI now dominantly takes the form of cross-border mergers and acquisitions (M&As) that do not add to productive assets in the host country but essentially alter patterns of ownership and occasionally management. Some of these M&As in the past year

have been huge deals involving major MNCs which then dominate international industry in that sector. Thus, in the petroleum sector there was a takeover by BP of Amoco for the record amount of $55 billion, creating the third largest petroleum company in the world, following the Shell Group and Exxon. Similarly, in the automobile industry, the latest in a wave of international mergers involved the acquisition of Chrysler by Daimler-Benz for 444.5 billion. The sheer size of some of these larger merger deals has contributed to the substantial increase in FDI flows despite developments in the world economy which were seen as unfavourable for FDI : slowdown in world output growth to less than 2 per cent; excess capacity held internationally in a number of important industries such as steel and automobiles; the decline in world trade, etc.

With this concentration, which is increasingly being forced upon even very large MNCs as part of a wave of mergers resulting from heightened international competition, the nature of international production is likely to change dramatically. This competitive pressure means that globally, a few giant firms emerge, which control the vast share of production in specific sectors. Such monster enterprises are clearly evolving in pharmaceutical, automobile, defense, telecom and financial industries. It has even been estimated by UNCTAD that "the total number of major automobile makers may well decline to 5-10 by 2010, from its current number of 15. In the pharmaceutical industry many markets are now controlled by a smaller number of firms, with 7 firms having sales of over $ 10 billion each, accounting for about a quarter of the $ 300 billion market." [World Investment Report 1998, pages 21-22]

This has important implications for consumers as well as workers. For consumers, the emergence of huge international corporations controlling huge shares of production and markets not just in one country but internationally, means that monopoly power of sellers has gone up . For governments, the sheer size of the newly merged entities and their market power makes their relative bargaining power that much more skewed and difficult to countervail. Also, typically with such mergers, profits may go up, but typically employment stagnates or falls. This often counterbalances or even negates the increase in employment of MNC affiliates, so that employment increase tends to be the least buoyant of all the major variables

associated with MNC production. From 1986 onwards, the growth rate of employment of the foreign affiliates of MNCs has been consistently lower than that of other important indicators like assets and sales.

These very large MNCs, which control vast proportions of world production in particular sectors even though they typically do not employ a commensurate number of people, are much more difficult for national governments to control than large national companies within a particular country. Their bargaining power vis-a-vis governments, workers and consumers is correspondingly greater, and all the attendant problems of monopolies or large oligopolies are magnified. When the acquisitions by such large firms are of assets previously held by the government sector, it also means the loss of public control, in however inadequate a fashion, in sectors and activities which may be absolutely crucial for development and economic welfare.

Thus, it comes as no surprise to realise that in many countries the privatisation of electricity generation and distribution has been very rapidly followed by the decontrol of the price of these services, and that the beneficiaries have rarely been consumers, but are more typically the large MNCs which have acquired these facilities. This is just one expression of a wider trend, in which the bargaining power of people or the citizenry at large, whether as workers or consumers, vis-a-vis large companies, is being continuously reduced, and the power of large corporations over ordinary people is being increased in various ways.

The issue of competition policy is already the subject of a work programme of a Working Group of the WTO, although thus far the actual measures suggested have been more in the nature of further increases in market access for MNCs. There is a growing realisation that, as government regulations are reduced over successive rounds of trade negotiations, restrictive practices and distortions originating from private enterprises my be increasing in importance, and also acquire an increasingly transborder dimension. Also, while there is now a plethora of rules that protect the interests of MNCs operating in host countries, there is

virtually nothing by way of international co-operation to control anti-competitive practices of such companies.

The business practices that can have anti-competitive effects and negatively affect both international and domestic trade are of four broad types :

(1) **Horizontal restraints**, that is arrangements between competing firms producing identical or similar products to restrain competition. These include import and export cartels and related arrangements, as well as international cartels which are akin to price-fixing and other collusive arrangements within one country.

(2) **Vertical restraints**, that is anti-competitive arrangements between forms along the production-distribution chain. These include exclusive dealing arrangements that prevent distributors from marketing products, tied selling that makes the purchase of one product of a given brand conditional on purchasing another product of the same brand, loyalty or sales rebates that provide financial incentives not to distribute the products of competitors, and exclusive territories that prevent distributors from selling outside certain geographical areas.

(3) **Abuses of dominant position**. These include exclusive dealing, market foreclosure through vertical integration, tied selling, control of scarce facilities and vital inputs or distribution channels, predatory price and non-price behaviour, price discrimination, exclusionary contractual arrangements, charging or higher than competitive prices or the imposition of other "exploitative" abuses.

(4) **Mergers**. There are three different types of mergers with varying implications. Horizontal mergers bring together two or more firms in the same line of business and in the same geographic market, with the same tendency to push prices upwards as in a cartel. However, here competition policy also needs to consider whether the merger may lead to lower costs of production and thus lower prices than before. Vertical mergers involve firms that are engaged in different stages of production and marketing within an industry. This may involve a reduction of transaction costs, but it may also be employed to foreclose sources of inputs or distribution channels to competitors. Conglomerate mergers integrate firms operating in unrelated lines of business, and usually do not involve an increase in the degree of market power of the new firm.

The difficulties in establishing an international competition law that will guard against all the above types of restrictive business practices, relate to the different priorities and objectives that exist in various national policies in this sphere. In many (typically developed) countries, the main explicit objective of such laws is to preserve and promote competition to ensure "efficient" allocation of resources in the economy. In many (typically developing) countries, there are other objectives which are seen to be equally important, such as the control of the concentration of economic power, promoting the competitiveness of domestic industries, encouraging innovation, supporting small and medium-sized industries, and encouraging regional integration and income convergence. In the countries where competition laws do exist (currently less than 80 of the 134 members of GATT) the degree of enforcement varies quite dramatically.

In addition, in framing a set of international rules, countries may wish to include other elements that affect various stakeholders, in terms of employment, environmental and health implications, and so on, and the focus may be quite different across countries in this regard. If a desirable competition policy is to be developed, it is important to emphasise the need to limits concentration and private monopoly power, instead of on the public aspect, which amounts to treating this as another avenue by which MNCs can ensure increased market access in particular countries. In this context, it may be necessary to adopt a more flexible approach by adopting a relatively less comprehensive international law and allowing individual countries to work out their own forms of legal and other intervention to ensure competitive practices. Thus governments of some developing countries may find it necessary to play a more active role in regulating and intervening in markets in order to safeguard national security (because of the need to maintain production capacities in industries and activities considered to be essential) to protect labour rights, or even to encourage more diversified industrialisation and development. The international regime needs to be one which allows for such action by individual governments, and retains some degree of flexibility.

II. C. Other means of regulating international investment behaviour

Using the legal framework is obviously crucial, but it is still only one - and not inevitably the most effective - of the ways in which undesirable effects of international investment can be sought to be controlled. Social awareness and social pressure which acts as incentive, rather than as punishment for transgression, is obviously preferable because it implies the creation of an environment which prevents the violation of such human rights in the first place. But for this to be established, a vigilant and active civil society is essential. Some of the other methods for promoting the respect for human rights among corporations include developing institutions that monitor and award those corporations that guarantee human rights of stakeholders, training and educating people at large so that there is greater general consciousness about the nature of the various human rights and of the forms of possible transgression, exposure in the media which may embarrass the companies concerned into better behaviour, and specific incentive measures awarded by civil society rather than government.

There is some evidence that some of this is already taking place, not only in the advanced post-industrial societies that have active and highly conscious public awareness, but even in some developing countries due to the efforts of civil society organisations. Thus, a highly vigilant consumer movement can not just play the role of watchdog but can also effectively impose social sanctions against corporations that are found guilty of violation. This in turn can act as a cautionary or preventive impetus for other companies. The Box below outlines some of the ways in which it is already advantageous for companies in several countries, to be seen to be "socially responsible" and to uphold human rights of stakeholders.

It is also true that globalisation from above tends to lead to a globalised resistance from below. Thanks to the greater facility of communication, there has been a mini-explosion of human rights organisations all around the world that are now in touch with each another, and are now beginning to talk more and more about common problems and common strategies. They are also increasingly more aware of the cross-border in these issues and the need to plan and campaign on an international basis, rather than simply remain focused on the problems in their own countries.

BOX : The advantages of corporations that choose to be socially responsible

(1) **Improved access to capital**: The Social Investment Forum reports that, in 1997, more than $1 trillion in assets was under management in the US in portfolios that used screens linked to ethics, the environment, and corporate social responsibility. The figure had increased from $639 billion in 1995. The 1997 portfolio amount accounted for nearly nine percent of the $13.7 trillion in investment assets under professional management in the US, suggesting that such companies have growing access to capital that has not otherwise been available.

2) **Improved financial performance**: Several studies have shown such a correlation between evident social responsibility and improved financial results. Thus, a recent Harvard University study conducted over eleven years found that 'stakeholder-balanced' companies showed four times the growth rate and eight times the employment growth when compared to companies that are shareholder-only focused.

3) **Reduced operating costs**: Some initiatives, such as environmentally oriented and workplace initiatives, also can reduce costs by dramatically cutting waste and inefficiencies or improving productivity. For example, many initiatives aimed at reducing emissions of gases that contribute to global climate change also cut waste-disposal costs and generate income by selling recycled materials. Vis-a-vis workers, schemes that result in reduced absenteeism and increased retention of employees can save companies money through increased productivity and by a reduction in hiring and training costs.

4) **Enhanced brand image and reputation**: Customers often are drawn to brands and companies considered to have good reputations in terms of social responsibility. This in turn may enhance its reputation within the business community, increasing a company's ability to attract capital and trading partners.

5) **Increased sales and customer loyalty**: A number of studies have suggested a large and growing market for the products and services of companies perceived to be socially responsible. While business must first satisfy customer's key buying criteria such as price, quality, appearance, taste, availability, safety and convenience studies also show a growing desire to buy based on other values-based criteria, such as 'sweatshop-free' and child-labour-free clothing. A 1997 study by Walker Research found that when price and quality are equal, 76 percent of consumers would switch brands or retailers if a company is associated with a good cause.

6) **Increased productivity and quality**: Company efforts that result in improved working conditions or fewer environmental impacts, or that increase employee involvement in decision-making, often lead to increased productivity and reduced error rate. For example, companies that improve working conditions and labour practices in the offshore suppliers often experience a decrease in defective or unsaleable merchandise. For example, a study of 15 large employers conducted by the Medstat Group and the American Productivity and Quality Centre found that health benefit programs can increase productivity and decrease

company costs related to absenteeism, turnover, disability and health-care claims by 30 percent.

7) **Increased ability to attract and retain employees:** Companies perceived to have strong social and environmental commitments often find it easier to recruit employees, particularly in tight labour markets. Retention levels may be higher, too, resulting in a reduction in turnover and associated recruitment and training costs. Studies also have shown that companies appearing on one of the many 'best places to work' lists have higher margins, rates of growth and job-creation.

8) **Reduced regulatory oversight**: Companies that have demonstrated that they are engaging in practices that satisfy and go beyond regulatory compliance requirements are being given less scrutiny and more free reign by both national and local government entities. In many cases, such companies are subject to fewer inspections and paperwork, and may be given preference or 'fast-track' treatment when applying for operating permits, zoning variances or other forms of governmental permission.

Source : Business for Social Responsibility

End of Box

II. The TRIPS Agreement and its implications for human rights

Of all the Uruguay Round agreements, the TRIPS agreement is possibly the one in greatest need of revision. The arguments for a substantial renegotiation of TRIPS, taking into account especially the concerns of developing countries, have already been comprehensively presented in HDR 1999, and so they are not repeated here.

The TRIPS Agreement protects intellectual property rights in all WTO member countries and constrains the production of imitation products. Estimates indicate that up to 90% of technology and product patents in the world and 80% of those in developing countries are owned by MNCs, which have tended to use such product patents as a tool for stifling competitors. Privately, negotiators acknowledge that the TRIPS Agreement was to a great extent driven by MNC interests rather than the requirements of citizens across the world.

From a human rights perspective, there are several aspects of both the way in TRIPS is framed and the manner of its operation so far, which tend to infringe on the various human rights described above, especially the economic and social ones. In a broad sense, all of these can be covered under the rubric "right to knowledge", which raises one of the basic philosophical problems with the entire concept of intellectual private property, and which has still not been adequately resolved. The critical issues remain in the sphere of the development of technology : thus, what is the direction of technology ? Is it determined by the need of society in general or the possibilities of private profit based in turn of patterns of income distribution ? How do we ensure that there is research and development in areas of long terms benefit and high social returns in an area in which externalities are so evident ? Similarly, if public research is downsized and technology development becomes increasingly private in scope, then what ensures people's access to technology ? This is more than an issue of technology transfer between developed and developing countries : it refers to the access of people within developed countries to such technology as well. This issue also impinges on market structure, for it implies monopoly rights to patent holders. Another problem is that of the right to traditional knowledge of communities, and possibilities of bio-piracy and other forms of knowledge theft, which is even more problematic because such theft removes existing knowledge from the public sphere and makes it a source of private gain.

In this context, this means that there are several aspects of the TRIPS agreement which can and should be subject to renegotiation to incorporate some of these legitimate concerns.

(1) **Transfer of technology** :

It has already been stressed by the representatives of several developing countries in the WTO that the objective of fostering the transfer and dissemination of technology, which is already explicitly stated in Article 7 of the TRIPS Agreement, should be made operational through special provisions. This is because, after a period in the early 1990s when technology access constraints were relaxed somewhat, there has been a tightening up after TRIPS was signed. In fact, developing countries and Least Developed Countries now face growing constraints to get access to up-to-date technologies. The enhanced competition between MNCs, which has also been reflected in the growing tendency towards merger and concentration at the international level, has in turn been associated with a reduced willingness to part with or share new technologies. Also, the stronger protection to invention which has been granted under TRIPS makes it more difficult for industries in developing countries to use, through reverse engineering and other devices, the adapted technology developed elsewhere. This reduces one of the more obvious means of "catching up" by late industrialisers, and of the more important sources of technology particularly for small and medium enterprises across the world.

It is true that the issues involved are complex, and there will be strong lobbies from the MNCs and other sources against any attempt to ease or broaden the TRIPS provisions to allow for the greater facility of technology transfer. However, in this case the point should be made that suppressing the technological development of developing countries is against the long run interests of everyone in the world economy, including those in the industrialised world, because in the absence of such development, there can be no sustainable expansion even in industrial countries. The enhancement of technology flows to developing countries may require the revision of several articles of the TRIPS Agreement, such as Article 27.1 (working obligations), Article 31. (b) (broader application of "refusal to deal" as an autonomous ground for compulsory licenses), Article 40 (specification of illegal restrictive business practices in voluntary licenses), and Article 66.2 (further specification of measures to be adopted to encourage the transfer of

technology to Least Developed Countries). There are other changes which could be thought of, including the incorporation of new articles.

(2) **Technology development** :

The shift towards greater private funding of research has been associated with a change in research patterns themselves, moving at the margin away from areas of greater social importance to those of currently higher profitability. Thus, medicine and disease research has been increasingly oriented towards the curative aspects of disease rather than prevention, and it has dealt more with diseases that are more common or more potentially dangerous in the rich societies. By contrast, the diseases which continue to proliferate in developing countries, and which within such countries are more prevalent among the poor, get less emphasis and certainly less research funds. Similarly, in the are of crop research, the focus has become on improving the *quality* of certain products in a consistent way, or on genetically modifying certain crops so as to ensure particular features which are found to improve marketing chances, rather than on improving yields, even though that remains the primary concern of most cultivators across the world and will remain the prime determinant of global food security at least as long as world population continues to increase.

For this to change in a way which would be more beneficial to humanity, the increasingly common perception that scientific research is essentially something that is carried out or funded by private corporations, must be fought. It is important to remember that even in the United States, until the 1980s most such research was actually funded by governmental and quasi-governmental agencies, other public bodies and universities, rather than by corporations. While the profit motivation was not entirely absent, certainly it was not the dominant motivating principle in much of the most important research that has occurred even in this century. It is necessary to recover this, in both developed and developing countries, simply because the research areas which the greatest long-term benefit to societies remain those with very high externalities, where social returns outstrip private returns, and where therefore socially desirable levels of expenditure will not otherwise be maintained.

This in turn means that the TRIPS agreement, which is really phrased from the perspective of private investors in R&D, need to be reworked to incorporate the possibility of much greater public involvement in such research activity.

(3) **Control of monopolies** :

There is an inherent contradiction between competition policy which seeks to prevent the exercise of undue and unfair market power, and the TRIPS agreement which effectively grants monopoly rights to patent holders. Since most R&D is now conducted under the aegis of MNCs or funded indirectly by them, they also end up holding the vast majority of the patents. There is sufficient evidence that such patents are used as a means of increasing market power and undermining the competition, and this in turn can easily lead to the growth of monopolies with all the attendant forms of anti-competitive business practices that were described in section II.b. In some cases these monopolies - and the fact that large MNCs control important patents - can be especially worrying when the products relate to crucial areas such as agricultural seeds and life-saving drugs. By restricting competition, the TRIPS rules will enable some companies to jack up prices of their products far beyond costs and thus earn rents in terms of monopoly revenues and profits. This has already been clearly seen in the case of computer software.

Thus, IPRs allow companies a monopoly of seed ownership and other biotechnology products. These companies can then also behave in a monopolistic way in global sales and distribution. For example, the chemical company Monsanto owns the second largest cotton seed company in the world (Stoneville Pedigreed) and is a major shareholder in the world's largest cotton seed company (Delta & Pineland). Restrictive business practices have been found to occur in cases such as farmers who use Monsanto's Roundup Ready soybean seeds also having to use Monsanto's pesticides and allow inspections of their fields. The linking of seeds and pesticides purchases has also been found in the case of cotton cultivation in South Asia, with problematic effects in terms of higher variability of output in addition to higher monetary costs for farmers.

It is a moot point whether the TRIPS agreement itself needs to be modified to take account of this problem, or whether a simultaneous application of a more stringent competition policy would be sufficient to deal with it. In some developed countries, it is true that the expansion and strengthening of IPRs has taken place *pari passu* with a more effective application of competition law, such as the increase the number of compulsory licenses granted in the United States in order to remedy anti-competitive practices. However, in general the nature of patent law itself needs to be sensitive to the potential that may be implicit in it for creating or strengthening monopoly behaviour, and that it should contain provisions which allow for revoking of patents of reduction of patent period if the holder is found guilty of anti-competitive behaviour. This is especially necessary in the case of patents relating to essential products.

(4) **Biodiversity and traditional knowledge** :

Much technological progress in the recent past has been in the field of biotechnology and genetic engineering, which in turn has been based on generic resources which are often available only in the tropics (that is, mainly developing countries). Increasingly, while research organised by private corporations into genetic resources has drawn on the traditional knowledge of indigenous communities, these communities and peoples themselves do not benefit from the patents or even from the resulting inventions. The issue of acknowledging and rewarding the contribution of indigenous and local communities is currently being discussed internationally. The Convention on Biological Diversity has attempted to deal with the question of people's participation in biotechnological research activities in areas where genetic resources are located, and share the fruits of such research. Similarly the Food and Agriculture Organisation of the UN in an International Undertaking has developed the concept of "farmers' rights", defined as the "rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources". These are important because they recognise the inherent communal and participatory nature of invention and technological progress, an aspect which the TRIPS approach has hitherto missed completely.

Reconciling the TRIPS agreement with these conventions and peoples' rights may become one of the focal points of renegotiation. This could include the amendment of Article 27.1 (requirement of universal novelty as a condition for patentability), Article 27.3 (b) relating to the patenting of life forms and plant varieties, and Article 29 (obligation to prove that prior informed consent has been obtained with regard to claimed biological materials). A new provision on "traditional knowledge" could also be considered. Article 27.3 (b) has already been the subject of some discussion, with the Africa Group and other lobbies within the WTO demanding a complete reworking of this article on the grounds that it contradicts the basic tenet that substances and processes that exist in nature are a discovery and not an invention, and as such cannot be patented. It also moots the option of *sui generis* laws in developing countries that would protect innovations of indigenous and local farming communities, allow the continuation of traditional farming practices including the right to save and exchange seeds and sell their harvests, and prevent anti-competitive rights and practices that threaten food security of people in developing countries.

(5) **Public Health**:

The implementation of public health policies may be restrained by the implementation of TRIPS. It forces all countries - rich and poor - to adopt the same, strict guidelines on respecting corporate patents, trademarks and copyrights. The TRIPS guarantees monopoly ownership over, among other things, pharmaceutical patents; thus a WTO member may not be able to suspend intellectual property rights even to address critical public health issues.

Once an approach focused on public health is accepted, several articles may require revision, for instance, Article 27.1 in order to exclude the patentability of "essential medicines" listed by WHO; Article 30 so as to incorporate an explicit recognition of an "early working" exception for the approval of generic products before the expiration of a patent; and, Article 31 in order to clarify the right to grant and the scope of compulsory licenses for public health reasons.

(6) **Environment**:

While several new innovations can have adverse ecological and environmental implications, the area of biotechnology research and application is perhaps the most fraught in this regard. Many environmentalists are concerned that the present lack of controls and accountability in the system will be detrimental to the global environment, especially as it is likely to accelerate biodiversity loss and could threaten natural ecosystems.

Within the WTO Committee on Trade and Environment, India has already indicated the need to amend the TRIPS Agreement in order to facilitate the access to and use of environmentally sound technologies. The proposal requires the amendment of Article 31 (compulsory licenses) and Article 33 (duration of patents), and suggests that patent holders should be subjected to an obligation of transferring environmentally sound technologies on fair terms and most favourable conditions. It also proposes a financial compensatory mechanism.

III. The social clause

While the net effects of the economic globalisation process on people across the world remain hotly debated, there is one area where the results are fairly clear and unambiguous, even if not so positive. The greater integration of

national economies through trade and investment organised along capitalist lines has dramatically *decreased* the bargaining power of workers across the world. This is not only true in developed countries where the perceived threat of losing jobs to less organised workers with lower wages in developing countries has become a source of major concern to the trade union movements. It is in fact equally true in developing countries, where workers struggling to improve their conditions of pay and work are typically told that any such moves are undesirable because they would make their economy a less attractive location for internationally mobile capital.

In most such cases, the threat of mobility is often as effective as the actual movement. And this reduction in the bargaining power of organised workers across different countries filters down to affect all workers. It has been observed in many developing countries that the conditions of organised workers tend to be positively associated with unorganised workers as well; in other words, when the unions are weaker and under attack, then even non-unionised workers tend to suffer. And this permeates all sectors of economic activity, including not just industry but also agriculture and services, and affecting employment conditions in the non-traded sectors as well.

There is no doubt therefore, that the threat of downward harmonisation of labour standards is real. As a consequence, competitive pressure is increasingly being felt not so much by capital as by labour, which is being told that it must accept worse conditions simply to retain jobs, or in other cases to get them in the first place. But still the area remains a hotly contested one, because of differences in perception on two basic questions: first, what are the main forces that are driving this process; and second, what are the best ways of confronting it?

The perception that underlies the pressures for introducing a "social clause" into GATT and allowing WTO action on it, is based on the idea that growing trade in goods and services and international capital mobility are the chief forces leading to reduced bargaining power of workers, especially in the industrial world. A "social clause" liking labour standards to trade and imposing uniform rules with respect to all the labour employed by MNCs is therefore seen as the best way to combat this. Typically, these labour standards are defined as those which are seen as the most significant of the ILO Fundamental Principles with respect to the rights of workers : (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory

labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

The key standards aimed at preventing repression, exploitation and discrimination are Conventions 87 and 98 on the rights to freedom of association and to bargain collectively, Conventions 29 and 105 on the abolition of forced labour, Conventions 111 and 100 on the prevention of discrimination in employment and equal pay for work of equal value, and Convention 138 on the minimum age for employment (child labour). These standards are amongst the most highly ratified of the ILO. Nearly 100 States have ratified at least five of the seven. The precise means by which the principles are translated into law and practice can vary according to the institutions and customs of the country concerned. In its supervision of the standards, the ILO does not attempt to impose a global harmonisation of labour laws but rather examines whether the effect of laws and practice achieve the objective of ensuring that the principles are applied.

However, the discussion on "social clause" has presented a rather different perception on the method of enforcing adherence to these principles. The position here is that trade sanctions can and should be imposed on those countries found guilty of not adhering to the labour standards. The attempt has created a sharp polarisation along North-South lines. Governments of developing countries have been overwhelmingly against such a linkage. Governments of industrial countries have been more divided (with the United States administration less than enthusiastic about the proposal despite pressure from US trade unions). The indications are that there would be greater unanimity in this regard within industrial countries, if some way could be found to employ the trade-labour standards link only against developing countries. All employers, in both developed and developing countries, tend to be totally opposed, with the possible exception of some textile and other producers in the North. Northern trade unions and the international workers or organisations controlled or dominated by them tend to favour such a link, whereas workers' organisations in the South have been divided, with most opposed. Many Southern NGOs, even those working closely with organised labour groups to enhance rights of workers in their countries, have also been opposed to this proposal.

The reason for this widespread antipathy to this proposal within developing countries is the understandable fear that this would be used essentially as a protectionist device, and become yet another "conditionality" stick with which to beat developing economies. The argument has been widely made that as afar as

improving the conditions of workers in developing countries is concerned, such a strategy would be counterproductive, since it would lead to losses in employment. Certainly, it is difficult to make a rigorous analytical case for such standards. While it could certainly help to protect some firms and workers in rich countries from export competition, it would clearly not lead to a general improvement in labour conditions in developing countries, and would more likely lead to a deterioration caused by job loss in particular exporting sectors which would face trade sanctions.

Discuss the theoretical difficulty with the concept.

Indeed, it is not even very clear that "exporting jobs" from the North to the South is the basic reason behind growing unemployment in industrial countries. There are several aspects to be noted here, and they all point to a different perspective on both the causes of unemployment and the best means to address the growing insecurity of all workers that has been one of the features of globalisation.

Thus, the view that MNCs are in a major relocative phase whereby they are moving their operations to the developing world and investing in order to generate imports into their home bases, may be an exaggeration or even wrong as a general proposition. An UNCTAD study has suggested that in the case of the US and Germany, the FDI outflows until 1991 resulted in more exports from the US and Germany and that only Japanese FDI (and contrary to charges against Japan) resulted in more imports into Japan. [Hufbauer, Lakdawala and Malani, 1994] There is also evidence that while some MNCs engage in subcontracting or outward processing abroad for the labour-intensive parts of the final production, others more often invest and produce abroad (with inputs from their own home base) to supply competitively to the host country market, in those circumstances when exports from the home base are less competitive because of transport and other costs. [Raghavan 1998]

The more critical concern is whether such activities anyway are responsible for the extent of unemployment in the North. In most cases the import penetration in the consumer markets of the North from the developing world's exports have not been very high or significant (except perhaps in the clothing sector) . UNCTAD (1997) reports that in any case, not only are Northern workers more productive than their counterparts in the South in similar industries because

of the higher levels of technology and capital investment there, but the wage-productivity differential has been moving in the same direction, indicating that rapid technological change in the North has prevented Southern workers from actually offering a significant lower wage advantage in unit labour cost terms.

Indeed, it necessary to realise that in both developed and developing countries (including the rapid exporting countries of East Asia, for example) the employment elasticities of manufacturing output have been falling rapidly. Thus, it is not that jobs are being exported from North to South, but that both Northern and Southern workers are losing jobs because of *technology changes* that reduce the labour required per unit of output.

Even such a process is cause for concern only because such labour-displacing technological change has not been accompanied by wider economic expansion which would employ those no longer required in such manufacturing activities. In other words, the increased productivity of labour in certain industries has not been associated with sufficient job creation in other activities, and therefore overall employment opportunities have fallen. It should be noted that this is as much of a problem in most developing countries, as it is in the industrial world.

Much of the reason for this can be traced to macroeconomic strategies which constrain the ability of governments to create economic expansion through a combination of fiscal and monetary intervention and assisted structural change. Governments across the world have lost their interventionist impetus, and indeed are often unable to utilise expansionary policy instruments because of the parallel fear that this would upset financial markets and therefore cause capital flight. In other words, this form of global integration through capital flows has also created a substantial deflationary pressure in the system.

If these are the causes of the greater unemployment and greater fragility of the employment contract in both developed and developing countries, then what is the best way to confront it ? In a broad sense, the greater insecurity of workers in the worlds economy today comes not only from the fact of capital mobility and the competitive pressure for workers that it generates, but because the world economy as a whole can be said to be in an unemployment equilibrium. So, if workers conditions globally are to improve, this must be based on much greater employment generation than is currently being thrown up by the capitalist system. It is clearly a mistake to suppose that sustainable and productive employment increases the more insecure the workers are (or "flexible" the labour markets). The evidence rather points in the other direction : that more secure workforces

not only are more productive over time, but also are the only way to create sustainable patterns of economic expansion.

Certainly, capitalist markets do involve a tension between workers rights and employment. But if international capitalism is to be managed in such a way that it can generate greater good for all, then such a tension needs to be openly addressed. All this means that guaranteeing workers' rights in the international system - which is the current context is almost impossible to enforce - would still not be a sufficient condition for re-establishing social progress in a global system. If there has to be progress in terms of a social agenda, it is necessary to be able to show that it is possible to manage change in firms, industries, regions and labour markets in socially equitable way. A model of industrial organisation has to be developed which is both competitive and socially acceptable. And simultaneously, a model of development has to presented which allows for sustainable employment generation and improvements in the aggregate social labour productivity in the system, rather than in a few isolated pockets.

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