

## LEGAL ASPECTS OF A POVERTY AGENDA AT THE WTO: TRADE LAW AND 'GLOBAL APARTHEID'

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### INTRODUCTION

This introductory essay is intended as a somewhat speculative examination of issues expected to shape the international economic law field in coming years. The issue of poverty is the overwhelming moral, economic, legal, and political issue facing us. It should, and will, transform the international economic system, and with it, the field of international economic law. It is chastening that this issue has been a part of the trade system since at least the founding of the GATT in 1947.

It is an appropriate moment to review the relationship between trade law and poverty. The Doha Development Agenda has begun with a pro-development ministerial declaration, and recent meetings in Monterrey on financing for development and in Johannesburg on sustainable development have advanced discussions of the problems of development. Oxfam has prepared a report on trade and poverty, and other NGOs have become active in this area.<sup>1</sup> Developing countries are showing increasing assertiveness in WTO dispute settlement. In addition, social scientists are exploring the relationship between poverty and terrorism, while some political leaders are proclaiming a link.

In 1999, 2.8 billion people lived on less than \$2 each day, while 1.2 billion people lived on less than \$1 each day – measures of extreme poverty.<sup>2</sup> This is not the place to offer further statistics on other measures of poverty, relating to nutrition, health, education, environmental degradation, etc. However, it is worth noting that many of these measures indicate degradation of capacity: these afflictions reduce not only the quality of life, but also the productive capacity of the afflicted, resulting in a vicious cycle of poverty.

Prior to the September 2002 Johannesburg Summit, Thabo Mbeki, the President of South Africa, described the present international distribution of wealth in terms of 'global apartheid'. We might understand this statement as

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<sup>1</sup> 'Make Trade Fair, Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty' (2002), available at [www.maketradefair.com](http://www.maketradefair.com) [hereinafter, the 'Oxfam Report'].

<sup>2</sup> United Nations Development Program, Human Development Report 2002, chap 1 at 17–18.

a reference to a circumstance in which the legal system is used to lock certain people into a position of poverty, inequality, and disenfranchisement, or to artificially separate groups of people. Under apartheid, the accident of birth into a particular race radically affected one's life opportunities. Under the international system as it exists, the accident of birth into a particular nationality has a similar effect.

To what extent is the trade law system complicit in the creation of a system of 'global apartheid'? Trade liberalization, at its core, involves the reduction of barriers to equal participation in commerce, so we must say at the outset that the trade law system holds promise for reducing global apartheid. Trade law can be revised to further extend the competitiveness of the *market* – to allow poor people to compete for better wages and better livelihoods. This would be an important component of the destruction of global apartheid, and it can be achieved using familiar trade law tools. The Doha Ministerial Declaration refers to a number of important market access and other issues of interest to poor people in poor countries. And yet, history suggests a degree of skepticism, as often in GATT and WTO history, efforts to assist poor countries have been limited to cheap talk.

Furthermore, there are two possible arguments that the trade law system may perpetuate global apartheid. First, if we consider the trade law system not so much in terms of its requirements of liberalization, but in terms of its *permission* for national barriers to movements of factors, including goods, services, labor, and capital, in both wealthy states and poor states, we may understand the trade law system as limiting the ability of the poor to trade out of poverty. Is the glass half full or half empty? Second, turning to the requirements of liberalization, if these requirements limit the ability of poor states to choose policies that will maximize growth, and best ameliorate poverty, do they not have the effect of perpetuating poverty? Even though the global system does not have the racist basis that South African apartheid did, it may have the effect of limiting the ability of poor people to overcome poverty, inequality of life opportunities, and disenfranchisement.

Let us move into a twilight zone. Looking beyond the traditional trade concern of contestable markets, the remit of trade law has not yet run in any significant way to *non-market* governance in the poverty-reduction sense: to redistribution. Indeed, the general international legal system has little redistributive capacity. However, if there is a need for redistribution, and the trade law system – the WTO – is viewed as responsible for the management of international economic relations, the WTO will be subject to criticism until the needed redistribution is implemented, at the WTO or elsewhere. To what extent is this criticism – similar to the environmentalists' criticism that the WTO does not do enough for the environment – justified?

If we compare the domestic sphere in wealthier states to the international system, we see that domestic politics includes a substantially greater capacity for redistribution than does international politics. The purpose of redistribu-

tion may be understood in terms of distributive justice, of social cohesion or of the ‘price’ of avoiding disruption of the market. To what extent do these goals apply equally in the global system? To the extent that they do, what institutional or legal mechanisms are needed to achieve them?

Thus, there are three main areas for work to improve the position of poor people in the international trade system:

1. *Market Access in Wealthy Countries.* It is clear that opening markets to poor country products, including agricultural products, textiles, and tropical products, is a useful and necessary means to reduce poverty, although the magnitude of the effects of these measures is disputed. Opening developed country markets to services and labor from poor countries would also help many poor people. Of course, while there may be winners in poor countries, there may be losers among the poor in wealthy countries. We must also recall that liberalization in wealthy countries may have the effect of raising the costs of some goods to poor people in poor countries, while it reduces the costs of some goods to poor people in wealthy countries.
2. *Reform in Poor Countries.* As many leading trade economists have pointed out, poor countries may achieve substantial benefits from domestic reform, including trade liberalization. Dani Rodrik has raised concerns about the correct sequencing of trade liberalization reforms, and has insisted that poor countries need sufficient flexibility to devise and implement reforms that are most suitable for their growth.
3. *Global Redistribution.* Providing more money to poor people to pay for needed medicine, food, and education would also help, but has remained outside the trade regime. Other methods to help poor people, including trade discrimination in favor of products of poor countries, are relatively inefficient ways to assist the poor, but may be justified where more direct redistribution is politically impossible. Finally, linked to point 2 above, appropriate policy adjustments must be made by poor countries themselves as a condition of assistance.

What may lawyers add to the debate about poverty and its alleviation? The legal profession is skilled in determining what the law is. However, the discipline of law alone cannot tell us what kind of law there ought to be. A broader social scientific approach, using economics and other tools, examines the relationship between institutions – including laws – and particular outcomes, such as poverty reduction. Nor does law alone tell us *why* poverty should be reduced. Rather, our own values, informed by ethical theory, tell us how to think about the need to reduce poverty, and how to determine our individual obligations. Finally, law tells us little about whether our compatriots and those in other countries will join us in an effort to alleviate poverty. This is the domain of politics.

So, what can a legal analyst do? In litigation, lawyers can argue for interpretations of law that may benefit the poor, but this seems like a marginal strategy at best. More valuably, lawyers can participate in research to evaluate the consequences of particular legal rules, and assist in institutional design. Research can serve a critical purpose. Research informed by a complete understanding of legal rules, and providing information about their consequences, can guide us as to the most effective legislative, or international treaty-based action to take. Research can empower negotiators and can form the basis for suggesting revised institutions. Furthermore, and this is an area in which international lawyers can contribute greatly, analysis of the role of artificial and real international legal constraints on action – mostly in the form of assertions of the inviolability of sovereignty and of the false necessity of the legal structure that contributes to ‘global apartheid’ – can help to overcome or remove those constraints.

Part I of this essay outlines ethical and selfish bases for greater assistance to the poor. Part II reviews some of the arguments from economics and political economy that market access for poor country goods and services, economic reform in poor countries often including trade liberalization,<sup>3</sup> and redistribution to poor people, are critical to poverty alleviation. Part III suggests in very rough terms the types of legal and institutional structures and rules that seem required in order to overcome these obstacles.

#### I. ETHICAL AND SELFISH FOUNDATIONS: COSMOPOLITANISM AND EMBEDDED LIBERALISM

Do we have an ethical obligation to assist the poor in our own countries;<sup>4</sup> does this obligation extend to the poor in other countries? What is the nature and extent of this obligation? If we do not have an obligation to assist the poor, would it nevertheless be useful – to us – to do so? This is not a question we can answer in any reliable way here, or perhaps anywhere. Below, I describe a Rawlsian rationale for redistribution. I also provide an analysis of the requirements of ‘embedded liberalism’, as well as its inadequacies, broadening the embedded liberalism<sup>5</sup> critique to suggest the need for more

<sup>3</sup> While the predominant view among economists seems to be that liberalization can promote growth in developing countries, there is at least some argument that the timing and scope of liberalization might be structured in different ways to enhance growth. See Francisco Rodriguez and Dani Rodrik, ‘Trade Policy and Economic Growth: A Skeptic’s Guide to Cross-National Evidence’, NBER Working Paper No W7081 (1999). For a response, see Jagdish Bhagwati and T. N. Srinivasan, ‘Trade and Poverty in the Poor Countries’, working paper dated 2002, available at [http://www.econ.yale.edu/~srinivas/trade\\_poverty.pdf](http://www.econ.yale.edu/~srinivas/trade_poverty.pdf).

<sup>4</sup> See G. A. Cohen, *If You’re an Egalitarian, How Come You’re So Rich?* (Harvard University Press 1999).

<sup>5</sup> John G. Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in Post-war Economic Order’, 36 *Int’l Org.*, 379 (1982). Ruggie modernizes and adapts a perspective earlier elucidated by Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*

than adjustment assistance. This argument depends on a kind of global social contract, and the possibility of ‘backlash’<sup>6</sup> by poor elements if they are not given a sufficient stake in the operation of global society.

I refer to a Rawlsian<sup>7</sup> analysis of the foundation of ethical responsibility to assist the poor. As is well known, Rawls uses the heuristic of an original position, in which the members of a society decide its structure under a ‘veil of ignorance’, in which they are ignorant of the actual position and endowments they will enjoy in society. Rawls then seeks to develop an understanding of the principles of justice on which individuals would agree in such a position. His second principle of justice (the first deals with equal liberty) postulates that inequality is only justified to the extent that it is necessary to improve the position of the least well-off members of society. If applied globally, this principle, known as the ‘difference principle’, would have revolutionary effects. In fact, Rawls, perhaps tragically, argues that this principle of justice only applies within a domestic society – for Rawls, international society lacks the solidarity that is a necessary predicate for its application.

On the other hand, political philosophers such as Charles Beitz<sup>8</sup> and Thomas Pogge<sup>9</sup> argue for a cosmopolitan approach, in which each individual, regardless of borders, enters into a global original position. Under this global original position, individuals, fearing that they might in the real world reside in one of the poorest states, or, more accurately, that they might be among the poorest persons, would decide on a difference principle, in the same way that they would in a domestic original position.

This difference principle-based approach is in very broad terms comparable to an approach to distribution based on ‘embedded liberalism’, drawing on the work of Polanyi and Ruggie. Polanyi and Ruggie believe that states must

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(Beacon Press 1944). Dani Rodrik has considered the application of this perspective to modern global markets. Dani Rodrik, *Has Globalization Gone Too Far?* 7 (1999). See also Robert L. Howse, *From Politics To Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 Am J Int'l L 94 (2002).

<sup>6</sup> For an application of this concept in the corporate law field, see Mark J. Roe, ‘Backlash’, 98 Colum L Rev 217 (1998)

<sup>7</sup> See *Global Justice* (Thomas W. Pogge (ed), Blackwell 2001); Frank J. Garcia, ‘Trade and Inequality: Economic Justice and the Developing World’, 21 Mich J Int'l L 975 (2000). See also Joel P. Trachtman, ‘Review Essay: The Law and Economics of Global Justice’, Am J Int'l L (2002).

<sup>8</sup> See Charles R. Beitz, ‘Review Essay: International Liberalism and Distributive Justice: A Survey of Recent Thought’, 51 World Pol 269, 290 (1999), stating that ‘I believe that the philosophical weakness most characteristic of cosmopolitan theories – although not found equally in all of them – is a failure to take seriously enough the associative relationships that individuals do and almost certainly must develop to live successful and rewarding lives.’ However, Beitz accepts a federal possibility: ‘it is hardly clear that a sophisticated cosmopolitanism *cannot* explain how local affiliations might give rise to special responsibilities. Such a view would recognize the value to individuals of their associations with domestic or local communities and argue that ethically significant properties of these associations justify internal distributive arrangements that are different from, although not inconsistent with, what is required by global principles.’ Id (citations omitted) (emphasis in original).

<sup>9</sup> Thomas W. Pogge, *Realizing Rawls* (Cornell University Press 1989).

regulate the distribution of gains from trade in order to avoid political discontent, and, ultimately, a ‘backlash’ that would destroy the liberal system. In Ruggie’s interpretation, individual states must cushion the domestic ‘losers’ from the loss of wages, livelihoods, and investments that results from liberalization – Ruggie extends Polanyi’s approach to relate free international trade to a domestic welfare state. The embedded liberalism ‘bargain’, in short, is one in which the state takes care of its own through regulatory intervention in order to maintain its political ability to liberalize. But, importantly, embedded liberalism calls for national regulatory intervention, not global regulatory intervention. Its call for redistribution is state-centered, and limited by domestic politics and budgetary capacity.

Further, it is important to recognize<sup>10</sup> that global liberalism embedded within a domestic welfare state is not quite analogous to the system described by Polanyi. Polanyi saw the need for society-wide regulatory intervention to make adjustments in connection with a society-wide market. The true analog in connection with global markets is global regulatory intervention – a global welfare state. Thus, if the scope of the market is to some degree global, then it would seem appropriate that the scope of regulatory intervention in the market would need to be roughly commensurately global.<sup>11</sup> After all, what would be the purpose of artificially constraining the possible funding for adjustment, or of other redistributive regulation, to sources within a particular *geographic segment* of the market?

It is important to recognize, with Polanyi’s original work and Ruggie’s extension, that the regulation that they are concerned with is best understood as implicitly redistributive. The point is not necessarily to provide a certain quality of regulation, but to provide a certain quality of life. It may be that labor regulation, health regulation, environmental regulation, and others are the best means to do this under particular circumstances. But, as Kaplow and Shavell have pointed out,<sup>12</sup> if redistribution is the goal, then taxation and explicit redistribution are the most efficient means, subject to what we might call political transaction costs. That is, there may be circumstances in which regulation is used to redistribute because direct redistribution will be too difficult in political terms. This technique, of course, has its ethical and practical

<sup>10</sup> As Ruggie does in more recent work. See John G. Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’, Miliband Public Lecture on Global Economic Governance, The London School of Economics and Political Science, 6 June 2002, available at [www.globaldimensions.net/articles/ruggie/globalliberalism.html](http://www.globaldimensions.net/articles/ruggie/globalliberalism.html).

<sup>11</sup> It is a question of subsidiarity. For a brief statement of this issue, see David Trubek, ‘Book Review: Governance in a Globalizing World’, 96 *Am J Int’l L* 748 (2002). On a related point, see Howse, above n 5, at 116.

<sup>12</sup> Louis Kaplow and Steven Shavell, ‘Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income’, 29 *J Leg Stud* 821 (2000); Louis Kaplow and Steven Shavell, ‘Why the Legal System is Less Efficient than the Income Tax in Redistributing Income’, 23 *J Leg Stud* 667 (1994).

problems. But it has even greater problems in the global setting, where these regulatory policies are dependent on different national economic, legal, and political systems and cultures. Suppression of differences in order to embed liberalism may be too costly in terms of legitimate regulatory diversity. Moreover, the scope for transnational externalization – for transnational redistribution – may be too greatly constrained by a requirement to act through regulatory means.

So, a true global embedded liberalism would extend to poor countries and would allow them, as well as wealthier countries, to attenuate the risks and costs of liberalism to which their citizens are exposed. The transfers could occur on a global basis, and would seem to require global institutions to overcome collective action problems in order to make them effectively.

Once extended in this way – in terms of both geographic reach and redistributive scope – the embedded liberalism idea seems to have more in common with the cosmopolitan ethical perspective described earlier. Of course, its motivations are not based on ethics, but on prudent self-interest: the embedded liberalism concept suggests that in order to protect liberalism from destruction by those who lose, it is necessary to compensate them through regulatory intervention. One way in which the Rawlsian difference principle and Polanyi's embedded liberalism can be merged is through recognition that, to some extent, each of us lives our lives in a 'real' veil of ignorance. That is, over time, we are uncertain to which group we will belong – whether we will be among the lucky few who hold wealth, or among the poorest wraiths. Under these circumstances, the difference principle is simply a hypothetical constitutional arrangement that we might actually enter into under uncertainty.<sup>13</sup>

The embedded liberalism concept calls for redistribution in order to forestall a backlash. On a very speculative, and perhaps even a counterfactual, level, we can at least imagine a relationship between poverty and terrorism along these lines. That is, even though there has not yet been identified a causal relationship between poverty and terrorism, we may, at least in our imaginations, consider whether terrorism could become the way that the poor disrupt global liberalism. Is the rise of terrorism a kind of 'backlash' against liberalism?<sup>14</sup> Is the correct response to 'embed' liberalism in a regulatory regime?

A more peaceful 'backlash' – or threat to withdraw from or disrupt the international trade rules system – took place in the early 1960s, when developing countries threatened to leave GATT as a bloc, and were able to obtain

<sup>13</sup> See Geoffrey Brennan and James M. Buchanan, *The Reason of Rules* 28–31 (Cambridge University Press: Cambridge 1985); James M. Buchanan and Gordon Tullock, *The Calculus of Consent* 77–80 (University of Michigan 1962); Dennis Mueller, *Constitutional Democracy* 61–64 (Oxford University Press: New York 1996).

<sup>14</sup> See Ruggie, above n 10.

substantial concessions from the developed countries.<sup>15</sup> A more peaceful ‘backlash’ may be said to be taking place now, and has resulted in the development focus of current negotiations at the WTO and elsewhere.

## II. GATT/WTO LAW AND POVERTY: CONTINUITY IN THE DOHA DEVELOPMENT AGENDA

Given the desperate and urgent circumstances of so many, the Doha Development Agenda seems rather modest in its scope.<sup>16</sup> It may be that the WTO is not the place to engage in the more extreme measures needed, and there are certainly other important contexts in which poverty is addressed, but there still may be room to contemplate further action. Furthermore, as noted above, to the extent that the WTO is identified with global economic management, it may be that the WTO will be subjected to increasing criticism for failure to address poverty issues more completely.

### A. Special and differential treatment

Although it features prominently in the Doha Development Agenda, it appears that the concept of ‘Special and Differential Treatment’ (S&D), at least as applied so far, has limited utility.<sup>17</sup> S&D is a complex phenomenon – some aspects of S&D are undoubtedly beneficial. However, this concept seems to mask the fact that the international trade system has done little

<sup>15</sup> Robert E. Hudec, *Developing Countries in the GATT Legal System*, 39, 40 (Gower: Aldershot 1987); See also John H. Jackson, *The World Trading System* 319–20 (MIT Press 1997) (‘a number of developing countries, dismayed with rules that had evolved [at the 1948 Havana conference], opted to stay out of the GATT system for years and even decades.’).

<sup>16</sup> For a contrary perspective, or at least an admittedly optimistic perspective, see Peter Gerhart, ‘Slow Transformations: The WTO as a Distributive Organization’, 17 *Am U L Rev* 1045 (2002). Prof. Gerhart suggests that in the Doha Ministerial Declaration there is evidence of a move toward greater emphasis on balanced outcomes, and toward a vision of the WTO as motivated not just by efficiency, but by redistribution.

<sup>17</sup> Paragraph 44 of the Doha Ministerial Declaration calls for a review of S&D, with a view toward making the relevant provisions more precise, effective, and operational. For a proposal to revise S&D in order to make it more favorable to poor countries, see Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe, Proposal for a Framework Agreement on Special and Differential Treatment, WT/GC/W/442 (2002). For the history of the concept of S&D, see John H. Jackson, *World Trade and the Law of the GATT: A Legal Analysis of the General Agreement on Tariffs and Trade*, 625–71 (Bobbs-Merrill: Indianapolis 1969). For an analysis of the S&D principle, see Peter Lichtenbaum, ‘“Special Treatment” vs. “Equal Participation”’: Striking a Balance in the Doha Negotiations’, 17 *Am U Int’l L Rev* 1004 (2002). See also John Whalley, ‘Special and Differential Treatment in a Millennium Round’, CSGR Working Paper 30/99, May 1999, available at <http://www.warwick.ac.uk/fac/soc/CSGR/wpapers/wp3099.PDF>; Constantine Michalopoulos, ‘The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization’, working paper dated 2000, available at <http://www.worldbank.org/research/trade/archive.html>.

specifically intended to alleviate poverty: it is not special and differential enough. S&D includes several specific rules and approaches that can be placed in three categories: non-reciprocity, preferential market access, and permissive protection.<sup>18</sup>

First, S&D includes the concept, initially expressed in the mid-1960s, that poor countries will not be expected or requested to make reciprocal concessions in trade negotiations.<sup>19</sup> This vague principle was later incorporated in Part IV of GATT.<sup>20</sup> However, as several have noted, those who are not required to reciprocate often find that few concessions are accorded to them – even under conditions of MFN.<sup>21</sup> This is because, of course, the products of export interest to developing countries often differ from those of interest to other countries, and so are not included in the give-and-take of negotiation over concessions.

Second, S&D includes the aspiration to provide enhanced market access to developing country products. Partly because of the principle of non-reciprocity, this aspiration was often ignored. The area in which S&D has had its greatest effect is in connection with the Generalized System of Preferences (GSP), which provides for reduced tariff treatment for certain developing country products. While the GSP has provided modest benefits, it has not been applied to provide greater market access for many of the most important poor country products,<sup>22</sup> and the US and EC have imposed substantial conditions on access to their GSP programs.<sup>23</sup> ‘Graduation’ policies including ceilings on eligible exports have also diminished the utility of GSP. Furthermore, as developed country tariffs have decreased to an average of less than 5 percent, and with the formation of more free trade areas and customs unions, the preferences under the GSP have been greatly eroded, and will be further eroded in future. The magnitude of the ‘differential’ has declined substantially. If benefits are unstable and are a wasting asset, they cannot form a sound basis for investment that would allow poor countries to actually achieve market access. Furthermore, the principle of non-reciprocity, as implemented

<sup>18</sup> See Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in the WTO Agreements and Decisions, WT/COMTD/W/77 (25 October 2000).

<sup>19</sup> BISD, 13th Supp. (1965).

<sup>20</sup> See Hudec above n 15, at 58.

<sup>21</sup> See, e.g., Constantine Michalopoulos, ‘Developing Country Strategies for the Millennium Round’, 33(5) *J World Trade* 1, 25 (1999); Hudec, above n 15, at 46.

<sup>22</sup> Paragraph 42 of the Doha Ministerial Declaration provides a commitment to the *objective* of duty-free, quota-free market access for products originating from least developed countries. If realized, this commitment could be of some importance.

<sup>23</sup> Hudec above n 15, at 210–15. India has begun dispute settlement proceedings against the EC in connection with the EC’s conditions applicable to its generalized system of preferences. Request for Consultations by India, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS264/1, 12 March 2002.

through GSP, seems to have the effect of diminishing incentives for liberalization by beneficiary countries.<sup>24</sup>

Third, S&D includes greater permission for protection, in particular under Articles XII and XVIII of GATT,<sup>25</sup> relating to balance of payments. As Michael Finger has pointed out, '[p]erhaps the least development-friendly side of the Doha Declaration is its willingness to ladle out 'special and differential treatment' without a perception of where developing Members would be better off if *they themselves* observed the disciplines the negotiations aim to establish'.<sup>26</sup> For much of the past 20 years, a consensus – part of the 'Washington Consensus' – developed that poor countries would benefit from liberalization of their domestic markets. The debate about whether protection of domestic markets is good or bad for poor countries has recently been revived.<sup>27</sup> However, there still seem to be solid reasons for poor countries to liberalize at some point in their development path. Furthermore, there would seem to be little basis for questioning liberalization as to goods and services, such as financial and telecommunications services, that provide infrastructure for other productive activities.

## B. Market access for poor country products

There is a strong consensus that liberalization by the wealthy states in agriculture, textiles, and tropical products, even on an MFN basis, would assist growth in poor countries.<sup>28</sup> For example, exports from developing countries are limited by continuing developed country tariffs (including quotas that were tariffed in the Uruguay Round), domestic supports, and export subsidies. And indeed, market access in products of export interest to poor countries would be an important way to enhance livelihoods in those countries, although it is not unambiguous. Easier exports to wealthy countries could mean higher prices at home. Reduction of wealthy country export subsidies on agriculture could hurt consumers in food importing states.

Furthermore, reduction of barriers in wealthy states would have adverse effects on domestic persons involved in production of competing goods, often

<sup>24</sup> Caglar Ozden and Eric Reinhardt, 'The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000', working paper dated 24 May 2002, available at <http://userwww.service.emory.edu/~erein/research/gsp2.pdf>.

<sup>25</sup> See Chantal Thomas, 'Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order', 15 *Am U Int'l L Rev* 1249, 1256 (2000).

<sup>26</sup> J. Michael Finger, 'A Diplomat's Economics: Development and Trade Perspectives on the Doha Agenda', working paper dated 10 May 2002 (emphasis in original).

<sup>27</sup> See Dani Rodrik and Francisco Rodríguez, 'Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence', in *Macroeconomics Annual 2000* (Ben Bernanke and Kenneth S. Rogoff, (eds), 2001).

<sup>28</sup> See Oxfam Report, above n 2.

hurting the poorest segments of wealthy countries.<sup>29</sup> On the other hand, barriers often disproportionately raise the costs of basic goods to poor consumers. Poverty is a cosmopolitan phenomenon. Bhagwati has suggested that as agriculture in wealthy countries is principally the occupation of wealthier agribusinesses, it is less ethically ambiguous to liberalize in agriculture than in textiles or other manufactured goods.<sup>30</sup>

Tariff peaks and tariff escalation in connection with goods of export interest to poor countries have restricted market access not only in agriculture, textiles, and tropical products, but also in other manufactured goods.<sup>31</sup> While developed country tariffs now average less than 5 percent, Hoekman points out that tariff peaks – higher tariffs – are ‘often concentrated in products that are of interest to developing countries’.<sup>32</sup> Many of these apply to agricultural products, and they are often associated with tariff escalation, by which the tariffs on unprocessed products are disproportionately less than the tariffs on processed products, providing perverse incentives against manufacturing in poor countries. Tariff peaks may be a result of the principle of non-reciprocity, or may be the result of ‘simple political economy’,<sup>33</sup> and of a desire to protect the jobs of the relatively poor in rich countries.

While it is necessary, and will be efficient, for developed states to reduce barriers to developing country products on an MFN basis,<sup>34</sup> it is also necessary to recognize the ethical and political need to take care of workers in competing industries in wealthier countries, as well as consumers in poor countries. Thus, while it is difficult to reduce these barriers because of the harm liberalization would do in wealthy countries, we also must recognize that trade barriers are not the most efficient means to help the poor in wealthier countries. It has long been understood that it would be more efficient globally to provide adjustment assistance to the poor in wealthier countries. However, the cost of adjustment assistance would be domestic, direct, and relatively transparent, whereas the cost of trade barriers is more dispersed, less direct, and relatively opaque.

Thus, it will not be easy, or ethically unambiguous, to achieve change. This is part of the political and ethical conundrum of poverty relief through trade.

<sup>29</sup> See Alan O. Sykes, ‘Comparative Advantage and the Normative Economics of International Trade Policy’, 1 *JIEL* (1998), at 69.

<sup>30</sup> Jagdish Bhagwati, ‘The Poor’s Best Hope’, *The Economist* (20 June 2002), at 24.

<sup>31</sup> Paragraph 16 of the Doha Declaration calls for the reduction of tariff peaks and tariff escalation.

<sup>32</sup> Bernard Hoekman, ‘Strengthening the Global Trade Architecture for Development: The Post-Doha Agenda’, working paper dated January 2002, at 5.

<sup>33</sup> Bhagwati, above n 30.

<sup>34</sup> Furthermore, developing countries themselves constitute an important export market for other developing countries. Under the Enabling Clause, developing countries may be able to provide enhanced market access to other developing countries, without benefiting wealthy countries on an MFN basis. Of course, opening developing country markets to imports from other developing countries will hurt some people, and will hurt some countries, again putting pressure on adjustment.

In order to open markets to products of poor countries, it may be necessary to make transfer payments to those harmed in both wealthy and poor countries. While from a welfare standpoint it would likely be more efficient to do so, this assumes relatively low political transaction costs allowing these transfer payments to be made. Otherwise, the low political cost solution may be simply to continue protection.

### C. Immigration and GATS

One way of ending ‘global apartheid’ would be to allow workers from poor countries to take jobs in wealthier countries – the current global system of restricted migration may be understood in at least one dimension as a macrocosm of the internal passport system that was used under apartheid. Dani Rodrik has pointed out that substantial benefit could be derived from liberalization of immigration to allow greater trade in labor.<sup>35</sup>

Market access for services, including unskilled labor, of export interest to poor countries should also be liberalized. The General Agreement on Trade in Services (GATS) focused on services in which wealthier countries are more competitive: financial services, telecommunications, professional services, etc., and concentrated on modes of delivery of services other than those that require immigration.<sup>36</sup> By contrast, poor countries have tremendous advantages in unskilled and semi-skilled services, which were largely excluded from GATS, both because their subject matter was not covered, and because the mode of delivery by which these services may be traded is physical movement of the service provider.

Of course, the adjustment issues mentioned in the prior section are applicable and are more intense in connection with immigration. Immigration also raises more intense political issues, partly because it involves issues of access to host country social welfare programs, as well as issues of participation in host country politics.

### D. Border measures, internal measures, and domestic policy flexibility

Leading economists including Jagdish Bhagwati, Michael Finger,<sup>37</sup> Dani Rodrik, and T. N. Srinivasen<sup>38</sup> have suggested that one of the problems with

<sup>35</sup> Dani Rodrik, ‘Feasible Globalizations’, working paper dated May 2002.

<sup>36</sup> See, e.g., WTO Secretariat, ‘GATS, Mode 4 and the Pattern of Commitments’, dated 12 April 2002, available at [http://www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_carzaniga\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_carzaniga_e.doc).

<sup>37</sup> See J. Michael Finger and Julio J. Nogues, ‘The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations’, working paper dated December 2001.

<sup>38</sup> T. N. Srinivasen, ‘Developing Countries and the Multilateral Trading System After Doha’, Yale University Economic Growth Center Discussion Paper No 842, dated February 2002, available at <http://www.econ.yale.edu/egcenter/research.htm>.

the post-Uruguay Round trade system is the intrusion of trade law into areas that were previously viewed as within domestic prerogatives, such as intellectual property rights, technical standards, and phytosanitary standards, and extending to some of the post-Uruguay Round agenda, including environmental protection and labor rights.

Bhagwati and Srinivasen suggest that we can only be confident that agreements will promote welfare when they are tariff-reducing – as tariff reductions, in neo-classical economic theory, promote the welfare of both the exporting state and the importing state, there is little risk of a welfare reduction. While this may generally be true as a matter of wealth maximization, trade policy is not limited to wealth maximization. Rather, as Avinash Dixit has suggested, wealth maximization may be sacrificed for a broader welfare calculus wherein preferences are transmitted through the political system.<sup>39</sup> Furthermore, in these public choice-oriented terms, even tariff reductions can cause harm to one side. Thus, in this broader welfare calculus, there is little difference between tariff reduction agreements and agreements that address domestic prerogatives.<sup>40</sup>

Rodrik, on the other hand, is concerned about domestic policy flexibility, and the need for poor states to have flexibility to tailor their economic policy to meet their own needs.<sup>41</sup> However, this concern does not appear to be implicated so much by restrictions on standards, and is not greatly implicated by labor or environmental measures. It is implicated by restrictions on subsidies and protection – imposed by traditional trade law applied to poor countries. It is also implicated by TRIPS, which is discussed further below.

#### **E. Technical assistance in negotiations, implementation, and dispute settlement**

The role of technical assistance in the trade sphere is in some respects comparable to legal aid in the domestic sphere. It can play an important role in assisting poor states to negotiate, or to bring claims to dispute settlement, or to implement their obligations. However, this role is notably interstitial, and its utility to poor people depends on the substantive rules to be negotiated, enforced, and implemented, respectively. So, it would be wrong to suggest that technical assistance does not help, and it certainly can be useful in addressing certain problems. Technical assistance for research and negotiation, allowing developing countries to understand and argue their positions more accurately and persuasively, is of critical importance.

<sup>39</sup> Avinash Dixit, *The Making of Economic Policy: A Transaction Cost Politics Perspective* (MIT Press 1996).

<sup>40</sup> I address the distributive effects of the TRIPS agreement in greater detail below.

<sup>41</sup> Rodrik, above n 35.

## F. TRIPS and poverty

It is clear that TRIPS has imposed significant costs on poor countries, and on poor people. Viewed alone, TRIPS was a bad deal for poor countries. It may be that even as part of the Uruguay Round package, TRIPS was a bad deal for poor countries. However, the problem of poor countries, and more specifically of poor people, in relation to TRIPS is not the rules of TRIPS themselves,<sup>42</sup> but the poverty of these individuals. One strategy that some have explored to seek to reduce the costs of AIDS and other medicines, and relieve the burden of TRIPS on poor people, is to argue for the modification or termination of TRIPS.<sup>43</sup> If all other things remained equal, this would redistribute wealth from the wealthy to the poor (or would reverse the redistribution effected by the original TRIPS from the poor to the wealthy). But it would change the global level of intellectual property protection.

It is not for me to say what the efficient global level of intellectual property protection is.<sup>44</sup> However, I would offer a view that in ideal circumstances, the efficient global level of intellectual property protection should not be modified to provide greater access to medicines for the poor. It would be much more efficient, if we had the institutional infrastructure to do so, simply to transfer resources to the poor to enable them to acquire needed medicines. Srinivasen concludes that ‘compared to a policy of income transfers to the poor to enable them to buy drugs at a common world price, market segmentation is an inferior policy.’<sup>45</sup>

Thus, it appears that the TRIPS-AIDS problem might be optimally addressed by redistribution. However, we lack effective institutions for redistribution. Under these circumstances, there may be stronger arguments to modify TRIPS obligations themselves, or even to use human rights-based arguments to procure effective redistribution through abrogation of intellectual property rights. But we should be clear that this technique amounts to a global expropriation of the existing ownership rights<sup>46</sup> of pharmaceutical companies.

## G. Summary

This part has suggested some of the limitations of trade law in connection with poverty alleviation. Measures taken thus far have been of limited effect-

<sup>42</sup> See Alan O. Sykes, ‘TRIPS, Pharmaceuticals, Developing Countries and the Doha “Solution”’, John M. Olin Law & Economics Working Paper No 140 (2d series) (2001), University of Chicago Law School, available at <http://www.law.uchicago.edu/Lawecon/index.html>.

<sup>43</sup> This type of redistribution through abrogation or renegotiation of agreements has some precedent in the periodic renegotiation of foreign debt, or expropriation of foreign direct investment. See Joel P. Trachtman, ‘Foreign Investment, Regulation and Expropriation: A Debtor’s Jubilee?’, 82 *Proceedings of the American Society of International Law* 103 (1995).

<sup>44</sup> See Sykes, above n 42; see also Frederic M. Scherer, *Industry Structure, Strategy and Public Policy* (HarperCollins 1996) 362–66.

<sup>45</sup> Srinivasen, above n 38, at 13.

<sup>46</sup> This argument is made more complicated, but is not refuted, by the fact that these rights are generally only recently acquired.

iveness. In order to make progress, it is necessary to open rich country markets to products, services, and workers of poor countries, and to encourage appropriate liberalization in poor countries. Opening rich country markets will require redistribution within rich countries. In order to increase the export capacity of poor countries, and in order to alleviate poverty, especially in light of TRIPS, it is necessary to engage in greater redistribution from rich countries to poor countries.

### III. WHAT IS TO BE DONE?

Part I has provided an ethical and rationalist argument for greater assistance to the poor. It has recognized the political barriers to action. Part II has shown the potential and limitations of the trade law system as it stands, recognizing the political barriers to action. Obviously, it is uncertain whether any action can be taken, and any action that is taken will be shaped by many factors relevant to negotiations. The purpose of this section is to engage in a relatively conjectural exercise as to what types of actions may be considered, and subjected to further research.

#### A. Liberalization and redistribution

There are two kinds of tools available to help the poor. The tool that comes most naturally to the trade system is improved market access and domestic reform. The second type of tool is international redistribution. Both tools seem appropriate to be used, and they can reinforce one another.

Enhanced market access would allow the poor to increase their incomes through competition with people in wealthy states. Immigration by poor persons to wealthier states may allow them to achieve greater incomes, and can also allow them access to the internal redistributive mechanisms available in wealthy countries. Increased investment in poor countries can provide the capital necessary to increase the returns to labor within poor countries. The point is factor mobility: breaking down the barriers of global apartheid.

The WTO has the capacity and mandate to coordinate reductions in barriers that impede flows of poor country goods and services, but has not yet addressed issues of labor mobility. While the WTO has not yet engaged in significant efforts to enhance flows of investment (outside of the relatively modest efforts in the GATS and TRIMS agreements), it is not out of the question that the WTO would become more involved in liberalizing investment flows, as recognized in the Doha Ministerial Declaration. The types of investment flows that are needed, of course, are steady flows of capital that would provide a stable basis for enhancing local productive capacity.

However, the TRIPS-AIDS problem described above illustrates too well that the fundamental problem of poor people and countries is that they are poor. Taxation and redistribution would often be a more efficient means to

assist the poor in this case, as well as in other policy contexts, compared to modifying what would otherwise be the most efficient intellectual property protection regime, or the most efficient trade policy regime.

At the same time that the poor are accorded greater opportunities to compete, greater aid is needed to provide the tools of competition: food, education, health care, and infrastructure. Given that many people in poor countries lack the nutritional, educational, health, and capital infrastructure to take advantage of enhanced market opportunities, transfers of resources are required to establish these conditions for participation in the global economy.

It is easy to say that more money should be transferred to the poor, but the greatest barrier to poverty alleviation in many cases is weak or predatory government. Recent research suggests that domestic institutional quality is a more significant determinant of growth than geography or trade liberalization.<sup>47</sup>

Finally, let us emphasize the connection between liberalization and redistribution based on the cosmopolitan nature of poverty. In many instances, trade liberalization gives rise to substantial political costs. These costs may be paid through selective protectionism: dissenting interests may be 'paid off' through protection against competing imports. This is despite the fact that it might enhance global social welfare to simply pay direct compensation. However, direct compensation is more readily criticized, and allows costs to fall fully on local taxpayers. On the other hand, protection often raises costs only to presumably more dispersed consumers, and also diminishes the welfare of foreign persons, whose interests are not directly taken into account in the domestic political system. The point is that domestic redistribution is critical to efficient liberalization, just as international redistribution is necessary to poverty relief more generally.

While many states have domestic institutions capable of facilitating redistribution, we lack global institutions capable of facilitating international redistribution. That is, redistribution may be impeded, or at least rendered inefficient, by the lack of appropriate institutions to allow individuals or states to engage in redistribution with confidence and efficiency. Institutional development can assist in overcoming collective action problems in connection with individual decisions to engage in redistribution.<sup>48</sup>

## **B. Institutional reform and the role of international economic lawyers**

As noted at the outset, international economic lawyers can assist by participating in research efforts, with economists and other social scientists, to better

<sup>47</sup> Dani Rodrik, Arvind Subramanian, and Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development', Harvard Center for International Development Paper No 97, October 2002, available at <http://www.cid.harvard.edu/cidwp/pdf/097.pdf>. Rodrik *et al.* refer to Daron Acemoglu, Simon Johnson, and James A. Robinson, 'The Colonial Origins of Comparative Development', 91(5) *Am Econ Rev* 1369 (2001).

<sup>48</sup> See Leif Wenar, 'Contractualism and Global Economic Justice', in Thomas W. Pogge (ed), *Global Justice* (Blackwell 2001), at 84.

understand the consequences of particular international economic law rules, as they are applied. They can also participate in exercises of institutional imagination, in order to evaluate what substitute legal rules and institutions are available, and to develop predictions regarding their consequences. This work should be particularistic; that is, it should recognize that different countries are at different stages of development, have different social and institutional structures, and have different goals.

In addition, international economic lawyers can participate with economists to develop methods to review the international economic policy, and also the domestic policy, of particular poor countries in terms not of trade liberalization but of poverty reduction. In this regard, a variant of the WTO's successful Trade Policy Review Mechanism, perhaps including support from the WTO, UNCTAD, the IMF, and the World Bank,<sup>49</sup> may be in order. This development policy review mechanism would require careful customized analysis.<sup>50</sup> It would be driven by the particular circumstances and institutional structure of the subject state, rather than by a more general Washington Consensus-type prescription.

Finally, and most speculatively, lawyers can assist in structuring appropriate international institutions to collect resources and redistribute them to poor countries. This is not a new proposal in international relations. As part of the 'Millennium Development Goals', wealthy countries have agreed to urge one another to 'make concrete efforts towards the target of 0.7 per cent of their GNP as [official development assistance] to developing countries and 0.15 to 0.20 per cent of GNP of developed countries to least developed countries . . .'.<sup>51</sup> Obviously, this is an intergovernmental and loose institutional structure. The proposals of the 1970s for a Deep Seabed Authority to reap the harvest of manganese nodules and other seabed resources as a common trust for development may serve as a more transnational and institutionalized precedent. The fact that the wealth of the seabed is to a large extent not economically feasible to exploit does not prevent us from identifying other

<sup>49</sup> The World Bank's International Development Association (IDA) administers a 20-factor 'Performance Based Allocation' system, which reviews a number of different features of development policy as a basis for lending. However, this system does not provide substantial room for country-specific determinations of appropriate policies. See 'Linking IDA Support to Country Performance: Third Annual Report on IDA's Country Assessment and Allocation Process', April 2002, available at <http://siteresources.worldbank.org/IDA/Resources/PBA2002.pdf>.

<sup>50</sup> See Michael Massing, 'Challenging the Growth Gurus: A Bitter Feud Is Heating up over Development Policy', *NY Times* (19 October 2002), A19, 21. In that article, Dani Rodrik is quoted as saying 'Trade reform is something that has to be tailored to each country's circumstances, taking into account its geographic advantage, its institutional needs, its relations with its main trading partners.' The article goes on to say that 'Such an approach troubles Jagdish Bhagwati, a colleague of Mr Stiglitz' at Columbia and a strong advocate of free trade. Joe assumes that there's a monolithic view at the fund and the bank, but that's not the case.' Thus, there seems to be agreement that a 'monolithic' approach would not make sense.

<sup>51</sup> Monterrey Consensus, UN Doc A/Conf.198/3, 22 March 2002, para 42. Even these minimal goals are not being met.

bases for aggregation of resources. The European Community funds its operations, including its redistribution, through customs duties, levies on agricultural imports, a portion of each member state's value added tax, and an additional resource based on member state GNP. Perhaps a start toward global reform would see wealthy states agree to turn their tariff revenue, including revenue from countervailing duties and anti-dumping duties, over to a redistributive mechanism. Presumably, such a structure would result in some tariff reduction, and would therefore have the collateral effect of increasing net global welfare.

Under circumstances of weak governance in many poor countries, in order to ensure that resources are not misapplied, some international institutional monitoring and conditionality arrangements are necessary. This will have the beneficial effect of causing governments seriously to examine their development policy, by removing moral hazard problems. If citizens could rely on unconditional global redistribution, they would lack appropriate incentives to cause their own state efficiently to achieve their goals – in economic terms, there would be a 'soft market constraint'.<sup>52</sup>

A development policy review mechanism along the lines mentioned above could be established to recommend a wide range of domestic and international policy prescriptions. For example, it could be authorized to recommend non-application of particular WTO legal rules by poor countries, and it could recommend particular domestic reforms. The WTO arrangements for balance of payments exceptions could be modified to serve as an institutional foundation for this type of structure. This would be a form of interventionism, and some will call it a form of neo-colonialism. But sovereignty, in the form of absolute state control over its own affairs, has been oversold to poor small states. First, these states have little control simply because of their weak economic position. Second, local control is not of benefit to individuals when it is in the hands of predatory governments – we must be open to a post-post-colonial possibility of intervention, in cases of failed domestic governance. If predatory governments can be disciplined, through a regime of analysis, transparency, and conditionality, it is possible to improve the lot of their citizens.

It may seem strange to be advancing greater international intervention and conditionality, at a time when the policies underlying World Bank and IMF conditionality are being hotly criticized.<sup>53</sup> While international governance is quite imperfect, to the extent that it can engage in a policy dialog with poor countries, it is possible that useful measures will result, and will be less imper-

<sup>52</sup> Rawls makes this argument explicitly at John Rawls, *The Law of Peoples* 8 (Harvard University Press 1999).

<sup>53</sup> See, e.g., Joseph Stiglitz, *Globalization and Its Discontents* (W.W. Norton 2002). But see, 'Letter from Kenneth Rogoff to Joseph Stiglitz', dated 2 July 2002, available at <http://www.imf.org/external/np/vc/2002/070202.htm>.

fect than the alternatives. Mechanisms need to be created to ensure and facilitate reasoned dialogue, rather than diktat.

Much will depend on the quality of governance in global institutions. What sort of 'constitutional moment' would it take for wealthy states (and poor ones) to accept that these decisions take place outside of national politics? For example, recent proposals for a bankruptcy reorganization-type procedure for states, presumably administered by the IMF, in order to be attractive to wealthy states, might require poor states contingently to give up further control over their domestic policies, and could require wealthy states to provide additional resources, in order to be attractive to poor ones.<sup>54</sup>

## CONCLUSION

Apartheid in South Africa was both separate and unequal. Traditional liberalization can reduce the separation between the poor in poor countries and the rich in rich countries. However, greater equalization – greater redistribution – is needed also, especially as both legal and informal separation will both endure for some time. Apartheid did not end immediately upon the world's recognition that it was wrong, and we cannot expect that global apartheid will end immediately.<sup>55</sup> But understanding must precede action.

To what extent can the trade law system be harnessed to dismantle the barriers that form 'global apartheid' and to redress inequality and poverty? While liberalization fits into the core tasks of the WTO, redistribution does not. This essay cannot address the question of whether the WTO, the World Bank, the IMF, the UN, or some new institutional structure would be the best way to proceed to attack the problem of poverty. However, it is increasingly obvious that the trade law system must not be seen to stand in the way of poverty reduction.

<sup>54</sup> See, e.g., Anne Krueger, 'International Financial Architecture for 2002: A New Approach to Sovereign Debt Restructuring', 26 November 2001, available at <http://www.imf.org/external/np/speeches/2001/112601.htm>; Richard N. Cooper, 'Chapter 11 for Countries, Foreign Affairs' (July/August 2002), at 90.

<sup>55</sup> 'Nobody made a greater mistake than he who did nothing because he could do only a little.' Edmund Burke.