

# Trade, Investment, Human Rights and Development

Joel P. Trachtman

The Fletcher School of Law and Diplomacy

Tufts University

# The Backlash Against Globalization

- Trump
- Brexit
- Populism and development
- Developing countries?



# What rights are implicated by globalization?

- Right to regulate? Whose is it?
- Economic rights
- Basic incomes rights
- Right to health
- Right to property?
- Right to trade?

# Trade, Investment, Human Rights Problems

- Essential medicines
- Rana Plaza
- Plain paper packaging
- Child labor soccer balls
- Migration rights versus numbers



# Fragmentation and Synergy

- Relating international commercial law to
- Distributive consequences
- Embedded liberalism
- Level playing fields
- Sequencing and stability of integration

# What is trade? What is investment?

- Cross border movement of goods, services, people, and capital
- Goods
- Services
  - E-services
  - Movement of natural persons/ migration
- Movement of capital



# International Legal Framework for Trade and Investment

- WTO
- Preferential trade agreements
- BITS

# What is development; what are human rights?

- Human rights as protections against government (obligations of corporations?)
- As protections against sacrifice of individual for collective
  - Role in trade
- Human rights as "priority" claims
  - Negative rights
  - Political participation rights
  - Positive rights
- Rights and tradeoffs—rights versus numbers in migration



# Begin with Development; Relation of Investment to Development

# Relationship of Investment Law to Development

- BITs
- Restrict discrimination between domestic and foreign investment
- Restrict performance requirements as condition for investment
- Restricts limits on repatriation of profits, capital: capital controls
- Restricts expropriation
- Restricts other policies? Labor protection?
- Movement away from ISDS



# India's Dilemma

- Sovereign right of host state to take/regulate in its territory
- Sovereign right of home state to protect its national
  - Definition of investor
- “Right to regulate”
- Regulatory expropriation
- Virtual representation theory

# Relationship of Trade to Development



# Economic Protectionism and Development

- Infant industries/crony capitalism
- Import competing producers versus consumers and exporters
  - For goods, workers align with owners
- Costs of raw materials, intermediate goods, services such as telecoms and finance
- Participation in supply chains
- Protection against investment
  - Workers not aligned with owners

# Relationship of Trade *Law* to Development

- WTO
  - Restrictions on imports—goods and services
  - Restrictions on subsidies—promotion of exports
  - TRIPS: intellectual property
- Free trade agreements
  - Linkage to labor rights
- EU: linkage to human rights
- “Right to regulate” for development
- Flexibility to respond to human rights crises
- Special and differential treatment



# Restrictions in Trade Law that Can Limit Development Strategy

- Tariff schedules
- Restrictions on export subsidies
- Restrictions on import substitution subsidies
- Restrictions on agricultural subsidies, including stockpiling
- Permissions for countervailing duties
- Permissions for anti-dumping duties

# Why would any state ever accept restrictions that can limit its development strategy?

- Reciprocity



# Special and Differential Treatment

- Non-reciprocity (or reduced reciprocity) in negotiations
- Special market access; “Generalized System of Preferences”
  - Limits
  - Graduation
  - Distorts comparative advantage
  - Trump administration exclusion of India
- Technical assistance
- Special rights to protect domestic industries
  - Art. XVIII GATT perm its quantitative restrictions, “in the interest of its programme of economic development and reconstruction”
- Special transition periods (now used up)

# Restrictions in Trade Law that Can Assist Development Strategy

- Foreign tariff schedules
- Restrictions on foreign export subsidies and import substitution subsidies
  - Cotton: Brazil v. U.S.
- SPS and TBT restricting protectionist product standards
- Permissions for countervailing duties and anti-dumping duties as forms of selective protection



# TTIP, TPP, and the BRICs

# Relationship of Trade and Investment to Human Rights

- Wealth promotes human rights
- Sacrifice of individual for collective—safety nets



# Relationship of Trade and Investment *Law* to Human Rights

- Restrictions on human rights-based conditionality: China MFN
- Human rights conditionality for regional free trade agreements
- Human rights conditionality for GSP
- Human rights conditionality and linkage for EU
- Trade and investment law limits on human rights
  - Labor rights under investment law?
  - TRIPS and essential medicines
  - Response to economic crisis—Argentina
- Framing of human rights issues as trade or investment issues

# An Investment Law Example: Phillip Morris v. Uruguay

- ISDS: investor-state dispute settlement
- Plain paper packaging law
- Human rights?
- Trademark as protected “investment”
- Expropriation
- Fair and equitable treatment



# A Trade Law Example: TRIPS, Patents and Essential Medicines

- International human rights law and WTO law
  - Conflict of laws
  - Interpretation
  - Scope and obligor of right to health
- Interpreting WTO law
  - Preamble
  - Art. 7: objectives
  - Art. 8: principles
  - Art. 27: patentable subject matter: public order or morality, including human, animal or plant life or health
  - Art. 30: exceptions to rights conferred
  - Art. 31: compulsory licensing; other use

# Child Labor Produced Footballs

- ILO Convention 138 Prohibition of Child Labor
- GATT Arts. III, I, XI
- GATT Article XX(b) exception



# India Quantitative Restrictions

- Balance of payments protection exceptions
- Pre-WTO: needed consensus to decide not permitted; to subject to dispute settlement
- Post-WTO: subject to dispute settlement

# EU Tariff Preferences

- EU drugs policy conditionality; special preference program limited to select group of countries, including Pakistan but excluding India
- Waiver for non-MFN treatment requires non-discriminatory treatment
- WTO Appellate Body avoids determining whether conditions are permitted, but states that conditions must “contribute positively” to development



# The Cotton Demarche

- Mali, Benin, Burkina Faso, Chad

# Argentina Economic Emergency



# 2013 Bali Ministerial Public Stockholding Decision

- Interim mechanism; negotiations for permanent solution at 11<sup>th</sup> Ministerial
- “In the interim, until a permanent solution is found”, peace clause re Articles 6.3 and 7.2(b) of AoA in relation to stockholding of traditional staple food crops for food security purposes
- Must ensure that stocks do not distort trade

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- Migration rights versus numbers—Martin Ruhs



Questions?

# Conclusions

- Competition and development
- Fragmentation and synergy
- Trade, investment, rights, and level playing fields
- European example; Brexit counterexample