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The hierarchy of international law: A hierarchy of values?

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In 1994, the world's governments created the World Trade Organization and a body of new trade laws backed by a powerful enforcement mechanism. Since then, the United Nations Office of the High Commissioner for Human Rights has identified "apparent conflicts" between the WTO's agriculture and intellectual property rights agreements and the human rights to food, health and self-determination, as well as potential conflicts between a future agreement on trade in services and the human rights to health and water. These trade agreements and human rights treaties coexist in the multilateral system alongside other legal regimes promoting labor rights, industrial development, foreign investment, environmental protection, disarmament and other values embraced by the international community.



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However, the WTO's powerful enforcement mechanism has made trade and investment the *de facto* priority in practice. Its dispute settlement body can require national governments to change national and local laws that interfere with a foreign company's "right" to trade or face sanctions. When the WTO appellate body agrees with one country that another country's law hinders trade, the losing country must reform that law or forfeit millions of dollars of export revenues. If the legislature chooses not to change this law, the WTO can authorize countries where the complaining companies are located to charge additional duties on all kinds of imports from the loser, making these products more expensive. The potential loss of foreign sales resulting from such a price increase creates pressure on the legislature of the exporting country to change the law instead. Laws that are vulnerable to challenge as "barriers to trade" include those that subsidize generic medicines, finance public services, encourage the employment of women, assist local entrepreneurs, favor locally produced foods, promote indigenous languages, support local artists, invest in community-based economic development and regulate environmental practices.

Similarly, national and local authorities find their jurisdiction over planning and development has been overwhelmed by the financial policies of the World Bank and International Monetary Fund. These institutions provide loans and promote private investment in less-developed countries, but often attach "conditionalities" that violate the fundamental democratic principles of national sovereignty and the rights of citizens to self-determination. Essentially, indebted governments are obligated to prioritize debt repayment over national priorities like education and health—with particularly severe impacts for women and children. Furthermore, the development of dams, ports and other infrastructure financed by these institutions to promote trade often displaces indigenous peoples, destroys rural livelihoods and devastates the environment.

Many conflicts between the rights of people and the economic interests of traders and investors await resolution in various jurisdictions. For example:

- The global pharmaceutical lobby accused Egypt of violating the WTO intellectual property rights agreement and Egyptian national law when the Egyptian minister of health approved for market 850 generic versions of patented drugs. Patent-holding companies claim producers of generic drugs must do independent testing instead of relying on the patent-holders' clinical trial data to replicate drugs quickly and affordably. Similar claims against South Africa and Brazil were filed a few years ago but dropped when public support for affordable drug programs grew. The complaint against Egypt could lead to a WTO dispute panel, but in the meantime the companies have asked the United States to retaliate by halting negotiations for a bilateral Egypt-U.S. free trade agreement.
- The world's largest transnational water company is demanding compensation from Argentina for business losses resulting from the government's emergency decree freezing all utility rates and suspending the charge for new connections. The company had not met its contracted goals for expanding services in Buenos Aires and the cost of water service had nearly doubled since 1997. Argentine citizens have filed an *amicus curiae* petition in the arbitration proceedings administered by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) requesting the right to health and other international human rights law be taken into account. The petition also requests public access to documents and all other matters before the ICSID, consistent with Argentina's constitutional guarantees to the right to information and participation in all matters of public concern.
- UPS, the United Parcel Service, is seeking at least \$160 million in compensation for Canada's "anti-competitive" national postal system under Chapter 11 of the North American Free Trade Agreement (NAFTA). In response to UPS, the Canadian Union of Postal Workers and other citizens groups have asked the provincial courts of Ontario for a ruling on the constitutionality of NAFTA Chapter 11. This is the first international agreement giving investors the right to directly enforce an international treaty to which they are not a party nor have any obligations, stating that none of the participating governments may "directly or indirectly nationalize or expropriate an investment ... or take a measure tantamount to nationalization or expropriation." There are currently 15 other cases pending under NAFTA's Chapter 11:
- In the environmental arena, two associations representing most of the world's automobile manufacturers have challenged a California state law requiring a 30 percent reduction in greenhouse gas emissions for all vehicles sold there within 10 years, arguing California exceeded its authority and uniform emission standards are the purview of the federal government. Meanwhile, the Inter-American Commission on Human Rights will consider a petition filed by the Inuit people alleging that the U.S. government's failure to sign and ratify the Kyoto Protocol on Climate Change violates their human rights and threatens their existence.

Another case to be settled soon may create a legal precedent of historic proportions. The United States has asked the WTO's dispute settlement body to determine whether or not European Union regulations of genetically engineered food and seed imports are an illegal barrier to trade because they are not "scientifically justified." U.S.-based public interest groups submitted an *amicus curiae* brief pointing out that the purpose of the dispute settlement body is to clarify trade rules "in accordance with customary rules of interpretation of public international law" and, therefore, in the context of the broader body of international law and principles. The brief also points out that the WTO appellate body had previously emphasized the importance of interpreting the law in the context of "the contemporary concerns of the community of nations"—reflected in this case by the recent entry into force of the Cartagena Protocol on Biosafety. Ratified by 116 national governments throughout the world (but not the United States), this multilateral environmental agreement affirms the rights of nations to regulate imports of genetically engineered organisms based on the "precautionary principle" when there is insufficient scientific evidence to determine risks.

If the WTO agrees with the U.S., however, ignoring the Cartagena Protocol on Biosafety, the precedent would be set for the WTO to evaluate trade disputes in isolation from other international laws and principles. Many other multilateral environmental agreements would be subject to a strict test of their impacts on commercial trade, effectively ending their use as a tool for environmental protection. The WTO could also apply this precedent to many other treaties achieved through the United Nations system, subordinating this entire body of international law to the

rules promoting commercial trade. From human rights and labor law to disarmament and the agreements for sharing the oceans and outer space, no international treaty affecting the volume and profitability of trade would prevail in this new hierarchy of international law.

On the other hand, numerous provisions of international law affirm the leading role of the UN and the non-violability of its web of treaties. These include the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Political Rights and significant jurisprudence developed in regards to these fundamental human rights international agreements; the Vienna Convention on the Law of Treaties; statements by presidents of the International Court of Justice; the work of the International Law Commission; and innumerable articles by prominent jurists and lawyers. Most clearly, Article 103 of the UN Charter simply states, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." In 1993, UN members issued the Vienna Declaration and Program of Action reaffirming that "human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the *first* responsibility of governments" (emphasis added).

However, the United Nations is a troubled institution lacking popular support and political authority, and hundreds of multilateral treaties negotiated under its auspices lack an effective mechanism for enforcement. U.S. refusal to participate in fewer than two of three of these treaties undermined the UN well before the U.S. decision to invade Iraq without the support of the UN Security Council.

As worldwide concern for the future of the multilateral system grows, the opportunity to reinforce UN authority relative to international economic institutions is upon us. In the near term, for example, effective campaigning could result in:

- A formal review by the UN Office of the High Commissioner or the UN Committee on Economic, Social and Cultural Rights of the impacts of the WTO, World Bank and IMF on human rights in specific countries.
- An advisory opinion rendered by the International Court of Justice concerning the legal authority of the rules of the WTO relative to the rules of the UN's human rights instruments, conventions of the International Labor Organization, disarmament treaties and multilateral environmental agreements.
- A decision by the UN Economic and Social Council to prepare a report or convene a special session to address international economic institutions' negative impacts and apparent conflicts between their laws and policies and those of the UN system.
- A policy recommendation from the UN Economic and Social Council to convene a conference and initiate negotiations to rectify the apparent conflicts between some of the activities of the UN-chartered international economic institutions and the UN Charter itself.

With sufficient political will, the United Nations could take upon itself the responsibility to comprehensively evaluate the impacts of international economic institutions, identify actual conflicts with the objectives of UN-sponsored treaties and effectively enforce compliance with the UN body of law. It will require the determined efforts of civil society internationally to achieve this goal. ▣

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