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I. THE ISSUE

This essay touches on a question that often generates deadlock: should the central actors in the national and international economy—from private companies to the World Trade Organization (WTO)[1]—consider it part of their mandate to respect human rights? One of the reasons for the deadlock is that critics object to an attempt to join into a unified set of principles what look like totally disparate domains: commercial relations and concerns for social justice. It makes sense, they say, to choose between these two but not to try to meld one with the other.

Nevertheless, attempts carry on. The marriage is sometimes attempted on grounds of economic self-interest. This argument acknowledges that human rights can often enhance the reputation of the body involved, be it a company operating in a controversial part of the world or the WTO regularly coping with outrage from some part of the public. The institution involved is encouraged to see the claims of human rights as, on this view, good for business. This approach creates a hostage to fortune. However, if, in any given situation, it is manifestly *bad* for business to have the institution's hands tied with human rights requirements, then the justification for obeying the constraint drains away. If a company does not have to worry about its reputation since it does not encounter customers in the general public, or if it has made the rational calculation that the extra cost associated with complying with human rights requirements outweighs the benefit of doing so, then there is nothing further linking the institution to that standard. The grip of human rights then becomes occasional and fragile. If the argument linking respect for human rights to economic self-interest is a link that is too weak for the human rights advocate, it is a link that is too much of an imposition in the eyes of those wary of human rights. The occasional appearance of these entitlements, when and if they happen to work in favor of business, is sometimes felt by financial planners to inject too much uncertainty into their strategies.

Another way of trying to achieve the marriage between human rights and commercial interests is via an analogy with the state—powerful economic actors are stronger than most states, it is argued, and should therefore be held to the same international human rights standards that states are asked to observe. This view also often fails to convince the skeptic. States, on the one hand, and bodies such as corporations or the WTO on the other, are said to be different in a fundamental way: the state draws its legitimacy from its ability to protect the basic rights of its subjects in society. If it did not, then there would be little reason to accept its authority. The corporation and the trade regulating body, argues the skeptic, have the roots of their legitimacy elsewhere. They have, for example, been created for specific purposes: to build and operate petroleum pipelines, or to integrate and expand markets for trade and investment. These specific commitments are thought to narrow the mandate of such bodies: their core obligation, it is said, is to further the particular business objectives for which they were founded, not to become involved in the general, open-ended commitments of human rights that should concern the state.

1. The WTO is an organization to which most states belong, designed to supervise and liberalize international trade. *See generally* World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Feb. 16, 2009).

These disagreements bypass what is actually happening. The rules and policies that are increasingly tying businesses and trade bodies to human rights occupy a different terrain: the link is stronger than the first position suggests—companies are increasingly held to human rights standards in bad times as well as good—but the responsibility created falls short of that proposed by the analogy with the state. Even though human rights are moving up the agenda for commercial actors, there persists a gap between the responsibilities of the state and that of independent institutions lying beneath or beyond it. Human rights stand in what can be called a "collateral" relationship to the independent institution's other objectives.

The term "collateral" aims to capture a particular feature that human rights might acquire as they impinge on an organization's functions. Consider an example: a national government and a private corporation can each undertake the exploitation of petroleum deposits, and they can each commit themselves to respecting human rights while doing so. This can include rights to an adequate standard of protection of health and safety that might be threatened in the course of operations. Now, there are several ways of adjusting the organization's activity so as to meet the human rights demands. One way involves shaping the rules that govern the extraction of the oil so as to do the least amount of damage to the rights; another way involves the opposite—shaping those rules designed to protect the rights so as to do the least amount of damage to the oil operations. Both approaches manifest a degree of respect for human rights, but the former strategy places them at the center of the organization's priorities, while the latter allocates those rights to a collateral role. In principle, the democratic state places its ability to deliver the rights in question at the core of its obligations. For the non-state economic actor, however, this central commitment is often considered inappropriate.[2] Many involved in running businesses or international trade regulating bodies tacitly favor the collateral role. They will acknowledge responsibility for human rights and incorporate them into their codes of conduct, but when tensions with their economic objectives appear, their commitment to human rights becomes subordinate to their primary mandate. The result is that basic rights are given a place on the institutional agenda, but it is not a place that someone schooled in human rights principles might expect them to occupy.[3]

2. For examples of positions wanting to give human rights a central role in international trade, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Working Paper: Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice*, U.N. Doc. E/CN.4/Sub.2/1999/11 (June 17, 1999) (*prepared by* J. Oloka-Onyango & Deepika Udagama); The High Commissioner, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Promotion and Prot. of Human Rights, *Liberalization of Trade in Services and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002).

3. *See* Amnesty Int'l, Contracting out of Human Rights: The Chad-Cameroon Pipeline Project (2005), *available at* http://www.amnesty.org/en/library/info/POL34/012/2005.pdf; Amnesty Int'l, Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project (2003), *available at* http://www.amnestyusa.org/business/humanrightsontheline.pdf. For earlier treatments of these issues by the author, see Sheldon Leader, *Collateralism*, *in* Global Governance and the Quest for Justice 53 (Roger Brownsword ed., 2006) [hereinafter Leader, *Collateralism*]; Sheldon Leader, *Trade and Human Rights II*, *in* 4 The World Trade Organization: Legal, Economic, and Political

II. TWO EXAMPLES

Consider two situations in which we can see an opening for human rights concerns in the international economy, and where the entitlements occupy a collateral role.

A. A WTO Case

In the *Thai Cigarettes* case, Thailand limited imports of tobacco while permitting its domestic manufacture and sale.[4] The limitation on imports was prima facie contrary to the General Agreement on Tariffs and Trade (GATT), one of the trade treaties administered by the WTO.[5] Thailand sought to defend the measures, *inter alia*, as necessary for the protection of human health, which is one of the heads of protection permitted by the GATT.[6] It was concerned with keeping domestic demand from growing.[7] Thailand argued that the entry of foreign producers would bring with it targeted marketing that would increase consumption among parts of the population who smoked far less than their foreign counterparts.[8] Smoking, it argued, "lowered the standard of living, increased sickness and thereby led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use being made of resources, human and natural."[9] The WTO dispute settlement panel did not disagree with Thailand's right to protect public health, but found that it could do so by a less trade-restrictive method: regulations requiring that the potentially harmful ingredients in different sorts of cigarettes, domestic or foreign, be clearly indicated to the consumer.[10] Thailand's methods of limiting tobacco use were therefore deemed unnecessary for the protection of public health.[11]

Two things about this case deserve notice. First, Thailand was allowed to give what can be called *ultimate* priority to the defense of public health—a domain in

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Analysis 664 (Patrick F.J. Macrory et al. eds., 2005); Sheldon Leader, *Human Rights, Risks, and New Strategies for Global Investments*, 9 J. Int'l Econ. L. 657 (2006) [hereinafter Leader, *Human Rights*]; Sheldon Leader, *Two Ways of Linking Economic Activity to Human Rights*, 57 Int'l Soc. Sci. J. 541 (2005).

4. Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 1, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 (1991) [hereinafter Thailand Report].

5. General Agreement on Tariffs and Trade art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. There were other heads of complaint as well, but these are not relevant in this context.

6. *Id.* art. XX(b); *see also* Thailand Report, *supra* note 4, ¶ 21 (articulating Thailand's contention that "the prohibition on imports of cigarettes was justified by the objective of healthy policy . . . [and] was therefore covered by Article XX(b)").

7. *See* Thailand Report, *supra* note 4, ¶¶ 24–26.

8. *See id.* ¶¶ 27, 54.

9. *Id.* ¶ 21.

10. *See id.* ¶¶ 76–79.

11. *Id.* ¶¶ 75, 81.

which human rights figure.[12] That is, it was entitled by the GATT to rank the protection of public health above the imperative of opening its markets to foreign imports, if a choice between the two had to be made. Second, the trading system protected by the GATT contains a device for reducing the occasions on which such a stark decision to opt for an ultimate priority is made: this is a requirement of adjustment. Here the range of alternative ways of protecting public health is scrutinized, and the one which does the least damage to a producer's access to a market is the one that is justified. The state's mandate to respect and protect public health remains, but its mode of execution is adjusted so as to allow space for the trade treaty's cross-cutting objective of opening markets on a non-discriminatory basis.

It is in this process of adjustment that basic rights can slip into a collateral position. Standard human rights principles would require that any given piece of commercial policy be adjusted so as to have the smallest impact on the right in question.[13] The GATT's approach inverts this direction of adjustment: the methods used by a member state to protect public health have to be adjusted so as to do the least damage to the aim of opening markets.[14]

B. An Example of Corporate Activity

In the course of building and operating the petroleum pipeline for the export of oil from Chad through Cameroon, ExxonMobil issued the following statement: "[We are] steadfast in promoting respect for human rights throughout the world. We believe corporations play an important role in supporting human rights and that our presence in developing countries positively influences issues relating to the treatment of people."[15]

The construction of the pipeline raised a problem for the rights of local populations with regard to their health. As heavy vehicles servicing the construction site passed through populated areas, they generated large amounts of dust that posed a significant

12. *See* International Covenant on Economic, Social and Cultural Rights, art. 12(1), Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR] ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *General Comment No. 14*]. On the connection between the right to health and international trade, see U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4/2004/49/Add.1 (Mar. 1, 2004) (*prepared by* Special Rapporteur, Paul Hunt).

13. The European Convention on Human Rights, for example, sets out certain rights that it then permits a member state to override if, *inter alia*, it can show that doing so is for a valid cross-cutting objective and does no more damage to the right than is "necessary in a democratic society." *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8–11, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

14. For elaboration of this point, see Leader, *Collateralism*, *supra* note 3.

15. ExxonMobil, 2003 Corporate Citizenship Report Summary, *available at* http://www.exxonmobil.com/corporate/files/corporate/CCR_2003.pdf.

health hazard, particularly to the elderly and the young.[16] There are two ways to deal with such a problem. One is for the company to require its vehicles to slow down on the dirt roads in the relevant areas. The other is to pave the roads with the appropriate dust controlling substance. The first would reduce the health hazard to some degree, but not as much as the second. On the other hand, the second would involve greater expense, adding an obstacle to the commercial objectives of the project.

Which of these solutions is in keeping with the spirit of ExxonMobil's human rights undertaking? This question would be triggered if the state were to impose the paving requirement, since ExxonMobil might then resist on the ground that its investment contract with the state provides that no "unreasonable" regulation of its operations can be imposed.[17] This term stands alongside the requirement in the contract that domestic law applicable to the project will be interpreted so as not to "prejudice the . . . economic advantages" of the investor.[18] Therefore, the contract could be read so as to allow the company to allocate the health concerns of the local population to a clear, but collateral role. The company could claim that it fulfills its explicit commitment to health rights by slowing the speed of its vehicles. At the same time, by refusing the more costly paving option, it adopts the solution that has the least significant impact on the project's core commercial objectives. The independent monitor for the project indicates that ExxonMobil in effect has taken this position and the monitor noted that well after the project's beginning, "the [petroleum] Consortium remain[ed] reluctant to apply a more permanent (and more costly) coating on trafficked areas of the roads."[19] The dust continued to be generated well above the level that paving would have prevented.

For those not satisfied with this way of adjusting basic rights and the imperatives of economic organizations, what is the alternative?

III. MOVING FROM A COLLATERAL TO A CENTRAL ROLE FOR HUMAN RIGHTS

There is a good deal at stake here. Human rights are given a role, but the *level* at which those rights are protected can be reduced by the principles of adjustment that are at work. For the Chad/Cameroon pipeline consortium to devote a considerable

16. Korina Horta et al., Envtl. Def. Fund, The Chad-Cameroon Oil and Pipeline Project (2007), *available at* http://www.edf.org/documents/6282_ChadCameroon-Non-Completion.pdf ("Major dust problems continue to be observed in the oil field area, especially along the main road. They are seriously impairing visibility and impacting air quality in the area. . . . [T]he situation poses health risks to the communities, including respiratory distress, and it calls for an urgent assessment of the impact of the damage caused by thick layers on crops, trees and shrubs.").

17. Agreement for the Development of Oil Fields, between the Republic of Chad and Esso-Shell-Chevron, cl. 17.4 (2004) (on file with author).

18. *Id.* cl. 34.4.

19. Envtl. Def. et al., The Chad-Cameroon Petroleum Development & Pipeline Project: Environmental and Social Problems Identified by the External Compliance Monitoring Group, the International Advisory Group, and the Inspection Panel (2004), *available at* http://www.bicusa.org/Legacy/Chad-Cam_ES_July2004.pdf.

amount of its time, energy, and resources to paving an access road is, in the collateralist's view, to promote confusion—confounding the *degree* of commitment we can rightly expect from a state with that which we should expect of certain bodies that operate either below or beyond it. If the state wishes to pave such roads at taxpayers' expense, then—from this view—so be it. The corporation would have no objection. Similarly, if Thailand were to wish to spend extra amounts of taxpayers' money on providing cures for smoking related illnesses, then the WTO would not stand in its way. What the WTO did object to was an attempt by the state to achieve an extra margin of health protection via further inroads into market freedom, which the WTO was in no position—from its perspective—to grant. There was a form of regulation available to Thailand that also allowed the trade body to fulfill its core mandate. Whatever solution might appeal to WTO officials in their personal capacities, this was the one they felt themselves institutionally bound to favor.

Is it possible to move basic rights from a collateral into a central position for these economic actors, and at the same time to preserve an appreciation that they are not states? We need to avoid trying to jam round pegs into square holes, but at the same time we need to investigate the prospect of a possible fit by doing some trimming of both. In specific terms, we need to see if there is an alternative way of fixing adjustments for basic rights: adjustments that will mirror more closely the promise of human rights principles. This would mean that, in our examples, the means used to attain commercial objectives would sometimes be adjusted so as to create less risk to public health, rather than the means used to attain health objectives always being adjusted so as to create the least risk to commercial interests.

To see how this might work, consider two types of public health risk that arise from the economic activity we have been examining. One such risk might be of damage that is life-threatening or permanently debilitating, such as lung disease contracted from smoking cigarettes, or from breathing high levels of a particular sort of dust generated in pipeline work. A second set of possible risks is less severe, such as the triggering of a mild allergy. Assume that all of these health hazards are nevertheless serious enough to merit regulation by the state and that the regulation will add to the costs of doing business. The question is, what happens to the state's ability to regulate in these two sets of circumstances when the regulations are put through the filter of the WTO rules or instruments such as the ExxonMobil investment agreement?

There might be one answer for the situation in which there are serious health risks, and a different one where the risks to health are less severe. For goods that carry the risk of serious damage, as in the *Thai Cigarettes* case,[20] it could be argued that the state should have the space to adopt policies relatively free of the worry that it must minimize the policy's impact on trade. It must give priority to the demand of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), that it "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," which includes an entitlement to "the

20. *See supra* Part II.A.

prevention, treatment and control of . . . occupational and other diseases."[21] It should not only have the formal entitlement to pursue this objective, as we have seen it has under the GATT,[22] but it should also be free to adjust its restrictions on those imported goods so as to do most to reduce the risks that those goods carry. In short, the state should be entitled, under the GATT, to ban the import if this is the most effective weapon it has to reach the level of protection it must provide.[23]

If, however, the state aims to protect the public from risks that are not as serious as those in the first category, then the GATT would legitimately narrow the government's options, demanding that any such measures, while legitimate, be implemented in the least trade restrictive way. This could require, for example, that user warnings be placed on the article, rather than creating an outright ban. A similar point can be made in relation to an activity such as the building of the pipeline and the health risks that it creates.[24] If the road-dust damage described earlier is confined to less serious illnesses, avoidance measures are still necessary and can be imposed by the state. But the company may well be entitled to demand that from among the alternative means of avoidance of these illnesses, the one be chosen that, while adding to the cost of operation, will do least damage to its commercial objectives. Any further measure of protection would have to come from the state's own resources. This approach could be buttressed by an interpretation of the investment agreement's restrictions on unreasonable regulation, seen earlier, which could prohibit any imposition on the company of costs above those minimally necessary, leaving costs of more effective prevention to be met by the state out of its own funds—if the state wishes to pursue that further margin of prevention.

Things are quite different when the impacts of the company's activities on health are serious. If these impacts fall within the range of the state's obligation to prevent diseases under the ICESCR, then, as has been seen, the state has no alternative but to opt for the most effective means at its disposal in order to achieve its objective. Assuming, in the example of the pipeline, that the damage to local populations is caused by the company owning and operating the project, the state might be justified in demanding that the company bear the cost of implementing the most effective way of lowering this risk to acceptable levels.

Interpretations of the investment contract can also create space for the satisfaction of this higher level of corporate obligation. In deciding what counts as an unreasonable impingement on the profitability of the project, it is possible for the adjudicator to carve out a special domain corresponding to the core obligations of the state to protect the health of its population. Here, the space for social protection widens.

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21. ICESCR, *supra* note 12, arts. 12(1)–(2). This assumes, of course, that the state has ratified the Covenant.

22. GATT, *supra* note 5.

23. This would be an approach to the GATT that fits it closely to the Covenant's requirement on the state "that every effort has . . . been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations [under Article 12]." *General Comment No. 14*, *supra* note 12, ¶ 47.

24. *See supra* Part II.B.

The state should be entitled, under the contract, to choose the most effective methods of damage prevention without the same concern of minimizing the impact on investor returns. Such a measure could still be considered reasonable within the terms of the agreement, so long as it was imposed by the state in good faith. The way would be opened for the state to satisfy the right to the *highest attainable* level of health, as demanded by the ICESCR.[25]

It is, of course, not easy to draw lines distinguishing between degrees of harm arising from exposure to different sorts of goods and services. However, the bodies charged with the primary duty of identifying types of workplace harm, such as the International Labour Organization, or certain dangerous consumer goods, such as the World Health Organization, do provide guidelines that can be used by those interpreting provisions of the GATT or of an investment agreement.[26] These guidelines can aid in determining when a state should adjust to find a method of protecting a right that has the least negative impact on trade or corporate profitability, or should impose a method of doing business that has the least negative impact on the right.

IV. CONCLUSION

It is important to move away from a *blanket* view in which concerns for social justice can be accommodated by business only by a side entrance—as a collateral requirement to its core objectives.[27] Such an approach can sit like a lid on top of a wide range of basic rights and aspirations. The result is something we are familiar with: the complaint worldwide that the rules administered by the WTO and the impact of investments by foreign companies weaken the ability of member states to pursue policies that are vital to social health.

To move human rights into the center of the concerns of economic actors in civil society does not force those actors to abandon commercial objectives over a wide range of their daily activities, or over a wide range of social concerns that these activities might raise. But there are core of human rights concerns that occasionally appear, and do legitimately put pressure on profits. This is not a category without boundaries. On the contrary, benchmarks for protection that human rights provide

25. For an investigation of different possible interpretations of investment contracts, see Leader, *Human Rights*, *supra* note 3, at 657–705.

26. The International Labour Organization has, as its objective, the improvement of conditions of labor by implementing world wide standards of fair treatment. *See generally* International Labour Organization, International Labour Standards, http://www.ilo.org/global/What_we_do/InternationalLabourStandards/lang--en/index.htm (last visited Feb. 19, 2009). The World Health Organization aims to improve health standards worldwide via assistance to governments and the proposal of international conventions and agreements. *See generally* World Health Organization, About WHO, http://www.who.int/about/en/ (last visited Feb. 19, 2009).

27. There are principles established in some WTO cases that take us in this direction, acknowledging the right of a state to restrict imports in order to meet its international obligations and allowing the level at which that commitment is to be fixed to flow from that undertaking rather than be compromised by the least trade restrictive demand. *See, e.g.*, Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DSB/M/103 (Apr. 5, 2001).

are increasingly clear in indicating what interests they do and do not cover—as can be seen in the human rights impact assessment tools that are being developed for deployment by businesses and the bodies that regulate them.[28]

This proposal hopefully avoids the confusion of roles between state and non-state actors that, as was seen from the outset, critics sometimes suspect lies in wait for anyone wanting to link more tightly human rights and commercial concerns. The state continues to have a wider range of responsibilities for a variety of basic rights that are not shared by the more narrowly focused trade regulators or private companies. Despite moving the standards of human rights into central concerns for the latter, those institutions still remain what they are: bodies whose functions are specified as the integration of markets for goods and services, the extraction of petroleum at a profit, etc. But it is possible and desirable that these bodies sometimes subordinate their defining functions to the wider demands of civil society, both national and international. These demands should not be relegated to a collateral role.

28. *See* Human Rights Impact, Assessment in Practice, Conference Report (2001), *available at* http://www.humanrightsimpact.org/fileadmin/hria_resources/Conference_2007/HRIA_Conference_2007_Report_-Aim_for_human_rights.pdf.