

**INTERNATIONAL ECONOMIC LAW AND FINANCING
DEVELOPMENT: THE MONTERREY CONSENSUS AND BEYOND**

JONATHAN T. FRIED*

* Senior Foreign Policy Advisor to the Prime Minister of Canada. Former member of the Inter-American Juridical Committee.

Introduction: International law and development¹

The central challenge: how can the international community put countries and people on a sustainable path to development?

History of development policy²

- Foreign Aid

- In 1800s, great powers approve exceptional measures to help countries in distress. Eg: 1812 US Congressional Act for the Relief of Citizens of Venezuela.
- 1940s: UN, UNICEF, CARE founded, Marshall Plan (largely program aid) launched.
- 1950s: Food and aid projects increase, but with Soviet Union, anti-communist ideology apparent.

- Rise of financial program aid, debt relief programs

- 1960 – 80s – growing establishment of bilateral aid programs and expansion of multilateral aid agencies.

- Foreign assistance programs generally consider aid as the best tool for development. Problem – often motivated by ideology, geo-political interests, and exporting surpluses. Aid has historically been a foreign policy tool, not a tool to alleviate problems in recipient countries.

New approach: The “Washington consensus”

- Policy recommendations, as identified by John Williamson in 1990, which reflected the political and technocratic policy advice common amongst DC institutions to Latin American countries.³

- Used as a condition for International Monetary Fund (“IMF”) loans: very strictly applied.

- Williamson’s propositions:

- Fiscal Discipline & interest rate liberalization;
- Redirection of public expenditure priorities toward fields offering high economic returns and the potential to improve income distribution, such as primary health care, education and infrastructure:
- Tax reform;
- Establishing a competitive exchange rate;

¹ Thanks to Kristen Boon for her assistance in preparing this outline.

² See Peter Hjertholm and Howard White: *Survey of Foreign Aid: History, Trends and Allocation* (1998). Available at: www.econ.ku.dk/wpa/pink/abstract/0004.pdf

³ John Williamson: *What Washington Means by Policy Reform*, in John Williamson (ed.), *Latin American Adjustment: How Much Has Happened?* Washington, D.C. Institute for International Economics (1990); see also John Williamson: *What Should the World Bank Think about the Washington Consensus*, in *The World Bank Research Observer*, Vol. 15, no. 2 (August 2000) p. 251-64. Available at: www.worldbank.org/research/journals/wbro/obsaug200/pdf/%286%29Williamson.pdf

J. T. FRIED

- Liberalization of foreign direct investment;
- Undertaking “market friendly” reforms (privatization, deregulation, and increasing openness to trade);
- Securing property rights.

- The Washington consensus came to be a moniker for the necessity to adhere to fiscal discipline and orthodox monetary policies.

Post-Washington

- Joseph Stiglitz, as the World Bank’s Chief Economist, renews emphasis on participation and the development of political institutions and education as a complement to markets.⁴

- The Montreal Consensus: links investment in social safety nets to economic growth.⁵

The 2000 millenium development goals⁶

- Contain specific and time limited commitments to reduce absolute poverty.
- Emphasize linkage between democracy, development and respect for human rights through the commitment of world leaders to: “spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.”
- Reaffirm that poverty reduction is the overarching development goal, and recognizes linkages between extreme poverty and human rights.

The Monterrey consensus

The Monterrey consensus (“MC”) of 2002 was adopted by heads of state in Monterrey, Mexico, following the Conference on Financing for Development which examined the financial implications of internationally agreed upon development goals adopted during the past decade.⁷

- Objectives are aspirational, but are more broadly accepted by developing countries because they were adopted by heads of state (as opposed to being a condition of IMF loans).

The Monterrey consensus is a watershed in policy foundation of globalization: (i) it emphasizes that developing countries are primarily responsible for their own development, (ii) it reconfirms that the path of development must be sustained and coherent, and (iii) it makes clear that mobilizing resources for

⁴ See: www.worldbank.org/wbi/mdf/mdf1/agenda.htm

⁵ See: www.fin.gc.ca/news01/01-038e.html

⁶ See: www.developmentgoals.com

⁷ Monterrey Consensus. Available at: www.un.org/esa/ffd

development is not primarily about ODA, and that resources must come from a wide variety of sources.⁸

The Monterrey consensus takes a holistic approach, setting out commitments in 6 chapters for:

- mobilizing domestic resources;
- mobilizing international resources;
- promoting trade;
- increasing technical cooperation;
- ensuring sustainable debt financing, and
- enhancing the coherence of the international monetary, financial and trading systems.⁹

The Monterrey consensus recognizes that financing needs will differ from country to country, and that the tools available must be utilized to meet the specific needs of a given country.

Although The Monterrey consensus itself is non-binding, its 6 chapters provide a useful framework to analyze the legal dimensions of trade and development because it takes the various strands of development policy and integrates them into one foundational document that offers a prescription that is both pro-poor and pro-growth. The goal of these lectures is to disaggregate the various components of The Monterrey consensus, and examine the doctrinal and legal dimensions of the law of development.

Components of the Monterrey consensus

Chapter 1: Mobilizing domestic financial resources for development

States must create an enabling environment for sustainable private sector development. Domestic private sector investments are of critical importance: they are generally higher than (i) domestic public investment, and (ii) external investment.¹⁰

- The rates of development reflect differences in rates of private domestic investment, and the percentage African-owned private wealth held and invested in Africa is only a tenth of Asian-owned private wealth held and invested in Asia.

⁸ See commentary at: See Inaamul Haque & Ruxandra Burdescu: *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 B.C. Int'l & Comp. L. Rev. 219 (2004); Dr. Detlef Radke: *The Monterrey Consensus: The Conference on Financing for Development*, in German Development Institute Briefing Paper (3/2002) p.1.

Available at: [www.die-gdi.de/de_homepage.nsf/0/48EA115A1D7009AC1256BC0004E87B7/\\$File/BP-3-2.pdf](http://www.die-gdi.de/de_homepage.nsf/0/48EA115A1D7009AC1256BC0004E87B7/$File/BP-3-2.pdf); Cristian Ossa: *Monitoring the Monterrey Consensus* (2003). Available at: www.g24.org/ossatgm.pdf

⁹ The Monterrey consensus para. 4.

¹⁰ Figures differ from country to county, but in broad terms, domestic private investment averaged 10-12% of GDP compared with 7% for domestic public investment and 2-5% for FDI in the 1990s. See: UNDP Commission on the Private Sector & Development: *Unleashing Entrepreneurship: Making Business Work for the Poor* (2004) p. 5. Available at: www.undp.org/cpsd

J. T. FRIED

- Public investments will be required to complement private investments, particularly with regards to developing infrastructure and providing public goods.
- The creation of an enabling environment involves social as well as economic components. With regards to the social sector, the 2004 ILO Report on Globalization emphasizes that:
 - Good governance (rule of law, democracy, human rights and social equity) is essential for sustainable development and a productive process of globalization,¹¹ and that;
 - Good governance includes an equitable process of development, which will improve the capabilities of the State (provision of public goods), people (education and skills), the production system and of society.¹²

The Monterrey consensus's recommendations for mobilizing domestic resources rest on three pillars:

- Strengthening the foundation for democracy;
- Good economic governance; and
- Moral and legal values.

Pillar 1: Democracy

International law and democracy

- Democracy concerns the role of the people in the process of governance;
- A variety of rights connected to democracy are encompassed in international human rights instruments, such as the rights to free speech and freedom of the press, and freedom of religion and assembly.¹³

Difference between rights and liberties:¹⁴

- "right to": imposes obligations upon governments;
- "freedom from": limits on governmental powers.

A variety of international instruments require signatory states to respect and ensure international human rights and democracy, and to take necessary steps to give effect to those rights. This obligation includes ensuring the availability of an effective remedy for violations, providing competent judicial, administrative or legislative authorities for determination of claims and enforcement of remedies.¹⁵

¹¹ *A Fair Globalization: Creating Opportunities for All* (2004) (hereinafter "ILO Report" para. 34.

¹² Report of the Director General: *A fair globalization: the role of the ILO* (2004) at p. 11 (hereinafter "DG Report on ILO"). Available at: www.ilo.org

¹³ These rights are codified in various international instruments including the Universal Declaration of Human Rights, the ICCPR & ICESR, the American Declaration on Human Rights, Warsaw Declaration, European Convention on Human Rights, and the Charter of the Organization of African Unity. For a discussion of the right to the democratic entitlement, see Thomas Franck: *The Normative Foundations of a Right to Political Participation*, in *Democratic Governance and International Law* (Gregory Fox & Brad Roth (eds.)) (2000) p.25. Available at: assets.cambridge.org/0521660955/sample/0521660955WS.PDF.

¹⁴ Isaiah Berlin: *Two Concepts of Liberty*, in *Liberalism and its Critics* (Michael Sandel ed.) 1987 at p. 15.

¹⁵ See e.g. Art. 2 of the ICCPR and ICESR.

Democracy and the Americas¹⁶

In 2001, the OAS concluded the Inter-American Democratic Charter. This instrument states that peoples of the Americas have a right to democracy, and their governments have an obligation to promote and defend it.¹⁷ Art. 4 states that the essential elements of representative democracy include:

- Respect for human rights and fundamental freedoms.
- Access to the exercise of power in accordance with the rule of law.
- The holding of free and fair elections.
- A plural political system, and;
- The separation of powers.

The Declaration of Quebec City and the “democracy clause”: “*any unconstitutional alteration or interruption of the democratic order in a state of the hemisphere constitutes an insurmountable obstacle to the participation of that state’s government in the summit of the Americas process.*”

- This principle was incorporated into Inter-American Democratic-Charter (Arts. 17 – 21).

- The clause was considered after the departure of Aristide from Haiti, and invoked after the coup in Venezuela through OAS Resolution 811.¹⁸

Pillar 2: Good governance

Secretary General Kofi Annan: “It is increasingly recognized that good governance is an essential building block for meeting the objectives of sustainable development, prosperity and peace ... [G]ood governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political process of their countries and in decisions affecting their lives.”¹⁹

Promoting the rule of law & property rights

Strengthening the rule of law to ensure predictable regulatory frameworks²⁰

- Open, transparent, efficient and fair public employment systems; professionalism amongst officials through training, codes of conduct, incentive structures; avoiding conflicts of interest;
- Fighting corruption and bribery, and undertaking regular audits;
- Simplifying regulations;

¹⁶ See generally: John W. Graham: *A Magna Carta for the Americas The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections* (2002).

Available at: www.focal.ca/images/pdf/ias_charter.pdf

¹⁷ See e.g. Art. 1 of the *Inter-American Democratic Charter* (2001). Available at: www.oas.org

¹⁸ See Graham, *supra*, p. 7-8.

¹⁹ Report of the Secretary General on the Work of the Organization, GAOR, 52nd Sess, Supp, No. 1 (A/52/1), 1997, p. 5 para. 22.

²⁰ UNDP Commission report, *supra*, p.28.

J. T. FRIED

- Accountability.

Enforcing property rights (particularly for businesses)

- Well funded court systems, functioning property registries and law enforcement agencies are key;
 - ADR;
 - Judicial independence²¹;
 - Specialized debt collection courts to resolve claims.

Good economic governance is increasingly promulgated by international agreements. For example, the General Agreement on Tariffs and Trade (“GATT”) Art. X: “Publication and Administration of Trade Regulations” requires transparency.²²

- Art. X requires publication of laws regulations, judicial decisions and administrative decisions; and agreements affecting international trade policy. It also provides that measures of general application that are not officially published shall not be enforced;
 - This requirement of regulatory transparency in domestic administrative laws has important governance implications for developing countries: it may require the adoption of concepts of notice, fairness, publication (related to western notions of public law and governance).²³

Similar requirements are being introduced through supplementary WTO agreements²⁴ such as the General Agreement on Trade on Services (GATS). For example:

- GATs Telecommunications Agreement (trade in services) adopted common principles of regulation (both institutional requirement of independence of regulator from telecommunications operator and non-discriminatory decision making process);
- Agreements on Sanitary and Phytosanitary Standards (“SPS”) / and Technical Barriers to Trade (“TBT”) guidelines create points of notification and publication requirements;
- The Bretton Woods institutions have also promulgated guidance for good economic governance of the financial sector, including a series of standards and codes in the field supervised by the IMF, World Bank assistance on tax administration and sound financial system management, and increased emphasis in development lending on promotion of sound macroeconomic policy, labour market protection and reform, and social services.

²¹ See Report of the Inter-American Juridical Committee on “Improvement of the Administration of Justice in the Americas: Protection and Guarantees for Judges and Lawyers in the Exercise of Their Functions”, CJI/SO/II/doc.42/94 rev.2, 1995.

²² GATT. Available at: www.wto.org

²³ Robert Wolfe: *Regulatory transparency, developing countries and the WTO*, in *World Trade Review* (2003) 2:2 p. 157-182.

²⁴ See *id.*, for text of agreements see: www.wto.org

Pillar 3: Implementing legal (moral) values for governance

Good governance ensures public accountability and the efficiency of markets.²⁵

International Financial Institutions are influencing this process by developing metrics, methods of measurement, and indicators of governance. Regional banks have similar systems.

- The World Bank's Country Policy and Institutions Assessment ("CPIA") currently rates 136 countries against 20 standard indicators, in the areas of: economic management, structural policies, policies for social inclusion and equity and public sector management and institutions.

- The CPIA rating influences the allocations of countries eligible for International Development Association (IDA) concessional loans and grants.²⁶

- Criticism: Some economists have questioned the usefulness of these metrics because they are not based on any clear definition of governance, and because the measures are based on indices that compare apples and oranges. For example, the frequency and number of parties involved in elections is measured, but there is no assessment of whether frequent elections are the result of instability rather than a healthy electoral system.

IMF's "Poverty Reduction and Growth Facility" (PRGF) links lending to good governance. IMF identifies priorities as: good governance, rule of law, improving efficiency and accountability, and tackling corruption, including:

- Elimination of poverty;
- Promotion of citizen participation through: electoral reform and power-sharing arrangements between ethnic or regional factions;
- Expanding opportunity by improving basic services and increasing access to markets (improving the legal and regulatory framework).

States are increasingly implementing public expenditure reviews and financial sector assessments, as well as participatory poverty assessments. These assessments assist countries to improve governance against internal (domestic) measures.

Corporate Governance²⁷ - James D. Wolfensohn, President of the World Bank, stated: "The governance of the corporation is now as important in the world economy as the government of countries".²⁸

²⁵ ILO Report, supra, para. 34.

²⁶ web.worldbank.org/governance/kkz2002/notes.html.

²⁷ See generally *The Globalization of Corporate Governance*: GLOBAL COUNSEL (Sept. 2000) (at www.lawdepartment.net/global).

²⁸ "A battle for Corporate Honesty" *The Economist*: The world in 1999 (1999) p. 38. The growing attention paid to corporate governance is reflected by the *Sarbanes-Oxley Act* of 2002, which introduced stringent new corporate governance rules in the US. Its objective is to protect investors by improving the accuracy and reliability of corporate disclosures made under US securities law by, among other measures, increasing the qualifications for members of Boards of Directors, augmenting the duties of the Board of Directors and tightening the applicable investigation and disciplinary proceedings.

Information on the Act is available at: www.sarbanes-oxley-forum.com

J. T. FRIED

- Effective corporate governance through laws and regulations: (i) ensures accountability of boards of directors, and promotes efficiency, (ii) improves investor confidence; (iii) reduces corruption, and (iv) increases capital.
- Subjects within corporate governance umbrella: disclosure requirements, shareholder rights, issuance and sale of securities, financial sector practices, competition for the service, and bankruptcy and creditor rights.
- General principles: fairness, transparency, accountability and responsibility (compliance).

Good Governance in Practice: the New Economic Partnership for Africa (“NEPAD”).²⁹

- Strategic framework adopted by the Organization of African Unity in 2001;
- Africa based initiative to confront problems in Africa including eradication of poverty, sustainable growth and development; halt marginalization of Africa in globalization process, and accelerate the empowerment of women;
- Principles: good government, African ownership and leadership, and linking development of Africa to its resources, and building African competitiveness and integration.
- Partnerships with NEPAD are linked to Millennium Development Goals and other development targets.
- NEPAD adopts a special economic and corporate governance initiative that includes the creation of a Task Force from Ministries of Finance and Central Banks that will be commissioned to review economic and corporate governance practices, and make recommendations on appropriate standards and codes of good practice;
- NEPAD has now been integrated into the G8 action plan, which gives it the status of a public contract with peer review mechanisms, increasing its effectiveness and accountability.

These standards are helping to create an emerging norm of good governance in international law. The result is a movement beyond individual rights to collective expectations of democratic governance.

Chapter 2: Mobilizing international resources for development: foreign direct investment and other private flows

Private capital flows are critical to development

In 2003, foreign direct investment to developing countries was \$135 billion in addition to \$14.3 billion in net portfolio equity inflows. In comparison, total foreign aid in 2002 was \$58 billion.³⁰

²⁹ www.nepad.org; “The New Partnership for Africa’s Development (NEPAD) An Initial Commentary” at www.arts.cornell.edu/poverty/kanbur/POVNEPAD.pdf

³⁰ Global Development Finance 2004. Available at: <http://siteresources.worldbank.org/>.

FDI flows have increased at 13% per year between 1980 – 1997: faster than trade.³¹ FDI tends not to be influenced by short term profit considerations that affect foreign bank lending and portfolio investment.

Most FDI results from transnational corporations in industrialized countries, but direct investment originating in developing countries has more than doubled since the mid-1980s.³²

Most private flows go to developing countries, not least developed countries.

- In Sub-Saharan Africa for example, FDI inflows were \$7bn, but over \$5bn were for extractive industries such as mining.³³

Private flows are rarely (if ever) directed towards public goods (building roads, ensuring clean water, improving the health care system).

Intense competition to attract foreign investment may result in concessions in working conditions and regulations.³⁴

Foreign direct investment (“FDI”)

FDI and trade takes place within the context of bilateral and regional trade and investment treaties, such as the European Union, the North American Free Trade Agreement, The Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, and the Common Market of the South (MERCOSUR).

Increasing number of Bilateral Investment Treaties (“BITs”) and Double Taxation Treaties; current estimates suggest that approximately 2,000 of each are in force.

What rules apply to foreigner investors before they are present?

There is no inherent right to invest in another country.

Right of Establishment: protects companies incorporated in a Member State from discrimination by other Member States.³⁵

- These may be established by bilateral or multilateral instruments. An example of the latter is Art. 52 of the Treaty of Rome (establishing the EU). It provides that companies organized in one Member State may establish and maintain businesses in any other Member State under the conditions laid down for

³¹ Padma Mallampally and Karl P. Sauvant: *Foreign Direct Investment in Developing Countries*, in Finance and Development, March 1999, Vol. 36 # 1.
Available at: www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm

³² See id.

³³ UNCTAD World Investment Report (2003).

³⁴ ILO DG Report p.22.

³⁵ This right is similar to the equal protection clause in the US. See Clark D. Smith: *Federalism and Company Law: A “Race to the Bottom” in the European Community*, in 79 Geo. L.J. 1581, fn 4 (1991).

J. T. FRIED

its own nationals by the law of the country where the establishment takes place.³⁶

What is owed to foreigner investors once they are in a country?

Basic Principles (common to most BITs and some regional trade agreements, drawing on WTO disciplines for goods):

- National treatment: in like circumstances, host country must treat foreign investor no less favorably than domestic investor;
- Minimum Standards of Treatment (Most Favoured Nation): host states must treat foreign investor in accordance with international minimum standards of fair and equitable treatment;
- Minimum Capital Requirements: a minimum level of capital may be required to incorporate, with a view to protecting creditors and to providing incentives for managers to maintain solvency;
- Prohibition on uncompensated for expropriation (direct and indirect) of investor assets.

Calvo clause

- Developed in Latin America in 1800s, and formulated by Argentinean jurist Carlos Calvo. The two basic principles of the clause are: (i) the “national treatment standard” (foreigners should not be granted more rights and privileges than nationals), and (ii) foreign states may not enforce their citizen’s private claims by violating the territorial sovereignty of host states through intervention.³⁷
- Arbitral awards have confirmed that a foreign investor’s contractual waiver of diplomatic protection would be effective unless it resulted in a “denial of justice”.³⁸
- Principles in the Calvo clause are integrated into many Latin American constitutions, statutes and treaties, a factor which may have led to reluctance on part of some Latin American countries to enter into international investment agreements that have conflicting provisions.

Regional versus multilateral trade agreements?

Regional trade agreements have fueled FDI – multinational companies can take advantage of economies of scale, they increase the bargaining power of a MNC, and bring like minded countries together.

There has been little support for a Multilateral Agreement on Investment (“MAI”) because of the difficulty of building consensus around general principles, where needs of countries vary greatly.³⁹

³⁶ Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, 298 U.N.T.S. 11. For a discussion of this article by the European Court of Justice see Laura Jankolovits: *An Analysis of Corporate Law in the European Union after the Centros Decision*, 11 *Cardozo J. Int’l & Comp. L.* 973, (2004).

³⁷ Christopher K. Dalrymple: *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, in 29 *Cornell International Law Journal* 161, 163 (1996).

³⁸ See e.g.: *Interoceanic Railway Co. of Mexico*, 6 *Annual Digest* 199 (131-32), cited in Dalrymple, *supra*, fn53.

Dispute resolution

Rise of FDI and trade have necessitated increased access to international legal remedies available to states and private parties alike;

International Centre for Settlement of Investment Disputes (“ICSID”) created under auspices of the WB in 1966 in the belief that an institution designed to facilitate the settlement of investment disputes between governments and foreign investors could promote increased flows of international investment;⁴⁰

UNCITRAL also provides an internationally-agreed procedural code for the conduct of investor-state dispute-settlement.

An increasing number of disputes are now addressed through investor-state arbitration:

- e.g: Chapter 11 NAFTA addresses foreign investment and the protection of such investments, and gives private investors in NAFTA countries access to binding international arbitration.
- Hearings and pleadings are private; NAFTA provides for parties to choose their arbitrators and rules of arbitration.
- Nonetheless, mixed Arbitrations are not new:
 - o Mexican Arbitrations.
 - o Iran - US Claims Tribunal: set up in 1981 to settle claims arising out of the 1979 crisis: 1,000 claims filed.⁴¹

Chapter 3: International trade as an engine for development

Trade can benefit countries at all stages of development, and meaningful trade liberalization is important to the sustainable development strategy.

- In 2000, FTAA trade reached almost \$800 billion, and was growing at approximately 11%/year.
- Effectiveness of trade depends on extent of market openness, terms of trade, and adequacy of infrastructure. Costs of trade barriers maintained by developed countries are estimated at between \$40 - \$100 billion.
 - Organization for Economic Cooperation and Development in Europe (“OECD”) states that tariffs on agricultural products still approx. 50%.
 - Tariffs on processed goods still higher than on raw materials (punishing countries that try to produce goods, and reduce dependence on imports).

The expansion of trade has not occurred uniformly: the industrialized countries and 12 developing countries accounted for most of the growth.

- Most LDCs experienced a decline in their share of the world markets.⁴²

³⁹ Kevin C. Kennedy: *A WTO Agreement on Investment: A Solution in Search of a Problem?* 24 U. Pa. J. Int'l Econ. L. 77 (2003).

⁴⁰ www.worldbank.org/icsid/about/about.htm

⁴¹ www.iusct.org/background-english.html

J. T. FRIED

- Impact of trade on employment and wages has been positive in Asian countries, but in Latin American countries such as Mexico and Brazil real wages have tended to decline.⁴³

History of trade regulation

GATT: created in the wake of WWII to address tariffs and general trade policies. Became the principal forum for trade negotiations from 1947-94. GATT 1947 established basic principles (ie MFN and National Treatment), a framework for negotiations on tariffs and trade, and, under various Articles, also provided measures on subsidies, quotas, and state trading mechanisms (regulating imports through monopoly bodies).⁴⁴

A series of trade negotiations took place under the GATT to reduce tariffs, and to address anti-dumping and non-tariff measures. The last round of negotiations (the Uruguay Round from 1986-1994) led to the creation of the WTO.

The WTO integrates GATT, and adds:

- General Agreement on Trade in Services;
- Agreements on Sanitary and Phytosanitary Measures and on Technical Barriers to Trade;
- Intellectual Property;
- Dispute Settlement and imposes equal levels of obligation on all member countries – the so-called “single undertaking”.

In 2001, a new round of trade talks commenced in Doha, Qatar. The Doha Development Agenda sets out an ambitious work program that is of direct relevance to the needs of developing countries:

- Reduction of agricultural subsidies and improved market access;
- Providing technical assistance and financial assistance to ensure LDCs can become members of the WTO;
- Non-agricultural market access for goods, particularly from LDCs;
- Access to medicines;
- Special and differential treatment for developing countries, likely to include either or both lower obligations, or technical assistance in meeting requirements;
- Trade-related capacity building.

Recent Developments: 2004 “July Package” represents breakthrough in development talks that stalled after Cancun.⁴⁵ The WTO’s 147 members adopted a framework by consensus for future trade talks.

- In July framework, WTO Members reiterated their commitment to place the needs and interests of developing and least-developed countries at the heart of

⁴² ILO Report, supra, p. 25.

⁴³ ILO Report, supra, p. 38.

⁴⁴ Agreements. Available at: www.wto.org

⁴⁵ “July Package”. Available at: www.wto.org/english/tratop_e/dda_e/dda_package_july04_e.htm

the Doha Work Program. Framework agreement provides a roadmap for cutting trade-distorting subsidies, and agricultural export subsidies.

- Single Undertaking: the Doha Declaration set a five year timetable for concluding the negotiations on key issues such as agriculture as part of a “single undertaking”. July Framework sets new target dates for 2005, but the Doha Round is not expected to finish before 2007.

Regionalism vs. Multilateralism

By July 2003, only three WTO members were not a party to a regional trade agreement (Macau China, Mongolia and Chinese Taipei), such as the European Union, the North American Free Trade Agreement, The Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation.⁴⁶

250 Regional Trade Agreements have been notified to the WTO, and this may increase to 300 by 2005.

In the Americas, numerous regional trade pacts exist:

- The Andean Pact; - The Central American Common Market; - The Caribbean Community and Common Market; - The Common Market of the South (MERCOSUR); - The North American Free Trade Agreement.

Negotiations underway for an agreement to create a free trade area of the Americas.

Benefits of regional agreements:

- Regional agreements can support the multilateral trading system where they allow countries to negotiate commitments that go beyond multilateral negotiations, and reduce barriers to trade within that regional group.

- Regional agreements may also pave the way for future WTO agreements. For example, regional agreements on services, intellectual property, the environment and competition policy were all raised first in the regional context, and later became the basis for WTO agreements and / or discussions.

- The WTO requires equal treatment for all trading partners (MFN treatment), but authorizes under GATT Art. XXIV regional free trade areas or customs unions provided that barriers to trade with extra-regional countries are not raised as a result.

Chapter 4: Increasing international financial and technical cooperation for development

Official Development Assistance (“ODA”) is a critical complement to other sources of funding. Overall, it is not the most significant financial flow, but it is essential for the least developed countries, particularly those countries without access to Financial Direct Investment or affordable loans.

⁴⁶ See *Chapter 4: “Cross-Cutting and new issues”* in *About the WTO* (2004). Available at: www.wto.org/english/thewto_e/whatis_e/htm

J. T. FRIED

- Official Development Assistance Targets: Starting in 1969 with Pearson Commission, ODA target of .7% Gross National Income. The Monterrey consensus reaffirms .7% ODA target.⁴⁷

- In practice, these targets are not met. USA is the largest ODA contributor in real terms, but its contribution in 2003 reached only .14% Gross National Income. The OECD estimated the EU contributions at .35%.

- USA, Canada and the EU announced significant unilateral ODA increases: US: 50% increase in US Development Aid over the next three fiscal years; Canada announced an ongoing 8 per cent increase to its international assistance budget that will double aid by 2009-2010; EU announced it would raise ODA quota from .33% to .39% by 2006.

- Overall ODA Levels. In 2000, ODA granted by members of the OECD's Development Assistance Committee ("DAC") was \$53 billion (.22% of combined Gross National Income, in 2003, ODA of the Development Assistance Committee reached a high of \$68.5 billion (.25% of Gross National Income).⁴⁸

- Debt servicing back to foreign creditors means that much ODA circles back to same countries.⁴⁹

What constitutes ODA?⁵⁰

The Development Assistance Committee of the OECD created in 1960, becomes largest convener of countries providing ODA.

Current OECD definition (to which Canada and most other states subscribe):

"Grants or loans to countries and territories on Part I of DAC List of Aid Recipients (developing countries) which are: (a) undertaken by the official sector; (b) with promotion of economic development and welfare as the main objective; (c) at concessional financial terms [if a loan, having a Grant Element of at least 25 per cent]. In addition to financial flows, Technical Co-operation is included in aid. Grants, loans, and credits for military purposes are excluded [...] Transfer payments to private individuals (e.g. pensions, reparations or insurance payouts) are in general not counted."⁵¹

Criticisms of this definition

There is some debate over the scope of the definition:

- Grants, loans and flows for military purposes are outside the scope of the OECD definition. On one view, in post-conflict situations such as Afghanistan, much military aid goes directly to peace-building efforts, which corresponds to the underlying principles of ODA.

⁴⁷ Monterrey consensus par. 42.

⁴⁸ OECD Report: ODA Statistics for 2003 and ODA Outlook.

Available at: www.oecd.org/dataoecd/40/63/31508396.pdf

⁴⁹ For history of ODA, see Roland Rich: *Democratic Conditionality in Development Assistance* (2001) (www.eprints.anu.edu.au)

⁵⁰ Helmut Fuhrer: *The Story of Official Development Assistance: A History of the Development Assistance Committee and the Development Co-Operation Directorate in Dates, Names and Figures* (1994) p. 24. Available at: www.oecd.org/dataoecd/3/39/1896816.pdf

⁵¹ www.oecd.org ("ODA").

- An opposing view is that ODA is meant to meet long-term needs (drinking water, sanitation, schools, medical care, and economic development) but some states have included the cost of development administration, emergency and disaster aid, initial costs of refugee claimants, and even cancellation of debts within their ODA figures.⁵² As a result, Chang states that ODA has been overstated by 25% - 30% in recent years;

- Inclusion of concessional loans, although including a grant element, has been criticized by the World Bank, on the basis that it distorts real development assistance by overstating aid and understanding the outflows to repay the loan element.⁵³ The IMF has proposed an alternative: “Effective Development Assistance” (EDA), which would include only the grant portion of loans.

Problems in practice

Even if ODA is targeted towards long term needs, countries receiving it may simply divert other resources in such a way as to frustrate the purpose of the aid (ie: ODA is put towards improving health care, but the recipient uses savings from ODA to purchase weapons).

Is development assistance a right or an obligation?

- It is neither. Countries have committed to ODA targets of .7%.

- The international documents containing the .7% target are not binding legal instruments.

- The .7% target remains extremely useful in encouraging support for development (particularly in Europe) but this figure is no longer based on any substantive assessment of development financing needs.

What is the best content of ODA policy?

Question of “aid effectiveness” has been one of the key issues the G-8 Finance Ministers have confronted in recent years.

What we have learned?⁵⁴

- Aggregate economic growth benefits most of the people most of the time.⁵⁵

- A healthy private sector and macroeconomic stability are key to growth. A strong financial sector is necessary to mobilize domestic savings.

- Social investments in health, education, and in social safety nets are critical.

⁵² Kunibert Raffer: *ODA and Global Public Goods: A Trend Analysis of Past and Present Spending Patterns* (ODS Background Paper) 1999, see also: Jens Martens: *Rethinking ODA* (Global Policy Forum) (2001). Available at: <http://www2.weed-online.org/ffd/index.htm/pdf/rethink-oda-e.pdf>.

⁵³ CHANG C., Charles, et al: *Measuring Aid Flows: A New Approach*, World Bank (1998).

⁵⁴ See generally: Jonathan T. Fried & Bruce Rayfuse: *Strengthening the Aid System*, in *Reshaping Globalization: Multilateral Dialogues and New Policy Initiatives* (Andrea Krizsan & Violetta Zentai eds.) (2003) 2p. 217 at p. 221-2.

⁵⁵ See generally: Joseph Stiglitz and Lyn Squire: *International Development: Is it Possible?* Foreign Policy, 110 (Spring, 1998): 138-152.

J. T. FRIED

- A “good governance” agenda that encompasses political, social and economic dimensions is a priority.
- Country ownership and national “buy-in” on the part of recipient countries is necessary.

There must be better assessment of the policies behind assistance, and better donor coordination.

Chapter 5: External debt

Sustainable debt financing and external debt relief can play a key role in liberating resources.

- Debt was one of the largest sources of capital flows to developing countries in the past 50 years,⁵⁶
- By 1999, total external indebtedness of developing countries was \$2.6 trillion, 75% percent of which is long term debt.⁵⁷

Sovereign Debt Crisis has led to various proposals for restructuring.⁵⁸

- Increased lending starting in the 1970s led to a series of debt defaults:
 - 1982: Mexico: “tequila crisis” created domino effect as creditors exited with relatively few capital losses;
 - 1997-8: East Asia;
 - 1998: Russia;
 - 2001: Turkey;
 - 2002: Argentina - \$141 billion.

A significant shift from syndication of bank loans to bond issuance has led to much less orderly restructuring. As stated by the IMF: “Currently the international financial system lacks a strong legal framework for the predictable and orderly restructuring of sovereign debt, which drives the cost of default even higher.”⁵⁹

Categories of creditors and debt

A country may borrow from four different sources: (i) international and supra national lenders; (ii) another sovereign, (iii) private banks, or (iv) its citizens.

Supranational lenders:

- Eg: WB IMF, IDB;
- International lenders provide financing to countries that cannot find sufficient funding on affordable terms from other lenders;

⁵⁶ See generally Randall Dodd: *Sovereign Debt Restructuring*, in *The Financier*, Vol. 9, Nos. 1-4 (2002). In recent years, debt has been edged out by remittances (cross-border financial flows resulting from money sent by migrants), but these are private subsistence flows as opposed to public ones.

⁵⁷ World Development Indicators (2001) Table 4.16, External Debt.

⁵⁸ www.imf.org/external/np/exr/facts/sdrm/htm & www.financialpolicy.org/dsc/%20sovdebt.pdf

⁵⁹ www.imf.org/external/np/exr/facts/sdrm/htm

- These institutions are preferred creditors, because they take the biggest risks;
- IMF and WB in the process of reconsidering the methods they use to measure debt, because the current measures are based on export levels, not needs. This may affect thresholds of sustainability.

Sovereign Lenders:

- Eg: developing country borrows (or gets sovereign credits from) another country;
- Paris Club:⁶⁰ an informal group of approximately 15 creditor countries that provides interim relief (reduction in debt payments) or a postponement of debt payments (cash flow relief) conditional on approval of an IMF program. Its relief mechanisms are thus geared to fundamental solvency issues and to liquidity problems;
- The Paris Club met for the first time in 1956 to help resolve a debt crisis in Argentina, and has held approximately 200 meetings since. In recent years, it has focused on countries in Sub-Saharan Africa, and some countries in Latin America and Eastern Europe, including Russia.

Private lenders:

- Eg: Citibank;
- Lends at market rates;
- London Club:⁶¹ an informal group of commercial banks that is convened at the request of the debtor country to renegotiate commercially held sovereign debts. Each London club is dissolved upon conclusion of a restructuring agreement;
- Advisory Committees are chaired by a financial firm and are composed of representatives from other exposed firms, and more recently of non-bank creditors (such as fund managers of sovereign bonds, if the individual bonds contain appropriate trustee or agency clauses authorizing such representation).

Reform proposals

Sovereign Debt Restructuring Mechanism (“SDRM”) proposed by the IMF.

Core features⁶²:

- Majority (rather than unanimous) rule in restructuring decisions;
- A “stay” of creditor actions;
- Protection of creditor interests; and,
- Priority financing.
- Assessment: creditors said SDRM is too coercive, and are now proposing the creation of a “best practices” code of conduct.

⁶⁰ www.clubdeparis.org

⁶¹ www.iff.com/ipi/sovereign.quagga

⁶² See *id.*, see also Dodd, *supra*, p.3.

J. T. FRIED

Codes of conduct: due to extent and sophistication of LDC debt resale market, proposals are underway to develop a non-binding code of conduct; proposals have been made by the Debt Traders Association (now the Emerging Markets Traders Association) and others.

Creation of an international insurance corporation that would provide guarantees on international loans for a modest fee. Ceiling would be country specific, and would be based on indebtedness and on macroeconomic conditions.

Linking debt payments to a country's GDP (growth indexed bonds). Investors are concerned about liquidity of the markets for GDP linked bonds.⁶³

An international analogue to bankruptcy. Countries that default have very limited access to capital for long periods of time; a sovereign bankruptcy procedure would prevent vulture creditors from using foreign courts to compel defaulting countries to be bought out.⁶⁴

Unique challenges: Overindebtedness of developing countries

Heavily Indebted Poor Countries Initiative ("HIPC").⁶⁵ HIPC was proposed by the WB & IMF and endorsed by governments around the world in 1986 and has been enhanced since.

- Aim: to reduce the external debt burdens of the world's poorest and most indebted countries. Represents first comprehensive debt reduction strategy: (i) includes debt of international financial institutions, and (ii) reflects coordinated approach involving the international community, multilateral organizations and governments;

- Eligibility: a country must face an unsustainable debt burden calculated on the basis of a debt to GDP ratio, establish a track record of reform and sound policies through IMF/WB programs, and have developed a Poverty Reduction Strategy Paper that commits the government to productive expenditure;

- If eligible, the international community commits to reducing debt to a sustainability threshold: ("the decision point") at which a country may immediately begin to receive interim relief on debt service payments. A country must continue to demonstrate good governance;

- Approximately half of the costs are born by multilateral creditors, and the other half is covered through donations by states into IMF & WB administered trust funds. Canada, for example, has contributed \$247 million to the HIPC Trust Fund since 1998;

- Over time, the 27 countries currently in the HIPC program are expected to benefit from over \$53 billion (in nominal terms) in debt service relief.⁶⁶

⁶³ Andrew Bulls: IMF Mulls Radical Proposal on Debts, Financial Times (London) (Aug. 10, 2004).

⁶⁴ See WHITE Michelle J.: *Sovereigns in Distress: Do They Need Bankruptcy?* Paper for the Brookings Panel on Economic Activity (2002) (paper on file with author).

⁶⁵ www.clubdeparis.org/en/presentation/presentation/php?BATCH=B04WP04

⁶⁶ HIPC Debt Initiative: Meeting of Multilateral Creditors: June 23-24, Chairman's Summary (IDA/SecM2004-0513).

Odious debt

The legal doctrine of odious debt provides that sovereign debt incurred without the consent of the people and not benefiting the people is odious and should not be transferable to a successor government, especially if creditors are aware of these facts in advance.⁶⁷ Elements:

- Debt incurred without consent of affected population;
- Debt did not benefit that population;
- Creditor was aware of these two conditions at the time the loan was granted.

Doctrine is analogous to domestic laws that protect individuals from the obligation of repayment where others fraudulently borrow in their name. Churches, NGOs, academics, and international debt-relief organizations particularly supportive. Eg: Jubilee 2000 Debt Campaign.

Examples of Odious Debt:⁶⁸

- Suharto government in Indonesia borrowed \$30 billion from the WB between 1966 -1988, \$10 billion of that served “manifestly personal” interests;
- Anastasio Somoza was reported to have embezzled \$100 - \$500 million from Nicaragua;
- Ferdinand Marcos’s personal wealth in 1986 was in the neighborhood of \$10 billion, at a time when the Philippines owed \$28 billion to foreign creditors.

Doctrine of Odious Debts has only been invoked in a few situations:

- 1867 Mexican repudiation of Hapsburg Emperor Maximilian debts to Austria for suppression of uprising in Mexico;
- 1889 US repudiation of Cuban debt to Spain after Spanish-American war. US argued debt was imposed upon people of Cuba without their consent, and was intended to suppress revolts against Spain.

Assessment: despite attractiveness of this doctrine, in practice, many do not take advantage of it out of concern they will alienate Western creditors.

- For example, South Africa would qualify for relief under this doctrine for the debts incurred by the Apartheid Regime for repressing the African majority, but it has chosen not to default on its loans because of its fear that it will affect foreign direct investment.
- In longer term however, it is hoped that it will deter lending to odious regimes.

Problems arise with regards to which regimes should be eligible for this debt relief:

⁶⁷ KREMER Michael & JAVACHANDRAN Seema: “Odious Debt” in FINANCE DEVELOPMENT Vol. 39 #2 (June 2002) p. 1 at: www.imf.org/external/pubs/ft/fandd/2002/06/kremer.htm. See also www.odiousdebts.org/odiousdebts/index.cfm & www.brookings.edu/comm/policybriefs/pb103.htm

⁶⁸ See *id.*

J. T. FRIED

- Criteria tend to be subjective and difficult to apply, and there is little consensus on how far back the doctrine should apply;
- Post-conflict regimes may inherit large amounts of debt at exactly the time when moneys should be spent on nation-building. Thus, some are proposing that Iraq's debts (\$127 billion) be submitted to an arbitration tribunal where creditors who wish to enforce repayment obligations can demonstrate that their loans were not odious;
- G8 did not come to agreement on cancellation of Iraq's debts –although US argued that 90% should be forgiven;
- Proposal for change: creation of independent institutions to rule on the legitimacy of loans before they are incurred, or submission of debts to arbitration after regime change.

Chapter 6: Systemic issues: enhancing the coherence and consistency of the international monetary, financial and trading systems in support of development

The Monterrey consensus states that global economic governance must be improved, and good governance is essential for sustained economic growth.

Priorities: (i) ensuring countries adopt policies that support, rather than undermine, efforts to sustain the development process, such as promoting knowledge-based economies; (ii) assessing trade-offs and synergies across fields of trade, investment, agriculture, health, education, the environment and development cooperation; (iii) combating money laundering, corruption, and international tax evasion, and improving corporate governance; (iv) improving policies on knowledge and technology transfer.⁶⁹

- Millenium Development Goal 8 calls for building a global partnership for development;
- The Monterrey consensus calls for shared responsibility in achieving development.

History: Institutions and the regulation of international economic policy

- Bretton Woods System: Organs to monitor and regulate international economic affairs were created at a conference held in 1944 at the closure of WWII, in Bretton Woods, New Hampshire. This conference marked the birth of the IMF and the WB. The International Trade Organization that had been envisioned by the Bretton Woods Agreement was not endorsed by the US Congress, and it was created in 1947, in the form of the GATT.
- These institutions were joined by the UN in 1945 and the WTO (replacing the GATT) in 1994.
- OECD: established in 1961, its mandate is to promote growth, trade, financial stability and full employment.

⁶⁹ See generally: OECD Policy Brief: *Policy Coherence: Vital for Global Development* (2003) at www.international.se/asia978.htm

- UN Conference on Trade and Development (“UNCTAD”): became a permanent organ of the UN in 1964, and its mandate is to promote trade in the interest of development, to formulate policies on trade, initiate multilateral trade agreements and to act as a focal point for harmonizing national policies on trade.
- The United Nations Development Program (UNDP) is an increasingly significant player, and specialized agencies of the UN, such as UNICEF, also participate in development efforts.

Instruments

“Soft law” versus “hard law”. Increasingly, multinationals corporations, international organizations, private associations and so on are promoting “soft law” practices: codes and standards that lack legal standing, but are used as benchmarks of good practice. They are implemented and enforced at the discretion of states, but are becoming common business practice and integral to programs promulgated by Multilateral Institutions.⁷⁰ “Hard law” refers to treaties and instruments that bind the actions of states.

Regulation of multinationals: Codes of conduct

Codes contain moral, not legal obligations.

Unlike corporate codes of conduct which are internally generated, multinational codes are externally established by governments, NGOs, intergovernmental organizations, and groups representing the interests of employees, consumers, religious or ethical groups.

- Origin of codes: codes are company specific, some are based on models from international community (ie: from the OECD), some are private sector initiatives (ie: maquiladora standards);
- Typical subject matter: emissions and the environment, advertising, competition, labour, health and safety;
- Eg: Labour Standards in Apparel Industry.
 - Basic elements: prohibitions on child labor, forced labor, discrimination based on race, religion, or ethnic origin, limits on working hours, provisions on wages and working hours.⁷¹
 - Eg: The mining industry has developed a Reporting Code for the Reporting of Mineral Exploration Results, Mineral Resources and Mineral Reserves.⁷²

⁷⁰ Giannini Curzio: *Promoting Financial Stability in Emerging-Market Countries: The soft law approach and beyond*, Comparative Economic Studies Vol. 44 Issues 2/3 (2002).

⁷¹ See report by US Department of Labour on ILO website: www.itcilo.it/actrav/actrav-english/telearn/global/ilo/code/apparel2.htm

⁷² www.eurogeologists.de/code_introduction.pdf

Regulation of officials: Corruption

Corruption deters private investment, reduces government funds (through payment of bribes and underreporting of revenue) and hence reduces the amount of public spending.⁷³

- Investment levels in countries with high levels of corruption were 6% lower than in countries with medium levels of corruption (21% compared to 27%).⁷⁴

Fight against corruption started as initiatives by international financial institutions like the WB, and by certain states like the US with the Foreign Corrupt Practices Act.

Has broadened into an issue of international concern:

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Convention Against Corruption, and the Inter-American Convention Against Corruption;⁷⁵

- WB reconfigured Corporate Committee on Fraud and Corruption Policy. New mandate: develop poverty reducing, encompassing and coordinated anti-corruption policy and strategies;⁷⁶

- Transparency International, the EU, the Council of Europe, the ERBD, the IMF, the IADB, the OECD and the Asian Development Bank have instituted anti-corruption guidelines and indices.

Soft law practices and trade law

WTO is promoting performance based codes through, e.g., its TBT Agreement:

- Code of Good Practice for the Preparation, Adoption and Application of Standards;

- For technical regulations, specifics must be given in terms of performance measures rather than design or descriptive characterization.

Regulation of governments

Standards and Codes (“S & C”) reflect financial and regulatory priorities such as: fiscal codes, general data dissemination systems, securities regulation, corporate governance, auditing and accounting, insolvency regimes, creditor rights.

⁷³ www.worldbank.org/publicsector/anticorrupt/topic1.htm

⁷⁴ Based on empirical data of transition economies in Eastern Europe and Central Asia in World Bank: Anticorruption in Transition (2000).

⁷⁵ See discussion of these conventions, and the fight against corruption and bribery more generally at: www.transparency.org

⁷⁶ www.worldbank.org (anticorruption strategy).

- Aim: reform of the global financial architecture by developing international rules and improved governance of national and international financial systems. The anticipated outcome: global financial stability;
- Financial Stability Forum (“FSF”)⁷⁷ established in Feb. 1999 by the G7 finance ministers & central bank governors in response to crisis in East Asia. Sets out 73 standards (12 core) in three areas: Macroeconomic policy transparency & accurate and timely data dissemination, institutional market infrastructure, and financial regulation and supervision;
- Eg: WB / IMF Financial Sector Assessment Program (“FSAP”): analyzes strengths and weaknesses of a country’s financial systems. Assessments are then used for Reports on Observance of Standards and Codes (ROSCs);⁷⁸
- Assessment: A number of difficulties have been noted with regards to the implementation of standards and codes:⁷⁹
 - Under-representation of developing countries;⁸⁰
 - Reports on Observation of Standards and Codes are not user-friendly (the information is time-consuming and too quantitative to implement effectively).⁸¹
 - There is little incentive for private actors to base their decisions on criteria linked to public-sector initiatives.⁸²
 - Low levels of state participation.

International Organization for Standardization (“ISO”): produces technical standards applicable to governments, trade, conformity assessment, and customers of products and services. ISO is a NGO that represents the national standards institutes of 148 countries.⁸³ The standards are voluntary:

- ISO 9,000: quality requirements in business dealings;
- ISO 14,000: standards for minimizing harmful effects on the environment;
- Proposed ISO 8,000: emerging labour standards.

Enforcement of codes

- Surveillance, international reporting, leverage (money);
- Problem: codes that have no monitoring or verification requirements, or procedures that are non-objective for such assessment, are of limited use.

Conclusion: A right to development in international law?

To date, program of globalization and liberalization (free markets, deregulation, and privatization leading to sustainable development) is of mixed success. Benefits of investment liberalization are not always realized because:

⁷⁷ www.fsforum.org
⁷⁸ www.imf.org/external/np/fsap/fsap.asp
⁷⁹ www.imf.org/external/np/exr/facts/sc.htm
⁸⁰ See *id.* at 2.
⁸¹ See *id.*
⁸² See *id.*
⁸³ See: www.iso.org

J. T. FRIED

- Policies on the gamut of issues under the development agenda (agriculture, health, trade, and intellectual property, economic and judicial reform) are not integrated;⁸⁴
- Different frameworks are used to assess the success of sustainable development, such as: human rights, fiscal and economic stability, respect for the environment, and investment liberalization;⁸⁵
- The benefits of globalization, trade, increased FDI flows and so on, are not equally distributed. LDCs have gained very little;
- Lack of coordination between social, economic and environmental policies and bad coordination between national donors results in less stable growth, and adversely affects employment and poverty.⁸⁶

Is there a right to development?

The context:

- Universe of rights: first, second, third, and fourth generations;
- Special status associated with being a right (including corresponding right to enforcement and possibly remedies);
- Unlike civil and political rights which require “freedom from” state interference, economic and social rights require state action. A state has an obligation towards its citizens to deliver the right; states must not simply rely on “spontaneous market forces”;⁸⁷
- In post WWII era, as reflected by the 1948 Universal Declaration of Human Rights, human rights were seen as integrated and included political, civil, economic, cultural and social rights;
- Cold war politics led to a separation of former rights from the latter, leading to two different covenants:
 - The International Covenant on Civil and Political Rights (“ICCPR”), and
 - The International Covenant on Economic, Social and Cultural Rights (“ICESCR”).

Proponents of the right to development

Growing international consensus that a right to development exists:

1986 UNGA Declaration on the Right to Development⁸⁸:

- The right to development is a “comprehensive economic, social, cultural and political process”;
- The human being is the main participant and beneficiary of development;
- The right to development is an inalienable human right and equality of opportunity for development is a prerogative both of nations and individuals who make up nations;

⁸⁴ See generally: www.unhchr.ch/development/right.html; www.unhchr.ch/html/menu5/wchr.htm

⁸⁵ High Commissioner of Human Rights: Report on Human Rights, Trade and Investment (2003) UN Doc. E/CN.4/Sub.2/2003/9/.

⁸⁶ ILO DG Report, supra, p. 11.

⁸⁷ Robert Howse: *Mainstreaming the Right to Development* (2004).

⁸⁸ Declaration on the Right to Development (General Assembly Resolution 41/128) (1986).

- States have the right and duty to formulate appropriate national development policies that aim at the improvement of the entire population.

The 1993 UN Conference on Human Rights in Vienna:⁸⁹

- Development is “a universal and inalienable right and integral part of fundamental human rights”,⁹⁰
- Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing;⁹¹
- The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development, and states must implement effective development policies at the national level.⁹²

In 1993, the UN Commission on Human Rights established a Working Group on the Right to Development that issues regular reports.

In 1992, the Rio Declaration on Environment and Development is adopted:

- “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations,”⁹³
- Scope of the “right to development”: as conceived in the documents noted above, this right encompasses a variety of basic rights of what it means to develop as a human being, such as: the right to education, to freedom of movement, and to freedom of speech.⁹⁴ The right to development therefore represents a process of development, drawing on fundamental rights and freedoms in the economic, social, cultural, civil and political spheres.

Proponents claim that the right to development encompasses a variety of individual rights (self-determination, security of the person) that an individual holds, and a development process whereby various rights (including the right to health and food) are realized.

Most proponents claim that the right to development is individual. That is, an individual may have a claim against their own state when individual rights are infringed.

The Independent Expert on the right to development argues that a development compact between developed and developing countries is required as a means of implementing a country-level right to development assistance.⁹⁵

⁸⁹ World Conference on Human Rights: Report of the Secretary General (A/CONF.157/24) (1993) paras. 8-12.

⁹⁰ Vienna Declaration, supra, Para. 10.

⁹¹ Vienna Declaration, supra, Para. 8.

⁹² Vienna Declaration, supra, para. 10.

⁹³ Rio Declaration, principle 3.

⁹⁴ Arjun Sengupta: *Implementing the Right to Development* at p. 17; Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals*, 2nd ed. (2000).

⁹⁵ Report of the Independent Expert on the Right to Development: Review of progress and obstacles in the promotion, implementation, operationalization and enjoyment of the right to development, UN Doc. E.CN.4/2004/WG.18/2 (2004). All reports of the Independent Expert on the right to development (Arjun Sengupta). Available at: www.unhcr.ch

J. T. FRIED

The skeptics

Declarations setting out right to development have no status under international law, as they are non-binding.

Development is a collective process. Like the purported right to peace or the right to a healthy environment, development is too broad a concept to be characterized as a right.

Individual rights connected to the development process (security of the person) may be violated by the claimant's state. There is no basis in international law, however, to aggregate these claims into a right to development that creates obligations on foreign states, or that creates a cause of action against a foreign state.

There is no obligation on states to help developing countries develop, and no obligation to provide transfers of wealth. The UN Charter only creates a general obligation for states to cooperate.

Development is on the international agenda, but it is pre-mature to discuss it as a legal right.⁹⁶

⁹⁶ MALCOM M. M. Shaw: International Law (4th Ed.) p. 224.