Chapter 4

A Proposal to Support Pro-development Trade Liberalisation

Aid for trade has failed to live up to its promise of additional, predictable and effective finance to support developing countries' integration into the global economy. More importantly, aid for trade may not be addressing the fundamental concerns with the global trading system and aid system that gave rise to it, and instead has become a means for both the aid and trade communities to paper over their weaknesses without doing much for the fundamental concerns of poor countries.

This book proposes a novel approach to aid for trade that would go some way to address the underlying unfairness of the global trading system and deficiencies in aid arrangements. Our proposal is to make aid and trade liberalisation work for poor countries and tied directly to specific development objectives.

4.1 The 'right to trade'

There are significant parts of industrial countries' trade policy that materially restrain the development of poor people and constrain the ability of developing countries to participate in international trade. In fact, perversely, the global trading system is still stacked against the poorest – the areas of trade where barriers are the highest (agriculture, textiles etc.) are also the areas of most importance to developing countries. As a consequence, as we have noted, the average tariff in OECD countries on imports from other OECD countries is significantly lower than imports from non-OECD countries. For example, import tax collected by the US from the imports originating in Bangladesh and Cambodia amounted to US$1 billion in 2008, which is more than the total amount collected on imports from the United Kingdom and France (Centre for Global Development 2010). In addition, it is not just the average level of tariffs that matter; it is their structure. Escalating tariffs are an impediment to development. And perhaps even more important than tariffs are the non-tariff barriers faced by developing-country exporters.[32]

Aid for trade cannot be a substitute for removing these inequities – it must be a complement rather than a replacement for fundamental change to the trading system. This was recognised

in 2005 in the Hong Kong Ministerial Declaration 'Aid for Trade cannot be a substitute for the development benefits that will result from a successful conclusion to the [Doha Development Agenda] DDA, particularly on market access. However, it can be a valuable complement to the DDA' (WTO 2005).

As the development promise of the Doha Round has faded away – only to be replaced by concerns that what remains may even have an adverse effect on some of the poorest countries – it has become clear that there is no imminent prospect of a pro-development reform to the trading system through formal rounds of multilateral liberalisation. Instead, it is imperative to install alternative mechanisms to rebalance the global trading system and make trade work for poor people. To achieve this, we propose that members of the World Trade Organization should adopt a general 'right to trade' and a 'right to development' operating within the dispute settlement body.

Article 20 of the GATT provides for certain exceptions to the applicability of trade commitments, e.g. for matters of national security, health and the environment. So too, TRIPS included a provision for compulsory licences for health – the breadth of that provision was a major subject of controversy prior to the Cancun meeting. The Shrimps-Turtle case provided an important set of exceptions in the enforcement of import restrictions (based on technology) on the basis of the environment.[33]

We have seen that trade liberalisation (especially if the rules are unbalanced and there is insufficient accompanying support) may not lead to growth; but worse, trade agreements and the obligations they impose may impair development, e.g. through the inability to develop new industries or through devastating effects on existing industries, through the inability to acquire technology and knowledge, or through impacts on public health or public budgets.

The 'right to development' would limit the applicability of WTO obligations when the enforcement of such obligations would have a significant adverse effect on development.[34]

Faizel Ismail has suggested the adoption of such a right to development for the least-developed countries:

> ….a mechanism should be established in the WTO in the course of the Doha negotiations that provides small, weak, and vulnerable economies with 'flexibility' to avoid implementation of a specific discipline, if such non-implementation is properly justified for development interests (Ismail 2006: 64).

We would argue, however, that such a right be extended not just to the most vulnerable economies, but to any of the least developed.

The 'right to development' is, in a sense, a right not to be harmed by the imposition of trade rules. It recognises that in the formulation of the trade rules, the voices and concerns of the least-developed countries were not given sufficient weight; that provisions on special and differential treatment were not adequately 'hard wired' into the international trading system; that development itself is a complex matter; and that trade ministers have neither necessarily the competence nor interests to design a global trading system that promotes development. Rather than specifying a long list of ways in which developing countries might be adversely affected, and how developed countries might offset these adverse effects (e.g. through aid for trade), it enunciates a broad *enforceable* principle, the details of which would have to be fleshed out in the WTO dispute resolution process.[35]

We argue further that if, as advocates of trade liberalisation claim, trade is good for growth and development (with its strongest advocates claiming that it is necessary and almost sufficient), then actions taken by developed countries to impede trade are, themselves, a violation of the 'right to development'. A corollary, then, of the right to development within the international trade regime is the 'right to trade'.

The right to trade would give developing countries the ability to bring an action against any advanced country where three conditions are satisfied:

i. a specific group of poor people within a developing country (or the country or group of countries as a whole) can be identified as being significantly and directly affected by a specific trade or trade-relate policy (or policies) of an advanced country;

ii. the effect of the policy acts to materially impede the economic development of those poor people (or the country or group of countries as a whole); and

iii. the impediment operates by restricting the ability of the people (or the country or group of countries as a whole) to trade, or gain the benefits of trade.

This right would enable any developing country to bring an action against an advanced country on the basis that a specific policy materially impedes the development of an identified community in a poor country by restricting its ability to trade.

4.1.1 Remedies

Subject to appropriate safeguards, this right would transcend existing agreements and apply to all trade-related policies of advanced country member states. A developing country (or countries) bringing successful actions under the right to trade could access a range of remedies:

- Elimination or change to the offending policy as a result of mediation between the advanced country and the developing country.
- A range of bilateral sanctions including an increase in tariffs against the advanced country (a remedy that would be available to all affected developing countries). This right to sanction would be tradeable (see Stiglitz and Charlton 2005). Rather than merely raise tariffs, sanctions should also be able to include suspension of other WTO commitments of interest to advanced countries, including the TRIPS agreement.
- Compensation from the offending advanced country or support from a multilateral aid for trade fund (outlined in the next section).

Any dispute between a rich and a poor country is never a fair fight. Setting aside the differences in their ability to bring suit, even when a developing country prevails, enforcement is difficult. Existing remedies under the WTO dispute settlement system suffer from a range of asymmetries, which weaken the position of poor and small countries and often make those remedies ineffective. For example, raising tariffs against the larger country can be counterproductive if the bigger country represents a large share of imports. The effect on the bigger country may be small, while the population of the small country may face higher prices on imported goods. That is why it is important that the sanctions be 'tradeable' and that they include the suspension of other WTO commitments.

4.1.2 Who can bring an action?

Poor countries may furthermore find themselves subject to coercion, as the larger countries make implied threats to reduce aid or other benefits. This will reduce the likelihood that actions will be brought, eviscerating the force of the 'right to trade'. To address this problem, we propose three alternative mechanisms:

i. Developing countries should be able to club together to impose joint sanctions, where they are mutually affected

by a developed country policy.[36] Also, developing countries should have recourse to funds (described further in the following section) to support themselves in the action and provide compensation for any reduction in aid or other losses resulting from retaliation by the developed country.

ii. Bilateral investment agreements have recognised the right of private parties to initiate actions against states, when they are harmed. The private parties that bring suit under investment agreements are corporations. The rights of poor people should be equally enshrined under the law. Indeed, the rule of law is supposed to be directed at protecting those who otherwise could not fend for themselves. Any group of poor individuals harmed by a trade policy of another country should therefore have the right to bring a case before the WTO.

iii. There should exist an office ('Defender of the Right to Trade'), potentially located within UNCTAD, that would have the right to bring suit against any country seen as violating the right to trade as defined above.

4.1.3 Breadth and specificity of the right to trade

Most advanced industrial countries have, effectively, recognised the right to trade on the part of least-developed countries. They have recognised that opening up their markets to these countries would have little impact on their own economies (indeed, to the extent that trade restrictions are distortionary, benefiting producers at the expense of consumers, overall welfare would probably increase), but could be of enormous benefit to the least-developed countries. That is why Europe adopted its EBA initiative and the US similarly passed AGOA. However, the implementation of the principle has fallen far short of the aspiration, partly as a result of non-tariff barriers (like rules of origin and phytosanitary conditions).

In a sense, the proposed right to trade does nothing more than formalise the obligations that developed countries have already broadly taken upon themselves, helping immunise trade ministries from the pressures that are brought by special interests within their own countries that would be adversely affected by such a provision.

A number of concerns have been raised about this 'right to trade'. One is the lack of specificity. What exactly is embraced within this 'right'? We are of two minds. On the one hand, specificity may help reduce trade uncertainty. Precisely defined rights give

guidance to countries concerning what is and is not allowed. On the other hand, in today's world of regulatory arbitrage, a high degree of specificity is likely to give rise to 'circumvention': attempts to devise policies that are consistent with the letter of the law (regulation), the specifics of the provision, but against its spirit. This is evidenced by the considerable ingenuity that has been exhibited in trying to circumvent existing liberalisation and anti-subsidy measures. This helps explain why in other contexts, countries have moved toward 'principles-based' regulation.[37] Both within the WTO and elsewhere, legal and regulatory systems with broadly defined rights and obligations have worked reasonably well. South Africa's constitution, for instance, includes a broad array of rights (such as the right to housing), which have proved effective in fulfilling the intention in ways consistent with the country's resources and without imposing undue uncertainty.[38]

We believe that the 'right to development' and the 'right to trade' should be enshrined at a high level of generality, partly because trade negotiators from developed countries will try to impose restrictions on its applicability that will create large 'carve outs' that will eviscerate the effect of the provision.[39]

For the least-developed countries, we believe that the 'right to trade' and 'right to development' should be enforceable within the WTO dispute resolution mechanism, partly because as we suggested the principle has already largely been accepted.

Emerging markets (middle-income countries) present a more difficult problem, as they have grown to the point where the trade restrictions that they do or could adopt can impose real costs on developed countries. Still, these countries have per capita incomes that are far below those of the more developed countries; they typically have large fractions of the population in poverty, and development and poverty eradication remain an imperative.

If the multilateral trading system is to flourish, those in these emerging market countries must see it to be not only fair, but consistent with their developmental aspirations. For these countries, a 'softer' version of the 'right to development' and 'right to trade' may be appropriate, whereby such a country (or a group of countries or groups within a country) may bring an action, asking for a declaratory judgment that the practices of a given country (or group of countries) has an adverse effect on trade or development, perhaps with a suggestion concerning alternatives that might have less adverse effects. Hopefully, such judgments would put pressure on the offending parties to change their policies or practices. At

the very least, an accumulation of such findings should spark discussion within the WTO for the need for reform of existing disciplines and rules – and aid for trade – so that the multilateral regime can be pro-development and pro-trade.

Some concern has been expressed too about the broadening of the private rights to bring action. Many look at the provisions of the bilateral investment treaties that give the right to private parties to bring actions against states as misguided; and while our proposal might be seen as counterbalancing this asymmetry, they argue that a preferred remedy is to withdraw the right of private parties to bring actions. We believe that the arguments presented here are, in fact, more compelling than in the bilateral investment agreements: as we noted, states can be put under pressure by the developed countries violating these rights not to bring action, so action will be taken in some cases only if the right is extended more broadly.

If there are worries about these rights to private action, then we suggest that such complaints be filed through the office of the Defender of the Right to Trade described earlier. Such an office would vet the claims, ensuring that only those that have a reasonable chance of success would go forward. If (and only if) private rights of action by corporations are restricted, then it might make sense to restrict the private rights to action proposed here; in which case the office of the Defender of the Right to Trade would bring suit directly.

4.2 Global Trade Facility

In addition to the right to trade, we propose the creation of a Global Trade Facility – a dedicated fund established at the global level, to which all donors would contribute resources that would be allocated to developing countries based on their needs.

This new fund would retain the concept of the Integrated Framework – where international organisations effectively co-operate on aid for trade – but concentrate its management within one institution. Dedicated funds for aid for trade should be allocated to a special facility to be administered by UNCTAD, much as the Global Environment Facility is administered by the World Bank and supported by a small secretariat operating within but independent from UNCTAD.[40]

This body would oversee the aid for trade programme, support the allocation of funds according to an agreed set of principles, create and monitor a common set of performance criteria and report on effectiveness. (The aid projects themselves would be

carried out by a variety of national and international institutions and organisations.)

This organisation would not directly manage the assistance programmes, but would allocate resources based on proposals from a wide range of development organisations, which could include multilateral institutions (including the World Bank and regional development banks), NGOs and countries themselves. (It would necessarily also have to have some responsibilities for oversight and evaluation.) This would encourage transparency, needs-based allocation and competition among aid recipients and deliverers to develop the most effective and efficient aid for trade projects and programmes.

The Global Trade Facility (GTF) would support the right to trade by providing resources to support developing countries' actions and fund genuine aid for trade – including assisting countries to maximise the benefits of new market access won through the dispute settlement system. The facility could also compensate developing countries for any losses – such as reduced aid or other retaliation[41] – associated with any right to trade dispute. It would also provide some adjustment assistance and even ongoing support to developing countries that may be negatively impacted as a result of changes to advanced countries' trade policies – for example, where a developing country was receiving preferences whose value is eroded by liberalisation.

As we have proposed (Stiglitz and Charlton 2006) the GTF should be supported by a funding commitment along the following lines:

i. The advanced industrial countries would contribute 0.05 per cent of their GDP to the GTF. This means that the aid to trade facility would comprise approximately 7 per cent of the total commitment (of 0.7 per cent of GDP) to developing countries, an amount that seems balanced within the framework of overall development needs.

ii. There would be an *additional* commitment of a small percentage of the value of the advanced countries' exports to least-developed countries. One can think of this as a partial substitution of the revenues that would have been received as tariffs; but it takes advantage of the greater administrative capacity of the developed countries, and avoids all of the distortionary and political economy 'costs' associated with tariffs. The advanced industrial countries need not actually levy the amount as a tax on exports, but simply pay the

amount (small relative to GDP of the advanced industrial countries) out of general revenues.[42]

iii. There would be an *additional* commitment of 5 per cent of all agricultural subsidies and 15 per cent of all arms sales to developing countries, partially reflecting the costs that these impose on developing countries.

These mechanisms would give aid for trade an annual flow of more than US$40 billion. This is around the quantum of ODA currently labelled aid for trade (OECD and WTO 2011). However, under the GTF framework this flow would be more secure, predictable and genuinely additional.