



United Nations
Human Rights

OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
REGIONAL OFFICE FOR THE PACIFIC

PACIFIC TRADE AND THE RIGHT TO HEALTH



Pacific Centre

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“I cannot overemphasize that all human rights principles and the responsibilities that flow from them also apply, mutatis mutandis, to intergovernmental organizations and mechanisms, including an international trade regime.”

Navi Pillay, UN High Commissioner for Human Rights

This information sheet, developed by the Regional Office for the Pacific of the Office of the High Commissioner for Human Rights and the United Nations Development Programme (UNDP) Pacific Centre, intends to explain how trade in the Pacific is relevant to all people in the Pacific. It illustrates this by looking at links between trade and the right to health, a concern that affects all Pacific people and that is also a basic human right.

Introduction

Issues of trade in the Pacific attract much attention, and yet, for those who are not trade experts, remain rather unclear and difficult to understand. This is in part due to the economic technicalities that are discussed, but also to the fact that trade agreements are usually negotiated confidentially, and much of what is discussed does not reach the public space. Human rights principles demand, among other things, that policies affecting basic human rights, such as the right to health, must be determined through community participation and consultation.¹

Trade agreements invariably affect human rights of consumers, residents, workers, those in poverty and others, and the ability of States to regulate to protect the human rights of their people. However, trade agreements are often negotiated without reference to their impact on the rights to health, education, food, work, water, sanitation and so on. Multilateral, regional and bilateral trade agreements are often regarded as primarily economic or commercial in nature and therefore are often not assessed for their impact on human rights. The effect of these agreements on the enjoyment of human rights of consumers and individuals in general is not often an explicit or even significant consideration in the negotiation and implementation of the agreements.

¹ See for example, General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. ESCOR, Comm. on Econ., Soc. and Cultural Rts., 22d Sess., U.N. Doc. E/C.12/2000/4 (2000)

Human Rights and Trade: conflicting or reinforcing?

“It is true that human rights are predicated on the equality of all human beings, while the imperative of comparative advantage in trade inevitably creates winners and losers. And it is also true that human rights priorities lie in the protection and empowerment of the vulnerable and the marginalized, while success in trade rewards those who possess a competitive edge in navigating the global markets. Further, human rights law insists on State obligations, while the liberalization of trade may make the role of States progressively shrink. I maintain, however, that as engines of human well-being, progress and mutual understanding, the common and potentially reciprocally reinforcing aspects of human rights and trade far outweigh their contrasting features.”

Navi Pillay, UN High Commissioner for Human Rights

Supporters of free trade argue that countries that liberalize their economies achieve higher levels of economic growth. According to this argument, increased growth in turn raises living standards for everyone since increased growth results in higher incomes and standards of living and ultimately more respect for and enjoyment of many human rights. Trade liberalization or economic liberalism is according to this claim ‘the key to unlocking the future development prospects of the developing countries.’² Trade liberalization has indeed assisted some countries to improve their human development status. It is not always the case, though, that it will and each situation needs to be assessed on its own terms. In the Pacific, for example, the situation of small island states needs to be taken into account. Small islands states and least developed countries (LDCs), where producers cannot compete equally with producers from technologically advanced economies, may not follow the positive examples cited in favour of trade liberalization. Not all countries that have adopted such policies have realized economic growth. Paul Krugman, the Nobel-prize winning Economist, for example, has argued that the policy prescription that free trade will make all countries achieve mutually beneficial exchanges is not necessarily true.³

Trade liberalization is usually accompanied by calls for a state to open up markets and de-regularize areas such as health, education and other social programs. This can lead to reduced levels of government spending and reduced space for government regulation in these areas. In this regard, such liberalization has a potential to undermine efforts to protect the right to health, education and other human rights.

2 Paul Mosley, Jane Harrigan and John Toye, *Aid and Power: The World Bank and Policy Based Lending*, Vol. 1, 1991, at 4.

3 Paul Krugman, *Pop Internationalism*, 1994

Economic, Social and Cultural Rights Obligations at Home and Abroad

Pacific Island Forum countries have a range of national and international human rights obligations established through both national law and constitutions, and through ratification of international human rights treaties. Although all these obligations have a bearing on the topic of human rights and trade, the treaty that is most relevant is the International Covenant on Economic, Social and Cultural Rights.⁴ Among other things, it protects:

- The right to work which includes the right of everyone to the opportunity to gain his living by work which he or she freely chooses.⁵
- The enjoyment of just and favorable conditions of work including fair wages and equal remuneration for work of equal value and safe working conditions.⁶
- The right to social security including social insurance.⁷
- The right to an adequate standard of living including adequate food, clothing and housing and to the continuous improvement of living conditions.⁸
- The right to the highest attainable standard of physical and mental health.⁹
- The right to education.¹⁰
- The right to take part in cultural life.¹¹

Australia, New Zealand, Papua New Guinea and Solomon Islands have ratified the International Covenant on Economic, Social and Cultural Rights.¹² Under the International Covenant, each State is required to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”¹³ The Committee on Economic, Social and Cultural Rights has elaborated this to mean that States are required to “take steps” that are to be “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”¹⁴ There is a strong presumption that retrogressive measures are not permissible.¹⁵ It is also clear that each State has both national level obligations towards residents of its own country, but also international obligations to promote economic, social and cultural rights in other countries, including in countries that may be party to a free

4 The Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, both widely ratified in the Pacific, also protect a broad range of these economic, social and cultural rights.

5 Article 6 of ICESCR

6 Article 7 of ICESCR

7 Article 9 of ICESCR

8 Article 11 of ICESCR

9 Article 12 of ICESCR

10 Article 13 of ICESCR

11 Article 15 of ICESCR

12 Notably, Article 2(3) of the International Covenant on Economic Social and Cultural Rights provides that “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

13 International Covenant on Economic, Social and Cultural Rights, art. 2, para. 1, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

14 ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment 3: The Nature of States Parties’ Obligations, para. 2, U.N. Doc. E/1991/23 (1990) [hereinafter ICESCR, General Comment 3].

15 This would mean, for example, that it would be a breach of a State Party’s obligations to enter a trade agreement that results in a deterioration of the right to health.

trade agreement with the State Party to the Covenant. In order to comply with the Covenant, State parties must respect the enjoyment of the right to health in other countries. “Depending on the available resources, the States [who have ratified the Covenant] should facilitate access to essential health facilities, goods and services in other countries...In relation to conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health.”¹⁶

Trade Impact on Health in the Pacific

As we saw above, the International Covenant on Economic, Social and Cultural Rights entitles “everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁷ The Committee on Economic, Social and Cultural Rights has defined the right to health to extend:

“not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and portable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.”¹⁸

This approach to the right to health embraces a complete state of physical and mental well being rather than merely the absence of disease. That means a concern with the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.¹⁹

With respect to the right to health, States have core minimum obligations to ensure:

- 1) The right of access to health facilities, goods and services *on a non-discriminatory basis*, especially for vulnerable or marginalized groups;
- 2) Access to the *minimum essential food* which is nutritionally adequate and safe;
- 3) Access to *shelter, housing and sanitation* and an adequate supply of *safe drinking water*;
- 4) The provision of *essential drugs*;
- 5) *Equitable distribution* of all health facilities, goods and services.²⁰

In this regard, States must maintain their ability to regulate issues that are relevant to these core minimum obligations, and should not sign away these abilities in a trade agreement. We address some of these key issues below.

16 General Comment 14, op. cit

17 Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights. Article 25 of the Universal Declaration of Human Rights provides that, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

18 General Comment 14, op.cit.

19 Ibid.

20 The Right to Health, Fact Sheet No. 31, Office of the High Commissioner for Human Rights and World Health Organisation, 2008

The right of access to health facilities, goods and services

The United Nations High Commissioner for Human Rights has argued that while “more efficient supply of services in any sector can promote economic growth and development, and therefore could provide the economic means needed to promote human rights...the liberalization of trade in services, without adequate governmental regulation and proper assessment of its effects, can also have undesirable effects” that could undermine the protection, fulfilment and promotion of human rights.²¹

The inclusion of trade in services in trade agreements can directly affect the right to health, along with a range of other rights. Trade agreements can impact on the quality of health services, which under international human rights law must be accessible and affordable to all, including to the most vulnerable and socially disadvantaged groups.²²

Given the small size of Pacific Island country economies, making widespread services liberalization commitments could limit the ability of these governments to regulate large parts of their service economy in the public interest. For example, the government may surrender control over finance, telecommunications and retail, but also over essential services, such as health and education. As a result regulations designed to serve the public interest on issues such as licensing, technical and professional standards, for example, would be regarded as barriers to entry of services under the rules of liberalization of trade in services.²³ In addition, service liberalization commitments would trigger rights to service providers in all these sectors to have an equal entitlement to compete for providing services on a commercial basis.

Experience has also shown that privatization or contracting of public health services can result in service providers focusing services on areas where results are easily achievable leaving the less profitable areas, such as complex or costly health care issues, underserved or for the government to address. The likelihood that negotiations on services would in reality limit the ability of the State to fulfill and protect the rights of their citizens²⁴ would call for a human rights impact analysis to ensure that adverse consequences are avoided.²⁵ Developed countries involved in negotiating a trade agreement, should support carrying out such an impact assessment, in accordance with their obligations under the International Covenant on Economic, Social and Cultural Rights.

In the Pacific, these issues are particularly important because the small market size of Pacific Island economies does not allow them to compete effectively against foreign competition. As such foreign competitors are likely to prevail and become monopolies in a deregulated market economy. In fact, since gains from trade are always built on the assumption of perfect or at least effective competition, this is best realized in larger markets such as those of developed

21 United Nations High Commissioner for Human Rights, “Liberalization of Trade in Services and Human Rights,” E/CN.4/SUB.2/2002/9)

22 See General Comment 14, op.cit

23 The WTO’s General Agreement on Trade in Services provides the complex regulatory structure for service liberalization. On its potential effects, see Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services*, 2008.

24 For example the provision of a governmental subsidy to a non-profit educational provider may under a liberalized educational market oblige that government to extend such a subsidy to a for-profit foreign provider, see Paras. 60-61 Ibid.

25 On this see, Wesley Morgan, Roshni Sami, Claire Rowland and David Legge, *Human Rights and Trade in the Pacific: A Scoping Study on Designing a Human Rights Impact Assessment for PACER-PLUS*, October 2010.

and middle income economies. This would leave the small Pacific Island governments with little ability to adequately control or regulate monopoly prices or practices.

Access to food

The right to health is linked to the right to food, with a minimum core obligation on governments to ensure access to essential food which is nutritionally adequate and safe.²⁶ The right to food requires that everyone has at all times adequate access to food or the means to procure it.²⁷ This right requires States not to take measures that would make it hard for anyone to access productive resources which they need to produce food. States also have the obligation to ensure that such access is not encroached upon by private parties and to protect food security and the livelihood of their populations.²⁸ Further, the right to food requires a government not to engage in practices or policies, or to allow any private company or other entity from its jurisdiction to undermine this right in other countries.²⁹ The Committee on Economic, Social and Cultural Rights has directly addressed this issue and noted that the failure to take into account the right to food in negotiating new trade agreements would violate the right.³⁰

Trade agreements can impose limits on a government in regulating food imports, which then can have a direct impact on health.

Trade agreements have made imported food cheaper than locally grown food in the Pacific. In **Vanuatu** for example, locally grown organic food in its islands is far more expensive in Port Vila, the biggest market, because of transportation costs from the islands to Port Vila. That means imported tinned baked beans or the fatty lamb and mutton flaps from New Zealand are major dietary items in the Pacific.³¹ These fatty flaps which contain less than 50% lean meat have already been identified by the Food and Agricultural Organization as contributing to the extremely high prevalence of lifestyle diseases such as diabetes.³²

26 Article 11 of the International Covenant on Economic, Social and Cultural Rights guarantees everyone the right to “an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” Article 27(1) of the Convention on the Rights of the Child makes provision for the “right of every child to a standard of living adequate for the child’s physical, mental or spiritual, moral and social development.” The right to food includes the availability of food in quantities and quality to satisfy the dietary needs of individuals, and sustainable accessibility that does not interfere with the enjoyment of other rights. General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, UN Doc E/12/1995/5.

27 The 1996 Plan of Action adopted at the World Food Summit in commitment four aspired to assuring that “food, agricultural trade and overall trade policies are conducive to fostering food security for all through a fair and market-oriented world trade system,” <http://www.fao.org/FOCUS/E/obesity/obes2.htm>

28 Rapporteur on the Right to Food, Interim Report on the Right to Food, A/65/285 (11, August 2010) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/482/30/PDF/N1048230.pdf?OpenElement>

29 Rapporteur on the Right to Food, (Jean Ziegler) The Right to Food, E/CN.4/2006/44 (16, March 2006) Para 35. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/118/82/PDF/G0611882.pdf?OpenElement>

30 Committee on Economic, Social and Cultural Rights, General Comments No.12 (E/C.12/1999/5)

31 The same has been found to be true in Tonga, i.e. locally grown nutritious foods are between 15-25% more expensive than imported meat flaps, see “Globalization, Diet and Health: An Example From Tonga,” 79 (9) Bulletin of the World Health Organization, (2001) available at http://www.scielosp.org/scielo.php?pid=S0042-96862001000900011&script=sci_arttext

32 FAO, The Nutrition Transition and Obesity, available at <http://www.fao.org/FOCUS/E/obesity/obes2.htm> See also Deborah Gewertz and Frederick Errington, Cheap Meat: Flap Food Nations in the Pacific Islands, (2010). Notably, although Fiji banned these flaps in 2003 and Tonga in 2007, they still get imported this time not as flaps but as part of a whole carcass or forequarters with flaps.

Notably, when **Fiji** and **Papua New Guinea** banned imported fatty lamb and mutton flaps from New Zealand, they did not explicitly justify the bans on the basis of the Sanitary and Phytosanitary Measures Agreement but argued that the fatty mutton was having adverse effects on the human health.³³ New Zealand's threat to challenge the ban at the WTO was not pursued perhaps recognizing the validity of the bans for public health reasons. In such situations, however, if the exporting country were to challenge a ban put in place on health grounds, it would be very costly and technically difficult for small developing countries to defend their positions through legal arbitration or law suits.

Finally, developed countries entering trade agreements with Pacific Island countries should help to realize the right to food by providing technical and other support to improve the production and distribution of food grown in the Pacific, and ensure that cheap and not necessarily healthier food imports do not undermine the rich agricultural and largely organic small scale agricultural farming in these small economies. Such support should aim to strengthen food security and the development of local economies. In accordance with their obligations under the Covenant on Economic, Social and Cultural Rights, developed countries should assess any possible impact of a trade agreement on the right to food and ensure that it is not negatively impacted.

Provision of essential medicines

Trade agreements can affect access to essential medicines through limiting the ability of countries to produce or import generic drugs, which are cheaper alternatives to patented drugs.³⁴ The Special Rapporteur on the Right to Health has raised concerns with a number of countries entering into trade agreements that the trade agreements would unduly limit access to essential medicines for the most vulnerable sections of the community.

The Special Rapporteur on the Right to Health has outlined a whole series of measures that developing and least developed countries can undertake to ensure the protection of the right to health in the context of access to essential, affordable and quality medicines that many Pacific countries can adopt, among others: making full use of TRIPS³⁵ flexibilities and transition periods; revoke or suspend patent laws; incorporate in their national patent laws all possible grounds upon which compulsory licenses, including government use, may be issued; and explore options to establish local manufacturing capabilities and so on.³⁶

33 See Maneesha Kharan, "Ban on Fatty Flaps," Fiji Times, January 2, 2010 available at <http://www.fijitimes.com/story.aspx?id=136531>

34 With the high prevalence of non-communicable diseases in the region, any impact on the cost of medicines could have a direct impact on many Pacific Islanders.

35 Agreement on Trade Related Intellectual Property Rights

36 See Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable State of Physical and Mental Health, Anand Grover, 31st March, 2009 A/HRC/11/12 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/127/11/PDF/G0912711.pdf?OpenElement>

Conclusion

“Human rights standards can help ensure that narrow economic interests do not come at the expense of the most vulnerable.”

Navi Pillay, UN High Commissioner for Human Rights

In order to ensure that governments are fulfilling their obligations to protect the right to health of their populations, the UN Office of the High Commissioner for Human Rights and the UNDP Pacific Centre considers that it essential that any proposed trade agreement is assessed in terms of its impact on human rights, including the right to health. This would enable the parties to the agreement to predict the likely impact and adjust accordingly, to ensure protection of basic rights. The findings should be made public and contribute to a full public debate around the possible benefits and concerns of trade agreements.



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