UNDERSTANDING GLOBAL TRADE & HUMAN RIGHTS


Based on the FIDH Training Seminar, Trade, WTO and Human Rights
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A. FUNDAMENTAL ISSUES & RELEVANT STRUCTURES

1. Why should we as human rights advocates think about trade and the WTO?

Over the ten-year history of the World Trade Organization (WTO), distrust and misinformation have controlled the relationship between human rights advocates and trade experts. Yet it is now evident to both 'sides' that trade-facilitated globalisation has profound human effects, as explicitly acknowledged in the Doha “Development Agenda.” Adopted at the fourth WTO Ministerial Conference in 2001, the Doha Ministerial Declaration establishes a framework for negotiating WTO agreements that respects the human dimensions of development. The interactions between trade and human rights are complex: bidirectional, direct and indirect, and positive and negative.

Given this context, and in preparation for the upcoming Hong Kong Ministerial in December 2005, the recent FIDH training seminar on trade and human rights aimed to increase advocates’ understanding of the dynamics of global trade and the WTO, and to equip them with practical strategies for making human rights arguments in the trade arena, specifically with respect to the “ecosoc” rights codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

This report includes a brief summary of the primary issues and a resource guide for further learning. It is intended for participants of the seminar and other members of national human rights organisations, all of whom are striving to reconcile the gap between human rights and trade. The FIDH expresses its warm gratitude and appreciation to all the participants in the May seminar, and suggests the Practical Guide to the WTO for Human Rights Advocates (3D--Trade--Human Rights--Equitable Economy & FORUM-ASIA, 2004) as an excellent manual on the issues discussed herein.

2. How can we make human rights arguments during trade discussions?

Human rights are both more and less than aspirational moral principles; they are norms codified in international law. Just as States are bound by negotiated bi-/multilateral trade agreements and the WTO legal regime, they are also obliged by international human rights law (IHRL) to fulfill concrete commitments: e.g. freedom from discrimination, the right to food, and gender equality. Not only is IHRL equal in status to trade law, but there are in fact legal arguments that support the primacy of human rights over all other legal norms. Thus, advocates should feel fully empowered, both legally and ethically, to argue confidently for human rights in the trade context.

The law of human rights began to emerge after WWI. In 1919, the International Labor Organization (ILO) was founded to respond to workers’ concerns and defend their human and labor rights, such as the rights to participation and organization/collective bargaining. Today, there are 185 conventions, eight of which are considered to be the “core Conventions” defining fundamental labor rights.

After WWII, the basic norms of IHRL were definitively established in the constitutional UN Charter and fleshed out in the Universal Declaration of Human Rights (UDHR). Subsequently, the twin treaties of 1966, the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, organized and elaborated on specific rights. The UDHR, ICCPR, and ICESCR constitute the international bill of human rights. Agreements that have followed, such as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), further emphasize and clarify the bill of rights norms.

Persons less familiar with IHRL may mistakenly perceive a hierarchical ordering or differences of obligation to exist among traditional groupings of human rights. For instance, the “positive” rights in the ICESCR have sometimes been classified as “programmatic,” and therefore less binding than the “negative” rights in the ICCPR. Article 2.1 of the ICESCR states that the principal obligation of States under the ICESCR is to “undertake steps (...) to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant” [emphasis added]. However, many UN bodies have reaffirmed that immediate obligations as well as minimal requirements or “core obligations” exist for economic, social, and political rights.
example, concerning the right to health, core obligations include ensuring access to basic shelter, housing, sanitation, and potable drinking water.\textsuperscript{11}

Another common misunderstanding is that State obligations are determined by physical boundaries. To the contrary, and with particular significance in the trade context, States must cooperate transnationally so as not to impede on other States’ ability to fulfill their human rights obligations.\textsuperscript{12} Later in this document, these general principles will be illustrated with respect to specific trade-affected rights.

Three basic policy failures have maligned the trade-human rights relationship. First, national governments have tended to compartmentalize their legal commitments—on the one hand, as WTO members, and on the other, as States parties to human rights treaties. The rhetorical and policy disconnect between these areas has led most States to disregard their binding human rights obligations (all of the WTO’s 148 members are party to at least one human rights treaty) while pursuing trade negotiations. State members have adhered to an agenda of trade liberalisation that has frustrated the WTO’s goals of “raising standards of living” and safeguarding “sustainable development,” as stated in the preamble of its constitutional document.\textsuperscript{13} The right to development is a human right that demands participation, self-determination, and sovereignty;\textsuperscript{14} these rights are all relevant to trade.

Second, States have often ignored the primacy of human rights under international law. These rights are outlined in the UN Charter (\textit{e.g.} Art. 55 on ecossoc rights), and given definitive interpretation in the UDHR (\textit{viz.} Preamble and Arts. 21-28 on ecossoc rights). The Charter establishes that States’ obligations stemming from the Charter prevail over all others (Art. 103), an unequivocal statement of the \textit{de jure} primacy of human rights in the international legal framework. The Preamble to the Vienna Convention further notes the special status of the Charter and human rights norms in international law, as does the Vienna Declaration and Programme of Action, which arose from the 1993 World Conference on Human Rights.\textsuperscript{15} All UN human rights treaties are relevant to discussions of trade, and the principle of primacy extends to the ICCPR and ICESCR, as well as the ILO Constitution and Conventions. However, because the WTO is capable of more concrete enforcement (including the risk of trade sanctions under the Dispute Settlement Mechanism, which all WTO members must accept as part of their “single undertaking”) than is the human rights regime, trade law has enjoyed a \textit{de facto} primacy that cannot be defended under international law.

Third, the misuse of human rights rhetoric, which has been resorted to for protectionist purposes, has led to skepticism on the part of some Southern States and generally undermined arguments to bring human rights within the WTO’s purview. While over two-thirds of the WTO is composed of developing nations\textsuperscript{16} whose citizens bear the brunt of negative trade impacts, governments of the global South have been wary of Northern arguments to incorporate human rights into WTO negotiations, fearing that these would serve as pretext for discriminatory trade practices or for denying their goods access to the markets of industrialized countries.

3. What is the basic framework of the WTO, and which specific agreements most affect human rights?

As the primary forum for international trade, the WTO is both an assembly of State members and a legal apparatus. At present, 148 nations belong to the WTO and are held to its numerous agreements; 31 are in the process of accession.\textsuperscript{17}

\textbf{a. Intellectual property rules (TRIPS & TRIPS-plus) affect the right to health.}

Experience has shown that the WTO agreement on Trade-Related Intellectual Property Rights (TRIPS) poses formidable obstacles to the fulfillment of the right to health, particularly in terms of access to medicines.\textsuperscript{18} This was particularly true before the Doha Declaration, when the TRIPS system of 20-year minimum patents had a disastrous effect on developing countries’ ability to deal with HIV/AIDS, malaria, and tuberculosis, among other diseases.\textsuperscript{19} Yet even after Doha, notwithstanding flexibilities such as compulsory licensing (intervening to restrict patent monopolies and provide access to generic drugs) and parallel importation (bringing in cheaper drugs from another
country) in certain circumstances, the pressures and politics of international trade limit the ability of poorer countries to ensure that TRIPS respects human rights.

In 2001 at Doha, WTO members adopted the “Declaration on the TRIPS agreement and public health.” This document, elaborating on the TRIPS section of the Doha Declaration, recognizes practical deficiencies that pose problems for public health and encourages nations to take advantage of TRIPS flexibilities. The Declaration did not, however, address the problem of how countries with insufficient or no pharmaceutical manufacturing capability would use compulsory licensing. This was only partially resolved in the WTO TRIPS Council’s Decision of Aug. 30, 2003, which allows for these countries to import i.e. generic drugs from a country that issues a compulsory license, so long as both parties inform the WTO of all relevant details.

However, the Decision imposes burdensome conditions on both exporting and importing nations, and to date, no country has formally notified the WTO of its intention to either export or import based on the granting of a compulsory license. Yet, there are reports that several developing countries, such as Zimbabwe, Malaysia, and Indonesia have made use of TRIPS flexibilities in various ways through domestic governmental channels. The African Group proposed a reformed text in December 2004, which focuses on the purpose of the compulsory licensing flexibility, rather than procedural requirements set out in the Aug. 30 Decision. This could be a strategic pressure point in moving forward.

As we approach the Hong Kong Ministerial, much of the world faces a crisis of access to medicines. Until the beginning of 2005, many developing nations continued to import affordable generic drugs from India, but this is no longer possible, as India too has now come under the TRIPS regime. Moreover, an increasing number of bilateral and regional trade deals (e.g. CAFTA) are going far beyond the already procrustean 20-year patent requirements of TRIPS; these TRIPS-plus negotiations are a matter of dire concern, both because of their opaque nature—in the context of a larger treaty that inadequately attends to the extensive protection afforded to intellectual property rights—and because of their impact on the right to health, including the right to access affordable medicines.

Increasingly, the US has pursued bilateral free trade agreements (FTAs) with various developing nations, resulting in extreme TRIPS-plus conditions, like those recently effectuated in Morocco. Negotiations were opened between the US and Morocco in 2003 and after the FTA text was finalized, it was approved by the US Congress and then by the Moroccan parliament in January 2005. This bilateral agreement provides for, inter alia, stricter intellectual property protection measures than exists under current international treaties; civil society actors in Morocco are bracing for a significant, detrimental public health impact with respect to medicines access. Similarly, the EU’s increasing number of FTAs, notably with the ACP (African, Caribbean and Pacific Group of States), has forced poor developing nations to adhere to TRIPS-plus regulations of life forms, including plant varieties.

Another persistent injustice is the crisis of neglected diseases; this is where the market-based justification for intellectual property laws—the notion of incentivizing innovation—shows its limits. In his recent mission to the WTO, the Special Rapporteur on the Right to Health, wrote that, “the commercial motivation of intellectual property rights encourages research, first and foremost, towards ‘profitable’ diseases, while diseases that predominantly affect people in poor countries—such as river blindness—remain under-researched.” As trade agreements continue to reward and secure capitalistic innovation, there will be less and less incentive to develop medicines for neglected diseases.

Click here for further reading:
b. Agricultural rules (AoA) affect the right to food & foodworkers’ rights

It is unsurprising that trade in agriculture would have profound meaning for human rights. After all, in many of the Southern countries that make up over two-thirds of the WTO, agriculture is still the dominant source of livelihood, as well as a basis of culture, community, and subsistence. Agriculture involves the human rights of millions of workers, and food is obviously fundamental to the right to life.

Negotiations on the WTO Agreement on Agriculture (AoA) are currently governed by paragraphs 13 and 14 of the Doha Declaration. This commitment recognizes the need of “developing countries to effectively take account of their development needs, including food security and rural development.” The AoA consists of three pillars, or three aspects of national agricultural policy: market access, domestic support, and export subsidies. In terms of the first prong, market access, the most visible, controversial element has been tariffication, or the process of converting all non-tariff “barriers” (e.g. quotas) into tariffs. While this should in theory open up large markets and increase access for poorer country producers, it has actually prevented the South from maintaining its domestic sector and protecting against imports from industrialized nations. The “July Package” negotiations of 2004 established a tiered formula, wherein higher tariffs are cut more than lower tariffs, and market access is expanded for all products.

Domestic support, the second pillar of the AoA, is meant to eliminate agricultural subsidies and other domestic policies that negatively affect, or “distort,” the global market. All domestic supports are placed into three color-coded “boxes” or categories of permissibility. The amber box applies to policies that have a direct effect on production and trade, and must therefore be gradually reduced; the green box contains measures like government funding for research, which do not affect domestic production and are therefore permitted. And the additional blue box mainly benefits developed countries, allowing for regulations that apply negligibly to a particular sector or for compensation to farmers due to subsidy cuts. In recent months, developed countries have actively advocated for the review of the green box, while developing country net food importers have opposed the idea.

The third pillar of the AoA mandates reductions in, toward the elimination of, export subsidies. Theoretically, this should have been a boon to developing nations, since subsidisation of exports by rich countries has historically led to dumping, which disadvantages developing countries in global markets and crowds out local producers. However, dumping of cheap agricultural goods onto countries of the South has persisted since the Agreement came into force due to increased subsidisation on the part of the US and the widespread perception that dumping contributes to Southern food security. Take cotton, for example: the EU and in particular the US have continued to provide billions in subsidies for domestic producers, dumping overproduced cotton at 61% below the cost of production between 1997 and 2002. This has contributed to a dramatic drop in cotton prices and thus great suffering for small farmers in West and Central Africa, where trade in cotton is often the sole source of income and thus essential for community livelihoods.

Especially in the past, the AoA did “not make a distinction between different types of agriculture—such as commercial agriculture or subsistence agriculture—and different players—from low-income and resource-poor farmers on the one hand, to national and international agrobusiness on the other.” The July 2004 negotiations did mandate, however, that special and differential (S&D) treatment, such as longer implementation periods and smaller cuts, would be given to developing countries. Other affirmative action-type measures would include flexible treatment of particular Special Products and recourse to a Safeguard Mechanism in case of import surges.
One cannot discuss trade in agriculture without considering the rights of agricultural and food workers, particularly those in developing countries. Protectionist policies, namely the subsidies of $1 billion per day in industrialized countries, contribute to falling prices and job insecurity. In this trade environment, agricultural workers and small-scale farmers in exporting countries cannot themselves afford to eat. Moreover, because of mechanized production, widespread pesticide use, and farming of genetically/living modified organisms (G/LMO)—as prohibitions on GMO foods are normally considered as an impermissible trade barrier—agricultural laborers are increasingly exposed to hazardous, even fatal, chemicals and working conditions. The pressures of this large-scale production also deprives workers of their right to organize and earn a decent living.

Approximately 20 ILO Conventions, which a large number of states have ratified, are directly relevant to agricultural production, including No. 105 on the Abolition of Forced Labour and No. 141 on Rural Workers’ Organizations. Labor NGOs and trade unions have pushed for the WTO to establish formal relations with the ILO, as the IMF and WB have already done.

Click here for further reading:

**c. Agreements on services (GATS & GATS-plus) affect basic, essential services.**

The original logic of the pre-WTO General Agreement on Tariffs and Trade (GATT) contemplated only trade in goods, not in services. With the passage of the GATS agreement during the Uruguay Round, however, trade in services and their related instrumentalities were brought under the WTO logic of “progressive liberalisation.” Practically, the GATS has enormous influence, potentially embracing everything from overseas workers, tourism, and financial services, to water and education. At present, although the special needs of developing countries are recognized in Doha Declaration paragraph 15, the formally available flexibilities in GATS are often compromised in practice.

In principle, each country can choose which sectors to liberalize through asserted commitments (positive-list commitment schedules), thus having no obligation to provide market access or national treatment in a particular field. Also, Article IV of GATS purports to increase the participation of developing countries through the negotiation of special commitments. Article XIV, moreover, provides two exceptions to the general framework: for reasons of public policy or national security. However, these terms remain poorly defined, and informational and resource deficiencies render poorer States unable to meet the burden of proof required to invoke the general exceptions.

Practice has shown that the GATS request-offer paradigm (wherein a member government requests that a trading partner open up a particular sector to foreign competition) leaves developing nations vulnerable to pressures from powerful developed States. Moreover, developed countries have used the language of “crisis in public services” to pressure developing countries into submitting requests. The GATS flexibilities are similarly defeated by the conditionalities imposed by international financial institutions like the International Monetary Fund (IMF); for instance, in Cochabamba, Bolivia, IMF pressures led to a 200% increase in water prices that drove civil society to aggressively protest the privatisation of services. As with TRIPS, bilateral and regional trade agreements have also led to GATS-plus regimes of negative-list commitment schedules (assuming complete liberalisation as the default rather than liberalizing item-by-item as under the positive-list approach) that over-
accelerate liberalisation. And developing countries sometimes make trade-offs, opening up their service sectors in exchange for concessions with respect to goods. Thus, developing countries in the WTO are not free to be selective, either in terms of sector or pace of liberalisation.

Due in part to the GATS, developing nations are increasingly pressured to privatize important sectors like water services, leaving them open to control by transnational enterprises. Should e.g. privatized water become unaffordable in a poor country, rural communities would be unable to grow established crops and maintain food security generally, since 70% of all fresh water is used for agriculture. In addition, farmworkers would face dehydration in the fields and be denied the water to clean themselves after exposure to agro-chemicals. This would represent the failure of a developing country to meet its human rights obligations under the rights to food, health, and labor, as has already occurred with the municipal system in Manila, Philippines. Similar effects are spurred by the privatisation of waste treatment and other environmental services, such as recovery of polluted rivers.

Click here for further reading:

d. Rules governing negotiations in industrial goods (viz. NAMA) will affect the global competitiveness of developing country exports and have an impact on workers’ rights.

At the start of this year, Non-Agricultural Market Access (NAMA) rules took full effect, bringing industrial goods ranging from fisheries to textiles and clothing under the WTO's liberalized regime. Formerly, industrial goods, as opposed to agricultural and manufactured goods, existed at the fringes of GATT and were therefore progressively phased into the WTO system. Fully integrating industrial products will have an enormous effect on developing and least developed countries, which e.g. export 50% of world textiles and 70% of world clothing.

The thrust of NAMA is to reduce tariffs according to a standardized formula; specific sectoral reductions have also been contemplated. It remains to be seen whether the S&D mandate of Doha Declaration paragraph 16 will be honored: that “negotiations shall take fully into account the special needs and interests of developing country participants, including through less than full reciprocity in reduction commitments…” Over many months, smaller developing countries have repeatedly asked for some adjustment mechanism that would mitigate the losses suffered under the new anti-quota system, but powerful developed country actors like the US have resisted.

The textile industry is one of the most salient components of NAMA for poor countries. Notably, Oxfam has documented the adverse effects of a liberalized, globalized textile/apparel industry on women workers. In the pressurized garment factories of developing countries, nearly all workers are women. Lacking secure contracts, unable to unionize, and deprived of proper remuneration and benefits, these young women work extremely long hours in unhealthy conditions. As NAMA fully liberalizes this industry, increasing the level of competition with products from developed countries, it will erode the competitive advantage of developing countries and increase the risks for these laborers.

Similarly, NAMA presents risks to the South in sensitive environmental sectors, including fisheries, forestry, and minerals. At present, developing countries hold over 50% of the export value of fish, an advantage that could be threatened under NAMA's full liberalisation regime. Among the potential negative effects of NAMA are diminished aquaculture-based food supplies in the South, degraded environmental safeguards in fishing, and nullification of much-needed fishing subsidies for developing country exporters.
e. Debating the “social clause”: should the WTO explicitly consider human rights?

Given that States members of the WTO often neglect their human rights commitments when negotiating trade agreements, would it be better for human rights concerns to be explicitly, systemically built-in to the WTO? In the lead up to the Singapore Ministerial of 1996, some unions and labor NGOs pursued the so-called “social clause,” which would force WTO members to consider labor rights (freedom to unionize and engage in collective bargaining, minimum working age, prohibition of forced labor, non-discriminatory hiring, and equal remuneration) in their trade negotiations. Presumably, the threat of trade sanctions would enforce countries’ respect for workers’ human rights.

While this sounds promising, a substantial portion of today’s civil society expresses reservations about inserting such a provision. The experience of the environmental movement has been the relevant touchstone in this debate, as it was NGO momentum that led to the creation of the WTO Committee on Trade and Environment (CTE) in 1994. However, under the Doha negotiations, groups like the Center for International Environmental Law (CIEL) became concerned about WTO action in this area, and warned it not to “intrude into areas within the jurisdiction of environmental institutions and regulations.” Similarly, many human rights NGOs worry that the insertion of a social clause would give the WTO undue jurisdiction to adjudicate human rights matters. Further, as has been voiced by developing countries, it is possible that allegations of human rights abuses or of poor human rights standards could disguise discriminatory or protectionist trade actions, or that human rights rhetoric would give the North yet another point of leverage against the South.

Social clause or not, it is a legal fact that WTO member States already have standing human rights obligations under various human rights treaties. Thus, whether or not it is practicable to add this type of mechanism to the WTO, States members must nonetheless comply with their responsibilities under IHRL. Human rights organisations opposed to the social clause therefore prefer to emphasize these existent norms and means of accountability. Unfortunately, many of the relevant UN treaty bodies (viz. Committee on Economic, Social and Cultural Rights [CESCR], Human Rights Committee [HRC]) do not have the enforcement mechanisms necessary (Cf. trade sanctions of WTO Dispute Settlement Mechanism) to effectively hold State actors to their obligations.

4. Which institutional procedures of the WTO are of particular interest to human rights advocates?

As captured by the protests in Seattle, the biannual Ministerial Conference has come to represent the institutional identity of the WTO. However, the WTO comprises much more than this symbolic assembly. It includes various levels of governance, from the Secretariat to working groups; and provides for complex procedures of accession, monitoring, and dispute settlement.

a. The accession process has the potential to encourage human rights, but can also lead applicant States to accept overly strict requirements.

Even before a State achieves WTO membership, it faces the harsh scrutiny and requirements of accession. In some cases, e.g. China, this can provide an opening for human rights defenders to capitalize on the WTO’s requirements of transparency and development of the rule of law. However, in other cases, WTO accession, while purportedly negotiated, has allowed current members to impose disproportionately stringent demands on recent applicant nations.

Acceding States are subjected to wholesale review of domestic laws and policies and must undertake extensive reforms. China’s accession package included significant agricultural tariff reductions, as well as the decade-long Transitional Review Mechanism (TRM), an evaluation
process created uniquely for the country, which entails the submission of detailed annual reports to 16 subsidiary bodies on all of China’s trade-related activities. This accession package also included harsh TRIPS-plus measures that forced Cambodia to prematurely open up its drug market to foreign competition and patent regulations.

Click here for further reading:
- Oxfam, Cambodia’s Accession to the WTO: How the law of the jungle is applied to one of the world’s poorest countries, Sept. 2, 2003: www.oxfam.org/eng/pdfs/doc030902_cambodia_accession.pdf.

b. Monitoring through trade reviews may facilitate transparency & broaden the scope of evaluation.

The WTO’s Trade Policy Review Mechanism (TPRM) calls for the periodic examination of every member State with respect to all policies and practices that relate to multilateral trade. Since the frequency of review is based on a country’s share of total multilateral trade, most developing countries are reviewed every six years (as opposed to every two years for the US, EU, Japan, and Canada).

Each review involves the preparation of two documents: a “policy statement” by the State being reviewed and a report written “independently” by the WTO Secretariat. The TPRM is a process of “peer review,” and the reports are declaratory, as opposed to suggestive or condemnatory—meant to contemplate the wider socio-economic context of member States, including environmental and developmental policies.

Review proceedings are open to all members, but non-governmental actors do not have standing as interveners. Possible NGO interventions will be explored later in this paper.

c. Advocates can pursue legal interventions in dispute settlement proceedings.

Serving a quasi-judicial function in the WTO, the Dispute Settlement Understanding/Mechanism (DSU/M) governs inter-member claims of non-compliance under WTO law. Two groups handle these claims: the Panel and the Appellate Body. To date, some 330 cases have been brought, resulting in approximately 80 Panel and 68 Appellate Body reports.

Under the DSM, when one State brings a claim against another, the process begins with consultations and then moves to panel adjudication. If negotiations to resolve the conflict fail, the Body can impose sanctions, but this implement of last resort has been invoked very few times in the history of the DSM.

Large developed States have taken most advantage of the DSM, as the process requires significant resources and because developing countries may not want to endanger their relationship with powerful trading partners. Moreover, “trade sanctions, or the threat to invoke them, are only effective against countries that are dependent on exports.” Clarifications and improvements on the DSU are contemplated in paragraph 30 of the Doha Declaration, but negotiation in this area has been secondary to that of other WTO agreements. In recent years, the DSM process has been more inclusive of civil society: NGOs are permitted to submit amicus briefs to the Appellate Body, but the Body has discretion over whether to consider them. Developing States have in fact opposed this development, fearing that NGOs would assert arguments—with de facto protectionist effects—based on environmental or human rights standards crafted by developed States. At the same time, NGOs promoting such values could seek to justify certain restrictions imposed by developing States, e.g. for the purposes of protecting local service providers, in order to e.g. ensure access to affordable medicines or limit the social consequences of the liberalisation of a particular services sector.
For further reading, see:

B. CONCRETE STRATEGIES & AVAILABLE RESOURCES

1. How can we help effectuate human rights-conscious trade policies?

As described in the foregoing, the various agreements of the WTO make formal commitments to the special needs of Southern member States, and offer certain structural flexibilities to these nations. Unfortunately, these have shown limited practicability, as developing countries often lack the necessary bargaining power and resources to invoke these provisions or resist the pressure of more powerful trading partners and international organisations. Thus, as civil society, we are taking the initial steps: to identify the full impact of the WTO, learn the workings of global trade, and identify opportunities to intervene. The next critical move is to strategize as to what we in the NGO community can do to further human rights, in this Ministerial year and in the long run.

The following paragraphs contemplate a range of human rights-based tools available to local and national NGOs working on trade. These strategies are meant to be concrete and useful at some degree of universality; however, they are merely suggestions, promising in some respects, but each with its risks and limitations.

a. Claim the right to participation: demand governmental transparency in WTO & multi-/bilateral trade negotiations.

In order to take action on important issues, individual citizens must be adequately informed. They depend on the government for much of this information, the disclosure of which is fundamental to the human right of participation, as articulated in UDHR Art. 21. Yet, international trade negotiations, like business deals, are carried out in phone calls and closed-door meetings among high-level officials and financial ministers. While the WTO is criticized for its opacity, its transparency has improved; in actuality, it is behind the curtain of mini-ministerial, country group meetings, and above all bilateral negotiations that TRIPS becomes TRIPS-plus and GATS becomes GATS-plus.

Advocates should be aware of regional and interest-based groupings. While group collaborations can be innocuous (i.e. trade that encourages Southern empowerment and intra-South exchanges), the most powerful trading nations sometimes use exclusive group meetings to predetermine WTO negotiations and disadvantage poorer countries.

By keeping these meetings on their radar, national and local NGOs can be effective as investigators and interveners, taking advantage of national disclosure laws, as well as WTO requirements of transparency (defined by the WTO as the “degree to which trade policies and practices, and the process by which they are established, are open and predictable”) to force national trade agendas into the open. Activists should know who their national trade representatives are, and as a more long-term strategy, meet with these actors and even campaign for negotiation teams to include persons with a human rights background.

As is often the case, media would be an invaluable partner. Advocates could, for example, work with media to write and publicize letters to a pair of countries set to begin bilateral negotiations—thus anticipating their trade moves and preemptively raising human rights concerns. For example, in view of the upcoming bilateral negotiations between Egypt and the US, Egyptian activists have been working to preempt the imposition of TRIPS-plus measures that would endanger the right to health. In other case, when essential public services in Buenos Aires faced arbitral adjudication before the World Bank, a group of human rights and environmental NGOs submitted an amicus laying claim to citizens’ participatory and economic and social rights.
b. Make full use of national/regional legal & media mechanisms, collaborating with all relevant actors.

Where States have adopted national or regional human rights mechanisms or constitutionalized human rights, NGOs should work through domestic courts, national human rights institutions, and other like bodies. This has been successful in South Africa and Kenya, where human rights are institutionalized at the national level. In Kenya in 2001, at a time of constitutional reform, activists worked through the Kenya Human Rights Commission to apply legal pressure on the State with respect to rights violations connected to TRIPS. Lawyers and civil society, in tandem with the media, can exploit administrative and judicial mechanisms to publicize the detrimental effects of trade on individual human rights, and hold governmental organs responsible for harmful trade practices.

Regional institutions like the Inter-American Commission on Human Rights, the European Committee of Social Rights, the African Commission on Human and Peoples’ Rights and the future African Court for Human Rights, and the European Court of Human Rights can also serve as effective fora for human rights advocacy. In States that are governed by these regional bodies, human rights activists should file communications in case of violations and stress to their national governments that trade deals must be in conformity with regional human rights commitments.

At minimum, even in the absence of specialized human rights institutions, advocates can expose the incoherence of State policies and commitments. In Morocco, for example, which is signatory to various ILO conventions and has passed a domestic labor code, civil society actors could publicize the detrimental impact of a particular trade policy on the State’s workers’ rights obligations. Human rights advocates can also invoke the rights-respecting provisions of multilateral environmental agreements (MEAs), as suggested by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF). For instance, a developing country that has signed the Cartagena Protocol on Biosafety, which recognizes States’ right to refuse the importation of G/LMOs, “can and should exercise the right to impose an indefinite moratorium on all international trade in GMOs.”

Advocates should also focus on lobbying national legislatures to pass human rights legislation. In a recent victory, Brazil’s Congressional Justice and Constitution Commission voted unanimously to ignore patents on HIV/AIDS drugs.

c. Communicate with UN Human Rights Bodies & Special Rapporteurs.

For every human rights treaty, there is a human rights body that issues comments and, depending on the instrument, hears individual complaints. There is some precedent for relying on these UN treaty bodies, including the CESCR, CRC, and HRC to address trade concerns. When one of these bodies is called on to examine a particular issue, civil society actors at the national or international level can submit parallel reports, thereby shaping the inquiries that the committee makes of a State and improving the quality of State assessments. In States where such action is possible, human rights advocates should directly participate in or support the filing of individual complaints. In the long-term, civil society should join the campaign for the adoption of an optional protocol to the ICESCR that would constitute a complaints mechanism for ecosoc rights. Advocates should also begin to file such complaints before the CEDAW Committee under its existing Optional Protocol.

Within the ILO, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has similar competence to the aforementioned treaty bodies, reviewing
government reports and specific issues. Under Art. 24 of the ILO constitution, worker or employer organizations can make “representations” as to State noncompliance, and official ILO delegates can similarly make “complaints” under Art. 26. In cases of continuing default on commitments, the ILO Governing Body can then recommend “such action as it may deem wise and expedient to secure compliance” under Art. 33. In 2000, based on Art. 26 complaints of forced labor (Convention 29) in Burma, the ILO Governing Body invoked Art. 33 for the first time, calling for concrete recommendations for reform and mobilizing the international community. While these ILO mechanisms may not provide direct modes of action for generalist human rights organisations, they represent an opportunity for human rights groups to partner with and support labor organisations and trade unions.

Human rights advocates can also make use of the UN special rapporteurs, independent experts commissioned by the Commission on Human Rights (CHR) to examine specific issues. Special rapporteurs undertake specific country missions and receive individual complaints, reporting this information to the CHR and the UN General Assembly. In the context of trade, NGOs could e.g. transmit information to the special rapporteurs on the right to food, the right to education, the right to housing, and the right to health—all ICESCR norms. In communications to the special rapporteurs, civil society organisations could describe, e.g. the general societal effects of a country’s trade practice on the right to food, or track the availability of medicines in a certain area after a State’s accession to the WTO, as it must be stressed that States are obligated to guarantee human rights in the context of trade liberalisation.

It should be noted that these suggested practices will depend on careful documentation and empirical analysis by civil society actors in order to establish a causative or even correlative relation between a trade action and a human rights impact. Analyses of this sort are reviewed later in this report.

Click here for further reading:

- ESCR-Net, An overview of the mandates of key UN Special Rapporteurs working on economic, social and cultural rights: [www.escr-net.org/ConferenceDocs/UNSpecialRapporteursESCR.doc](http://www.escr-net.org/ConferenceDocs/UNSpecialRapporteursESCR.doc)

**d. Engage directly with the WTO, taking every advantage of its mechanisms.**

In strategizing on trade issues, human rights NGOs could exploit, to the best of their ability, opportunities for action within the WTO framework. The WTO is far from transparent, but diligent advocates may still find it more penetrable than extra-WTO trade negotiations.

As touched on in the foregoing, the TPRM and DSM offer small windows of opportunity to inject human rights concerns. For many years, based on WTO members’ legal obligations to respect labor standards as established in the Singapore and Doha Rounds, the International Confederation of Free Trade Unions (ICFTU) has submitted a shadow report to coincide with every TPR. While the ICFTU’s findings have not been explicitly incorporated into TPR reports, the EU and Brazil reports have alluded to some social aspects of trade. In terms of the DSM, NGOs with access to legal expertise should submit amicus curiae briefs to the adjudicatory bodies of the WTO, particularly the Appellate Body. As the DSM caselaw develops—hopefully with ever-increasing attention to social issues—these amicus briefs may influence decisions and hold decision-makers to positive precedent.

If resources permit, advocates should attend this year’s Ministerial Conference in Hong Kong. Although the WTO does not provide for an official observer or consultative status for NGOs, Ministerials may provide civil society the opportunity to observe proceedings and gain valuable insight. Moreover, since business organisations also qualify as civil society organisations and have attended past Ministerials in large numbers, it is imperative that human rights groups make known their presence and perspectives. Interested groups must go through the WTO’s accreditation process, as only NGOs that have an interest in trade issues are eligible to attend, and each NGO can typically send only one or very few representatives.
Civil society should continue to press the WTO to establish a formal consultative process with trade unions, NGOs, and other actors.\textsuperscript{112}

Click here for further reading:

\textit{e. As a long-term strategy, undertake empirical studies & evaluations, including Human Rights Impact Assessments.}

To advocates working on the ground, the human impacts of trade policies are evident. But to economists, trade experts, and government policymakers, the only data is “hard” data: statistical evidence and mathematically verifiable causality. As civil society advocates, we must be able to translate our experiential evidence into the language of our target audience.

In recent years, various scholars and advocates have developed human rights impact assessment (HRIA) methodologies, in the tradition of the environmental impact assessment (EIA). The HRIA is a descriptive and/or analytical tool, used \textit{ex ante} and \textit{ex post}, to evaluate the effects of a policy on specific human rights (e.g. right to food, labor rights, gender equality, right to development, etc.).

To illustrate, imagine that your organisation provides HIV-positive children with antiretroviral drugs in accordance with the CRC, to which your country is a party. In recent years, access to antiretroviral drugs has improved for the children in your community, but you are concerned about the possible effects of your country’s imminent accession to the WTO. A HRIA method could be a useful \textit{ex ante} tool to influence national policymaking at an early stage. You would begin by identifying specific indicators, such as drug prices and treatment levels, and then compile data over a set period, connecting these findings to specific human rights laws. You would then use economic models to predict the effect of TRIPS on these indicators. These statistics would dramatically bolster legal and moral arguments for your country to make trade policies that cohere with its existing human rights obligations, in this case stemming from the CRC.

This process may sound intimidating; indeed, even where the scope of review is extremely narrow, a HRIA would require substantial resources. To conduct a HRIA, NGOs should make use of all existent available data, collaborate with partners engaged in data analysis, and explore technical assistance grants.

View the following sample HRIA methodologies:

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2. Where can I find more general information?

a. Listservs & Newsletters
   - ESCR-Net (on trade, investment, and human rights); to subscribe: escr-trade-subscribe@yahoogroups.com.
   - ICTSD, Passerelles (a bi-monthly summary of trade and sustainable development); to subscribe: passerelles@ictsd.ch.
   - Rights and Democracy, WTO Human Rights Caucus; to subscribe: csamdup@dd-rd.ca.

b. Websites
   - Hong Kong People’s Alliance (HKPA) (to track local organizing efforts in Hong Kong): http://hkpa.does.it.
   - International Centre for Trade and Sustainable Development: www.ictsd.org.
   - UN Special Rapporteur on the right to food: www.unhchr.ch/html/menu2/7/b/mfood.htm.

c. Publications
   - IBOH, Carrening Towards WTO Hong Kong: The Dangerous Race to Clinch the Doha Round, Apr. 15, 2005.

### C. ANNEX: INFORMATION FROM THE SEMINAR

#### 1. Itinerary

**DAY ONE: MAY 17**

- **Introduction:** Globalisation and new challenges to human rights: business, trade and human rights (Olivier De Schutter, FIDH)
- **General introduction to the WTO** (Peter Prove, WLF)
- **Working principles of the WTO and the current context**
  - Challenges of current negotiations for developing countries (Vicente Paolo B. Yu, III, The South Centre)
  - The Dispute Settlement Mechanism (Kerry Allbeury, WTO)
- **The international law of human rights and trade agreements**
  - The principle of primacy of human rights law (Olivier De Schutter, FIDH)
  - Interaction of trade agreements and international human rights law (Mireille Cossy, WTO)
  - The social dimension of globalisation and human rights, including the right to work (Hamish Jenkins, ILO)
  - WTO accession and human rights (Elisabeth Wickeri, HRIC)
  - The debate around a “social clause” (Esther Busser, ICFTU; Peter Prove, WLF)
  - The social clause and developing countries: the example of Morocco (Seddiki Abdeslam, OMDH)

**DAY TWO: MAY 18**

- **TRIPS and the right to health**
  - TRIPS, the Doha Declaration and impact on access to essential medicine (Ellen t’Hoen, MSF)
  - Bilateral trade agreements and TRIPS-plus: a threat to the right to health (Davinia Ovett, 3D)
  - Kenya, TRIPS and the right to health (Steve Ouma, KHRC)
  - Egypt and TRIPS (Helmy El Rawy, EIPR)
- **GATS and access to essential services**
  - Privatisation, liberalisation of essential services and right to education, right to health, right to work… (Johannes Bernabe, ICTSD)
  - Liberalisation of water supply services in the Philippines (Jazminda Buncan Lumang, IBON)
- **WTO Agreement on Agriculture**
  - WTO agreements on agriculture and their impact on the right to food and other human rights (Sally-Anne Way, Assistant to the UN Special Rapporteur on the Right to Food)
  - Other WTO agreements (e.g. GATS) and their impact on the right to food (Peter Rossman, IUF)

**DAY THREE: MAY 19**

- **Using existing human rights mechanisms**
  - International human rights mechanisms: UN special rapporteurs, UN treaty bodies (Davinia Ovett, 3D and Sally-Anne Way)
  - Regional human rights mechanisms: the Inter-American Commission (Julieta Rossi, CELS)
- **Using human rights within the WTO**
  - Using human rights in negotiations (Carin Smaller, IATP)
UNDERSTANDING GLOBAL TRADE AND HUMAN RIGHTS

- WTO Dispute Settlement: how can NGOs interact? (Nathalie Bernasconi-Osterwalder, CIEL)
- WTO compliance mechanisms: possible ‘interventions’ for NGOs? (Elisabeth Wickeri, HRIC)

Final session: NGO strategies
- Strategies for the Hong Kong Ministerial (Suzanne Wu, HKPA; Jacques Chai Chomthongdi, Focus on the Global South; Elisabeth Wickeri, HRIC; Carin Smaller, IATP; Caroline Dommen, 3D)
- Advocating for human rights impact analysis (Olivier De Schutter, FIDH; Simon Walker, UNHCHR)

2. Participants

- 3D→Trade→Human Rights→Equitable Economy: Caroline Dommen, Davinia Ovett
- Association malienne des droits de l’Homme: Brahima Koné
- Association Marocaine des Droits Humains (AMDH): Abdelkhalek Benzekri
- Cambodia Human Rights and Development Association (ADHOC), Thun Saray
- Cambodian League for the Promotion and Defense of Human Rights (LICADHO): Kek Galabru
- Center for International Environmental Law (CIEL): Nathalie Bernasconi-Osterwalder
- Centro de Estudios Legales y Sociales (CELS), Argentina: Julieta Rossi
- Centro Derechos Economicos y Sociales (CDES), Ecuador: Christian Sieber
- Comité Vietnam: Nhat Vo Tran
- Egyptian Initiative for Personal Rights (EIPR): Helmy El-Rawy
- FIDH: Olivier De Schutter, Elin Wrzoncki, Isabelle Brachet, Amandine Regamey, Tammy Kim (intern)
- Focus on the Global South: Jacques Chai Chomtongdi
- Hong Kong People’s Alliance (HKPA): Suzanne Wu
- Human Rights Azerbaijan: Elmira Alakbarova
- Human Rights in China (HRIC): Elisabeth Wickeri
- Human Rights Information and Documentation Center (HRIDC), Georgia: Ucha Nanuashvili
- IBON, Philippines: Jazminda Buncan Lumang
- Institute for Agriculture and Trade Policy (IATP): Carin Smaller
- Instituto Latinoamericano de Servicios Legales Alternativos (ILSA), Colombia: Héctor-León Moncayo
- International Centre for Trade and Sustainable Development (ICTSD): Johannes Bernabe
- International Confederation of Free Trade Unions (ICFTU): Esther Busser
- International Labor Organization (ILO): Hamish Jenkins
- International Union of Foodworkers (IUF): Peter Rossman
- Kenyan Human Rights Commission (KHRC): Steve Ouma
- Liga direitos humanos, Mozambique: Paulo Comoane
- Médecins Sans Frontières (MSF): Ellen t’Hoen
- Office of the High Commissioner on Human Rights (UNHCHR): Simon Walker
- Organisation Marocaine des droits Humains (OMDH): Abdes Seddiki
- The South Centre: Vicente Paolo B. Yu, III
- UN Special Rapporteur on the Right to Food, Assistant to: Sally-Anne Way
- World Lutheran Federation: Peter Prove
- WTO: Kerry Allbeury, Mireille Cossy
3. Materials from the dossier

- For the Primacy of Human Rights; For a Human Rights Impact Assessment of WTO Agreements, 5th WTO Ministerial Conference, Cancún, Mexico, 10-14 September 2003, FIDH.
- Human Rights and Trade, 5th WTO Ministerial Conference, Cancún, Mexico, 10-14 September 2003, OHCHR.
- Denmark and Italy: Trade-related intellectual property rights, access to medicines and human rights, 3D-->Trade--Human Rights--Equitable Economy (October 2004).
- Ecuador: Trade-related intellectual property rights, access to medicines and the right to health, 3D-->Trade--Human Rights--Equitable Economy (April 2004).
- Overview of the July Package, Doha Round Briefing Series vol. 3, ICTSD (February 2005).
- Agriculture, Doha Round Briefing Series vol. 3 no. 2, ICTSD (February 2005).
- Trade in Services, Doha Round Briefing Series vol. 3 no. 3, ICTSD (February 2005).
- Market Access for Non-Agricultural Products, Doha Round Briefing Series vol. 3 no. 4, ICTSD (February 2005).
- Intellectual Property Rights, Doha Round Briefing Series vol. 3 no. 5, ICTSD (February 2005).
- Review of the Dispute Settlement Understanding, Doha Round Briefing Series vol. 3 no. 8, ICTSD (February 2005).
- Bridges yr. 9 no. 1, ICTSD (January 2005).
- Bridges yr. 8 no. 10, ICTSD (November 2004).
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See WTO, Negotiations, implementation and development: the Doha agenda, available at www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited June 10, 2005). The UN’s Millennium Development Goals (MDG) are also relevant to this paper but cannot be adequately discussed herein; for more information, see UN, United Nations Millennium Development Goals (MDG), available at www.un.org/millenniumgoals/ (last visited June 10, 2005).

Id.


Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, at 193, UN Doc. A/RES/34/180 (1979), available at www.un.org/womenwatch/daw/cedaw/text/econvention.htm (last visited June 10, 2005). Traditionally, civil and political rights were thought to be negative rights that merely prohibited state interference. Conversely, ecocosc rights were thought to require positive state action and were therefore seen as being contextual and having indeterminate content. Today, it is understood that this distinction is false and that, for every right, there are complementary state obligations. These are described as the obligations to protect, respect, and fulfill.


Preamble, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153 (1994), available at www.wto.org/english/docs_e/legal_e/04-wto.pdf (last visited June 10, 2005). While many people do not give full credence to preambulatory statements, Art. 31 of the Vienna Convention states that preambles are part of the important contextual material that should govern the interpretation of treaties.


For more on “developing countries” according to the WTO, see www.wto.org/english/wto_e/whatis_e/tif_e/dev1_e.htm (June 10, 2005).


Under ICESCR Art. 12, states parties are obliged to take steps toward the full realisation of the highest attainable standard of mental and physical health for all persons. In General Comment 14, the Committee on Economic Social and Cultural Rights (CESCR) has interpreted this article to demand the provision of primary health services and essential drugs as defined by the WHO (¶¶ 12, 17, 43). Moreover, States parties’ obligations endure in spite of the potentially detrimental impacts on drug availability due to the actions of drug manufacturers (¶¶35, 51) and other states (¶41). Beyond the ICESCR, the right to health is addressed explicitly or implicitly in UDHR 25(1); ICCPR Art. 6; CRC inter alia Arts. 17, 23, 24; CEDAW 11(1)(f), 12; and CERD 5(3)(iv).


TRIPS Art. 31(f) requires production under compulsory licensing to be “predominantly for the supply of the domestic market,” id.


29 For the complete text of the US-Morocco FTA, see www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Print_Text/Section_Index.html (last visited June 21, 2005).


37 Id. at 3.

38 “Dumping” is defined as “the export of agriculture commodities at prices below the cost of production,” Institute for Agriculture and Trade Policy (IATP), Glossary for the WTO Agreement on Agriculture, Nov. 2004, at http://dakardeclaration.org/IMG/pdf/0411_glossary_A4.pdf (last visited June 10, 2005).


41 Id.

42 Supra note 35, para. 47.

43 See supra note 36, at 3.

44 Id.


47 Id. at 4. The IUF further points out that under the WTO principle of legal and regulatory harmonization, “any local standards which exceed these international standards are labeled unfair trade barriers. See also infra note 97 and text accompanying.

48 Id. at 7.


51 Four modes of supply are covered by the agreement: cross-border supply (e.g. international post or telephone); consumption abroad (e.g. tourist services); foreign commercial presence (e.g. bank branches); and presence of natural persons (e.g. services provided by foreign technicians or temporary workers). See UNDP, General Agreement on Trade in Services, MAKING GLOBAL TRADE WORK FOR PEOPLE (2003), available at www.undp.org/mdg/globaltrade.pdf (last visited June 10, 2005).

52 The first sentence of paragraph 15 reads: “The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries,” supra note 34, at para. 15.

53 See supra note 50, art. iv.


56 See supra note 54, at 3.

57 Id. at 8.


59 Textile quotas have been in place since 1961; the Multifibre Arrangement was reached in 1974; and the transitional Agreement on Textiles and Clothing (ATC)—a phasing-out of the Multifibre quotas—was initiated with the WTO itself in 1995 and expired on December 31, 2004. See www.wto.org/english/tratop_e/markacc_e/markacc_negot_e.htm (last visited June 10, 2005).

60 See supra note 45, para. 377. The list of least developed countries can be found at www.un.org/special-rep/ihrlls/ldc/list.htm (last visited June 10, 2005).


62 Supra note 34, at para. 16.

63 Supra note 61, at 3.

64 Id. at 4.


67 Id. at 5.

68 Id. at 7.


70 See Abdeslam Seddiki, Organisation marocaine des droits Humains (OMDH), La « clause sociale » et les PVD : le cas du Maroc (2005), at 2.


73 The basic criteria and process for accession were established at Marrakesh. See WTO, Accessions, at www.wto.org/english/tratop_e/whatis_e/acc_e/acc_e.htm (last visited June 10, 2005).

74 See infra note 87.

75 Oxfam, Cambodia’s Accession to the WTO: How the law of the jungle is applied to one of the world’s poorest countries, Sept. 2, 2003, available at www.oxfam.org/eng/pdfs/doc030902_cambodia_accession.pdf (last visited June 10, 2005).
IMPLEMENTATION OF THE TRIPS: A RIGHTS-BASED ANALYSIS

2005, FIDH Training Seminar on Trade, the WTO and Human Rights.


Implementation of International Conventions (ICESCR, ICCPR and CRC): References to Intellectual Property and

2005).

See supra note 46, at 19.

See supra note 6, art. 21.

Among WTO members, these assemblages include: G10, G20; CARICOM; G33; African, Caribbean & Pacific countries; five interested parties; Cairns Group; Common Market; Least Developed Countries; ASEAN; and the OECD.


See European Court of Human Rights, at www.echr.coe.int/ (last visited June 13, 2005).

See supra note 70.


Id. at 2-3.


See supra note 4.


110 Id.


The International Federation for Human Rights (FIDH) is an international non-governmental organisation dedicated to the world-wide defence of human rights as defined by the Universal Declaration of Human Rights of 1948. Founded in 1922, the FIDH has 141 national affiliates in all regions. To date, the FIDH has undertaken more than a thousand international fact-finding, judicial, mediation or training missions in over one hundred countries.

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