

## Trade and human rights

### Introduction

In the late nineteenth century, when faced with difficulties in establishing trading relations with the tiny island states of the South Pacific that were effectively self-sufficient, early German trading magnates had a neat solution. They simply created demand. They set up so-called ‘smoking schools’ to teach the locals how to smoke tobacco and thereby to inculcate in them the habit.<sup>1</sup> The company dispensed free pipes and tobacco and manufactured an aura that cigarette smoking was not only pleasurable, but sophisticated and a symbol of status.<sup>2</sup> The ploy worked and trade began to flourish as the islanders imported tobacco products paid for by exports of such natural resources as copra, exotic fruits, timber, herbs and spices, and phosphate.

This discomfiting tale casts light on two fundamental features of international trade and its relationship with human rights. First it shows that it is corporations and not states that do the trading,<sup>3</sup> even if it is states that must establish the rules of international trade and police their observance. This adjectival role of states – individually and by way of their multilateral creations (for example, the WTO, the EU, the North American Free

- 1 See Stewart Firth, ‘German Firms in the Western Pacific Islands, 1857–1914’ (1973) 8 *Journal of Pacific History* 11, at 13. I am indebted to Christie Weeramantry for alerting me to this saga, which he unearthed during his time as Chairman of the Nauru Commission of Inquiry in 1987–8, before he was appointed to the International Court of Justice in 1991. See C. G. Weeramantry, ‘Human Rights and the Global Marketplace’ (1999) 25 *Brooklyn Journal of International Law* 28, at 42–4.
- 2 Tobacco companies today are accused of much the same sort of advertising, particularly in developing countries whose regulation of such corporate behaviour is often absent or ineffective and whose populations may be considered especially vulnerable; see the World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (Washington, DC: World Bank, 1999).
- 3 Of course states can trade through so-called ‘State Owned Enterprises’ (which even in communist states are being rapidly dismantled), but these are nevertheless corporations, not the state *qua* the state.

Trade Agreement (NAFTA) and the Asia-Pacific Economic Cooperation (APEC)) – is key to understanding how international trade laws work and what legitimate expectations might be required of such trading bodies as listed above in support of human rights. This is a theme traced through this chapter. It is also an illustration of the interrelationship and interdependency of corporations and trade, despite my separate treatment of them in this book.

The second illuminated feature is that the wave of economic globalisation which swept the globe in the late 1800s and early 1900s, just as with the current wave, was powered by exponential advances in the technologies of production, communication, travel and trade. In both waves, mega-corporations deepened and widened their commercial empires along – and often ahead of – the lines drawn by the great economic powers of their time. New trading routes have been opened and old ones revitalised, as the ripple of global trade leaves few countries and communities unaffected. Economies, social and religious mores, political philosophies and environmental circumstances have all been affected to some degree or other. Human rights are evidently no exception. Thus, while at the time these smoking schools were being set up in the Pacific few people would have couched the episode in human rights terms, and certainly there existed no relevant international human rights treaties then, it is clear nonetheless that there were human rights concerns. As we know of human rights now, these concerns would be in respect of the rights to life and to health care, freedom of information (being that part of the right to free speech that embraces the receipt as well as the dissemination of information – in this case the known addictive attributes of smoking tobacco, if not yet their carcinogenic properties), and even the right to privacy (not to be subjected to environmental pollution).<sup>4</sup>

Trade goes round the world and makes the world go round. It exerts an almost hypnotic effect on nations; balance of trade figures are part of the economic stories that make or break governments; the clamour to join the WTO – the membership of which, as noted in [chapter 1](#), comprises nearly all countries (and all those, save Russia, of any economic significance) – has been achieved in less than a decade and a half, and is now paralleled, if not outstripped, by the enormous growth in bilateral trade treaties; and it is seen by many developing nations as the path to their potential economic salvation and a better life for their citizens.

4 It was upon such health and human rights concerns that the World Health Organisation established the *Framework Convention for Tobacco Control* in 2003; see [www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf).

From the outset, the simple intention of trade has been to gain access to greater variety and quantities of commodities and services, and to make a profit from the selling of one's own wit and wares. *Free* trade was to trade without so-called protections, which, as Adam Smith counter-intuitively argued, do not protect at all. 'To the contrary, trade spurs the wealth of nations, increases the commonweal, regulates prices and wages, and harmonizes relations among nations.'<sup>5</sup> These remain the basic premises for trade and free trade today. But the modern, post-war, conceptions of international trade are overlain by another factor: one that is especially relevant to the concern of this book – namely, a utilitarian concern to ensure that trade benefits as wide a spectrum of humanity as possible, but above all the poorest and the least advantaged.

The overlay of international trade welfarism was an apparent concern of the delegates who gathered in Havana in 1947 to draw up a treaty for the establishment of the International Trade Organisation (ITO). As Clair Wilcox, the Vice-Chairman of the US delegation, put it in his reflections on the negotiations, '[t]he most violent controversies at the conference and the most protracted ones were those evoked by issues raised in the name of economic development'.<sup>6</sup> Though, inevitably, the product of these machinations bore the hallmarks of compromise, Article 1 of the resultant Havana Charter nevertheless stressed the need 'to foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development' within its broad remit to 'increase production, consumption and the exchange of goods'. The Charter also expressly related the ITO's objects and *modus operandi* to the UN's general ambition 'to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations', and specifically to its concern to promote 'universal respect for, and observance of, human rights and fundamental freedoms', as stipulated in Article 55 of the UN Charter.

The Havana Charter never came into force. Its fate was sealed by the US Senate failing to consent to the Charter's ratification, largely because of other apparently more pressing international concerns facing Congress at the time, including the drawing up and implementation of the Marshall Plan and the conclusion of the North Atlantic Treaty.<sup>7</sup>

5 As Peter Dougherty puts it in his book *Who's Afraid of Adam Smith?* (New York: J. Wiley, 2002), p. 55.

6 *A Charter for World Trade* (New York: Macmillan, 1949), at p. 48.

7 'The Administration had its hands full getting other measures through Congress and could see no gain in loading one more controversial item onto a crowded schedule', is

Additionally, despite the US's initial role as principal advocate of the negotiation of the agreement, concerns were now being aired in Congress and in the Administration about the result.<sup>8</sup> So, the ITO never took its intended place alongside the World Bank and the IMF as the third pillar of the new superstructure of global economic institutions. That said, its development-oriented trade prescriptions (recognisably 'sustainable development' in today's terminology)<sup>9</sup> survived the intervening forty-seven years until the international community returned once again to the idea of creating a global trade body – this time successfully – when the delegates from 124 countries and the European Communities congregated in Marrakesh in 1994 and agreed to establish the World Trade Organisation (WTO). The key provisions that I quoted from the Preamble of the WTO Agreement in [chapter 1](#)<sup>10</sup> support this line of reasoning. Indeed, for Rob Howse and Makua Mutua it is clear that the Preamble 'does not make free trade an end in itself. Rather, it establishes the objectives of the [WTO] system as related to the fulfillment of basic human values, including the improvement of living standards for all people and sustainable development, [and] ... these objectives cannot be reached without respect for human rights.'<sup>11</sup> John Jackson, a leading light within international economic and trade law circles today, also revealingly concludes in a paper discussing the relationship of trade and peace that the inclusion of such 'peace-related trade goals' as poverty reduction and

how William Diebold put it, in *The End of the ITO*, Essays in International Finance No. 16 (Princeton University, 1952), p. 6. By the time President Truman sent the ITO Charter to Congress for approval in April 1949, Congress was preoccupied with the formation of NATO and the descent into the Cold War, such that, as Simon Reisman notes, 'there was no time and no enthusiasm for what had become a rather stale and disappointing enterprise'; 'The Birth of a World Trading System: ITO and GATT', in Orin Kirshner (ed.), *The Bretton Woods–GATT System: Retrospect and Prospect after Fifty Years* (Armonk: M. E. Sharpe, 1996), p. 86.

- 8 The result of the Havana conference failed to appeal to the protectionists, the promoters of free trade or the pragmatists in the US trade debate, since it contained, respectively, either too many concessions, too many exceptions, or too little in terms of concrete and timely outcomes; see Reisman, 'Birth of a World Trading System', p. 85.
- 9 That is, reflecting the ethos behind the term as promoted by the Brundtland Commission's iconic report *Our Common Future* published in 1987 in which sustainable development was defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'; see The World Commission on Environment and Development, *Our Common Future* (1987), Australian edition (Melbourne: Oxford University Press, 1990), p. 87.
- 10 Above, p. 31.
- 11 Robert Howse and Makau Mutua, 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation', p. 3; available at the Rights & Democracy website: [www.ichrdd.ca/english/commndoc/publications/globalization/wtoRightsGlob.html](http://www.ichrdd.ca/english/commndoc/publications/globalization/wtoRightsGlob.html).

sustainable environmental development in the list of the WTO's objectives has important deductive consequences. Namely, that 'while none of these goals expressly mention human rights or democracy, you can see various connections with those concepts in each of the goals and thus ultimately yet more connections tying the WTO via democracy and human rights to peace'.<sup>12</sup>

There is no shortage of commentators identifying the sorts of rights that are relevant to trade, as well as those rights that are especially affected by trade. These include the right to a fair trial, freedom of movement and association, participation in (or election of) government, personal safety, property protection, non-discrimination, education, health and labour rights.<sup>13</sup> The problem has always been, however, that the trade theory (or at least that represented by these broad legal prescriptions) is not always borne out in trade practice as prosecuted by economists, trade officials and commercial enterprises. In respect of the international regimes in general, and the WTO in particular, such stated objectives – even when enshrined in treaties that bind the states that sign them – are not always interpreted as such, and in fact (as illustrated by the Bhagwati opera metaphor noted at the end of the [last chapter](#)) are more likely to be overlooked or ignored by many. Even the most socially sympathetic trade lawyers like Andrew Lang warn us against the temptation to over-estimate 'the extent to which the normative vision of the trade regime is deducible from the text of trade agreements'.<sup>14</sup>

Within the operational framework of the WTO, law is subsumed within the dominant concerns of economics; lawyers are viewed as procedural plumbers, rather than as policy-makers or strategists. Frieder Roessler, the former Director of the Legal Affairs Division of the General Agreement on Tariffs and Trade (GATT),<sup>15</sup> provides us with a personal reflection on the historical embeddedness of this attitude:

- 12 John Jackson, 'Reflections on the Trade and Peace Relationship', in Padideh Ala'i, Tomer Broude and Colin Picker (eds.), *Trade as Guarantor of Peace, Liberty and Security?* (Washington, DC: The American Society of International Law, 2006), p. 28.
- 13 See *ibid.*; and Caroline Dommén, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2002) 24 *Human Rights Quarterly* 1.
- 14 Andrew Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' (2006) 9 *Journal of International Economic Law* 81, at 94.
- 15 The GATT came into force in 1947 and was, and today remains, the principal international trade treaty. Since 1994 it has constituted one of the sixty-odd agreements, annexes, decisions and understandings administered by the WTO.

The small secretariat of the GATT did not have a legal service when I became a staff member in 1973. Eager to use my education in international law, I asked the Director-General of the GATT at a staff meeting whether he intended to create a legal service. To my surprise and embarrassment, my enquiry met with a chuckle from the assembly. After the meeting, an older colleague explained in a patient tone of voice that the GATT did not believe in law, but in pragmatism.<sup>16</sup>

Robert Hudec, the father of modern international trade law, labelled the sort of law that emerged from these straitened circumstances 'a diplomat's jurisprudence', which is a 'jurisprudence puzzling to lawyers, for it is primarily the work of diplomats . . . [who] have developed an approach toward law which attempts to reconcile, on their own terms, the regulatory objectives of a conventional legal system with the turbulent realities of international trade affairs'.<sup>17</sup>

Hudec was concerned especially with the particular mechanics of dispute settlement under the GATT, but his point about treaty provisions being implemented in the context of the realities of international trade applies as much, if not more so, to their broad social and economic goals. While a key economic reality of international trade is, of course, the prevailing ethos of trade liberalisation coupled with economic efficiency, so too are the social concerns of trade to improve the living standards, employment conditions and development prospects of the poor part of that reality. The two are clearly linked, in that – broadly speaking – economic success through trade *can* facilitate social improvements. Even orthodox free-traders – indeed, they more especially – will promote precisely this line. Clive Crook of *The Economist* argues against globalisation sceptics by maintaining that the market economy theory of international trade provides that the poor, as well as the rich, *should* gain.

[G]ains-from-trade logic often arouses suspicion, because the benefits seem to come from nowhere. Surely one side or other must lose. Not so. The benefits that a rich country gets through trade do not come at the expense of its poor-country trading partners, or vice versa. Recall that according to theory, trade is a positive-sum game [in that] . . . in all these transactions, both sides – exporters and importers, borrowers and lenders, shareholders and workers – can gain.<sup>18</sup>

16 Frieder Roessler, 'Foreword' to Robert Hudec, *Essays on the Nature of International Trade Law* (London: Cameron May, 1999), p. 10.

17 Robert Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence' (1970) 4 *Journal of World Trade Law* 615, at 615.

18 Clive Crook, 'Grinding the Poor', in Simon Cox (ed.), *Economics and Making Sense of the Modern Economy* (London: The Economist and Profile Books, 2nd edn 2006), p. 15.

However, what is missing in this analysis is any acknowledgement of the declared intention of international trade laws to try to *ensure* that international trade delivers on this potential. This is the central problem with trade's adoption of the notion of economic efficiency as its fundamental normative principle. Typically, it treats such issues as human rights as 'externalities'. As such, they are not, or cannot be, 'internalised' in the construction process of the model, and so they are discounted from any evaluation of the outcomes.<sup>19</sup> The simple reliance on human rights protection by way of the conditional incidence of the benefits of trade is not enough. Rather, the prosecution of international trade must be directed towards that outcome. Free trade, after all, is not a promise of trade without regulation, but rather trade regulated with the intention to make it flow freely so as to fulfil its aims of greater prosperity for all, including and especially the poor, and thereby to assist in the promotion of base social and human rights standards. How this 'trying to ensure' can be done, how it is being done, and how it should be done better, are questions that together constitute the framework for my analysis of trade and human rights in this chapter.

I turn now to look at the theory and practice of the impact of trade (and trade law) on human rights, followed by a specific analysis of what is the present and possible future role played by the WTO, and finally a review of specific international initiatives that 'link' access to trade opportunities to human rights performance.

### **'A rising tide lifts all boats'?**

This idiom – mostly famously invoked by J. F. Kennedy to emphasise the breadth of the purported beneficial impacts of his economic policies – is often used in respect of trade, to emphasise the purported beneficial impact of its liberalisation on the balance of payments of states and the hip pockets of their citizens. The highlighting of the notion of equality – that is, the flat application of the benefits to all, regardless of their current position – is quite deliberate. All will benefit, it asserts. However, implicit in the phrase is, of course, an acknowledgement that existing disparities between boats will remain: dinghies will be floating higher than before, but so will the cruisers and the liners. As a matter of principle, the maintenance

19 See Lorand Bartels, 'Trade and Human Rights', in Daniel Bethlehem *et al.* (eds.), *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, forthcoming 2009), p. 576.

of inequality in relative terms may be more acceptable than its maintenance in absolute terms, but it still raises difficult problems of justice. The fact that in reality, far from showing that the relative differentials between countries are being maintained, data are pointing to their growth (in some cases exponentially so)<sup>20</sup> adds to the moral unease. Ha-Joon Chang, in his acclaimed book *Kicking away the Ladder*, attributes this circumstance in large measure to the fact that the economic advantages of protectionism, captured markets, and selective liberalisation exploited by the developed countries of today when they were climbing the development ladder, are being systematically denied to presently developing countries, ironically – some say hypocritically – in the name of equality and fairness.<sup>21</sup>

### *Historical analysis of theory and practice*

Belief in the personal, social and political as well as economic benefits of free (or freer) trade has a long history. John Stuart Mill, a doyen of the liberalist philosophy, is well known for his articulation of the conceptual and practical arguments for the promotion of individual liberty within the political and social spheres, stating that ‘the only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.’<sup>22</sup> But Mill also insisted on the importance of the intersection of individual liberty with the ‘social act’ of free trade to the wide fulfilment of international peace, order and security, saying that trade is ‘the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions, and the character of the human race.’<sup>23</sup>

The liberalisation of trading relations between states is considered to yield broad benefits which are only imperfectly identified when described

20 The UNDP noted that in 2003 ‘18 countries with a combined population of 460 million people, registered lower scores on the human development index (HDI) than in 1990 – an unprecedented reversal’, and ‘in human development terms the space between countries is marked by deep and, in some cases, widening inequalities in income and life chances’. UNDP, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (New York: UNDP, 2005), p. 3.

21 Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002), especially [chapter 2](#).

22 John Stuart Mill, ‘On Liberty’ (1859) in *On Liberty and Other Essays*, ed. John Gray (Oxford and New York: Oxford University Press, 1998), p. 14.

23 John Stuart Mill, *Principles of Political Economy* (1848), introduced by Sir John Lubbock (London: George Routledge and Sons, 1891), p. 395.



in economic or commercial terms. Trade, it is believed, increases competition, innovation and productivity growth. But it is the fact that these factors in turn generate greater prosperity and produce better living standards that provides trade with its ultimate worth and indeed its *raison d'être*. The process of trade is important, but by insisting on a focus on the consequential outcomes, the process is put in perspective. In this regard, there is no doubting the brilliance of David Ricardo's construction of the notion of 'comparative advantage' as an explanation and description of how and why trade between states is sought out and sustainably pursued. For many economists the beauty of the concept is in its classical identification of the factors of the efficient allocation of scarce resources. Cross-border trade necessarily agitates for the exploitation of comparative advantage by 'mov[ing] output in the direction of activities that offer domestic factors of production the highest returns', as Martin Wolf describes it.<sup>24</sup> This is why today the West engages in comparatively little manufacturing, and provides the bulk of the world's services industries, whereas in China it is the other way around. And yet, for Ricardo himself, the wider social, political and economic consequences of understanding trade in this way were just as (if not more) important.

This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically; while, by increasing the general mass of productions, it diffuses general benefit, and binds together, by one common tie of interest and intercourse, the universal society of nations throughout the civilised world.<sup>25</sup>

Nonetheless, it was not until the concerted efforts to reform the apparatus of the international economy at the end of the Second World War that these broader social and political dimensions were institutionalised; that is – to adopt John Ruggie's term – when liberalism was 'embedded' within broader social concerns, such as achieving full employment and improving living standards, that were shared across the industrialised world at the time. This embedded liberalism marked a shift from the 'unembedded' or orthodox laissez-faire liberalism that held sway in the international trading order during the latter part of the nineteenth century and the first

24 Martin Wolf, *Why Globalization Works* (New Haven and London: Yale University Press, 2004), p. 81.

25 David Ricardo, *On the Principles of Political Economy and Taxation* (1817), Great Minds Series (Amherst, MA: Prometheus Books, 1996), p. 93.

part of the twentieth century, and to some extent represented the international community's desire expressly to recognise the integration of the social, political and economic concerns of states on the international plane.

The task of postwar institutional reconstruction... [was] to devise a framework which would safeguard and even aid the quest for domestic stability without, at the same time, triggering the mutually destructive external consequences that had plagued the interwar period. This was the essence of the embedded liberalism compromise: unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade [that prevailed from the late 1800s until the early 1930s], its multilateralism would be predicated upon domestic interventionism.<sup>26</sup>

In respect of international trade, the enunciated aspirations of the GATT, and the ITO before it, discussed earlier, reflected this embedded liberalism. In practice, however, it may be said that the early post-war years proved to be something of a high point for the idea, for as global trade gathered pace during the 1960s and 1970s, the compromise between domestic stability and international economic liberalisation began to unravel. So much so that, despite the fact that the words 'free trade' appear nowhere in the text of the GATT, and the drafters of the GATT 'were far from doctrinaire advocates of unfettered markets',<sup>27</sup> the language and practice of free trade orthodoxy came to dominate international trading relations. A dramatically increasing global economy driven by waves of international trade and investment, and tigerish international financial markets characterised by highly mobile (or 'footloose') capital, has led to nations increasingly qualifying the scope and depth of domestic welfare programmes,<sup>28</sup> and consequentially diminishing the economic and social rights that such programmes (where they exist at all) are designed to protect. Indeed, a controversial report by the UN Commission on Trade and Development (UNCTAD) in 2004 maintained that trade liberalisation had, on the whole, not aided those least developed countries (LDCs) that had adopted such policies, especially in terms of efforts to combat poverty. The report argued:

26 John Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order' (1982) 36(2) *International Organization* 379, at 393.

27 Jeffrey Dunoff, 'Globalization and Human Rights' (1999) 25(1) *Brooklyn Journal of International Law* 125, at 130.

28 *Ibid.* at 136.

that the potential positive role of trade in poverty reduction is not being translated into reality in a large number of LDCs. The major policy challenge in linking international trade to poverty reduction in the LDCs is to bridge the gap between the positive role of trade . . . and the often neutral, and even negative, trade–poverty relationship which . . . currently exists in too many LDCs.<sup>29</sup>

It must be said that the ‘immiserising trade effect’ that the authors of the report claimed their research demonstrated was forthrightly rejected by, among others, *The Economist*. While acknowledging the report’s value in identifying worrying trends of some of the poorest and weakest states doing badly when they formally opened their markets to international trade (average income rising only marginally and the incidence of extreme poverty remaining static), the journal was scathing about the report’s assumptions and methodology failing to take into account factors other than trade that might have negatively impacted on these states, and the fact that so much of the economic enterprise in the poorest countries is beyond measurement, being informal and subsistence rather than part of the formal market and therefore recordable.<sup>30</sup> In fact, neither the report nor its criticism is conclusive. More important than the disagreements is the acceptance by both camps of the continuing, severe economic and social problems experienced by many of the poorest states in the world. How to ensure that trade, under whatever conditions, plays a positive part in their revival on all fronts, including human rights, is the key concern.

### *Linking human rights and trade*

Given this historical progression, it is unsurprising therefore that among commentators on international relations generally, and on international trade in particular, there has been a burgeoning interest in reasserting the original post-war sentiments of balancing the benefits of robust global trade with the needs of domestic social order and welfare.<sup>31</sup> Equally predictably, this movement has itself been rebutted by the defenders of the present format of globalisation. The canvas upon which this debate has been painted has been, of course, the emergence of the WTO with its own particular representation of wide social and economic aspirations to be achieved through the mediated expansion of multilateral trade relations.

29 UNCTAD, *The Least Developed Countries Report 2004: Linking International Trade with Poverty Reduction* (New York and Geneva: United Nations, 2004), at p. 123.

30 ‘Nothing to Sell’, *The Economist*, 29 May 2004, pp. 73–4.

31 As chartered by Lang, ‘Reconstructing Embedded Liberalism’.

Wolfgang Benedek, for example, argues that the international economic system as a whole, and that of the WTO in particular, ought to take greater heed of the exhortation in Article 55 of the UN Charter (to which, of course, all members of the WTO are parties), better to reconcile its economic, social *and* human rights objectives.<sup>32</sup> Dani Rodrik demands a more radical approach, when he insists on a rehabilitation of the lost soul of trade by re-educating those who dictate its current form and direction. Within the world trading regime there needs to be, he maintains, a 'shift from a "market access" mind-set to a "development" mind-set'.<sup>33</sup> Thereby, the currently debilitating preoccupation with maximising trade flow (seen too often as an end in itself) would be replaced by one that focuses on how to maximise the possibilities for the socio-economic development of states individually and as a whole (which would require using trade flows as a means to an end).<sup>34</sup>

Adopting *and* implementing a development-oriented approach to trade would necessitate critical assessment not only of circumstances in which developing countries suffer from too much free trade, but also when there is too little. That is, when the West (in particular) does not open all of its markets evenly and substantially to developing states (especially, for example, in the agricultural sector), while at the same time insisting on wholesale dismantling of trade barriers of those same developing countries. Either way, these conditions are established in negotiations between states in which, as Thomas Pogge puts it, 'our [developed country] governments enjoy a crushing advantage in bargaining power and expertise'.<sup>35</sup>

Joseph Stiglitz also bemoans international trade's lack of earnest and effective focus on the economic development of the poorer states and sees the solution lying in its better management and regulation rather than philosophical orientation. He too suggests such better management would require a mixture of both more trade liberalisation (the West opening up *all* of its markets unconditionally to trade from the developing world), and more protectionism (in the sense of extending the preferential treatment given to trade from developing countries).<sup>36</sup>

32 Wolfgang Benedek, 'The World Trade Organisation and Human Rights', in Benedek *et al.* (eds.), *Economic Globalisation and Human Rights* (Cambridge: Cambridge University Press, 2007), p. 165.

33 Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton: Princeton University Press, 2007), p. 234.

34 *Ibid.*

35 Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), p. 21.

36 Joseph Stiglitz, *Making Globalisation Work* (New York: W. W. Norton, 2006), pp. 82–7.

Such critiques, however, have attracted robust defences of trade liberalisation in its current guise. Jagdish Bhagwati is optimistic about what the empirical evidence of trade shows for the plight of the world's poor and the states in which they live and work. Trade generally rewards 'outward-oriented economies' (as he labels them), whether poor or rich, for they are best able to exploit export opportunities overseas and thereby finance and expand their own import markets.<sup>37</sup> Martin Wolf devotes a complete chapter in his book on *Why Globalization Works* to countering critics whom he sees are unnecessarily, and at times illogically, 'traumatized by trade'.<sup>38</sup> Kent Jones goes further and argues that, at least among his own tribe of 'economists and trade professionals', most 'regard the WTO as the catalyst for economic growth and emergence from poverty' through the democratic and social reforms, and the increased regard for human rights and the environment, that tend to flow from increased trade.<sup>39</sup>

In fact, the gap between the critics and the defenders is far less than at first it seems. When one reads these accounts closely, it is clear that most of what they rail against are caricatures. The plainly ill-conceived or unsupported criticisms of free trade, and equally of free trade critics, ought to be dismissed as untenable by all observers who have invested the time and effort to inform themselves of both sides of the debate. Examples of the outlandish have been rightly condemned by commentators such as Kent Jones, in his targeting of what he calls 'WTO bashers' (as opposed to 'WTO skeptics') who 'see irreconcilable conflicts between human rights, social justice, and the global environment on the one hand, and a market driven trading system on the other',<sup>40</sup> and Martin Wolf, who gives short shrift to claims that any employment of children occasioned by new trading opportunities is *necessarily* bad for the children and an infringement of their rights to education, health and not being exploited.<sup>41</sup> In fact, regarding the latter, the 1989 UN Convention on the Rights of the Child (which, incidentally, is by far the most heavily ratified of all human rights treaties) specifically acknowledges that children can and do undertake employment; it is the type and intensity of such work that Article 32 of the Convention seeks to limit. Similarly, the ILO Convention No. 182 is

37 Jagdish Bhagwati, *In Defense of Globalization* (New York: Oxford University Press, 2004), pp. 60–4.

38 Wolf, *Why Globalization Works*, chapter 10.

39 Kent Jones, *Who's Afraid of the WTO?* (Oxford and New York: Oxford University Press, 2004), p. 147.

40 *Ibid.* p. 5. 41 Wolf, *Why Globalization Works*, pp. 187–8.

concerned with prohibiting the worst forms of child labour, rather than child labour per se.

We might fairly conclude, therefore, that today the trade and social justice lobbies appear to share some important common goals. The majority of economists, claims Jagdish Bhagwati, *do* see trade as a ‘powerful weapon in the arsenal of policies that we can deploy to fight poverty’.<sup>42</sup> However, the devil is in the detail of how that weapon is deployed, what conditions (if any) are imposed upon it, and what expectations are made of its impact, immediate and long-term, that constitute grounds of difference and dispute between free trade protagonists and development, social justice and human rights advocates. In specific relation to human rights, what this boils down to is the question of ‘linkage’: whether and how trade and human rights are linked to one another. In answering this question, not only must we draw from the relative legal bases of both fields, but we must also place them within the relevant political context of their interaction.

### *The political context of law-based linkage*

The interactions between trade and human rights laws – both extant and projected – are not conducted in a vacuum, but rather are dominated by the demands of international relations, domestic politics, and perceptions of economic advantage or necessity.<sup>43</sup> In terms of its facilitation by international trade law, the most that can be said with certainty of the relationship between trade rules and human rights is that it is diffuse. ‘The theoretical, empirical and policy issues raised by this discussion are complex and much remains unclear. In this regard, the normative aspects of the debate in terms of “*what should be*”, have dominated.’ This is how Hoe Lim insightfully described it in 2001.<sup>44</sup> Lim lamented the lack of in-depth analysis of *what is*, and set about starting to correct this in his article. In the years since, a large body of work has been devoted to both the present and future tenses of the relationship within the particular context of WTO law and policy.

42 Bhagwati, *In Defense of Globalization*, p. 82.

43 As Philip Alston noted more than twenty-five years ago: ‘trade policy is foreign policy’, and ‘the promotion of respect for human rights is an important goal of foreign policy’. Having said that, Alston also conceded that such statements do not lead inexorably to any sort of certainty over the nature of the link between trade and human rights; ‘International Trade as an Instrument of Positive Human Rights Policy’ (1982) 4 *Human Rights Quarterly* 155, at 156–7.

44 Hoe Lim, ‘Trade and Human Rights: What’s at Issue?’ (2001) 35(2) *Journal of World Trade* 275.

When trade increases then adverse pressure can, especially in developing countries, be placed on labour rights (including in respect of occupational health and safety), the rights of women and children, ethnic minority rights, and rights to food, health, education, housing and a clean environment. Positive pressure on such rights can also occur; sometimes, paradoxically, alongside the negative impacts. Thus, for example, while there have been valid causes for concern over the conditions of employment of women in garment manufacturing in Bangladesh, which has grown massively since the early 1990s in line with the country's export drive in clothing and footwear, the very fact that the women are now employed has been seen as a tremendous step forward in empowering them and permitting them greater access to exercising not only their economic and social rights, but also their civil and political rights. The confidence of women workers, born of rising trade union solidarity and the steady rise in the number of female leaders in the trade union movement, has led to significant advances in the political voice of women. 'Ten years ago you didn't see women on the streets of Bangladesh, and the garment industry has meant a massive change in the profile of women as paid workers', as Naila Kabeer argues.<sup>45</sup>

It was precisely this sort of mix of good, bad and unknown implications that my colleague Hai Nguyen (from the Ho Chi Minh National Political Academy, Institute for Human Rights) and I found in our study of the human rights impact of Vietnam's accession to the WTO in 2007. So, for example, while there have been undoubted social advantages borne on the back of Vietnam's booming economy over the years since it opened its doors to international trade in the late 1990s, there will be, inevitably, severe dislocations in certain areas of the economy such as agriculture, which is already raising serious human rights concerns.

There is a coalition of economic, social and human rights reasons that warrant singling out the agriculture sector as a special case. Agriculture employs 60 per cent of Viet Nam's labour force, and 45 per cent of the rural population live below the poverty line. Indeed, it is in rural areas that 'more than 90 per cent of the country's poor people live and work'. The opening up of the sector to the forces of international trade will, at least in the short term, very likely compound this problem given the size and antiquated practices that predominate in the sector: farms are typically low yield, subsistence based and small – the average farm size being 0.7 hectare per household. The World Bank predicts that, as land transactions

45 Quoted by Annie Kelly, 'Battle Is Joined in the Fight for Equality', *Guardian Weekly*, 22 February 2008, p. 7.

become easier, the less productive (presumably poorer) households could be forced to sell some of their land to the more productive households, as market forces favour efficiency over egalitarianism. It is envisaged that the size of rural sector employment will drop dramatically over the next five to ten years as people are 'pushed' out of the sector by competition, and 'pulled' out by the draw of alternative employment in the industrial and manufacturing sectors. The human rights implications of these swift and significant shifts in circumstances of rural communities, and especially of the poor, will, at least in the short term, be profound.<sup>46</sup>

Given these circumstances, we might ask what should be expected of the rules and operations of the WTO to advance the beneficial aspects of trade for human rights protection and to minimise the adverse consequences? Are the rules 'rigged' against the interests of the poor and their attendant human rights concerns and in favour of the rich states and their human rights concerns, as Oxfam asserts in its influential 2004 Report,<sup>47</sup> or rather is it just that as a matter of practice trade deems human rights to be irrelevant and simply ignores them?<sup>48</sup> Paradoxically, it is a bit of both. Within the strict confines of the WTO, there is precious little room for human rights to be considered. That is despite the fact that the WTO's legal regime is to some extent subject to the constitutional goals and objectives of the UN. Articles 55 and 56 of the UN Charter mandate the UN (including all its organs and associated agencies),<sup>49</sup> and all member states of the UN,<sup>50</sup> respectively, to promote and strive to achieve the purposes of the UN which include 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 55). Article XXI of the GATT

46 David Kinley and Hai Nguyen, *Viet Nam, Human Rights and Trade: Implications of Viet Nam's Accession to the WTO*, Dialogue on Globalization, Occasional Paper No. 29 (Geneva: Friedrich-Ebert-Stiftung, 2008), p. 25 (footnotes omitted).

47 Oxfam, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight against Poverty* (Oxford: Oxfam, 2002).

48 'Economists and government representatives in the WTO dictate the content of its policies without assessing their impact on human rights', as Floris van Hees puts it: 'Protection v. Protectionism: The Use of Human Rights Arguments in the Debate for and against the Liberalisation of Trade' (2004), p. 13, available at <http://web.abo.fi/institut/imr/norfa/floris.pdf>.

49 Though the WTO has no formalised association with the UN, its founding charter, the Marrakesh Agreement, provides (under Article V(1)) that the WTO's General Council 'shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO'.

50 Which, of course, include all the current 153 members of the WTO (though not, as Lorand Bartels has pointed out to me, the customs territories of the EU, Taiwan, Hong Kong and Macau).



expressly gives primacy to UN Charter obligations of states regarding international peace and security over any GATT rules, which obligations are increasingly based on the grounds of gross violations of human rights. Furthermore, Article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969) – in an (unsuccessful) effort to prevent the fragmentation of international law into all its different subject areas – provides that in the interpretation of treaties ‘any relevant rules of international law applicable in the relations between the parties’ shall be taken into account. On the face of it, this stipulation requires the WTO dispute settlement bodies to consider shared international human rights obligations in their deliberations. Somewhat controversially, this is not quite how the WTO has since interpreted the provision.<sup>51</sup>

What is more, certain international human rights treaties impose obligations on states in respect of their intercourse with each other, including in trade. The UN Committee on Economic, Social and Cultural Rights has repeatedly stated that, under the terms of Article 2 of the ICESCR, signatory states<sup>52</sup> are obliged both to refrain from any actions that might result in human rights breaches in other countries (negative obligations), and to act in ways that aid and facilitate the efforts of other countries to protect human rights within their jurisdictions (positive obligations).<sup>53</sup> An inherent difficulty with such extended obligations is how they are applied in practice. So much depends on there being a sufficient degree of causal nexus between the legal measure and the effect, which, given the complex nature of both trade and human rights, is extremely difficult to ascertain with any degree of precision.

Certainly, there are surrogate or companion notions more openly acknowledged (such as strengthening the rule of law in member states by way of the lengthy and detailed legal processes of their accession and subsequent compliance measures),<sup>54</sup> and recognition of the importance of antecedent or parallel concerns (such as labour conditions and standards of living, as discussed earlier), but the addressing of human rights issues

51 In the *EC–Biotech* case (2007), briefly discussed below, a WTO dispute settlement panel ruled that this provision would only apply in WTO cases where *all* WTO members were signatory to the particular treaty at issue.

52 As at July 2008, there are 159 parties to the ICESCR.

53 For a compilation of such statements, see Bartels, ‘Trade and Human Rights’, p. 577, at footnote 27.

54 And without at least the rudiments of the rule of law, a state will simply be by-passed by global trade, resulting in ‘black holes in the world economy . . . from which little but desperate people and capital flight emerge’, as Wolf puts it: *Why Globalization Works*, p. 79.

expressly is limited to a few highly disputed cases before the WTO's dispute settlement panels (discussed below). Even Director-General Lamy's welcome and much vaunted declaration on the need to 'humanize globalization' by launching a more welfare-oriented 'Geneva Consensus' to counter-balance the perceived neo-liberalism of the 'Washington Consensus' in international trade relations does not once refer directly to human rights.<sup>55</sup>

In international trade law and relations outside the WTO, there is greater evidence of, and opportunity for, incorporating human rights matters. This is perhaps most strikingly apparent in respect of certain bilateral trade agreements (especially those concluded with the EU) which have standard human rights clauses. Indeed, generally, the incidence of developing countries linking access to trade benefits for developing states with their meeting certain human rights conditions is evidently growing. At the same time, the crude use of trade sanctions, which 'the WTO dispute settlement system is simply neither mandated nor competent to handle',<sup>56</sup> for reasons that might include human rights abuses, appears to be on the decline. I further discuss 'conditionality' in all of these senses in the final part of this chapter.

The trade and human rights debate has been gathering pace since the years immediately before and after the birth of the WTO in 1994. There have been a number of ambient political factors that have pushed it along, including the extension of free trade into Eastern Europe, Asia and, to some extent, South America in the 1990s, as well as the greater consciousness of the relevance of human rights issues in international relations generally, and specifically in respect of capitalism and private enterprise. There was also, of course, the fanfare establishment of the WTO, itself. Above all, however, there have been three developments that have stood out as being of especial importance to the development of the trade and human rights relationship.

The first of these was the awareness-raising impact of China's long road to accession to the WTO, which began in 1987 and concluded in December 2001. The process coincided with the early indications of how quickly China's economy was opening up and expanding, while its apparatus of state remained authoritarian and its social order controlled – a circumstance that some have labelled '“market Leninism” in which centralised political control co-exists with (and indeed may depend upon)

55 Pascal Lamy, 'Humanising Globalisation', speech, 30 January 2006; available at [www.wto.org/english/news\\_e/sppl\\_e/sppl16\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm).

56 Lim, 'Trade and Human Rights', at 286.

opening to global markets'.<sup>57</sup> The juxtaposition of China's striving for greater trade opportunities and its abject record of human rights violations was quickly latched onto as a high-profile subject of debate and a basis for demands. For some (mostly human rights activists), the situation provided an opportunity to leverage the prospect of entry into the WTO to try to extract concessions from China regarding its hard-line attitude towards human rights. For others (mostly trade specialists), such a course of action was not only unwise but counter-productive, and they argued that the best hope for better protecting human rights in China through instituting the rule of law, promoting greater transparency and representation in government, and the construction of a viable and vibrant civil society, lay with liberalising its economy and the opening up of its borders to global trade.<sup>58</sup> As for China itself, it has routinely argued in its periodic 'White Papers' on human rights that 'the human rights of its 1.3 billion people are being met by its economic development, which has seen standards of living rise tremendously'.<sup>59</sup> In any event, the resultant debate certainly projected the linkage of trade and human rights into public domains, in the West in particular, as a matter of interest and concern.

The second development was an initiative instigated in 1995 by the OECD further to liberalise global capital through its Multilateral Agreement on Investment (MAI).<sup>60</sup> The MAI – which was drafted in private (or in a 'black hole', as Noam Chomsky put it)<sup>61</sup> – was met by unprecedented and widespread condemnation and it was abandoned in 1998 when France, the host nation, withdrew its support. It comprised a suite of measures that would oblige states to dismantle their individual domestic financial regulations, as well as the myriad bilateral schemes created

57 Alison Brysk (ed.), *Globalization and Human Rights* (Berkeley: University of California Press, 2002), p. 12.

58 See for example, John Dorn, a China specialist with the CATO Institute in the US, 'Advancing Human Rights in China' (1999) at [www.fretrade.org/node/181](http://www.fretrade.org/node/181).

59 Paul Reynolds, 'Whisper if You Mention Human Rights in China', *BBC News* (18 January 2008), at [http://news.bbc.co.uk/1/hi/uk\\_politics/7196086.stm](http://news.bbc.co.uk/1/hi/uk_politics/7196086.stm). For China's latest 'White Paper' on human rights, entitled 'China's Progress in Human Rights in 2004' (Beijing: Information Office of the State Council of the People's Republic of China, 2005), see [http://english.gov.cn/official/2005-07/28/content\\_18115.htm](http://english.gov.cn/official/2005-07/28/content_18115.htm).

60 The Multilateral Agreement on Investment – Draft Consolidated Text (22 April 2008) OECD document DAF/MAI(98)7/REV1, available at [www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf](http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf).

61 'A black hole reserved for topics rated unfit for public consumption'; Noam Chomsky, 'Domestic Constituencies', *Z Magazine* (May 1998) at [www.chomsky.info/articles/199805-.htm](http://www.chomsky.info/articles/199805-.htm).

by Bilateral Investment Treaties (BITs), and instead abide by a new, uniform international regime which included provisions for corporations to sue states that had not sufficiently complied with the Agreement's deregulatory demands. The opposition to the Agreement was remarkable on account of the prominence accorded to the perceived adverse human rights consequences (alongside environmental and labour standards concerns) of the MAI, especially in developing countries, where it was believed that it would seriously compromise countries' sovereign budgetary controls by giving the providers of foreign direct investment immoderate financial leverage over governments and leaving states at the mercy of the savage short-termism of the financial markets.<sup>62</sup> The anti-MAI movement fed into the growing anti-globalisation movement at that time which was so visibly expressed in the public protests that dogged G8 summits, WTO ministerial meetings, and the annual meetings of the World Economic Forum and of the World Bank and the IMF, from Seattle and Washington DC, to Genoa and Melbourne.

The whole MAI episode proved to be something of a watershed event on account of both the Agreement's uncompromised abandonment and its coinciding with the Asian financial crisis (1997–8), which was precipitated (or at least exacerbated) by the extreme fluidity of finance and instances of swift and massive capital flight. If it was not already a 'dead man walking', the Asian financial crisis effectively sealed the fate of the MAI, and indeed also convinced many – including many economists and trade liberalists – of the economic *and* social dangers posed by opening up capital markets even further to the hyperbolic nature of capital, its flights of fancy and swamping invasions.<sup>63</sup> Amidst the damage done to a number of exposed South American economies in the years following the turmoil in Asia, Brazil's experience provided further evidence of the manifold dangers of such financial crises, even for apparently robust emerging economies, as well as grounds for pointing fingers at who or what was to blame. Political analyst Gary Younge tells the compelling story of how Luiz Inácio Lula da Silva, the then newly elected Brazilian President in 2002, was 'cruelly mugged' by the mounting crisis:

62 One of the most comprehensive analyses of these (and other) implications of the MAI was conducted by the Joint Standing Committee on Treaties of the Australian Parliament; see its *Multilateral Agreement on Investment: Interim Report* (May 1998), at [www.aph.gov.au/house/committee/jsct/reports/report14/report14.pdf](http://www.aph.gov.au/house/committee/jsct/reports/report14/report14.pdf).

63 See Robert Kuttner, 'The Role of Governments in the Global Economy', in Will Hutton and Anthony Giddens (eds.), *On the Edge: Living with Global Capitalism* (London: Vintage, 2001), p. 147, at pp. 161–3.

In the three months between his winning the vote and being sworn in, the nation's currency plummeted by 30%, \$6 billion in hot money had left the country, and some [global credit] agencies had given Brazil the highest debt-risk ratings in the world.

'We are in Government but not in power', said Lula's close aide, Domini-can friar Frei Betto. 'Power today is global power, the power of the big companies, the power of financial capital.'<sup>64</sup>

There are today greater efforts being made to understand and coordinate the interface between trade and finance – in terms of both their respective goals and their *modus operandi*.<sup>65</sup> The US sub-prime lending contagion that sparked the most recent global financial crisis has even prompted no less a devoted free-trade organ than *The Economist* to declare that, after thirty years of dominance over public policy, belief in the power of the market might be waning and that the 'growing calls from all sides for bold re-regulation' might have to be heeded.<sup>66</sup> Clearly, even advanced economies have a hard time reining in the excesses of free range, capital markets, so the prospects for developing economies doing so, when they have neither the administrative capacities nor the human capital, as Dani Rodrik and Arvind Subramanian point out, are even less promising. Embracing 'financial globalization', as they label such free market capital, is not a policy priority for such states when they have so many other, more basic and pressing, economic challenges to overcome.<sup>67</sup>

The third factor that played an instrumental role in promoting the idea of linking trade and human rights was the much heralded establishment of the Doha Round of trade talks in 2001 (which President Bush once embarrassingly referred to as the 'Darfur Round', albeit it with some unintended appropriateness).<sup>68</sup> The aim of the Round was to focus on development and thereby, derivatively, provide for better levels of human rights protection. The trade ministers who put their names to the Declaration that launched the round pledged to 'continue to make positive

64 Gary Younge, 'Obama Faces the Pressure of High Hopes', *Guardian Weekly*, 13 June 2008, p. 18.

65 Thus, for example, in her review of existing cooperation between the IMF and the WTO, Christine Kaufmann identifies 'trade as a new factor in preventing balance of payments crises': 'Aid for Trade and the Call for Global Governance', paper delivered at the International Monetary Fund and Financial Crises Conference, University of Cambridge, April 2008, draft, p. 3.

66 'Fixing Finance', *The Economist*, 5–11 April 2008, p. 15.

67 Dani Rodrik and Arvind Subramanian, 'Why Did Financial Globalization Disappoint?' (24 March 2008), p. 10, at [http://ksghome.harvard.edu/~drodrik/Why\\_Did\\_FG\\_Disappoint\\_March\\_24\\_2008.pdf](http://ksghome.harvard.edu/~drodrik/Why_Did_FG_Disappoint_March_24_2008.pdf).

68 'Just Do It', *The Economist*, 13 January 2007, p. 64.

efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development'.<sup>69</sup> It was the ninth negotiating round since 1947, and the first under the auspices of the WTO (the other eight having been within the GATT system). It was intended to be something of a redress for developing countries of the developed-country emphasis in all the prior rounds on the dismantling of tariff and non-tariff barriers and, latterly, the expansion of liberalisation into the fields of intellectual property, services and textiles and (to a more limited extent) agriculture. In fact, as Joseph Stiglitz and Andrew Charlton note, the 'unfinished business' of the previous round (the Uruguay Round), especially in respect of services and agriculture,<sup>70</sup> has dominated the Doha Round and has been an important cause of its current sclerotic state, which has been lingering since the first efforts to bring the negotiations to a close began in early 2006.

With one striking exception, the human rights dimension of Doha has been implicit rather than explicit. The exception concerns the formulation of the Doha Declaration on the TRIPS Agreement and Public Health (2001)<sup>71</sup> which reiterated the TRIPS provision<sup>72</sup> allowing developing states to negotiate (or exceptionally, compulsorily to acquire) the rights to manufacture so-called generic drugs (i.e. very cheap copies) on the grounds of the needs of public health, despite any existing patent restrictions.<sup>73</sup> The conclusion of the Declaration was assisted by the extraordinary case in 1998 of the forty-two transnational pharmaceutical companies that sued the South African government in the local courts on the grounds that the latter's actions in permitting the local manufacture of generic anti-retroviral AIDS drugs breached both its obligations under TRIPS and the protection of intellectual property rights under the South African Constitution (Article 25). No matter what the legal merits

69 *Ministerial Declaration*, adopted 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, para. 2.

70 Joseph Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (New York: Oxford University Press, 2005), pp. 52–3.

71 *Declaration on the TRIPS Agreement and Public Health*, adopted 14 November 2001, WTO Doc. WT/MIN(01)/DEC/2.

72 That is, Trade-Related Aspects of Intellectual Property Rights (TRIPS) Articles 27 and 31.

73 For examples of such agreements between the Brazilian Government and a group of US pharmaceutical companies, see Davina Ovet, 'Making Trade Policies More Accountable and Human Rights-Consistent: An NGO Perspective of Using Human Rights Instruments in the Case of Access to Medicine', in Wolfgang Benedek, Koen de Feyter and Fabrizio Marrella (eds.), *Economic Globalisation and Human Rights* (Cambridge: Cambridge University Press, 2007), p. 17.

of the case were (and there are grounds to believe that they were weak and the main aim of the litigation was simply aggressively to assert commercial interests), the political overtones of the case were incendiary.<sup>74</sup> The global public outcry over what was widely perceived to be the avaricious, amoral and politically inept stance of the corporations was as predictable as it was damning, and the case was settled out of court.<sup>75</sup> For the South African Government there was clearly an important economic imperative to take the course of action it did; however, it was also based on sound human rights grounds. The obligation to promote and protect the right of access to adequate health care is enshrined in Article 12 of the ICESCR, to which South Africa is a party, and which is incorporated in its national constitution (Article 27). Faced with an HIV/AIDS crisis of epidemic proportions, the Government thought that it had sufficient grounds to trigger the public health exception to the patent protections recognised in TRIPS, and so had passed legislation accordingly. The pharmaceutical companies thought otherwise, believing that the Government had neither acted constitutionally, nor sought with sufficient intent to engage with them in discussions over alternative ways to address the problem.<sup>76</sup>

The Doha Round, its development aspirations and its impact on human rights protections remain uncertain. But at least the profile of their intersections has been raised even in (indeed, especially in) the minds and words of such arch-conservatives as Paul Wolfowitz, who in 2005 (when he was still President of the World Bank) pronounced that:

The Doha development round of trade talks will be judged by one simple test: does it enable people in poor countries to sell more of their goods overseas, creating more jobs and lifting their incomes? If the answer is yes, the round will succeed in enabling tens of millions of people to lift

74 See Margo Bagley, 'Legal Movements in Intellectual Property: TRIPS, Unilateral Action, Bilateral Agreements and HIV/AIDS' (2003) 17 *Emory International Law Review* 781, at 785.

75 *Ibid.* It beggars belief that someone – whether lawyer or not – within the corporations' team contemplating this action could so catastrophically fail to foresee how badly the case would be received publicly, and not have sought some other, less patently aggressive, course of action.

76 A subsequent decision of the General Council of the WTO in August 2003 (later formalised in December 2005) provided certain concessions to states seeking to issue compulsory licences in respect of medicines used to combat epidemics provided they complied with a newly established notification process – see *Implementation of para. 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, Decision of the General Council, 20 August 2003, WTO Doc WT/L/540. Though the scheme was initially not used by any states (see discussion below), it was invoked in 2007 by both Canada and Rwanda in respect of the manufacture of anti-retroviral HIV/AIDS drugs.

themselves out of abject poverty over the next decade and give them and their children a chance to lead a better life – in some cases, it will be the difference between a healthy life or an early death from a preventable disease.<sup>77</sup>

### Overlapping jurisdictions?

Still, despite this promising political context in which some important socio-political connections have been established between the two domains, these are the exceptions more than the rule. In legal and institutional terms, human rights and trade remain largely separate. It is on this basis that a report from the relatively newly established 'trade and human rights' programme of the OHCHR calls for the 'increasing dialogue on human rights and trade' across a wide spectrum of institutions and actors at both international and domestic levels, including trade, finance, environmental and human rights practitioners, ministries and relevant agencies and other public bodies, civil society groups, academic commentators and of course international organisations representing trade and human rights interests.<sup>78</sup> Building on certain parallel instances of such dialogue, this comprehensive exchange is being pursued through the Enhanced Integrated Framework which comprises two UN agencies (UNCTAD and the UN Development Program (UNDP)), the World Bank, the IMF, the International Trade Commission and the WTO itself, as well as through the so-called cooperation (that is, consultative) agreements that the WTO has signed with both Bretton Woods institutions.<sup>79</sup>

Shared jurisdictional grounds do appear to be there. It is easy to agree with Amartya Sen's proclamation, for example, that there exists:

a remarkable empirical connection that links freedoms of different kinds with one another. Political freedoms (in the form of free speech and elections) help to promote economic security. Social opportunities (in the form of educational and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities to participate in trade and production) can help to generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.<sup>80</sup>

77 Paul Wolfowitz, 'Everyone Must Do More for Doha To Succeed', FT. com., 23 October 2005, p. 1.

78 Report of the UN High Commissioner for Human Rights, 'Human Rights, Trade and Investment', UN Doc. E/CN.4/Sub.2/2003/9 (2 July 2003), para. 62.

79 *Agreements between the WTO and the IMF and the World Bank*, General Council Decision, WT/L/194 (18 November 1996).

80 Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), p. 11.



Yet, this is only part of the story. Questions remain as to how this does, or could, reflect what human rights international law provides for, and how the relevant international institutions actually operate in practice. For a long time the linkage between the fields of international trade law and international human rights law was best described as no more than coexistence: ‘interactions have existed since their inception, but remained marginal or largely ineffective’, according to Cottier, Pauwelyn and Bürgi.<sup>81</sup> Since the mid 1990s, however, there have been pushes from within both fields to reinterpret and promote their relationship as being one of interdependence. To some degree this constitutes a part of a wider movement to link trade with any number of non-trade issues, such as peace and security, the environment, labour and culture,<sup>82</sup> but it is also a reflection of a number of essentially legal concerns. These are, first, the fear among human rights lawyers that the WTO’s reinforcement of the dispute settlement mechanisms within trade law would effectively give primacy to trade rules over less well enforced international laws such as human rights standards; second, in direct response to the first, a movement to seek out ways in which human rights might be located within trade law and thereby harness the perceived enforcement power of the trade regime in ways that might advance human rights ends; and third, the analogue drawn by some commentators between the intermeshing of economic and trade policies and human rights protections within state constitutional arrangements, and that which might be aspired to at the level of international law. In this latter respect, Ernst-Ulrich Petersmann leads the charge, fuelled by what he sees as the instructive example of international constitutionalism of the EU.<sup>83</sup>

81 Thomas Cottier, Joost Pauwelyn and Elizabeth Bürgi, ‘Introduction’, in Cottier *et al.* (eds.), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005), p. 2.

82 On the last mentioned, see Hélène Ruiz Fabri’s analysis of the tense relationship that exists between trade enhancement and the preservation of cultural diversity, for both developed and developing states: ‘Games within Fragmentation: The Convention on the Protection and Promotion of the Diversity of Cultural Expressions’, in Sarah Joseph, David Kinley and Jeffrey Waincymer (eds.), *The World Trade Organization and Human Rights: Interdisciplinary Approaches* (London: Edward Elgar, forthcoming 2009).

83 Ernst-Ulrich Petersmann, ‘Human Rights and International Trade Law: Defining and Connecting the Two Fields’, in Cottier *et al.* (eds.), *Human Rights and International Trade*, p. 37. It is perhaps worth noting here that this aspirational stance of Petersmann’s contrasts starkly with Philip Alston’s focus on what is possible under *current* circumstances. As such, the vividly combative dispute between the two referred to in [chapter 1](#) has been interpreted by some observers as a classic case of a *dialogue des sourdes*: Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi, ‘Linking Trade Regulation and Human Rights in International Law: An Overview’, in *ibid.* p. 7.

The taxonomy of linkage is, as David Leebron charts it, broad and complex. This is so not just in terms of the areas in which linkage is sought as noted above,<sup>84</sup> but also in terms of the various reasons for, and forms of, linkage. Leebron identifies linkages that are substantive in nature (where trade and other norms overlap in object or relative impact on each other), others that are strategic (where there is no connection between the two sets of norms themselves but they share approaches and processes), and some that are both.<sup>85</sup> He also lists a host of different means by which linkages are pursued, ranging from simple inter-regime negotiations to intricate legal arguments as to jurisdictional boundaries.<sup>86</sup>

Fundamentally, the linkages between trade law and human rights law are of two sorts: either they concern the status of human rights standards within the rules and adjudicatory procedures of trade regulation, or they concern the status of trade rules within human rights laws and adjudicatory formats.<sup>87</sup> Ancillary to these base models there are institutional interactions which, at the international level, are still in their nascent stages (i.e. such as the joining of the WTO and the UN's OHCHR in informal, information-gathering or scoping exercises),<sup>88</sup> and interactions born of efforts to construct the conceptual frameworks that explain or justify the degree of instantiation of each regime within the other. The law, evidently, is an important format within which intersections between trade and human rights occur, even if motivations and outcomes are much more widely framed. As such, it is to the details of the nature and form of the inter-linkages between international trade law and human rights law, presently and possibly, that I now turn: first to consider the specific circumstances of the WTO and human rights protection, and then, in the final part of this chapter, to address the questions of human rights concessions and conditionality within trade, and the use of trade sanctions for human rights ends.

84 And see further José Alvarez, 'Symposium: The Boundaries of the WTO: Foreword' (2002) 96 *American Journal of International Law* 1, at 2.

85 David Leebron, 'Linkages' (2002) 96 *American Journal of International Law* 5, at 11–15.

86 *Ibid.* 15–24. 87 See Cottier *et al.* (eds.), *Human Rights and International Trade*, p. 3.

88 Including four separate reports by the OHCHR on the impact on human rights of, respectively: TRIPS (2001), the Agreement on Agriculture (2002), the General Agreement on Trade in Services (GATS) (2002) and investment (2003). For an excellent discussion of their methodology, analysis and conclusions, see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Portland, OR: Hart, 2007), pp. 127–40.

*The limits and possibilities of the WTO protecting human rights*

The term ‘human rights’ does not appear anywhere in the Agreement establishing the WTO, nor in any of the sixty or so agreements and decisions over which it presides. Yet, there appears to be ample room for the relevance of human rights to be established. The WTO’s constitutive instruments range widely across specific industry sectors – such as agriculture, textiles and clothing, maritime transport, sanitary and phytosanitary standards, financial services and intellectual property protections, through to technical issues – such as the process of dismantling tariff and non-tariff trade barriers, conditions of government procurement, dispute settlement procedures, negotiating protocols, environmental protection and accession arrangements.<sup>89</sup> This does not mean to say that the door is closed to human rights in WTO law, just that in so far as it finds its way in, it does so by ways other than through the front door. This, historically, has been the case with trade law, where other terms have been used to permit a human rights angle to be run. Stephen Powell notes that ‘dozens of the trade agreements predating the GATT routinely linked “moral” with “humanitarian” goals through an exception for “moral and humanitarian reasons”’.<sup>90</sup>

Today, in the GATT itself and in the multitude of trade instruments that have followed it, the opportunities for inserting human rights demands still arise in ulterior forms – that is, as possible exceptions or legitimate excuses, not to be bound by the otherwise mandatory rules to dispense with tariffs and subsidies, to treat all trading partners equally, and to make no distinctions between domestic and foreign produced or sourced goods and services. Typically, these ‘exceptions clauses’ are based on such notions as the protection of public health, of morals and of the environment (or at least animal and plant life), as well as the prohibition of prison labour and where the interests of national security require. I will look at the jurisprudence associated with the interpretation, application and enforcement of these exceptions in a moment. First, however, I want to stress the importance of certain structural dictates of international trade

89 See the WTO’s online data base on ‘Legal Texts’, at [www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm).

90 Stephen Powell, ‘The Place of Human Rights Law in World Trade Organisation Rules’ (2004) 16 *Florida Journal of International Law* 219, at 223 n18. See also Nicolas Diebold, ‘The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole’ (2008) 11 *Journal of International Economic Law* 43, who charts the lineage of such interpretations of key phrases in the GATT and GATS.

law generally, and the institution of the WTO in particular, within which the intersection with human rights occurs.

### *Structural dictates*

There are some basic features of the international trade regime that remain constant and which to some significant extent dictate whether and to what extent human rights can civilise trade. The first of these is the fact that the WTO is an inter-governmental organisation: a creature of states, effectively directed by them, as administered by a secretariat charged with little or no significant capacity (not jurisdictionally, nor politically, nor in terms of manpower, and certainly not financially)<sup>91</sup> to operate outside the remit given to it by the member states. Unlike other international organisations such as the UN, the World Bank or the IMF, the mandates of which provided various levels of institutional autonomy, the WTO is held under the sway of being a 'member driven organisation', with the Director-General and secretariat having no independent, organic mandate to develop policy or issue binding determinations or interpretations. It is a legal regime, therefore, that is more open than others to being governed by the demands of domestic politics rather than international comity, and this includes attitudes towards human rights and the extent to which they should be accommodated within the WTO framework.

That said, while in the WTO regime there is abundant evidence of states pursuing self-interest and of their coercion, it is not, as Jack Goldsmith and Eric Posner argue in their über-realist treatise, that these are the *only* factors at play; there being no room for the normative influence of international comity and laws (beyond their mere coincidence with self-interest), that is the target of the authors' polemic.<sup>92</sup> Surely manifest statal desires to promote international comity and laws are themselves key parts of self-interest, or form parts of the reason for coercion, whether coincidental or not.<sup>93</sup> The evidence I refer to is the fact that the most politically and economically powerful states have been able to

91 The organisation employs a total of 625 people and has an annual budget of only \$183 million (in 2007 figures), which is allocated almost entirely to salaries and running costs.

92 Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford and New York: Oxford University Press, 2005), especially chapter 5 on international trade.

93 Neils Petersen suggests that the pursuit of such ends is better explained by way of a 'deliberative approach' than by adopting the blinkered instrumental approach of rational choice; see 'Rational Choice or Deliberation? Customary International Law between Coordination and Constitutionalization' (1 July 2008). Max Planck Institute, Collective Goods Preprint, No. 2008/28; available at <http://ssrn.com/abstract=1161123>.

exert their influence over the operations of the WTO, and thereby to promote their interests – across the board – ahead of those of other states. This is despite the fact that, formally, the voting authority of all member states is the same (which, incidentally, is also in stark contrast to the complicated weighted voting structures of both the IMF and the World Bank).

The WTO's 'one member, one vote' format was intended to dilute the bargaining power of the powerful, at least in formal terms, even if in practice a host of exogenous factors (such as differences in expertise, and the striking of back-room deals – 'Green Room'<sup>94</sup> negotiations, as they are colloquially known) has meant that this has not been borne out in practice. The GATT was in fact designed to do something similar. It was a 'disarmament treaty', to use Martin Wolf's imaginative phrase, in that it intentionally sought to restrict the nature and scope of the erstwhile untrammelled freedom with which trade negotiations were conducted between states, and between states and merchants.<sup>95</sup> But for nearly the whole life of GATT and the first five or so years of the WTO, the rich nations had been able to guide the multilateral trade ship across the sea of liberalisation more or less unchecked, save in the important respect of disagreements between themselves. This led to a situation in the late 1990s where there was a mounting demand from developing countries for a collectively greater voice in the WTO. For while decisions are indeed taken by consensus, 'developing countries complain about not being able to defend their interests, as an important part of the decision-making is done between a selected group of (developed) countries outside the formal meetings in the hallways and "green rooms" of the WTO'.<sup>96</sup>

Signs that developing countries might be gaining entry into the ship's wheelhouse became apparent in the late 1990s with moves that led to the launch of the Doha Development Round in 2001 (as discussed above), and when coalitions of developing countries and mixtures of developing and

94 A metaphorical allusion, for, as noted on the WTO website, 'the term "Green Room" has its origins in British theatre and refers to the room where performers would wait when they were not needed on stage'. It adds that 'Green Room meetings serve a useful purpose in that their informal nature allows negotiators to explore new approaches to settling difficult issues'; at [www.wto.org/english/tratop\\_e/dda\\_e/meet08\\_org\\_e.htm#green\\_room](http://www.wto.org/english/tratop_e/dda_e/meet08_org_e.htm#green_room). Green Room discussions are conducted under the stewardship of the Director-General.

95 Wolf, *Why Globalization Works*, p. 91. Which circumstances led to the ironic situation today where to agree to liberalise is now seen as a concession rather than a gain (the presumption being that protectionism is natural or best); *ibid*.

96 Van Hees, 'Protection v. Protectionism', p. 13.

developed countries began to emerge or were revitalised with the express object of pooling political, legal and economic resources against US and EU domination. Examples of coalitions include the Cairns Group of agricultural exporting countries,<sup>97</sup> the African, Caribbean, Pacific group of states,<sup>98</sup> and more recently the International Sugar Trade Coalition of sugar exporting countries that trade with the US.<sup>99</sup> The Ministerial Meetings in Cancún in 2003 and Hong Kong in 2005 proved to be something of watershed events in the power struggles within the WTO, with a large and diverse group of developing nations (the G90) staging a walk-out and effectively scuppering the negotiations in Cancún. In Hong Kong, decisions were made to refocus on core trade issues (agriculture, services and industrial goods) and ditch the attempts to pursue discussion on governance matters (the so-called 'Singapore Issues'),<sup>100</sup> which were strongly disliked by developing states, and to launch the 'aid for trade' initiative,<sup>101</sup> all in an effort to prevent a repeat performance of mass disaffection. These efforts were not enough, however, to prevent the debilitating failure to bring the Doha Round to a close in July 2008 when developed and developing states could simply not 'bridge their differences'<sup>102</sup> over levels of agricultural subsidies and special provisions enabling developing countries to protect their farmers from import surges and sudden price falls in staple crops. It remains to be seen whether and how, once again, the Round will rise, Phoenix-like, from these ashes.

At one level, the empowering of the developing states within the WTO framework can readily be seen as potentially very good for their economies, social orders and human rights protections – that is, to the extent that the relevant governments direct the resultant increases in economic prosperity towards the upkeep of the other two. At another level, however, it can also be considered to be a setback for social welfare and human rights, if the developing states are only, or primarily, interested in the economy, and view any pressure to deliver on these other outcomes

97 See [www.cairnsgroup.org](http://www.cairnsgroup.org). 98 See [www.acpsec.org](http://www.acpsec.org).

99 Established in 2006; see [www.sugarcoalition.org](http://www.sugarcoalition.org).

100 Primarily, greater transparency in government procurement; enhanced 'trade facilitation', investment and more effective competition policies. Incidentally, this realignment was built on agreement brokered in the previous year by Pascal Lamy, the EU Trade Commissioner, and Robert Zoellick, the US Trade Representative, now the Director-General of the WTO and the President of the World Bank, respectively.

101 Discussed further below.

102 As Pascal Lamy reported to an informal meeting of the Trade Negotiations Committee: 'Chairman's Opening Remarks', 29 July 2008, at [www.wto.org/english/news\\_e/news08\\_e/meet08\\_chair\\_29july08\\_e.htm](http://www.wto.org/english/news_e/news08_e/meet08_chair_29july08_e.htm).

as sovereignty-invading conditionality. This is an important point, but one that is characterised by great complexity and sensitivity, as such conditionality is open to misuse and misunderstanding. The situation is, in fact, an inevitable consequence of the WTO's legal structure, as well as the interpretation and implementation of the various exceptions clauses.

While some limited level of human rights conditionality is available through exceptions in many treaties within the WTO regime (and much more outside the WTO), it cannot be utilised as a disguise for protectionism or other trade restrictive practices,<sup>103</sup> which is what many developing states believe to be the real reasons behind developed states' use of exceptions. Thus, for example, the concerted effort of the EU and the US to force the issue of labour standards onto the agenda of the 1999 Seattle Ministerial was greeted with near-universal suspicion and condemnation among developing states. 'They saw it', to repeat Nigel Grimwade's words, 'as having one purpose only – to provide developed countries with *carte blanche* to introduce trade restrictions on their products under the guise of protecting human rights.'<sup>104</sup> In particular, developing countries see international pressure to have them raise their domestic labour standards (despite the 1996 Singapore Ministerial Declaration's apparent stipulation to the contrary)<sup>105</sup> as challenging the single most important comparative advantage many of them have – namely, cheap labour. Certainly, there is something of a conflict of interest when trade unionists in the North push for higher labour standards in the South, if not blatant cynicism. One high-ranking American trade union leader, for example, was reported as saying in a private conversation with a senior aide to the WTO: 'We don't give a damn about workers in the Third World. We just want to protect our members' interests.'<sup>106</sup> The tension and mutual suspicion extends beyond developing countries' relationship with Northern trade unions, to cover nearly the whole community of Northern NGOs working on trade issues, despite, that is, their shared goals of a 'democratic and accountable WTO

103 See GATT, Article XX (chapeau), as outlined below.

104 Nigel Grimwade, 'The GATT, the Doha Round and Developing Countries', in Homi Katrak and Roger Strange (eds.), *The WTO and Developing Countries* (Houndmills and New York: Palgrave Macmillan, 2004), p. 25.

105 Paragraph 4 of the Declaration expressly states that the comparative labour advantage of developing countries should not be limited, though it then adds that labour standards cannot be used for protectionist purposes; *Singapore Ministerial Declaration*, 13 December 1996, available at [www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm).

106 Philippe Legrain, *Open World: The Truth about Globalisation* (London: Abacus, 2002), p. 64.

that is more concerned with the problems of poverty and development and . . . a more just and equitable trading system'.<sup>107</sup>

Of course, Machiavellian manoeuvring is not the preserve of the rich states alone. The governments of developing states can be gallingly insincere when they throw up accusations of such protectionism as a smoke-screen to cover their inability or unwillingness to meet their human rights responsibilities. There can be little doubt that oft-repeated pleas not to interfere with a country's poor labour conditions and wage levels, in order to preserve its attractiveness to foreign investment and the cheapness of its exports, can lead quickly into blatant worker exploitation as developing countries compete with each other for global trade and business opportunities in 'a race to the bottom'.

In 1999, President Clinton captured the thrust of the issue when he addressed the ILO on the occasion of the US signing of the ILO Convention No. 182, on the Elimination of the Worst Forms of Child Labour:

The step we take today affirms fundamental human rights. Ultimately, that's what core labor standards are all about, not an instrument of protectionism or a vehicle to impose one nation's values on another but about our shared values, about the dignity of work, the decency of life, the fragility and importance of childhood.<sup>108</sup>

This is a statement of principle, and one with which I agree. It is not, however, a representation of *Realpolitik*; nor does it purport to be so. The actions taken within the institutional confines of the WTO that bear on the relations between trade and human rights are, as James Harrison has trenchantly argued, much more equivocal and often contradictory.<sup>109</sup> We are, as yet, far from the comfort of being able to declare with the certainty of Christine Breining-Kaufmann and Michelle Foster that the debate has 'moved beyond the stage of questioning whether the link is appropriate and legitimate'.<sup>110</sup>

All that said, the WTO's 'Dispute Settlement Mechanism' (DSM) has been the focus a great deal of attention and expectation as a possible vehicle

107 Daniel Bradlow, '“The Times Are A’Changin’”: Some Preliminary Thoughts on Developing Countries, NGOs and Reform of the WTO' (2001) 33 *George Washington International Law Review* 503.

108 President Clinton, 'Remarks by the President at Signing of ILO Convention #182', Seattle, Washington, 2 December 1999; see <http://clinton6.nara.gov/1999/12/1999-12-02-remarks-by-the-president-at-signing-of-ilo-convention.html>.

109 Harrison, *The Human Rights Impact of the World Trade Organisation*, pp. 76–81.

110 Christine Breining-Kaufmann and Michelle Foster, 'Introduction', in Frederick Abbott *et al.* (eds.), *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press, 2006), p. 4.



to carry human rights issues further into the heartland of international trade.

*Human rights in the WTO's Dispute Settlement Mechanism?*

Alongside the new trade policy apparatus that the WTO established, its other significant innovation was the creation of a legal regime for the enforcement of trade rules and the settlement of disputes between member states to replace that which existed under the GATT. There is, as indicated earlier, very little scope for considering human rights within the DSM. As such accommodation was not in the minds of the drafters, this is perhaps not that surprising. The argument, therefore, to raise the profile of human rights within the deliberations of the dispute panels and the appellate body that constitute the DSM is an uphill struggle. And yet great struggle there has been. In part, faith in the quest has been drawn from the belief in the power of rule enforcement and formalised adjudication, especially as the WTO's DSM is perceived to have real teeth, unlike international human rights tribunals (all of which, except, notably, the European and American Courts of Human Rights, are advisory only). The fact, then, that the DSM definitively determines winners, and losers, and metes out punishments to the latter, has been a great attraction – a sort of ‘penance envy’, to use Joel Trachtman’s delightfully mischievous phrase.<sup>111</sup>

There are, however, a number of aspects of the DSM as it presently operates that together caution against too much investment in its capacity to deliver on human rights goals. First, there are some commentators who challenge the notion that the DSM is indeed at all, or even primarily, about rigidly enforcing rules. Steve Charnovitz perceptively notes ‘the WTO may have the best dispute settlement system of any international organization, but it does not have the best compliance system’.<sup>112</sup> In a similar vein, Andrew Lang (approvingly) reports the following argument made by Jeffrey Dunoff at a conference in London in 2005:

Compliance, he suggests, has never been the sole nor even the highest value of the dispute settlement processes in the WTO. Instead, he suggests, we should see such processes as a compromise between the need to ensure compliance and the need to provide a degree of flexibility – a complex and

111 As quoted by Alvarez, ‘Symposium: The Boundaries of the WTO: Foreword’, at 2.

112 Steve Charnovitz, ‘Rethinking WTO Trade Sanctions’ (2001) 95 *American Journal of International Law* 792, at 832.

evolving compromise between legalism and pragmatism, between rule- and power-based approaches to dispute settlement.<sup>113</sup>

This compromised approach might of course open up greater room for human rights concerns to be heard, but that is only possible within the boundaries of relevant legal provisions that may tolerate some flexibility. In any case, flexibility does not get over the fact that the scope for the accommodation of human rights concerns in the WTO's constitutive treaties is limited. Article XX of the GATT is the most important of the exceptions clauses and typifies those found in other WTO treaties. It permits states to employ potential, or actual, restrictive measures when trying to protect public morals, and human (or plant or animal) life; when blocking products of prison labour, or conserving exhaustible natural resources, or when trying to secure the essential acquisition or distribution of products in short supply, *provided* that such measures are necessary, non-arbitrary and, above all, not mere disguises for protectionist policies. Article XXI of the GATT also permits the imposition of restrictive measures where they are deemed necessary to protect national security. Articles XVIII and XIX of the GATT also allow poorer states, exceptionally and for limited periods, to protect fragile markets through export subsidies and/or import restrictions. Human rights may be read into each of these exceptions to different degrees. But most are relatively little used and, with the exception of the protection of human and animal health, very little litigated (and not at all in the case of the prison labour exception).

As with all rule systems, the very fact that they seek to define what is and is not permissible invites dispute, avoidance and evasion. Take, for example, the reprehensible, but legal, scam cooked up by EU and US biofuel manufacturers and merchants to ship huge quantities of biodiesel from Europe to the US 'where a small quantity of fuel is added, allowing traders to claim 11 pence [US 21 cents] a litre of US subsidy for the entire cargo',<sup>114</sup> before it is shipped straight back to Europe. The subsidy was intended, of course, for genuine, significant 'blending' of bio and fossil fuels, but has inadvertently allowed this violation of *l'esprit de la loi*, if not its letter. Neither the above environmental nor the health exceptions would seem to permit the arrest of this 'splash and dash' practice.

113 Lang, 'Reconstructing Embedded Liberalism', at 94.

114 Terry McAllister, 'US Biofuels Loophole Allows Trading Scam', *Guardian Weekly*, 4 April 2008, p. 6.

The jurisprudence that is trotted out as evidence of some potential to argue human rights points in Article XX (and its siblings in other treaties) is, if the truth be told, tangential, eclectic and inconsistent. It is further, bizarrely, somewhat dependent on the fate of various attempts to protect fauna (especially aquatic), and their indirect relevance to protecting human beings and their rights. Thus, for example, in cases involving challenges to restrictions imposed for health reasons – the US complaining about the EC's import ban on American hormone-treated beef (1998), and Canada's challenge to Australia's ban on the former's uncooked salmon (1998)<sup>115</sup> (both cases argued under the Sanitary and Phytosanitary Agreement (SPS))<sup>116</sup> – separate dispute-settlement panels decided against the respondent states. The arguments of both Australia and the EC were dismissed on the grounds that their respective scientific analysis had been inadequate, based more on supposition than on proof. Explicitly, the panels rejected arguments suggesting that the precautionary principle (borrowed from international environmental law) should be applied and thereby allow the bans, until such time as scientific proof was established to settle the matter one way or the other.

These decisions – and especially the dismissal of the precautionary principle as irrelevant to trade law – were criticised in non-trade circles for being blinkered, unnecessarily pedantic and detrimental to people's rights to health and food safety. And indeed, shortly afterwards, in 2001, the use of the very same 'protection of health' exception (this time under the GATT) was upheld by a dispute settlement panel. In this case, France's ban on the importation of asbestos products from Canada on public health grounds was allowed to stand, despite the fact that there was no unanimity in expert scientific opinion regarding the precise risks posed by various uses of the products in question.<sup>117</sup> But this might best be viewed

115 Respectively: Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R; and Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr. 1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R.

116 In effect, the whole of the SPS agreement is an 'exception clause', in that its very purpose is to allow restrictions on the basis of the preservation and protection of animal or human life. Article 2.4 of the Agreement provides that any measure taken in conformity with the SPS agreement would be per se consistent with the GATT (in particular with Article XX(b)).

117 Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add. 1, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS135/AB/R.

as something of an aberration, for as a rule the insistence on scientific backup, where it is required by the relevant treaty provisions, would otherwise appear to be unstintingly pursued. This is clearly illustrated by the so-called Genetically Modified Organisms (GMOs) case in which a number of countries challenged the EC's general moratorium on the approvals of biotech products (including GMOs), as well as certain health related safeguard policies that some EU member states had also mounted against biotech products, under the SPS Agreement. The challenge was successful, in part due to the fact that the Panel found that the EC had failed to undertake adequate scientific risk analyses and/or to demonstrate sufficiently clearly the presence of a risk to human health.<sup>118</sup>

There seems, perhaps, to be more room to pursue rights-type arguments in such 'non-scientific' areas as the protection of public morals and public order, as illustrated in the *US – Gambling Services* case. In this case, the WTO Appellate Body accepted that the US's banning of on-line gambling services emanating from some Caribbean states was justifiably necessary on public morals grounds, as provided by Article XIV of the GATS (albeit that, in the end, it found against the US on the legislation's infringement of another aspect of the Article).<sup>119</sup>

The picture is different again regarding trade restrictions based on reasons of environmental protection. At the heart of a clutch of cases concerning fishing practices and their effect on certain protected or endangered species was the question of whether the WTO rules could or should permit states to restrict goods that have been produced (or harvested, as in these cases) by allegedly environmentally harmful methods. Initially, in the two *Tuna/Dolphin* cases (*Tuna/Dolphin I* (1991) and *Tuna/Dolphin II* (1994)), decided under the old GATT dispute settlement system, the relevant panels clearly rejected any suggestion that process and production methods (PPMs) could be used as a basis for the US to ban tuna imports from Mexico (*Tuna/Dolphin I*) and the EC (*Tuna/Dolphin II*), on the grounds that the 'purse seine' methods employed by the fishing fleets from these states to catch tuna also, incidentally, killed significant

118 Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R and Corr. 1, adopted 21 November 2006.

119 Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005. The hurdle the ban failed to clear in the view of the Appellate Body was the requirement, under the chapeau of Article XIV, that any measures taken are not applied in a way that is unjustifiably or arbitrarily discriminatory.

numbers of dolphins.<sup>120</sup> At the time, these decisions were also heavily criticised on the grounds that, by simply focusing on trade equity concerns, they overlooked the wider and vitally important environmental implications. It was argued, further, that the Panel's reasoning would, by extension, result in cases where bans imposed on goods produced, for example, by child labour or by forced labour would be deemed impermissible. (As an aside, it should be noted that in part response to just this type of concern, the recent Economic Partnership Agreement between the European Community and the forum of Caribbean states (Cariforum) expressly states in its 'general exceptions clause' (which is modelled on the GATT original) that 'measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health'.<sup>121</sup>)

Shortly after the establishment of the WTO, the opportunity arose to review the principle established by the *Tuna/Dolphin* cases, this time in a case involving a US ban on the shrimp caught in nets that were not equipped with 'turtle excluder devices'.<sup>122</sup> In this case it was India, Malaysia, Pakistan and Thailand who complained that the ban constituted an unjustified restraint of trade. The US responded by claiming that the ban was allowable as it sought to conserve an 'exhaustible natural resource' (the sea turtles) as provided by Article XX(g) of the GATT. The WTO Appellate Body agreed that the ban was justifiable on this basis, but, ultimately, the US measure failed to satisfy the non-discriminatory demands of the chapeau to Article XX and the ruling went against the US.<sup>123</sup> Predictably, again, there was anger and even a little despair in environmentalist camps. As one activist group put it:

The outlook for sea turtles is bleak. The WTO has always ruled against environmental measures when they conflict with commerce. This ruling has set the wheels in motion for the dismantling of the US law. The WTO

120 Panel Report, *United States – Restrictions on Imports of Tuna*, GATT DS21/R, 3 September 1991 ('Tuna/Dolphin I') and Panel Report, *United States – Restrictions on Imports of Tuna*, GATT DS29/R, 16 June 1994 ('Tuna/Dolphin II').

121 *Economic Partnership Agreement between Cariforum and the EC and its Member States*, Article 224 (footnote 30); see [www.normangirvan.info/cariforum-ec-epa-annexes/](http://www.normangirvan.info/cariforum-ec-epa-annexes/). At the time of writing (mid 2008), the agreement had been initialled but not yet signed by the parties. I am indebted to Lorand Bartels for bringing this to my attention.

122 If netted, the turtles drowned, being unable to surface for air.

123 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998.

is creating the path for the rapid destruction of our global resources and the plundering of local economies.<sup>124</sup>

The perceived intransigence of the WTO dispute resolution bodies, and the attendant trade myopia as represented by this latest decision in the shrimp/turtle case, certainly contributed to the growing anti-WTO and anti-globalisation movements in the late 1990s, which may or may not have had some effect on the outcome of the final case in this particular dispute. In 2001, Malaysia alone pursued the US over what it believed to be the latter's incomplete compliance with the initial decision. The Panel decided in this case that the US's continuing ban on shrimp not caught in nets with turtle excluder devices was indeed justifiable under GATT Article XX(g) – a decision that was subsequently confirmed on appeal.<sup>125</sup> And yet, despite the more subtle balancing of the interests of protecting (animal) health against the disguised or arbitrary protectionism employed in this latter case,<sup>126</sup> the implications for the protection of human rights of the decision are tangential rather than substantial. Apart from the benefits we gain from protecting vibrant and diverse ecosystems, the only other relevant consequence is that this decision (together with the decision in the asbestos case) might precipitate more openness on the part of the dispute-settlement panels to entertain non-core trade issues in their deliberations, including, possibly, human rights concerns – an openness, what is more, that that should not be blocked by any misplaced arguments over limited jurisdiction and applicable laws. The International Law Commission's landmark *Fragmentation Report* in 2006 made it plain that while acknowledging that the WTO's legal regime does indeed limit both its jurisdictional reach and its competence to entertain issues arising under human rights and environmental law treaties, nonetheless, 'when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context

124 Sea Turtle Restoration Project, 'The Story of the WTO versus the Sea Turtles', at [www.seaturtles.org/article.php?id=68](http://www.seaturtles.org/article.php?id=68).

125 Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, as upheld by Appellate Body Report, WT/DS58/AB/RW. See Press Release of the US Trade Representative, 22 October 2001, at [www.ustr.gov/Document\\_Library/Press\\_Releases/2001/October/US\\_Wins\\_WTO\\_Case\\_on\\_Sea\\_Turtle\\_Conservation.html](http://www.ustr.gov/Document_Library/Press_Releases/2001/October/US_Wins_WTO_Case_on_Sea_Turtle_Conservation.html).

126 As followed through in the context of human health in the *Brazil – Retreaded Tyres* case: Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS332/AB/R.

of general international law (including the relevant environmental and human rights treaties).<sup>127</sup>

In review, all this is a thin gruel for hopeful human rights advocates to feed on, and far from a wholesale, long-term solution. 'The WTO is not an appropriate forum for enforcing human rights law, and Article XX is not a legal backdoor', as Tatjana Eres starkly warns in the conclusion to her review of the jurisprudence.<sup>128</sup> Furthermore, there is something clearly problematic about the prospect of seeking to rely on specialists in the settlement of trade disputes, to interpret, apply and enforce human rights standards to any significant degree. Functionally, the panels and the Appellate Body as they stand today are ill suited for such a task. Procedurally as well, the DSM exhibits features that are not especially conducive to the addressing of human rights concerns, at least not in any systematic way. Gregory Shaffer's illuminating work in this area reveals not only how the nature of the disputes submitted to the DSM are becoming increasingly skewed towards private commercial interests (as opposed to public economic interests, let alone social issues), but also that the burdens on developing countries to hold anything like their own against the EU and the US, in terms of legal capacity and expertise to run these trade disputes, are especially onerous.

The growing interaction between private enterprises, their lawyers, and US and European public officials in the bringing of most trade claims reflects a trend from predominantly intergovernmental decision-making toward multilevel private litigation strategies involving direct public-private exchange at the national and international levels.<sup>129</sup>

Shaffer unearths the extent to which corporations are the driving force behind so many disputes pursued by states and the degree to which they underwrite the resultant legal costs. There is nothing illegal about this, and on reflection it is unsurprising, given the often enormous commercial interests at stake. But it is unsettling, nonetheless.

Historically, developing countries have had great difficulties matching the developed states in terms of their capacity (legal, financial and

127 *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006), para. 170 and see also para. 45.

128 Tatjana Eres, 'The Limits of GATT Article XX: A Back Door for Human Rights?' (2003–4) 35 *Georgetown Journal of International Law* 597, at 635.

129 Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington, DC: Brookings Institution Press, 2003), p. 4.

bureaucratic) to mount or defend challenges, and the privatisation of disputes noted by Shaffer is likely only to make the playing field even less level.<sup>130</sup> Sylvester Stallone once said polo was like playing golf in an earthquake;<sup>131</sup> it might be said that the same sense of bewilderment engulfed many developing, and (especially) least developing, countries when they tackled the machinations of the DSM. Despite all, however, Shaffer believes that the stronger developing nations at least are 'learning to use the dispute settlement system more effectively',<sup>132</sup> and they are finding some institutional support in the form of an Advisory Centre on WTO Law established in 2001, that provides subsidised legal services to developing countries engaged in WTO disputes.<sup>133</sup>

Fundamentally, in my view, within the current operational parameters of the WTO's DSM, there is only limited opportunity to develop means and methods of protecting human rights. Calls for greater accommodation by, and reforms of, the DSM continue to be made from within and without the WTO. John Jackson believes that the dispute-settlement system needs some 'fine-tuning' if it is to be more amenable to such non-core trade issues as human rights. He suggests that hearings ought to be conducted in public; that there should be greater room for NGO participation, and for Panels to accept and consider amicus briefs. To these suggestions, James Harrison, in his thoughtful and prodigiously researched book on human rights and the WTO, adds a number of proposals that he believes would broaden the scope for ensuring that the WTO not only refrains from negatively affecting human rights, but also positively promotes their advancement. These include: monitoring the effects of trade rules on human rights protections (by way of human rights impact assessments, for example); the promoting of understanding among trade specialists and members of the WTO's dispute-settlement bodies of the jurisprudence of international human rights laws; and the insertion of express human rights reference in certain key WTO treaties.<sup>134</sup>

Perhaps most significant, however, is Gabrielle Marceau's trenchant assessment of what changes need to be made to the dispute-settlement regime within the context of the current situation. Marceau, formally a Counsellor in the Legal Affairs Division of the WTO secretariat, and who

130 Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5 *World Trade Review* 177.

131 Michael Booth, 'Argentina: Where the Polo Crowd Swing Swing', *Independent*, 4 February 2001, available at [www.independent.co.uk](http://www.independent.co.uk).

132 Shaffer, 'The Challenges of WTO Law', at 197.      133 See [www.acwl.ch](http://www.acwl.ch).

134 Harrison, *The Human Rights Impact of the World Trade Organisation*, pp. 225–45.



now works in the Cabinet of the Director-General, is in no doubt that WTO law cannot be interpreted and applied in isolation. She stresses the importance of the fundamental principle of international law that states are presumed always to negotiate all their international treaty obligations in good faith.<sup>135</sup>

Therefore [she argues], all WTO members must comply with their human rights obligations and with their WTO obligations at the same time without letting a conflict arise between the two sets of legislations. Hence, it is only reasonable to expect that the WTO adjudicating bodies would interpret WTO provisions taking into account all relevant obligations of WTO disputing states.<sup>136</sup>

What needs to be done to ensure that this 'reasonable expectation' is better fulfilled, Marceau suggests, is that human rights expertise and evidence should, where relevant, be accommodated by the panels and the Appellate Body, and that greater efforts should be invested in having inter-state conflicts between human rights and trade laws reach negotiated settlements rather than proceed to formal adjudication. She also, rightly, points out that if adjudication there must be on these trade and human rights issues, then it is a mistake to rely *solely* on WTO apparatus. The dispute-settlement mechanisms of human rights treaty regimes must also be engaged, which necessitates that they be strengthened to 'reduce the attractiveness of the WTO[s]'.<sup>137</sup>

## Conditionality, concessions and sanctions

### *Trade sanctions*

For many people, trade sanctions are perhaps the first thing that comes to mind when they consider how trade is linked to human rights. And indeed economic sanctions, almost invariably executed with some measure of military backing, have an ancient history as a means to punish, pressure and persuade – from Troy and Carthage, through Xiangyang and Derry, to Leningrad and Sarajevo.

135 That is, the principle of *pacta sunt servanda*, as stipulated in Article 26 of the Vienna Convention on the Law of Treaties 1969.

136 Gabrielle Marceau, 'The WTO Dispute Settlement and Human Rights', in Abbott *et al.* (eds.), *International Trade and Human Rights*, p. 234. Her last point is underlined by the Vienna Convention on the Law of Treaties 1969, Article 31(3)(c), which provides that in the interpretation of treaties 'any relevant rules of international law applicable in the relations between the parties' must be taken into account.

137 *Ibid.* p. 235.

International law's gradual relegation of the use of military force to a mechanism of last resort in dispute resolution between nations, culminating in the UN Charter of 1945,<sup>138</sup> has had the effect of elevating the importance of economic sanctions (*without* military backing) as an instrument of pressure in international conflicts. The UN Charter expressly authorises the Security Council to decide what measures are necessary to implement its decisions, including calling upon member states to institute measures that effect 'complete or partial interruption of economic relations' (Article 41), though this power is constrained by the loosely defined stipulations in Article 2(3) and (4) that such actions must not themselves endanger international peace and security, nor threaten the territorial integrity or political independence of any state.

Since 1945 there has been no shortage of examples of sanctions imposed for human rights reasons – against the Apartheid regime in South Africa; communist regimes in China, Cuba, the USSR and Vietnam; military regimes in Burma and Pakistan; dictatorships in Iraq, Indonesia, Libya, North Korea and Uganda; kleptocracies in Cambodia and Zimbabwe; and repressive theocracies in Afghanistan and Iran. Some of these have been backed by the UN, but many have been minimally multilateral, or even unilateral (such as the US embargo of Vietnam from 1975 until 1995).

Despite their number, variety and longevity (the West's sanctions against North Korea have lasted more than fifty years), sanctions are widely acknowledged as being crude exercises of political and economic power. They can be very effective in imposing economic and social hardships (and thereby themselves occasioning human rights violations), but are seldom effective in promoting political change. The poor, the sick, the marginalised and children all tend to be especially seriously affected, as sanctions almost invariably increase the costs of staple foods, essential medicines and power, and they starve welfare services, food security programmes, water and sanitation services, health care and schools of necessary public funding. Unsurprisingly, embargoed countries will turn elsewhere for economic as well as social and political support: for example, Cuba's reliance on USSR assistance (until 1990) and Burma's current reliance on trading relations with China and to a lesser extent India. Economic sanctions are also often honoured as much in their breach as in compliance, for example Barclays Bank's continuation,

138 Chapter VII, 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression'.

albeit disguised, of investment in South Africa in the 1980s, and in the 2000s the Australian Wheat Board's subversion of the UN 'Oil for Food' programme (which programme was a specialised form of conditional sanction).

That said, one should never underestimate how sanctions can be symbolically important or psychologically significant, especially for those directly suffering from the government actions that have prompted the sanctions. Nelson Mandela has always been clear about how much store he set by the sanctions levied against South Africa's Apartheid governments, calling them a 'potent weapon'.<sup>139</sup> But, even with the benefit of hindsight, it has been extremely difficult to discern any clear causal relationship between the sanctions imposed, and the ending of Apartheid in 1994, the election of Mandela himself as President, and the subsequent enactment of a Constitution with extensive human rights provisions. As the economist Philip Levy concludes in his case-study of the sanctions and Apartheid: 'while foreign companies doing business in South Africa experienced pressure in their home countries to disinvest, it is difficult to distinguish the effects of this pressure from South Africa's diminishing appeal as a borrower'.<sup>140</sup> Political, economic and social changes, in the end, come from complex combinations of internal dissatisfaction and unrest, as well as exogenous factors such as border conflicts, or the death or displacement of a despot, in which sanctions may well play a part, but are never the sole or even the primary cause of change.

As a consequence of the obligation to treat equally all nations with which a member state trades (the principle of the universalising 'Most Favoured Nation' (MFN) status) imposed by the WTO Agreement and the GATT before it, the use of economic sanctions would appear to be barred on the basis that they are necessarily discriminatory. Member states have effectively 'contract[ed] away the right to impose unilateral, trade-restrictive measures to enforce human rights in another Member's territory'.<sup>141</sup> Such a conclusion is what some human rights advocates fear is an especially reprehensible outcome of the WTO, forbidding 'trade

139 Nelson Mandela, 'Closing Address to the 48th National Conference of the African National Congress' (1991), at [www.anc.org.za/ancdocs/history/mandela/1991/sp910700-03.html](http://www.anc.org.za/ancdocs/history/mandela/1991/sp910700-03.html).

140 Philip Levy, 'Sanctions on South Africa. What Did They Do?', Center Discussion Paper No. 796 (Economic Growth Center, Yale University, 1999), p. 5; at [www.econ.yale.edu/growth\\_pdf/cdp796.pdf](http://www.econ.yale.edu/growth_pdf/cdp796.pdf). Levy also notes that to the extent that sanctions did exert pressure on the former governments, it was that coming from the private sector, rather than from the states, that was most effective; *ibid.* p. 2.

141 Eres, 'The Limits of GATT Article XX', at 611–12.

sanctions even in response to violations of human rights or other norms of international law', as Carlos Manuel Vásquez puts it.<sup>142</sup> After all, the whole post-war trade law apparatus has been likened, as mentioned earlier, to a disarmament treaty; with multilateral initiatives expressly intended to regulate trade relations by, inter alia, providing a rule-based adjudicatory system for the settlement of disputes, to replace the use of the unregulated armament of trade sanctions.

The problem has always been when the causes of trade disputes are situated outside trade, as is the case of claims of human rights abuse. If, then, the international trade law regime is to deal with the problem, it must necessarily reach out beyond the boundaries of trade, or at least ensure that its legal borders are sufficiently porous to permit entry of non-trade issues. With some liberal interpretation, the public morals, human health and national security exceptions under the GATT (Article XX(a), (b) and Article XXI respectively) might be read so as to justify some measure of trade sanctions, though there has been little or no jurisprudence on these provisions.<sup>143</sup> Trade sanctions have, however, had some airing in the DSM. In 1997, the EU and Japan challenged the US over Massachusetts' *Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)* of 1996, which barred any companies (US and foreign) who had business dealings with Myanmar/Burma from bidding for state government contracts. The legislation was inspired by ongoing human rights abuses perpetrated on the people of Myanmar by the ruling military junta there. Dispute settlement proceedings were initiated, based mainly on complaints that the law breached the WTO Agreement on Government Procurement which prohibits such discriminatory practices and provides no exception that would justify the Massachusetts law.<sup>144</sup> However, the case lapsed in 2000, after domestic litigation mounted against the legislation led to a judgment from the US Supreme Court pronouncing the law to be unconstitutional.<sup>145</sup>

Related to these specific WTO concerns, there is also a wider debate within international law about the legality of trade sanctions. Sarah

142 Carlos Manuel Vásquez, 'Trade Sanctions and Human Rights – Past, Present and Future' (2003) 6(4) *Journal of International Economic Law* 797, at 801.

143 *Ibid.* 809–10.

144 See *United States – Measure Affecting Government Procurement – Request for Consultations by the European Communities*, WT/DS88/1, 26 June 1997; and *United States – Measure Affecting Government Procurement – Request for Consultations by Japan*, WT/DS95/1, 21 July 1997.

145 *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Cleveland has shown in her work<sup>146</sup> how the foundational legal bases for economic sanctions overlap with international human rights law, with somewhat unclear results. She notes the importance of *jus cogens* principles, which can be understood to bear directly on economic sanctions in two ways. First, they appear to permit states to take appropriate actions (including trade sanction actions) against human rights transgressors to stop violations. But secondly, at the same time, they constrain states from taking actions that would result in the infringement of such basic human rights as protection from slavery and torture, either directly by actions of the sanctioning state, or indirectly, by actions of the sanctioning state that prevent the target state itself from providing adequate protection.

The International Court of Justice (ICJ) has insisted upon the transnational interest that all states have in the preservation of certain fundamental rights and the prevention of their infringement by any nation in the seminal *Barcelona Traction* case (1970).<sup>147</sup> Further, the Court appeared partially to endorse the use of sanctions in *Nicaragua v. US* (1986), when it chose *not* to admonish the US for its termination of economic aid to Nicaragua (rather, its proscriptions were aimed at the active support the US was providing to the Contras both inside and outside Nicaragua).<sup>148</sup> The latter point is perhaps surprising, given the fact that Article 60 of the Vienna Convention on the Law of Treaties (1969) explicitly states that the normal rule that a material breach of a bilateral treaty by one party entitles the other party to terminate the treaty does *not* apply when the treaty is humanitarian in nature.<sup>149</sup>

To this inconclusive state of affairs, international human rights law, alas, brings no obvious resolution. Though some human rights treaties may be read to imply some level of endorsement (see, for example, the earlier discussion on the ICESCR), none provides any unambiguous authority

146 Sarah Cleveland, 'Human Rights Sanctions and the World Trade Organisation', in Francesco Francioni (ed.), *Environment, Human Rights and International Trade* (Oxford and Portland: Hart, 2001), p. 119, at pp. 208–13 *et seq.*

147 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase) [1970] ICJ Reports 3, at 32 (paras. 33–4).

148 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits) [1986] ICJ Reports 14.

149 As underscored by the International Court of Justice, which has noted a 'general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5 of the Vienna Convention)'; in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Reports 16, at p. 47.

for the use of economic sanctions in order to safeguard human rights. This, Sarah Cleveland points out, is in contrast to international environmental agreements which commonly condone trade sanctions in express terms.<sup>150</sup>

So, there is 'no clear trump card'<sup>151</sup> provided either by *jus cogens* principles or by human rights treaties for the use of economic sanctions for human rights ends over the objections that such actions are illegal. And trade sanctions still occur. It can be concluded, therefore, that while international law does have an important normative influence on the conduct of international relations in this area (as in many others), evidently it is not determinative. Where other pressures demand (for example, non-trade relations with other countries, or domestic politics), then trade laws can and will be flouted, or their provisions interpreted imaginatively by states. An illustration of this is provided by the postscript to the demise of the above-mentioned Massachusetts statute targeting corporations doing business in Myanmar. Shortly after the Supreme Court decision, President Clinton issued an Executive Order prohibiting all federal executive agencies from purchasing goods produced 'wholly or in part by forced or indentured child labor'.<sup>152</sup>

### *Preferential treatment and conditionality*

Special and differential treatment has always been a controversial aspect of trade liberalisation, precisely because it appears to counteract the main tenet of the liberalising agenda, namely that trading partners should all be treated equally as between each other, and also that there should be little or no distinction between a country's treatment of domestic and foreign corporate enterprises. Some of this disquiet is voiced by those outside a preferential trade deal – such as many critics of the Lomé Convention and the Cotonou Agreement which until very recently<sup>153</sup> gave the ACP

150 Cleveland has compiled a list of such treaties, which includes instruments covering transboundary movement of hazardous wastes, ozone depletion and the protection of endangered species; Cleveland, 'Human Rights Sanctions and the World Trade Organisation', at pp. 210–11.

151 *Ibid.* p. 213.

152 As noted by Raul Pangalangan, 'Sweatshops and International Labor Standards: Globalizing Markets, Localizing Norms', in Alison Brysk (ed.), *Globalization and Human Rights* (Berkeley: University of California Press, 2002), p. 104.

153 Now being replaced by 'European Partnership Agreements' (EPAs) which, in respect of the ACP, have been heavily criticised for their classical free trade demands that access and liberalisation be reciprocal. See Oxfam, *Partnership or Power Play? How Europe*

(African, Caribbean, Pacific) group of countries privileged access to the EU Market – and some by those within such a deal, over the nature and extent of the conditions imposed on them, including meeting certain human rights standards, in order to gain the preferences on offer.

Special and differential treatment is in fact endemic through trade agreements. It is recognised in various formats including in Accession Agreements; bilateral and regional trade agreements; certain sector-specific treaties (e.g. in the Agreement on Agriculture);<sup>154</sup> ‘Generalised System of Preferences’ arrangements (GSPs); and most recently the suite of initiatives launched under the banner of ‘Aid for Trade’ which ‘aim to help developing countries, particularly LDCs, to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade’.<sup>155</sup> All of these attach conditions on target states usually based on some combination of economic goals (e.g. reciprocal tariff and subsidy reductions, or export targets), and what can be called social and political welfare issues (e.g. labour standards, good governance practices and human rights goals).

Despite its prevalence, there is a sizeable body of literature that sees such conditionality, taken as a whole, as counter-productive. Referring generally to the phenomenon of conditionality in relation to economic deals that developed countries strike with developing ones, Balakrishnan Rajagopal, for example, is very critical about the manner in which conditions are chosen and the form in which they are expressed.

Selectivity is the idea that donors should be more discriminating about the governments they are willing to support. The criteria for such discrimination are by no means self-evident but are supposed to include a good policy environment and a clean government that has not engaged in massive repression, such as the Burmese Junta. These criteria are in the end

*Should Bring Development into its Trade Deals with African, Caribbean and Pacific Countries*, Oxfam Briefing Paper No. 110 (April 2008); [www.oxfam.org/en/policy/briefingpapers/bp110.EPAs\\_europe\\_trade\\_deals\\_with\\_acp\\_countries.0804](http://www.oxfam.org/en/policy/briefingpapers/bp110.EPAs_europe_trade_deals_with_acp_countries.0804).

154 Article 6 of the Agreement on Agriculture, which governs domestic support, and Article 9 of the same Agreement concerning export subsidies, both contain provisions which give special or differential treatment to developing country members, being Articles 6.2 (exempting investment subsidies for agricultural development from domestic support reduction commitments) and 6.4(b) (increasing the level of the *de minimis* exception for developing countries), and Articles 9.2(b) and 9.4 (providing less onerous export subsidy reduction commitments for developing countries during the first six years of the Agreement’s implementation).

155 These are the words used in paragraph 57 of the *Hong Kong Ministerial Declaration* (adopted 18 December 2005), WT/MIN(05)/DEC, that mandated the initiative.

contradictory or self-defeating. It is the absence of good policy that leads to the financial crisis that calls for conditionality-based intervention in the first place; therefore, a good policy environment could not be a criterion for positive discrimination.<sup>156</sup>

In practice, this apparently circular problem is circumvented by, as Rajagopal notes, setting the threshold criterion very low, and by the liberal and pragmatic employment of attitudes of hope over expectation when engaging states in negotiations about such conditions. This broad contextual setting of conditionality bears directly on the specific instance of the impact of human rights conditionality in trade agreements with which I am concerned.

The principal trade-related vehicle through which express human rights conditionality is pursued is the GSP mechanism. GSPs are a specific kind of preferential trade arrangement. Their basic premise is broadly to provide calibrated exceptions to the universalised MFN principle for a wide range of developing countries, in order initially to encourage the maturation of their fragile or emerging economies by giving some targeted privileged access to the host state's markets, and, ultimately, to propel them towards the point where such preferential treatment is no longer required. Their legal legitimacy is obtained through the WTO's so-called 'Enabling Clause'<sup>157</sup> which in effect provides a permanent waiver to the MFN stipulation, by permitting 'differential and more favourable treatment to developing countries', provided it has the intention 'to facilitate and promote the trade of developing countries', and does not, in consequence, 'raise barriers to or create undue difficulties for the trade of any other contracting parties'.<sup>158</sup> The delicate task of facilitating trade for developing states while at the same time not impeding trade relations between other states is the fulcrum upon which the whole apparatus of GSPs balances.<sup>159</sup>

156 Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions' (2000) 41 *Harvard International Law Journal* 529, at 575.

157 Entitled: 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', adopted by Member States under the GATT, 28 November 1979 (L/4903).

158 *Ibid.* para. 3(a).

159 As demonstrated in the reasoning of the Panel and Appellate Body reports in *European Communities – Tariff Preferences* (Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report, WT/DS246/AB/R) in which India challenged the specific conditions set down in the EU GSP regarding trading incentives for certain developing countries taking measures to counteract illegal drug trafficking.



Currently, there are thirteen GSPs,<sup>160</sup> covering every developing country, and although all of them are broadly concerned with the promotion of good political and economic management, there are only two that make specific reference to labour and human rights standards – namely those of the US and the EU.

The US GSP, which has been periodically renewed since 1974, has two categories of target states: (i) some 131 developing states eligible for duty free access to 3,400 lines of products imported into the US, and (ii) further preferences for 42 least developed states that have duty free access to an additional 1,400 product lines.<sup>161</sup> Eligibility for membership of the GSP depends on meeting certain criteria – that the state is non-communist,<sup>162</sup> is not engaged in acts supportive of terrorism, and does not otherwise act in ways contrary to US national interests; acts to protect intellectual property rights and (since 1984), respects core international labour rights (for example, trade union membership, rights to collective bargaining, prohibitions against child labour and forced labour).<sup>163</sup> Continuance of membership depends on avoiding transgressions of these same criteria. Though over the years there have been many hundreds of petitions filed claiming breaches (a great many of which were lodged by American trades union), suspension of a state's membership has occurred relatively rarely.<sup>164</sup>

More telling, I think, has been the maintenance of punitive 'Watch Lists' issued under section 301 of the US *Trade and Tariff Act* 1984,<sup>165</sup> which by virtue of their selective application (notably in respect of states suspected

160 See UNCTAD website on GSPs: [www.unctad.org/Templates/Page.asp?intItemID=1418&=1](http://www.unctad.org/Templates/Page.asp?intItemID=1418&=1).

161 Office of the United States Trade Representative, *US Generalized System of Preferences Guidebook* (Washington, DC: USTR, March 2008), pp. 3, 6.

162 Though this appears to be relaxable where the state is a member of the WTO; thus it is understood that, at the time of writing, the US Trade Representative is considering granting GSP beneficiary status to Vietnam, which joined the WTO in 2007.

163 For the text of the relevant statute, see 19 USC § 2461 *et seq.*

164 There have been only nineteen suspensions since the programme's inception in the mid 1970s, according to data extracted from United States Government Accountability Office, *US Trade Preference Programs: An Overview of Use by Beneficiaries and US Administrative Reviews*, Report to the Chairman, Committee on Finance, US Senate, and Chairman, Committee Ways and Means, House of Representatives (27 September 2007), table 4: 'Changes in Countries' GSP Beneficiary Status since Program Implementation', pp. 68–71.

165 The statutory provision authorises the withdrawal of trade benefits and/or the imposition of duties on goods from countries deemed not to have provided protection for US intellectual property interests. A compilation by the *IP Justice* in the US indicates that Section 301 was utilised against fifty-nine countries (most repeatedly so) between

of flaunting intellectual property laws) have been described by Eric Smith, President of the International Intellectual Property Alliance, as having 'done more than any other provision of U.S. trade law to improve the level of worldwide protection of U.S. products embodying copyright',<sup>166</sup> rather than necessarily promoting the protection of human rights in the target countries.

In their detailed study of the implementation and enforcement of all aspects of the US GSP over twenty years, Lance Compa and Jeffrey Vogt reach the conclusion that 'geopolitics and foreign policy are the chief considerations for applying the GSP labour rights clause, not the merits of a country's compliance or non-compliance with the law'.<sup>167</sup>

In terms of its capacity to contribute to the protection of human rights, what is perhaps the most significant limitation of the US GSP is that its rights component is focused solely on labour rights – and even then on what Bob Hepple calls 'idiosyncratic interpretations' of labour rights. Hepple notes, for example, one bizarre instance in which 'the murder of a trade union leader has been classified as a violation of "human rights" not of a "worker right" and so excluded from the GSP program'.<sup>168</sup>

The EU has also had a continuing cycle of GSPs since 1971, with the latest version established in 2005 to run for three years having been extended for a further three years from 1 January 2009.<sup>169</sup> As with the US regime, the EU GSP provides potential concessions to all developing countries, and additional concessions to some fifty least developed countries.<sup>170</sup> These twin base-line GSP arrangements have been supplemented under the EU scheme by a third arm referred to as 'GSP Plus', which is designed as a sort of human rights compliance 'carrot'. It offers still greater reductions in access barriers to 'vulnerable countries' (picked on economic criteria), provided that the state complies with an expanded list of sixteen human

2001 and 2007; see compilation of *United States Trade Representative (USTR) Section 301 Annual Reports (2001–2007)*, <http://ipjustice.org/wp/wp-content/uploads/2008-Section-301-Table-IPJustice.htm>.

166 As quoted by Susan Sell, 'Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS, and Post-TRIPS Strategies' (2002) 10 *Cardozo Journal of International and Comparative Law* 79, at 101.

167 Lance Compa and Jeffrey Vogt, 'Labour Rights in the Generalised System of Preferences: A 20 Year Review' (2001) 22 *Comparative Labor Law and Policy Journal* 199, at 236.

168 Bob Hepple, *Labour Laws and Global Trade* (Oxford and Portland, OR: Hart, 2005), p. 95.

169 Council Regulation No. 732/2008 of 22 July 2008 [2008] OJ L211/1.

170 The additional concessions for LDCs effectively widen duty free access to product lines that include 'everything but arms'.

rights and labour rights conventions, as well as a further eleven treaties covering environmental protection, narcotics and governance.<sup>171</sup>

Compared to the US enforcement against transgressions of eligibility, the EU has been more hesitant about invoking the ultimate sanction of withdrawing preferences, which was always intended to be an action of last resort.<sup>172</sup> Thus far, there have only been two clear sanctions (Burma, in respect of forced labour in 1997, and Belarus, regarding restrictions on trades union in 2006), and one inquiry into the use of child labour in Pakistan (in 1996). That said, it is fair to conclude that the EU's GSP scheme, with its much broader inclusion of human rights instruments, possesses the greater potential to impact positively on the target states' levels of human rights protection.

While it appears that there can be certain economic benefits of the scheme (see, for example, the gains noted by Ludo Cuyvers and Stijin Verherstraeten in respect of the Association of South-East Asian Nations (ASEAN) countries that are among the greatest potential beneficiaries of the EU GSP),<sup>173</sup> it is very difficult to gauge what impact it is having in human rights terms. This is as true for the US GSP as for that of the EU, despite the former's more aggressive record. Attempts that purport to measure the human rights impact of GSP regimes do not withstand scrutiny, tending too easily to 'mistake motion for action', as Ernest Hemingway warned us against doing in all aspects of life.<sup>174</sup> For example, Emilie Hafner-Burton's survey of the influence of preferential trade agreements 'on government repression' in 177 countries between 1972 and 2002<sup>175</sup> falls prey to the simplistic temptation of interpreting coincidence of compliance or non-compliance as evidence of direct causal relationship with the conditionality of the preferential trade agreements.<sup>176</sup> The complexity

171 Council Regulation No. 980/2005 of 27 June 2005 [2005] OJ L169/1. The relevant conventions are listed in Annex III to the Regulation.

172 As noted by Barbara Brandtner and Allan Rosas, 'Trade Preferences and Human Rights', in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), p. 699, at p. 717.

173 Ludo Cuyvers and Stijin Verherstraeten, *The EU's Generalized System of Preferences and its ASEAN Beneficiaries: A Success Story?* CAS Discussion Paper 47 (December 2005), pp. 11–19.

174 As attributed.

175 Emilie Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59(3) *International Organization* 593.

176 Consider for example the enormous assumptions as to governmental motivations regarding trade and human rights (let alone regarding all the other manifest concerns that impact on day-to-day governmental decision-making) in the construction of her remarkable 'repression formula'; *ibid.* at 614–23.

of reasons why states do or do not adopt certain human rights protections, together with the many gradations of their actual compliance, is so substantial that the only real value of efforts such as Hafner-Burton's is to demonstrate how lacking the human rights and trade communities are in respect of rigorous methodologies to address such important questions of cause and effect. An exposure, let me say, that is both long overdue and telling.

Alongside the GSP, the EU also has a long history of inclusion of human rights provisions in its many bilateral and multilateral trade treaties. Typically, these comprise a standard ('essential elements') exhortation to abide by democratic principles and respect international human rights standards generally, the inclusion (where necessary) of specific human rights concerns peculiar to the parties, and sanctions provisions regarding non-compliance.<sup>177</sup> But these too, despite their promise, have yielded little by way of clear human rights benefits. In his review of their application and enforcement, Lorand Bartels concludes that, 'compared to the range of *possible* scenarios in which human rights clauses might be applied, their actual impact on the EU's external human rights policies has been relatively modest . . . [with] limited use of human rights clauses to suspend benefits provided under agreements'.<sup>178</sup> Amnesty International has even called the 'essential elements' clause a 'dead letter',<sup>179</sup> which damned status is most graphically confirmed by the absence of human rights clauses from so-called sectoral agreements, and some bilateral agreements with certain states – for example, in respect of China (the biggest single benefactor of the EU's preferential trade agreements), and much of South East Asia.<sup>180</sup>

The general tenor of the whole of the EU's apparatus of human rights conditionality in trade relations is one of potential power, but timidity in practice – like 'a shiver waiting for a spine to climb up', as former Australian Prime Minister Paul Keating once put it in a very different context.<sup>181</sup> Some commentators believe that the spine is now there to be climbed – the new EU GSP model being viewed as 'a step forward' in that

177 As discussed in Commission Communication (COM 216/1995) of 23 May 1995 on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, available at [http://ec.europa.eu/external\\_relations/human\\_rights/doc/com95\\_216.en.pdf](http://ec.europa.eu/external_relations/human_rights/doc/com95_216.en.pdf).

178 Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005), pp. 37–8.

179 As quoted in *ibid.* p. 38. 180 *Ibid.* pp. 34–5.

181 Unsurprisingly, perhaps, in light of Keating's acerbic reputation, this was his *ad hominem* assessment of the then leader of the Opposition (and the next Australian Prime

direction<sup>182</sup> – while others continue to call for greater efforts to be made to strengthen the backbone of human rights conditionality within trade relations, by, for instance, focusing much more on the most economically vulnerable countries (e.g. small island states and land-locked states) where leverage is greater and substantial assistance potentially more effective.<sup>183</sup>

Whatever the precise format of human rights conditionality in the EU or US schemes, their application in practice has to be focused on assisting (and cajoling) ‘governments to deliver the human rights entitlements of their people in the course of their financial [and trade] programs, not on making demands as conditions for assistance’.<sup>184</sup> The impact is more likely to be more effective and actively embraced by the target states where the approach is facilitative rather than when it is intended and viewed as being admonitory and coercive.

### Conclusion

In the late 1990s the UN Sub-Commission on Human Rights boldly declared that ‘human rights are the primary objective of trade, investment and financial policy’.<sup>185</sup> In the intervening years, while much has been said and written about the relationship between trade and human rights, there have been few steps taken within trade circles towards demonstrating agreement with such a statement, let alone clear, positive steps taken towards its fulfilment.

To be sure, there has been the establishment of grounds for a better understanding of what the economic benefits of trade can and have done for economic development, social welfare and political stability, and thereby for better standards of human rights observance. But in terms of trade practice, we are still some way from ‘“delinking” international trade strategy from the theory of neo-liberalism and setting a high priority

Minister), John Howard; as reported by David Fickling, ‘Strewth! Australian Prime Minister Tells Larrikins to Mind Their Tongues’, *Guardian*, 10 July 2004, p. 3.

182 Harrison, *The Human Rights Impact of the World Trade Organisation*, pp. 120–1.

183 See Bartels, *Human Rights Conditionality in the EU’s International Agreements*, pp. 42–4, and also Lorand Bartels, ‘The WTO Legality of the EU’s GSP+ Arrangement’ (2007) 10(4) *Journal of International Economic Law* 869, at 883–4. In the latter Bartels admits, of course, that such a truncated but more intrusive scheme would be politically difficult to sell within (and outside) the EU.

184 Adam McBeth, ‘Global Rules for Global Players: International Economic Actors and Human Rights’, PhD thesis 2007, on file with author, p. 210. McBeth was here drawing on the arguments of Jorge Daniel Taillant, *Human Rights and the IFIs*, paper for Sustainable Justice Conference, Montreal (June 2002), part 1.

185 Sub-Commission on Human Rights Resolution 1998/12 (20 August 1998).

on compliance with human rights norms', which, Gig Moon argues, remains a key and, as yet, unfulfilled objective of global trade relations.<sup>186</sup>

The development orientation of the WTO, as the unchallenged lodestone of multilateral trade policy development, rule creation and dispute resolution, holds the promise to do more in these respects. There are both legal and political (or rhetorical) avenues within the WTO down which human rights concerns have travelled. The legal avenues are restricted, however, in jurisdictional, capacity and cultural terms, as the above discussions on the limited accommodation for human rights arguments in the 'exceptions clauses', and the ad hoc and piecemeal formats of the US and EU GSP schemes illustrate. There are indications of change, such as with the advances in the access to certain essential medicines in the developing world through the amendments to the TRIPS compulsory licensing scheme,<sup>187</sup> which prove 'that change is indeed possible . . . however slow and cumbersome' it may be, as Adam McBeth puts it.<sup>188</sup>

Nonetheless, the legal route is not – at least not alone – the basket into which to put all one's trade and human rights eggs. The philosophical, political and diplomatic arenas are predominantly important at this stage; it is, fundamentally, a case of winning over 'hearts and minds', more than winning legal cases. Marking the tenth anniversary of the WTO, the lacklustre Sutherland Report in 2005 did little to inspire this cause. Joost Pauwelyn describes it as 'a missed opportunity'. 'The overall message of the report', he laments, 'is an unabated defense of the WTO largely unchanged [save the (unoriginal) calls for greater transparency] and, for the most part, to be kept safely secluded from other international efforts to correct market failures and accompany free trade with social and other non-economic safety nets.'<sup>189</sup> Reflecting, in part, these sorts of criticisms, Pascal Lamy, who was appointed as the new Director-General of the WTO shortly after the publication of the Sutherland Report, has

186 Gillian Moon, 'The WTO-Minus Strategy: Development and Human Rights under WTO Law' (2008) 2 *Human Rights & International Legal Discourse* 37, at 78.

187 Initially, developing countries have preferred to strike deals with large pharmaceutical companies to obtain access to heavily subsidised drugs, rather than invoking the compulsory licensing option, though certainly the threat of the latter has proven to be a powerful bargaining chip; see Adam McBeth, 'When Nobody Comes to the Party: Why Have No States Used the WTO Scheme for Compulsory Licensing of Essential Medicines?' (2006) 3 *New Zealand Yearbook of International Law* 69, at 97–8.

188 *Ibid.* 99.

189 Joost Pauwelyn, 'The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO' (2005) 8(2) *Journal of International Economic Law* 329, at 329–30.

pursued (as earlier discussed) a ‘humanising globalisation’ agenda, which has included the WTO-led ‘Aid for Trade’ initiative.<sup>190</sup> Such enterprise, even if beholden to the desires and determinations of the member states of the WTO, nevertheless represents the sort of broad spaces in which discussions of trade and human rights might be fruitfully pursued. That is, if and when the member states extricate themselves from the politically charged textual intricacies of closing the current Doha Round.

Speaking personally, I have lost count of the number of trade specialists (lawyers, economists, national and international bureaucrats, and academics) who roll their eyes whenever mention is made of human rights and trade, followed immediately by pained pronouncements that of course there is a great deal of misunderstanding over what that can and does mean in terms of how trade operates and how it is regulated. It is likely that they have heard many unfounded criticisms and bad arguments. But there are a number of valid, well-reasoned arguments why trade and human rights are and can be linked – many of which are represented in this chapter. There is a very great difference between those who use their experiences of bad arguments to justify both their supercilious response that their area of expertise is much misunderstood and their subsequent disingenuous dismissal of *all* talk of a trade and human rights linkage, and those whose awareness of the awfulness of some human rights and trade arguments is matched by their preparedness to accommodate the better ones.

Such open-mindedness together with the adoption in certain quarters of broader perspectives on trade and human rights linkages is certain to become even more significant as bilateralism increasingly becomes the vehicle of choice for new trade and investment negotiations.<sup>191</sup> Alongside much else, this movement towards bilateralism has important implications for human rights. The manifest ‘inequality of arms’ experienced by many developing nations (and all of the least developed states) in bilateral trade negotiations with rich states presents not only opportunities for their economic exploitation by the latter, but also opportunities to advance human rights compliance agendas with those same countries,

190 For an overview of which see the joint OECD/WTO, *Aid for Trade at a Glance 2007: First Global Review* (Paris: OECD; Geneva: WTO, 2007).

191 In respect specifically of the now more than 2,500 Bilateral Investment Treaties (BITs) there are particular human rights implications relating to the treaty provisions that limit host states’ ability to meet their international human rights obligations, in favour of the interests of the home state investor. I discuss this issue in further detail in [chapter 4](#).

whether earnestly intended as such, or as disguised protectionist measures (or a little of both). For trade-related human rights programmes to have lasting impacts in developing states they must reach beyond merely the export sector, otherwise 'there is a danger that [they] will fail to make a difference to working conditions in the usually much larger informal and non-export sectors'.<sup>192</sup>

No matter the re-emergence of robust trade bilateralism, the WTO will still, of course, figure largely in the picture (as will other multilateral organisations more concerned with human rights, such as the UN). But the important human rights impacts of trade, both positive and negative, will also occur in forums that operate alongside or outside the WTO, even if they too hinge upon the demands and dispositions of states parties, their representative politicians and their bureaucrats.

192 Harrison, *The Human Rights Impact of the World Trade Organisation*, p. 114.