A Human Rights Approach to Trade and Investment Policies

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Introduction

This paper proposes a framework for a human rights approach to the negotiation and implementation of trade and investment agreements. It is structured in two parts. A first part presents the normative framework (I.). It recalls the sources of international human rights law, the status of human rights in international law, and the content of human rights obligations imposed on States under human rights treaties or other sources of human rights law. A second part seeks to list the techniques which may be explored in order to ensure that States’ commitments under trade and investment agreements do not conflict with their human rights obligations (II.). This second part is divided in two sections. A first section explains how trade and investment regimes develop in isolation from human rights regimes, giving rise to what has been referred to as the ‘fragmentation’ of international law. A second section reviews potential solutions to the problem of fragmentation.
The Normative Framework

The obligation of States to comply with human rights has its source, first and foremost, in the treaties they have ratified. But this obligation also follows from the United Nations Charter itself. And human rights have acquired the status of customary international law and they constitute general principles of law, both of which sources are mentioned in Article 38(1)(c) of the Statute of the International Court of Justice as sources of international law (1. The sources of international human rights law). In addition, human rights have a specific normative status, implying that any international treaty which conflicts with the obligation of the State to comply with human rights should either be considered void, or disapplied to the extent that there exists such a conflict (2. The normative status of international human rights). Finally, the content of the obligations imposed on States under human rights instruments (or, indeed, under human rights as part of general public international law) is now better understood, allowing to identify which measures States should take in order to ensure that their trade and investment policies remain consistent with their human rights obligations. States are under an obligation to respect, to protect, and to fulfil human rights. These obligations are not limited geographically: a State must not only comply with these obligations towards the persons on its national territory, but also towards persons situated outside its borders. A matrix can therefore be developed, which takes those obligations into account, although it should be complemented by taking into account the right to development (3. The matrix of human rights obligations).

1) The sources of international human rights law

As members of the Organization of the United Nations, all States have pledged under Article 56 of the UN Charter to ‘take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55’ of the UN Charter, which imposes on the United Nations a duty to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’. Scholars have sometimes questioned whether these provisions in fact impose legal obligations on States, or simply defined in general terms a programme of action for the organization. The sceptical views, however, were often confusing the question whether the Charter’s provisions were self-executing, with the question whether they were legally binding; and they were premised on the indeterminate character of the content of the ‘human rights and fundamental freedoms’ referred to in the Charter, which the Universal Declaration of Human Rights adopted in 1948 precisely sought to clarify authoritatively. The International Court of Justice seems to have definitively put an end to the controversy in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), where it stated that ‘to establish (...), and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter’. Although the statement was made in

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3 1971 I.C.J. Reports 16.
relation to the obligations of South Africa as a Mandatory power in South West Africa, there is no reason to restrict it to this hypothesis; instead, it would seem to follow from the Opinion that the UN Charter imposes on all States that they comply, at a minimum, with a core set of human rights, which the Charter refers to without listing them exhaustively.

In addition, the Universal Declaration of Human Rights, although adopted as a non-binding resolution by the United Nations General Assembly on 10 December 1948, is considered to have acquired the status of customary international law or alternatively to codify principles which, due to their large recognition and due to the fact that they are replicated in a large number of national constitutions throughout the world, across various regions and legal systems, may be said to constitute general principles of law.

2) The normative status of international human rights

Should a conflict arise between the obligations imposed on a State under international human rights law and obligations imposed under a trade agreement, the former should prevail. Two arguments are traditionally put forward in order to justify the view that human rights occupy a hierarchically superior position among the norms of international law.

First, Article 103 of the UN Charter provides that ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. Since one of the purposes of the UN Charter is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination (Art. 1(3) and 55), and since Article 56 clearly imposes obligations both on the organization itself and on its Member States to contribute to the fulfilment of this objective, it would follow, then, that any international obligation conflicting with the obligation to promote and protect human rights should be set aside, in order for this latter objective to be given priority.

Second, although the norms of international law (custom, treaties, and the ‘general principles of law recognized by civilized nations’) are otherwise not hierarchically ordered according to their various sources, certain norms are specific in that they embody a form of international public policy. In the specific context of the law of treaties, the Vienna Convention on the Law of Treaties states that any treaty which, at the time of its conclusion, is in violation of a peremptory norm of general international law, is to be considered void. A peremptory norm of general international law is defined as ‘a norm accepted and recognized by the international community of States as a

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6 For the argument that founding the recognition of human rights in general public international law should be on the basis of the notion of ‘general principles of law’ rather than on customary international law, see Bruno Simma and Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Australian Yearbook of International Law 82 (1988-1989).

whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.\(^8\) The existing judicial practice shows that such *jus cogens* norms are those which ensure the safeguard of two fundamental interests of the international community: those of its primary subjects, the States, whose essential prerogatives are preserved by the recognition of their equal sovereignty and by the prohibition of the use of force in conditions other than those authorized by the UN Charter; and those of the international community in the preservation of certain fundamental human rights.\(^9\)

In theory, the sanctions attached to the hierarchical principle will differ according to whether it is based on Article 103 of the Charter or on the nature of the superior norms recognized as *jus cogens*: whereas a treaty found to be in violation of a *jus cogens* norm is void and must be considered to have never existed, a treaty incompatible with obligations flowing from membership in the United Nations does not disappear, but shall not be applied to the extent of such an incompatibility.\(^10\) However, the logics under which each of these mechanisms operate are not systematically opposed to one another: where a treaty is not per se in violation of a *jus cogens* requirement but may lead to certain decisions being adopted which result in such a violation, only those decisions shall have to be considered invalid, while the treaty itself will remain in force.\(^12\)

Human rights obligations imposed on States are also specific in that they do not primarily define obligations owed to other States, as do rules contained in traditional treaties. Rather, these obligations are owed, first and foremost, by a State to its own population. Human rights treaties therefore have an ‘objective’ character in that they are not reducible to bilateral exchanges of advantages between the contracting States. The principle has been put concisely by the Human Rights Committee: ‘Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights’.\(^13\) The idea is not a new one. In its Advisory Opinion on the issue of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,\(^14\) the International Court of Justice already noted the specificity of the 1948 Genocide Convention which, it stated, ‘was manifestly

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8 Article 53. Article 64 of the Vienna Convention on the Law of Treaties adds that ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates’.


12 See *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10)*, commentary to article 40 of the International Law Commission’s draft articles on State Responsibility, para. (3) (also reproduced in James Crawford (ed.), *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge Univ. Press, 2002, at p. 187) (‘...one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen’).

13 Human Rights Committee, General Comment no 24 (1994): Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, at para. 17.

adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties’. The same idea was expressed as follows by the Inter-American Court on Human Rights:

...modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.15

This characteristic of human rights rules – which also is visible from the Vienna Convention on the Law of Treaties16 – has sometimes led courts to dismiss the idea that States could invoke their other international obligations, such as obligations imposed under trade or investment treaties, to justify setting aside or restricting their obligations under human rights treaties. In the Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Paraguay argued before the Inter-American Court of Human Rights that it was precluded from giving effect to the indigenous community’s right to property over their ancestral lands because, among other reasons, these lands now belonged to a German investor, protected by a bilateral investment treaty. The Court answered: ‘the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States’17.

3) The matrix of human rights obligations

3.1) Obligations to respect, protect, and to fulfil

Human rights impose on States three types of obligations: these are the obligation to respect the rights which individuals enjoy, to protect these rights from being infringed by the acts of

16 The Vienna Convention on the Law of Treaties recognizes the specificity of human rights treaties by stating in Article 60(5) that the principle according to which the material breach of a treaty by one party authorizes the other party to terminate or suspend the agreement does not apply to ‘provisions relating to the protection of the person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties’.
private parties, and to fulfil these rights. As regards the right to food for instance, these obligations have been described as follows:

The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.\(^\text{18}\)

3.2) **Extraterritorial obligations**

These obligations are imposed on States not only towards persons found on their national territory, but also towards persons situated outside the national borders, although in this second set of situations, the State must discharge its obligations taking into account the sovereign rights of the territorial State. Indeed, it is now widely agreed that human rights treaties may, in principle, impose on States parties obligations not only when they adopt measures applicable on their own territory, but also extraterritorial obligations, which may include positive obligations going insofar as the State can influence situations located abroad.\(^\text{19}\) In the General Comment adopted in 2002 on the right to water, the UN Committee on Economic, Social and Cultural Rights notes:

> To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. **Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.**\(^\text{20}\)

For instance, where a State heavily subsidies agricultural products which are exported by economic actors based under its jurisdiction, thus crowding out the local producers in the receiving markets, this should be treated as a violation of the right to food by the exporting State, since it constitutes a threat to food security in the importing country.\(^\text{21}\) This is also the spirit of the General Comment which the Committee on Economic, Social and Cultural Rights adopted on the relationship between economic sanctions and respect for economic, social and cultural

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\(^{18}\) U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The right to adequate food (art. 11), U.N. doc. E/C.12/1999/5, at para. 15.


\(^{21}\) See, mutatis mutandis, as regards the appropriate provision of food aid, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The right to adequate food (art. 11), U.N. doc. E/C.12/1999/5, at para. 39 (‘Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries’).

23 See para. 51 of General Comment No. 8.

24 U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The right to adequate food (art. 11), U.N. doc. E/C.12/1999/5, at para. 19. See also para. 36: ‘States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end’.


Under the principles of international law [...] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.\textsuperscript{27}

The principle according to which no State may allow damage to be caused to another State by use of its territory is not limited to environmental damage.\textsuperscript{28} In the \textit{Corfu Channel Case}, while accepting that an activity cannot be imputed to the State by reason merely of the fact that it took place on its territory, the International Court of Justice nevertheless noted that ‘a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation’: where the State knew or ought to have known that activities unlawful under international law (i.e., activities that would constitute a violation of international law if they were imputed to the State in question) are perpetrated on its territory and cause damage to another State, the first State is expected to take measures to prevent them from taking place or, if they are taking place, from continuing.\textsuperscript{29} Brownlie comments on this basis that the State ‘is under the duty to control the activities of private persons within its State territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State’.\textsuperscript{30}

The realization of the right to adequate food should therefore guide the establishment of efforts aimed at developing a multilateral trading system. Article 28 of the Universal Declaration of Human Rights states that ‘everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’. This provision recognizes the co-dependency of national and international measures in the fulfilment of human rights. The right to adequate food can only be fully realized by States within a multilateral trading system which is equitable. Such a system should not only refrain from imposing obligations which directly infringe upon the right to food. It should also ensure that all States have the policy space they require to take measures which contribute to the progressive realization of the right to food under their jurisdiction. As stated by the Committee on Economic, Social and Cultural Rights, the International Covenant on Economic, Social and Cultural Rights requires that they ‘move as expeditiously as possible towards that goal’ by making ‘full use of the maximum available resources’ (E/C.12/1999/5, para. 9). This obligation must be facilitated, not impeded, by the organisation of the multilateral trade regime.

\textsuperscript{27} \textit{Trail Smelter Case} (United States v. Canada), 3 R.I.A.A. 1905 (1941).

\textsuperscript{28} As regards environmental damage, see particularly the dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the \textit{Legality of threat or use of nuclear weapons}. Referring to the principle that ‘damage must not be caused to other nations’, Judge Weeramantry considered that the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country’s population, should be decided ‘in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law’.

\textsuperscript{29} \textit{Corfu Channel Case}, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 4, at p. 18. The fact of territorial control also influences the burden of proof imposed on the claiming State that the territorial State has failed to comply with its obligations under international law. Although it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors’, nevertheless the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion’.

\textsuperscript{30} I. Brownlie, \textit{System of the Law of Nations}. \textit{State responsibility}, Clarendon Press, Oxford, 1983, p. 165. See also N. Jägers, \textit{Corporate Human Rights Obligations: in Search of Accountability}, Intersentia, Antwerpen-Oxford-New York, 2002, p. 172 (deriving from ‘the general principle formulated in the \textit{Corfu Channel} case – that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States – that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control’).
Indeed, a failure by a State to ensure that no activities are conducted on its territory which could lead to affect the enjoyment of human rights on another State’s territory could violate the prohibition imposed on all States to aid or assist another State in committing an internationally wrongful act, in the meaning of Article 16 of the ILC’s Articles on State Responsibility. This is relevant, in particular, as regards the various forms of support a State routinely provides to corporations domiciled on its territory, which intend to export or invest abroad. When such support is given with the knowledge that this will facilitate the commission of human rights violations by that corporation abroad which the host State will be unwilling or unable to prevent or to sanction, the home State is in effect aiding or assisting the host State to violate its obligation to protect human rights, thus becoming a complicit in this omission. States offer significant support to their companies investing abroad, in most cases without imposing compliance with human rights as a condition to the provision of such support. Such support takes a variety of forms, the most spectacular of which consist in the conclusion of bilateral or multilateral investment treaties recognizing a number of rights to the investors from each State party having established themselves on the territory of another party, and in the guarantees offered by export credit agencies or other institutions, which provide insurance against the risks of investment in foreign jurisdictions. According to the argument based on complicity, such support may lead to a situation where the home State knowingly facilitates or encourages the violation of human rights by the host State. This would be the case, in particular, where ‘economic stabilization’ clauses are inserted into host government agreements concluded between the host State and the foreign investor, insulating the investor from the risks of a diminished profitability which would result, for instance, from the adoption by the host State of social or environmental standards, although these may be evolving in conformity with the international obligations of that State. In such situations, by actively supporting the investor, whose presence in the host State makes it more difficult or even impossible for that State to comply with its international obligations, the home State might become a complicit in the violation by the host State of the said obligations. Similarly, ‘States which have provided financial banking for these projects through [export credit agencies] to corporate nationals involved (...) may be found to be complicit in a host State’s internationally wrongful act (i.e. a violation of its human rights obligations) in relation to respecting and protecting the international human rights of persons affected by the [corporation’s] activities’.

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31 Article 16 of the ILC’s Articles on State Responsibility provides that: ‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State’.


34 On such clauses, see Stabilization Clauses and Human Rights. A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 11 March 2008, XV + 43 pp.


In a situation of complicity such as that described above, the extraterritorial human rights obligations of States derive, not only from the human rights obligations of the State in a position to affect the enjoyment of human rights of populations under the territory of another State, but also from the human rights obligations of the territorially competent State itself. The obligations of the latter State may be relevant also in another way. When, in 1997, the Committee on Economic, Social and Cultural Rights adopted its General Comment on the relationship between economic sanctions and respect for economic, social and cultural rights, it took the view that States imposing sanctions should not, in doing so, jeopardize the economic, social and cultural rights of the population in the targeted State. It stated in this regard:

While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it [38]. Most of the non-permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...”. When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near-universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.

The notion that an obligation would be ‘doubly’ incumbent upon a State can only be understood by reference to the idea of complicity. Of course, all that matters, where sanctions adopted by one State have an impact on the population of another State, are the obligations of the first State under international law, which may or may not include the obligation not to violate the rights of populations outside its borders. And the General Comment clearly implies not only that a State party to the International Covenant on Economic, Social and Cultural Rights is under an obligation not to violate the rights stipulated in the Covenant in other countries, but also that such an obligation could be breached by that State voting in favor of adopting or upholding economic sanctions which have a severe impact on the realization of economic and social rights in the targeted country. But this does not mean that the obligations of the targeted State towards its own population are irrelevant to the determination of the question whether or not the State adopting sanctions has violated its own obligations. For, in addition, States parties to the International Covenant on Economic, Social and Cultural Rights may be violating their international obligations by coercing other States into violating their own obligations under either the Covenant or under other rules of international law.

38 China ratified the International Covenant on Economic, Social and Cultural Rights in 2001, after the date at which this General Comment was adopted.
40 This is of course the hypothesis envisaged under Article 18 of the International Law Commission’s 2001 articles on Responsibility of States for internationally wrongful acts (cited above, n. 12), under the heading ‘Coercion of another State’: ‘A State which coerces another State to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) The coercing State does so with knowledge of the circumstances of the act’. 
3.3) **The matrix**

The tripartite typology developed in order to clarify the set of human rights obligations imposed on States applies similarly as regards their extraterritorial dimensions. The following table illustrates the obligations of States to take into account their human rights obligations in their trade or investment policies:

<table>
<thead>
<tr>
<th>Obligations towards the State’s pop.</th>
<th>Extraterritorial obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obligation to respect (to abstain from measures which negatively impact on the enjoyment of human rights)</td>
<td>Obligation not to impose on other countries trade or investment treaties which may impede the realization of human rights on their territory</td>
</tr>
<tr>
<td>Obligation not to conclude trade or investment treaties that may threaten the livelihoods of certain segments of the population</td>
<td>Obligation to abstain from practices, such as dumping, which threaten livelihoods in other countries</td>
</tr>
<tr>
<td>Obligation to protect (to take measures which regulate the activities of private actors in order to ensure that they do not negatively impact on human rights)</td>
<td>Obligation for the home State to regulate the activities of companies domiciled in that State, in order to ensure that they will not negatively impact on human rights abroad</td>
</tr>
<tr>
<td>Obligation to use existing flexibilities within trade or investment agreements which could shield the vulnerable segments of the population from the negative impacts on human rights</td>
<td>Obligation to regulate the activities of companies, including foreign companies and investors, in order to ensure that they do not negatively impact on the enjoyment of human rights</td>
</tr>
<tr>
<td>Obligation to regulate the activities of companies, including foreign companies and investors, in order to ensure that they do not negatively impact on human rights</td>
<td>Obligation to facilitate the compliance of producers of other countries with standards, to transfer technologies, etc., in order to ensure that producers in other countries may effectively have access to markets</td>
</tr>
<tr>
<td>Obligation to fulfill (to take measures to realize human rights, either by facilitating the exercise of such rights by individuals, or by providing goods or services)</td>
<td>Obligation to provide local producers with the means that will allow them to benefit from trade and investment, e.g. by helping them to comply with standards or by enabling access to inputs for the poor, by making technologies available, or by supporting self-organising of the producers in order to strengthen their bargaining power</td>
</tr>
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</tr>
</tbody>
</table>

Whether or not there is general agreement on the obligations thus outlined, one clear limitation to this approach is that it imposes a framework to the negotiation, conclusion and implementation of trade and investment agreements, but may not be sufficient to guard against the risks entailed by the kind of development which trade and investment deregulation may lead to. For instance, trade deregulation may lead a country to favor cash crops for export instead of food crops for local consumption, leading to increased vulnerability both when prices go up on international markets – leading to balance of payments problems for net-food importing countries, who depend on imports in order to feed their population – and when prices go down – leading to loss of revenues for local producers, particularly if they face competition from food
imported at dumping prices on domestic markets –. The development of monocultures for exports which is encouraged by trade deregulation leads to increased competition with other forms of agriculture for cropland and water resources. Specialization of countries in the production and export of certain goods or commodities – particularly agricultural commodities, for developing countries – may lock those countries into a form of development which will inhibit the development of an industry or services sector.

A development path pursued at the cost of increased vulnerability to declining terms of trade and the volatility of commodity prices thus may constitute a threat to the right to food. It also may put in jeopardy the realization of the right to development. As proclaimed by the UN General Assembly in 1986, the right to development is an ‘inalienable human right by virtue of which every human person an all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights can be fully realized’ (Art. 1). It should be seen as requiring an international environment enabling States to implement policies which allow them to pursue a form of development which is not limited to economic growth but includes the full realization of all human rights. States have both a right to development, to which corresponding duties are attached for the international community, and a duty towards their population, to pursue a form of development leading to an expansion of human freedoms. The trade and investment agreements they conclude or which are pressed upon them should be tested also against this requirement.

The Problem of Inconsistency

Nevertheless, despite this theoretical affirmation a normative superiority of human rights over other commitments of the States (see above, part I, section 2.), including those contained in trade and investment agreements, difficulties remain at the level of implementation, due to the fragmentation of international law into self-contained regimes. The following section explains the problem. In the second section of this part, a number of solutions to this problem are then explored.42

1) The risks entailed by the development of self-contained regimes

The different rules recalled above should allow the coexistence of different sets of obligations imposed on States – under human rights regimes, under WTO agreements, and under trade and investment agreements concluded at a regional or bilateral level –, by affirming the primacy of human rights obligations. However, such coexistence may nevertheless be problematic in practice, due to what is referred to as the problem of fragmentation of international law, i.e., the fact that international law is split up into highly specialized “boxes” that claim relative autonomy from each other and from the general law.43 The separate development of ‘trade law’, ‘investment law’, and ‘human rights law’, each with their own set of rules and institutions for dispute-resolution, in the absence of coordination between these regimes,44 results in a mismatch between the affirmation of a hierarchical priority of human rights and the reality of trade and investment regimes which allow for the enforcement of States’ obligations under trade or investment regimes through the adoption of sanctions, which have a particularly strong disciplining power when applied against smaller countries.45

As regards the relationship between human rights law and treaties concluded in the areas of trade and investment, three risks in particular deserve to be highlighted:

• A first risk is that of conflicting obligations being imposed on one State. For instance, a State would need to adopt certain measures in the environmental or social field, in order to comply with provisions contained in human rights treaties protecting the right to a healthy environment or labor rights, but by doing do, the State may be found in violation of investment treaties protecting the rights of foreign investors in the form of ‘economic stabilization’ clauses46 or clauses prohibiting indirect expropriation. Or a State would need to raise import tariffs in order to protect the livelihood of its farmers, whose ability to live off their crops could be threatened by sudden import surges of agricultural commodities sold at dumping prices on the international markets. In the absence of clear rules contained in trade and investment treaties which would allow the adoption of measures required in order to comply with a State’s human rights obligations, a State may be unwilling to run the risk of being found in violation of the former obligations, because of the trade sanctions or arbitral awards this could lead to. This may be called ‘regulatory chill’.

43 Fragmentation of international law, para. 8.
46 On such clauses, see above, note 34.
• A second and quite different risk is that the State, which has opened its economy by the conclusion of trade and investment treaties, may fear to put in place certain policies which would result in that State being less attractive as a destination for foreign direct investment, or that would make its producers less competitive. Even if, under the trade and investment treaties in force for that State, it would be perfectly allowable to take certain measures, a State may be reluctant to do so, where this could affect that State’s competitive position on international markets. This may be called ‘competition chill’.

• Finally, a third risk is that, by opening up its economy to trade and investment, the country loses revenues, for example as a result of that country lowering import tariffs or because foreign companies operating on the national territory pay their taxes in another jurisdiction where their profits are repatriated. This could make it difficult for the country concerned to finance certain public policies, in health or education for instance, although such policies may be crucial in realizing human rights. There is no ‘chill’ here, but rather an incapacity of the State to make progress towards fulfilling human rights under its jurisdiction, and to reap fully the benefits of trade and investment liberalization.

The question of fragmentation of international law into a number of separate, self-contained regimes, leading to inconsistencies between the human rights obligations of States and its other commitments, only has direct bearing on the first of these three difficulties. Yet, a number of solutions which are proposed to overcome that difficulty – such as human rights impact assessments or sunset clauses inserted into trade and investment treaties – may also contribute to alleviating the other problems which have been referred to. The following section reviews such solutions.

2) Solutions to the problem of inconsistency

To the fullest extent possible, conflicts between different regimes should be avoided ex ante, by preventing the risks of conflicts. Two such preventative mechanisms should be encouraged. These are a) the insertion of exception clauses or flexibilities into trade or investment agreements; and b) ex ante human rights impact assessments. However, this may not be sufficient. Human rights evolve, under the influence of the body of case-law developed by human rights treaties expert bodies and international courts. The extent to which agreements concluded in the areas of trade and investment may create obstacles to the ability for States to comply with their human rights obligations may therefore be difficult to predict before the implementation of those agreements, since such impacts may depend, for instance, on the attitudes of investors and traders, on the ability of the resources to shift from the least competitive to the most competitive sectors of the economy, or on the evolution of the terms of trade as a result of the evolution of the relative prices of commodities on international markets. Therefore, mechanisms should also be put in place which allow for such impacts to be mitigated. These include c) harmonization of international agreements through interpretation, in accordance with evolving international law; and d) the insertion of sunset (or ‘rendez-vous’) clauses into trade and investment agreements, allowing such agreements to be revised if it appears that they conflict with the commitments of States towards fulfilling their human rights obligations. The following paragraphs review these different possibilities.47

2.1) Exception clauses and flexibilities

Trade and investment agreements should include exception clauses and flexibilities allowing States to comply with their human rights obligations without having to fear economic sanctions. For example, in order to preclude the risk that the protection of investors from one Party against forms of ‘indirect expropriation’ by the host State will result in this State fearing to adopt regulations which may impose excessive burdens on that investor, the 2004 Model Bilateral Investment Treaty guiding United States negotiators contains the following clarification: ‘(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations’.48

Such exceptions or flexibilities are well known in the area of trade law. In the framework of the WTO for instance, Article XX GATT and Article XIV GATS justify derogations from the most-favored nation clause and non-discrimination, inter alia, for reasons of public morals49 and the protection of human life and health. In the Gambling Case a panel and the Appellate Body referred to the notion of ‘public morals’ as it appears in Article XIV (a) GATS as denoting ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’; as to the notion of ‘public order’, which also is referred to in Article XIV (a) GATS, it is seen to refer ‘to the preservation of the fundamental interests of a society, as reflected in public policy and law’.50 These notions thus seem construed broadly enough to allow for human rights considerations to trump the requirements of trade law,51 at least to the extent that this does not lead to arbitrary or unjustifiable discrimination or a disguised restriction of international trade, as would be the case, in particular, if the restrictive measure appeared disproportionate, i.e., if it went beyond what is necessary in order to achieve the desired objective.

In certain cases, the conflict between human rights considerations and the requirements of trade or investment agreements will only appear after the conclusion of such agreements, without such agreements providing for the necessary exceptions or flexibilities. In that case, it may be useful to provide for the possibility of waivers, under a simplified procedure, not requirement a formal amendment to the treaties concerned. Under the WTO framework, this is for instance what allowed the initial establishment in 1971 of a generalized system of preferences (GSP).

50 Appellate Body Report, 7 April 2005, United States – Measures affecting the cross-border supply of gambling and betting services, Gambling Case (Antigua v. United States), WT/DS285/AB/R (para. 296). The question presented to the panel, whose decision was reviewed by the Appellate Body, was whether the United States could adopt measures making it unlawful for suppliers located outside the United States to supply gambling and betting services to consumers within the United States.
scheme improving market access for developing countries,\textsuperscript{52} before this was confirmed in the ‘Enabling Clause’ adopted in 1979.\textsuperscript{53} It is also on the basis of a waiver that the Kimberley Process Certification Scheme restricting trade in conflict diamonds could be made compatible with the GATT non-discrimination requirement.\textsuperscript{54} And of course, this is also the mechanism which was used in order to respond to the concern that the intellectual property rights of the pharmaceutical companies on medicines could constitute an obstacle to the fight against certain epidemics, particularly HIV, in developing countries: a Decision of the General Council of the WTO on 30 August 2003 provided for an ‘interim waiver’ allowing least developed countries and certain other countries to go beyond the flexibilities provided for in Article 31 f) and h) of the TRIPS Agreement ‘in the case of a national emergency of other circumstance’, since it was recognized that these countries may not have the manufacturing capacities in the pharmaceutical sector allowing them to make effective use of a system of compulsory licensing.\textsuperscript{55}

2.2) \textit{Ex ante human rights impact assessments}

Human rights impact assessments must be prepared in order to evaluate the potential impacts of trade or investment agreements prior to the completion of the negotiations. The results of such impact assessments which they should prepare should not only guide their negotiators, but also be taken into account by their partners, who should refrain from imposing concessions which are demonstrated by such impact assessments to be detrimental to the full realization of the right to food. If properly conceived, the conduct of human rights impact assessments would not only ensure the compatibility of trade agreements with the obligations of States under international human rights instruments. They also have the potential to significantly improve the content of the trade and/or investment agreements negotiated, in particular by helping the negotiators to identify any potential flanking measures which could ensure that the agreement will work in favor of human development. Such flanking measures may include, for instance, the setting up of funds to facilitate transition, retraining of workers, back payments to producers in sectors who will have to adapt to new conditions, etc. In addition, explicitly basing impact assessments of trade agreements on a human rights framework presents a number of distinct advantages.

First, by basing impact assessments on human rights, we provide them with a sound, and universally agreed, analytical framework. In the field of social and economic rights which require that individuals have access to certain social goods (such as the right to education, to housing, to medicine, or to food), it is now generally accepted – and this has been made clear in the approach of the Committee on Economic, Social and Cultural Rights – that the following dimensions should play a role, and guide the examination of the question whether the right has been complied with:

a) **Availability** – the good to be provided should be available in sufficient quantity within the jurisdiction of the State party;

b) **Accessibility** – the good has to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: \textit{1°} Non-discrimination (specifically, the most vulnerable groups, in law and fact, must have


\textsuperscript{53} Decision on Differential and favourable treatment, reciprocity and fuller participation of developing countries, 28 November 1979, L/4903, GATT BISD 26S/203.


adequate access to the good without discrimination); 2° Physical accessibility (the good must be within safe physical reach, and accessible to persons with disabilities); 3° Economic accessibility (affordability);

c) Acceptability – the good has to be acceptable to all: there should be no obstacles, cultural or religious, to its access, and it should be of sufficient quality;

d) Adaptability – the good must be provided under conditions which are flexible so it can adapt to the needs of changing societies and communities.

The impacts of trade liberalization on all these levels should be assessed not only at country level, but for different groups of the population, through indicators appropriate for the local circumstances. Such indicators may for instance allow to disaggregate the impacts according to gender, ethnic origin, level of education or professional qualification, or sector of activity. This is one of the reasons why human rights based impact assessments go beyond the standard practice of examining whether a State as a whole, and taking into account its comparative advantages in the production of certain goods or in the provision of certain services, will gain from concluding a trade agreement. From the point of view of human rights, this aggregate measure is insufficient: what truly matters is the impact on different sectors, and differently situated households, of the reform process brought about by trade liberalization.

Second, procedural requirements, in addition to requirements about the fairness of outcomes, would be examined through adequately prepared human rights impact assessments. Indeed, in addition to indicators related to the outcome – i.e., the impact on human rights of the trade/investment agreement in question –, human rights indicators as used in human rights impact assessments should focus on the structural and the process dimensions. They should therefore address, not only the question of how human rights might be affected by certain trade and/or investment agreements, but also which institutional structures exist to ensure that human rights are not violated (ratification of international human rights instruments by the state concerned; transparency of the negotiations; accountability of the Executive, responsible for the trade negotiations, before Parliament; existence of consultations with civil society organizations, including trade unions), and which measures are being adopted by the State concerned to avoid, or mitigate, any negative impact the agreement may have on the enjoyment of human rights (public policies or programmes to facilitate reconversion; safety nets for workers of certain less competitive sectors).

Third, the use of human rights indicators may be empowering for individuals and communities who, on the basis of the results of HRIAs, will be able to formulate claims where their human rights are threatened by trade and/or investment negotiations. As noted by the Office of the High Commissioner for Human Rights, ‘the demand for appropriate indicators is not only for monitoring the implementation of the human rights instruments by States parties, but indicators are also seen as useful tools in reinforcing accountability, in articulating and advancing claims on the duty-bearers and in formulating requisite public policies and programmes for facilitating the realization of human rights. In this attempt to make the reporting, implementation and monitoring of human rights treaties more effective and efficient, there is an understanding that one needs to move away from using general statistics, the relevance of which to such tasks is often indirect and lacks clarity, to using specific indicators that, while embedded in the relevant human rights normative framework, can be easily applied and interpreted by the potential users’. 56

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The preparation of HRIAs should be envisaged in a participatory setting, with the active involvement of human rights and development NGOs, and in close cooperation with the Office of the High Commissioner for Human Rights as well as, as regards labour rights, the International Labour Office. The definition of the terms of reference for HRIAs, including the choice of indicators and of methodology, should be set in dialogue with these actors. Specialized institutions such as UNICEF, the WHO, and the FAO, also should be involved, as regards, respectively, the right to education and children rights, the right to health, and the right to food.

The HRIAs themselves should be performed in conditions which guarantee the full independence of the assessments provided, not exclusively by international trade experts, but also by human rights experts, both acting in close cooperation with one another. The teams in charge of HRIAs should consult broadly within the civil society of the countries concerned, and in cooperation with the local agencies of the UN or of the ILO. A participatory methodology should be used, alongside other methodologies such as modelling, cause-chain analysis, empirical studies, etc.

2.3) Harmonization through interpretation

As a rule, ‘when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations’. As far as treaty interpretation is concerned, this general maxim of interpretation is reflected in Article 31, para. 3 (c) of the Vienna Convention on the Law of Treaties, which stipulates that the interpretation of treaties must take into account ‘any relevant rules of international law applicable in the relations between the parties’. Trade and investment treaties must therefore be interpreted, to the fullest extent possible, so as to be compatible with evolving customary international law and with the general principles of law which are part of international law, as well as with the rules of any treaty applicable in the relationships between the parties to the dispute giving rise to the question of interpretation, as such rules may develop, in particular, through adjudication. In the specific context of the WTO agreements, Article 3.2. of the Dispute Settlement Understanding confirms that WTO norms may be ‘clarified ... in accordance with customary rules of interpretation of international law’, leading the Appellate Body to remark that WTO law cannot be seen ‘in clinical isolation’ from general international law. The Vienna Convention on the Law of Treaties is therefore fully applicable to the interpretation of the WTO agreements, including the principle of ‘systemic integration’ embodied in Article 31, para. 3 (c) of that Convention, and taking into account any developments of international law applicable in the relations between the parties. Only if such interpretation cannot be offered – i.e., if it appears impossible to reconcile the commitments under trade agreements such as those concluded in the framework of the WTO, with human rights obligations – should the trade agreement be set aside and disapplied.

57 Fragmentation of international law, para. 14, at (4).
58 The ‘relevant rules of international law’ referred to by Article 31 para. 3 (c) of the Vienna Convention on the Law of Treaties are not deemed to be static. On the contrary, it has been noted by the International Court of Justice that the interpretation of treaties should be dynamic, since it should take into account the context as it has developed since the initial conclusion of the treaty. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 at p. 31, para. 53 ; Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, pp. 76-80, paras. 132-147.
61 On the need for an evolutionary interpretation, see Appellate Body Report, 12 October 1998, United States – Import Prohibition of Certain Shrimp and Shrimp Products (United States v. India, Malaysia, Pakistan, Thailand), WT/DS58/AB/R, para. 129.
In the system of the WTO, the requirement that the agreements be interpreted in accordance with the other international obligations of the Members is further strengthened by the fact that the authoritative interpretation of the agreements lies in the hands of the Members themselves, within the Ministerial Conference or the General Council. It would be unacceptable for the Members to ignore their other international obligations in their interpretation of the WTO agreements since, if this were authorized, this would constitute an easy means to evade those other, competing obligations. This is particularly so as regards human rights obligations, taking into account the superior normative status of these obligations (see above, I., 2.).

2.4) **Sunset (or ‘rendez-vous’) clauses**

Finally, in addition to ex ante HRIAs, ex post HRIAs should be prepared. Ex ante HRIAs are essential in order to guide the negotiations and to ensure that the parties are fully aware of the human rights implications of the commitments they are entering into. But ex post assessments, 3 to 5 years following the entry into force of the agreement, are equally important, in order to take into account the need to follow indirect impacts and the requirement of progressive realization of human rights. For such ex post assessments to be truly useful, trade and/or investment agreements should contain a ‘rendez-vous’ clause allowing revision where it appears that certain impacts have been underestimated or entirely neglected.

In Article 20 of the Agreement on Agriculture, the Members, '[r]ecognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process', ‘agree that negotiations for continuing the process will be initiated one year before the end of the implementation period [1 January 1995-1 January 2001], taking into account:

a) the experience to that date from implementing the reduction commitments;

b) the effects of the reduction commitments on world trade in agriculture;

c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and

d) what further commitments are necessary to achieve the above mentioned long-term objectives."

This recognizes the need for an objective evaluation of the impact of the Agreement on Agriculture prior to its revision, and in particular, for an evaluation of the impact of the implementation of the agreement on the enjoyment of the right to food. The right to food clearly should be included among the ‘non-trade concerns’ referred to in Article 20 (c), as confirmed explicitly by the Preamble of the AoA which mentions food security among the non-trade concerns which should be taken into account. This is also consistent with the principle of systemic integration

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