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Raising Human Rights Concerns in the World Trade Organisation
Actors, Processes and Possible Strategies

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INTRODUCTION

Whether the WTO helps or hinders the realisation of human rights has been high on the popular agenda in the last couple of years. The WTO has been accused of preventing countries from setting their own health standards, of dangerously eroding citizens' interests in favour of commercial interests, and of being a veritable nightmare for certain sectors of humanity. These accusations usually end with a call to the WTO to recognise the primacy of human rights over international trade law. Such calls have not been heeded, and one might wonder whether they have even been heard.

This article will explore why calls for the WTO to take human rights on board have not yet met with success. To set the exploration off in the right direction, this article starts with an overview of the history, structure and functions of the WTO. It then looks at some specific areas of conflict between human rights norms and WTO-related policies, in order also to give concrete illustration of some of the main political and economic dynamics at play in the WTO. It will conclude that this is a propitious time to raise human rights in the WTO, but will argue that in order to be heard, human rights advocates will have to ensure that the strong legal and ethical arguments supporting the primacy of human rights are directed to the appropriate actors and processes rather than to the WTO as a whole, and that calls for the WTO to respect human rights are framed in the context of the political realities that shape the WTO environment.

I SHARED FEATURES OF THE INTERNATIONAL HUMAN RIGHTS AND TRADE REGIMES

The Universal Declaration of Human Rights was adopted within months of the WTO's predecessor, the General Agreement on Tariffs and Trade, and both had as main aim to prevent the recurrence of the events of the 1930s and 1940s which caused the suffering and devastation that occurred in the Second World War. The Universal Declaration of Human Rights (UDHR) sought to protect individuals from human rights abuses of the kinds millions in Europe and Asia had been subjected to in the 1940s, before and during the War. Indeed, these events demonstrated as never before the extreme consequences that could follow from doctrines of national sovereignty and ideologies of superiority, and highlighted the need to reaffirm safeguards for minorities and human rights, and for respecting the inherent dignity of each human being. In 1942, almost all the States at war against Germany, Italy, or Japan affirmed in the Declaration of the United Nations the need to preserve human rights and justice in their own lands as well as in other lands, and to fight tyranny, cruelty and serfdom everywhere.[1] The Second World War thus provided the opportunity and the motivation to enunciate basic human rights principles, resulting in respect for human rights and fundamental freedoms being listed as one of the central purposes of the

[1] See PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS 145 - 146 (1998).

United Nations in the United Nations Charter, and the adoption of the UDHR by the UN General Assembly soon after.

The origins of the General Agreement on Tariffs and Trade (GATT) go back to the 1930s, when many countries were pursuing beggar-my-neighbour policies including competitive devaluations and high, discriminatory trade barriers in an attempt to keep the effects of the economic depression out of their countries. In fact, this increasing protectionism led to a deep and persistent economic slump, the implosion of trade, the collapse of the international monetary system, and the termination of international lending as well as worsening domestic economic problems, including unemployment and inflation. The great depression of the 1930s made clear the huge costs of the failure to develop international rules and organisational structures to guide the conduct of economic policies, and the absence of an institutional framework allowed countries to pursue opportunistic policies that compounded their neighbours' problems.[2] Most observers hold the great depression and the degradation in international relations caused by the beggar-my-neighbour policies as ultimately responsible for the outbreak of war in 1939. "To a great extent, the rationale for the creation of the GATT in 1947 was to prevent a repeat of the trade wars of the 1930s, not to mention the world war that followed."[3]

Thus both the UDHR and GATT were created to limit the States' scope for making policy decisions that were based on misguided or unjust judgments of the value of human freedom. At first sight, both regimes seem to require the State to stand back from intervening in the areas of human rights or of trade but both in fact require that the government take active steps to create the conditions in which "free" trade can take place or respect for human rights can be guaranteed. Governments must, for instance, ensure that there is a trained judiciary, that laws protecting against arbitrary detention are in place, or that public health policies exist. In the trade field governments must, for instance, ensure that institutions allowing for the review of administrative decisions affecting trade must be established and maintained, and must publish their trade regulations. As Petersmann points out, both human rights and WTO rules are based on non-discrimination; the rule of law; access to courts and adjudication of disputes; promotion of social welfare through peaceful cooperation among free citizens; and parliamentary approval of national and international rules."[4] Moreover, both international human rights law and international trade law assume that if respected, application of these laws will naturally lead to the increased general well-being of people all over the world.[5]

[2] See Barry Eichengreen & Peter B. Kenen, *Managing the World Economy under the Bretton Woods System: An Overview, in* MANAGING THE WORLD ECONOMY 11 (Peter B. Kenen, ed., 1994).
[3] BERNARD M. HOEKMAN & MICHAEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 2 (1995).
[4] Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECONOMIC L. 19, 19 (2000).
[5] This is illustrated by an extract from the WTO's First (Singapore) Ministerial Declaration: "We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of [core labour] standards:" *Singapore Ministerial Declaration*, 13 December 1996, on the web at <www.wto.org/english/thewto_e/minist_e/min96_e/wtodec.htm>

Given their shared origins, objectives and means of administration, one might assume that these two bodies of law are mutually supporting, and evolving on parallel tracks. However, a growing number of voices have been pointing out that this is not the case - the spotlight is increasingly being shone on the differences in the underlying principles and objectives of each of these two bodies of law and the tensions between them. The paucity of communication between trade and human rights policy-makers means that efforts to ensure mutual supportiveness or inclusiveness in the evolution of each of the two regimes were until recently non-existent, and currently fraught with misunderstanding and tension.[6]

Another issue which has confused attempts to raise human rights concerns with the WTO community is that different people are speaking of different things. Some groups would like to see trade, or the WTO's enforcement mechanisms, used to ensure Western human rights standards are enforced on other countries. President Clinton arrived at the WTO's Third (Seattle) Ministerial in November 1999 and called loudly for labour standards to be brought under the WTO's binding dispute settlement mechanism (DSM). Several U.S. groups were angry at the possibility that the EC and Japan would ask the WTO's DSM to rule against a Massachussetts law that would terminate government purchasing contracts with companies doing business in Burma, in order to keep public money from supporting a repressive military regime. Other human rights groups do not seek to use the WTO to enforce their moral choices abroad, but rather, are concerned that WTO rules or the application of these rules will incidentally harm human rights type of concern. The political will to consider these two different types of human rights concerns is very different, and this article will focus on the latter. Because human rights activists have so far not clearly distinguished between the two the WTO has in a sense thrown the baby out with the bathwater.

Before moving on to analysis of specific areas where international trade policy can clash with internationally recognised human rights, this article will present some of the main characteristics of the WTO. This is necessary as the structure and political climate of the WTO is very different to that of other international bodies such as the UN or its human rights machinery. Misunderstanding or misrepresentation of the WTO by human rights activists has resulted in misdirected criticism or suggestions that fell wide of their mark, even if their content was valid.

II THE WORLD TRADE ORGANISATION - STRUCTURE, FUNCTIONS AND HISTORY

A Structure and Functions

The World Trade Organisation (WTO) came into being in 1995 with the aim of providing predictability and stability in international trade, reducing existing barriers to trade and preventing new ones from

[6] See Figure 2, page xxx below. See also *L'OMC se défend contre un rapport critique de l'ONU,* LE TEMPS (Switzerland) (26 August 2000).

developing, in order *inter alia*, to raise standards of living and ensure full employment. The WTO is now one of the world's most important and influential international organisations.[7] The term "WTO" may be used to refer to any one of four distinct things: the WTO Agreement, the WTO as a multilateral, "Member-driven" Organisation, the WTO Secretariat, or the WTO dispute settlement mechanism.

1.The WTO Agreement

The term "WTO Agreement" is used to refer to the package of over 40 Agreements and interpretative Understandings and Decisions that were adopted as a single undertaking at the conclusion of the "Uruguay Round" of multilateral trade negotiations, in 1994.[8] In other words, Members of the WTO are bound by all the WTO Uruguay Round agreements,[9] known collectively as the "WTO Agreement." This contrasts to the situation existing previously in the context of the GATT, often referred to as "GATT *à la carte*", where a State could pick and choose which of the GATT agreements it wanted to be a party to, which led to a complex web of international trade obligations governed by several different dispute settlement provisions.[10] The scope of the WTO Agreement is broad, with agreements on trade in goods, trade in services, agriculture, textiles and clothing, intellectual property rights, subsidies, and investment measures. The WTO Agreement thus covers a wide range of sectors with implications for most aspects of daily life such as food production, pharmaceuticals, banking, transport and telecommunications.

The Preamble of the WTO Agreement recognises that WTO Members' trade and economic relations must

> "be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[11]

2. The WTO, the Organisation

The World Trade Organisation was created by the WTO Agreement, and came into being on 1 January 1995, in a sense replacing or formalising the *ad hoc* organisational arrangement that had existed to

[7] By November 2000 there were 140 Members of the WTO. Another 30 economies, including China and Russia, are in the process of negotiating their accession. For a complete list of WTO Members and applicants for membership, see <www.wto.org/wto/about/organsn6.htm>

[8] The agreements that make up the WTO Agreement are set out in the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (April 15, 1994) reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS - THE LEGAL TEXTS (1994), and in 33 ILM 1140 (1994), on the web at www.wto.org/english/docs_e/legal_e/ursum_e.htm#Agreement (hereinafter URUGUAY ROUND LEGAL TEXTS).

[9] Four "plurilateral" agreements were also adopted during the Uruguay Round – these are only binding on some WTO Members.

[10] It is worth noting that this kind of situation exists in many international legal regimes. The UN Human Rights regime, for instance, is based on a number of different international agreements and States choose which of these agreements they wish to become parties to. Each of the UN Human Rights agreements has its own implementation, compliance or dispute settlement mechanism.

[11] *Marrakesh Agreement Establishing the World Trade Organisation*, in URUGUAY ROUND LEGAL TEXTS, *supra* note 8.

service the GATT. As an organisation, the WTO's functions are to oversee and facilitate implementation of the WTO Agreement to serve as a forum for further multilateral trade negotiations, and to service the WTO's Dispute Settlement Mechanism. In its daily work the WTO is essentially a forum for negotiations in which Members pursue their own self-interest, and its nature as a negotiating forum leaves it little room to step back and discuss policy issues of general concern.

The WTO is "Member-driven", meaning that any policy decisions or initiatives come from its Members. Also, all WTO Members can participate in the councils and committees through which the WTO carries out its work.[12] There are no smaller "Executive Council"-type bodies in the WTO - in other words, all WTO decisions are taken by all of its Members. The Ministerial Conference, which meets at least every two years, is the WTO's Governing Body, setting strategic direction and making all final decisions. The WTO's General Council is the body responsible for overseeing the WTO's day-to-day business and management. WTO delegates in Geneva are the main actors in the WTO's ongoing activities, with technical representatives coming from capitals for meetings of some of the WTO's technical bodies (such as the Council on Trade-related Aspects of Intellectual Property Rights or the Committee on Trade and Environment).

One of the ways in which the WTO discharges its function of overseeing and implementing the WTO Agreement is through the Trade Policy Review Mechanism (TPRM). By this mechanism, the WTO reviews the overall trade policies of each Member on a periodic and regular basis, the frequency of each country's review varying according to its share of world trade. The review is based on two reports, one prepared by the Member being reviewed and one prepared by the WTO Secretariat. The TPRM's objective is to examine the impact of Members' trade policies and practices on the trading system, and to contribute to improved adherence to WTO rules. The approach is not supposed to be legalistic, and the legal compatibility of any particular measure with WTO rules is not examined. The focus is rather on transparency with regard to WTO Agreement obligations and the general impact of the trade policies, both on the WTO Member being examined and on its trading partners.[13]

3. The WTO Secretariat

The WTO's Secretariat, headed by the Director-General, is located in Geneva and is relatively small, with a staff of 500 and a budget of 127 million Swiss francs for 2000.[14] The WTO Secretariat officially only provides administrative and technical support for the WTO and its Members and does not have the power to propose new initiatives or policies, or to elaborate on existing rules, since the Member-driven nature of

[12] Although on paper all countries are entitled to participate in all official WTO meetings, many small or developing countries have been excluded from informal but key negotiating sessions, as discussed below, p. xxxx.
[13] See *Trade Policy Review Mechanism*, Annex 3 to *The Marrakesh Agreement Establishing the World Trade Organisation*, in URUGUAY ROUND LEGAL TEXTS, *supra* note 8. See also HOEKMAN & KOSTECKI, *supra* note 3, at 45.
[14] The World Bank has a staff of around 6000. The Geneva Office of the High Commissioner for Human Rights has a staff of approximately 200, and a yearly budget of approximately U.S.$80 million.

the WTO means that all WTO policies and decisions are made by the Members themselves. In other words, the WTO Secretariat has few or no supranational powers, and it is not likely to be given such powers in the foreseeable future.

4. The Dispute Settlement Mechanism

One of the key features of the WTO is its Dispute Settlement Mechanism (DSM), which is widely considered to be one of the most effective international judicial bodies. The DSM provides a binding dispute settlement procedure, and sets out clearly defined time limits for each stage of a dispute's adjudication. A Member can bring a dispute to the WTO when it believes that another Member is violating trade rules set out in the WTO Agreement. The disputing Members must first hold consultations, and if these fail, a panel is set up, composed of three individuals appointed by the parties to the dispute and/or the WTO Director-General. A panel will deliver its ruling on the WTO-consistency of the measure at issue, usually within nine months. The WTO DSM allows either party to appeal a panel decision to the WTO's Appellate Body, which is a standing body of seven members, three of which sit on any one case. Importantly, the DSM allows a WTO Member to impose trade sanctions (referred to as "compensation and suspension of concessions") against a Member who has not complied with a dispute settlement ruling.[15]

B Historical Background

The WTO replaced the General Agreement on Tariffs and Trade (GATT), adopted in 1947. GATT was intended to be a provisional arrangement pending establishment of the International Trade Organisation (ITO), which was to be the major international trade institution, and a specialised agency of the UN system.[16] The draft ITO Charter was completed at a Conference in Havana in 1948, but lack of support (particularly from the U.S. Congress) meant that it was never ratified and the organisation never came into being.[17] GATT (the *ad hoc* institution that serviced GATT the treaty) continued to exist until it was replaced by the WTO in 1995. GATT (the treaty) continues to exist,[18] and is the centrepiece of the WTO Agreement.

GATT, like the WTO, was established to provide predictability, stability, and transparency in international trade relations. GATT sought to regulate and expand international trade through the reduction of tariffs and the elimination of other "non-tariff" barriers to trade, and provided for protection

[15] See *Understanding on Rules and Procedures governing the Settlement of Disputes* (hereinafter Dispute Settlement Understanding, or DSU), in URUGUAY ROUND LEGAL TEXTS, *supra* note 8.
[16] The WTO is neither part of the UN nor a UN specialised agency. See JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION - CONSTITUTION AND JURISPRUDENCE 52 (1998).
[17] See *Havana Charter for an International Trade Organisation*, UN Conference on Trade and Employment, ch. II, UN Doc. E/CONF.2/78 (1948).
[18] GATT 1947 was slightly modified in 1994, and one now refers to GATT 1994 to distinguish the current version of GATT from the original one. The rules of GATT 1994 apply where not superseded by a more specific WTO agreement.

against unfair trade and disguised obstacles to trade. The emphasis was on tariffs as tariffs were the main trade-regulating measure used in GATT's early days.

GATT, like the WTO Agreement, is premised on three key principles to fulfil its aims of non-discrimination between trading partners and predictability of trade: "most-favoured nation" (MFN) treatment, national treatment, and transparency. MFN means that a party to GATT must grant all trading partners the same treatment on any "like product"[19] as that accorded to its most-favoured trading partner.[20] National treatment basically requires that the goods and services imported from other countries be treated in the same way as those produced in the importing country[21] - in other words, domestic and foreign like products must be subjected to the same requirements as regards packaging, sanitary, or content standards, for instance. Transparency as a principle in the GATT and WTO was inspired by what Jagdish Bhagwati has called the "Dracula Principle," meaning that problems may disappear once light is thrown on them.[22] Transparency is ensured mainly by the requirements that WTO Members publish their trade regulations, "their schedules of concessions,"[23] and notify the WTO of measures such as new technical or sanitary standards or subsidies.

GATT and the other agreements that make up the WTO Agreement provide for exceptions to their non-discrimination principles. GATT for instance allows non-tariff measures in certain circumstances, and allows more favourable treatment of some countries (such as developing countries, or countries within customs unions). Members can also derogate from GATT principles on certain grounds, such as security considerations,[24] to protect public morals, to protect human, animal or plant life or health, for the conservation of exhaustible natural resources,[25] or in order to provide governmental assistance to economic development.[26]

GATT originally only applied to trade in goods. Also, GATT was originally essentially designed to deal with reductions of tariffs and elimination of non-tariff barriers on traded goods. In other words, GATT essentially applied to measures that were applied at a country's border. However the GATT/WTO regime has over the years increasingly moved inwards beyond measures applied at the border, to areas of concern to domestic policy. This has occurred primarily for two reasons.

[19] The term "like product" was left undefined in GATT and still sparks controversy, particularly in environment and labour standards discussions, see below, p. xxxx. In disputes concerning the meaning of "like products" dispute settlement panels have tended to look at criteria such as international usage and customs classifications. The tendency has however been to equate "like" with "same". See WALTER GOODE, DICTIONARY OF TRADE POLICY TERMS 171 (1998).
[20] GATT Article I *General Most-Favoured-Nation Treatment.*
[21] GATT Article III *National Treatment on Internal Taxation and Regulation.*
[22] Quoted in HOEKMAN & KOSTECKI, *supra* note 3, at 43.
[23] A schedule of concessions is a national schedule negotiated under WTO auspices which sets out the terms and conditions under which goods may be imported.
[24] GATT Article XXI *Security Exceptions*.
[25] GATT Article XX *General Exceptions*, paragraphs (*a*), (*b*) and (*g*) respectively.
[26] GATT Article XVIII *Governmental Assistance to Economic Development*.

First, GATT then WTO have moved away from focusing on tariffs to non-tariff barriers because as tariffs were lowered, domestic producer interests turned to other devices to limit competition from imports. Non-tariff barriers thus became more common and more sophisticated and have been said to be "the crucial terrain of trade policy today"[27] Not only is negotiating reduction or removal of non-tariff barriers much more complex than tariff reductions, but the implementation of agreements on non-tariff measures is harder to achieve. Thousands of non-tariff barriers exist, some of which - such as quotas - have trade objectives, whilst others - such as sanitary or packaging requirements - are imposed for non-trade objectives and only incidentally reduce imports. Regulating or negotiating these necessarily means raising domestic policy considerations in the international trade policy arena.

The second way in which GATT/WTO rules have moved within the border is that new sectors have been introduced within their scope. The agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Agreement in Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS) and the Agreement on Agriculture (AoA) indeed affect policy areas traditionally solely within a domestic government's area of competence. This move to bring services, investment and intellectual property into the GATT/WTO regime occurred because of the desire of industrialised countries, and particularly the U.S. to ensure that markets around the world were open to sectors in which industrialised country businesses wanted to expand their market reach, such as telecommunications and banking, and to protect the activities of their businesses abroad.[28]

Other reasons for introducing new sectors into the WTO were to bring them under the WTO's strong dispute settlement mechanism, and to broaden its enforcement capability. The fact that several trade and trade-related agreements are covered by the same DSM allows the possibility for "cross-retaliation," in other words, if a WTO Member is found by the DSM to have violated its WTO obligations on one sector, the Member bringing the complaint to the DSM can retaliate (i.e. suspend trade concessions) in that or another trade sector.

In the 1940s, when GATT was being created, it was seen as being part of a three-pronged system for international governance in the post-Second World War era. One part of the system (the IMF and the World Bank) was to deal with international financial issues, a second part (GATT-ITO) was to deal with international trade, and the third part (the UN) was to ensure that social issues were properly taken into account. Thus GATT did not preoccupy itself with social or human rights questions. Until very recently, few human rights groups were concerned with the effects of trade or trade rules on human rights. Until recently, civil society groups working on international economic issues (mainly non-governmental organisations concerned with development education) tended not to be concerned with human rights, and

[27] JACKSON, *supra* note 16, at 20.
[28] See JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM - A HISTORY OF THE URUGUAY ROUND (2nd revised ed., 1999), who also notes that many developing countries opposed inclusion of "new" subjects into the GATT Uruguay Round

the few non-governmental groups working on these issues turned to other fora to ensure that social issues were taken into account in international economic relations.

In the early 1990s, however, as States struggled to conclude the Uruguay Round of trade negotiations, voices were increasingly making themselves heard for the international trading system to take social issues such as labour, sustainable development, and environmental concerns into account. These concerns were not taken on board by the negotiators, but were reflected in different provisions of the WTO Agreement. The Agreement's Preamble recognises that WTO Members' trade and economic relations "should be conducted with a view to raising standards of living, ensuring full employment [...] while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment [...]."[29]

III SPECIFIC AREAS OF CONFLICT BETWEEN HUMAN RIGHTS AND WTO LAW

There are several areas in which developments in the WTO have caused concern amongst human rights advocates. These include the right to health, the right to food, the right to education, women's rights, indigenous peoples' rights and labour rights. Critics from within and outside the WTO have also frequently raised general concerns about equity, democracy and transparency. This article will focus on the right to health and the right to food, and will point out some of the equity and transparency concerns.[30]

A The WTO, Domestic Health Policy, and the Right to Health

The right to health is clearly protected by a number of international legal instruments, including the World Health Organisation Constitution, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination Against Women, as well as by several national constitutions.[31] The right to health is considered not to be confined to the right to health care, but embraces a wide range of socio-economic factors that promote conditions in which people can lead a

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negotiations. See CROOME, at 87-88, and below, p. xxx for reasons why agriculture had been left out of GATT until the Uruguay Round.

[29] *Marrakesh Agreement Establishing the World Trade Organisation*, in URUGUAY ROUND LEGAL TEXTS, *supra* note 8.

[30] Other areas have been covered elsewhere, see for instance INFORMAL WORKING GROUP ON GENDER AND TRADE, GENDER AND TRADE - SOME CONCEPTUAL AND POLICY LINKS (May 1998), James Howard, *Tackling the social impact of international trade*, 3 CAMPAIGN, (October 1999) ; CUTS, TRADE, LABOUR, GLOBAL COMPETITION AND THE SOCIAL CLAUSE (1997), available on the web via < www.cuts-india.org/trade-susdevl.htm > ; *Summary of the Panel on Trade and Indigenous People*, Commission on Sustainable Development (CSD-8) (26 April 2000),on the web at <www.un.org/esa/sustdev/mgipdaypan1.htm>

[31] See Virginia A. Leary, *Justiciability and Beyond; Complaint Procedures and the Right to Health*, 55 INTERNATIONAL COMMISSION OF JURISTS REVIEW 105, 106, 107 and 118-119 (1995).

healthy life, and extends to the underlying determinants of health including food and nutrition, access to safe and potable water, and a healthy environment.[32]

The WTO in principle does not place any restrictions on its Members' latitude to set their own health policy or define their environmental standards. However a number of recent developments in the WTO have given the impression that it does limit national autonomy on health policy. This debate has been

Some Basic Incompatibilities Between Human Rights and WTO Law

Different fundamental aims
The main aim of human rights law is to place an ethical boundary on power, whereas those seeking to extend the reaches of the world trade system so far have been seeking to extend the boundaries of their strength. The world trade system in practice aims to increase power (revenue) of those who can and will access the international trading system, not necessarily to ensure that it is gained without detriment to someone else, or whether its benefits are fairly distributed.

Rights are different from interests
The human rights regime protects rights, the WTO protects interests

Same words – different meanings
The same words – non-discrimination, freedom, rights – mean very different things depending on whether they are used in the trade or in the human rights context. This has caused confusion. In a human rights context these words are used to protect the most vulnerable members of society. In the WTO context these words are used to break down any obstacles that may prevent potential traders from trading. Members of the WTO community say that the WTO protects human rights: the right to economic freedom, to non-discrimination, to equal opportunity, and it recognizes intellectual property rights. IPRs expire after a few years, which is not the case of any fundamental, inalienable human right.

Asymmetry 1: Governments acting for different beneficiaries
In the trade arena, governments are acting for the good of their industry. In the human rights arena, governments are supposed to act for the good of their people. So when the good of the corporation isn't the same as what is good for the people in general, there is a problem.

Asymmetry 2: Insufficient accountability of the trade system's main actors
The WTO does not analyze the role of transnational corporations (TNCs) in its system. Most trade takes place through the private sector, not through the State. The WTO holds Member governments, not private actors, accountable in case of violations of WTO norms, but trade sanctions affect – generally smaller - private actors.

Asymmetry 3 – between rights and obligations of corporations and countries
Many of the Uruguay Agreements *will* bring benefits for corporations - and have already done so - while they only *might* bring benefits for developing countries and their people. WTO Members, particularly developing countries, have to take a series of sometimes costly domestic legal and administrative steps to adapt their domestic conditions to the needs of big companies.

Unequal representation or acknowledgment of different cultures
Many of the WTO's Agreements assume that the world was a level playing field at the outset, that States were endowed with similar strengths and weaknesses. The WTO assumes a single dominant culture in several respects local food staples can easily be replaced by a different, imported food, uniform modern business practices and cultures are expected, social inappropriateness of particular policies is not an excuse.

[32] *General Comment No 14 (2000), The Right to the Highest Attainable Standard of Health*, Committee on Economic, Social and Cultural Rights, E/C.12/2000/4, 11 August 2000.

particularly vivid in the light of the increasing public concern for food safety, and the links between trade, health, food safety, and genetically-modified organisms, as well as in the light of concerns that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) may limit WTO Members' access to essential drugs. The next sections will discuss cases that have become before the Dispute Settlement Mechanism following a complaint by one or more WTO Members that another Member's domestic health policy contravened international trade laws, and the TRIPs Agreement and health policy.[33]

1.The "Hormone-Beef" and "Asbestos" cases before the WTO Dispute Settlement Mechanism

Under GATT it was assumed that a country was free to set its own health standards as long as it respected GATT's non-discrimination principles, i.e. that it treated all imported like products in the same way, and in the same way as its own like products. So under GATT, a domestic health standard which required restricting imports was judged only against the standard of non-discrimination - as long as the import was treated no less favourably than the domestic product, it did not matter how flimsy the justification was for the national standard.[34] We must recall, however, that GATT originally focussed on tariffs. Since States have increasingly turned to non-tariff measures to regulate trade, the WTO regulates non-tariff measures more strictly than the GATT did.

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),[35] which is an integral part of the WTO Agreement, addresses one type of non-tariff measure - sanitary and phytosanitary standards. Its provisions aim to prevent States using sanitary measures as a pretext for banning foreign imports. It thus subjects domestic standards to supervision whenever they directly or indirectly affect trade. According to the SPS Agreement, WTO Members must ensure that sanitary and phytosanitary measures only be applied to the extent necessary to protect human, animal or plant life or health, and that such measures be based on scientific evidence and on an assessment of the risks to life or health. If scientific evidence is insufficient, a Member may adopt an SPS measure provisionally, as long as at the same time it seeks more scientific evidence and then reviews the measure within a reasonable period of time. The WTO favours application of SPS measures which are based on or conform to international standards, and presumes that those that do so are WTO-consistent. Members must ensure

[33]Three other areas of the WTO's work which are feared to interfere with the right to health will not be discussed here: (1) the General Agreement on Trade in Services (GATS - also part of the WTO Agreement) has been said to be able to play a potentially harmful role in health-care services, see Agnes Bertrand and Laurence Kalafides, *The WTO and Public Health*, THE ECOLOGIST (October 1999), (2) Developments in the context of Article 27.3(b) of the TRIPs Agreement are feared to limit access to traditional medicine, which plays an important role in health care in both developed and developing countries. See for instance Xiaorui Zhang, *Traditional Medicine and its Knowledge*, paper presented to the UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva, 30 October 2000, and (3) the lack of clarity on whether WTO Members can limit import of Domestically Prohibited Goods could affect the right to health if Members are not allowed to ban imports of goods that might be dangerous. See PHILLIP EVANS & JAMES WALSH, THE EIU GUIDE TO WORLD TRADE UNDER THE WTO 69-70 (1995).
[34] See Steve Charnovitz, *Improving the Agreement on Sanitary and Phytosanitary Standards*, in TRADE, ENVIRONMENT, AND THE MILLENNIUM 171 (Gary P. Sampson & W. Bradnee Chambers, eds, 1999).
[35] See URUGUAY ROUND LEGAL TEXTS, *supra* note 8.

that their SPS measures are consistent with the non-discrimination principles of most-favoured nation and national treatment, and must ensure that SPS measures are not applied in a manner which would constitute a disguised restriction on international trade. If a Member wishes to apply stricter sanitary or phytosanitary standards (i.e. restrict imports) it can, as long as it can show a number of things, including that it has a scientific justification for doing so and that its standard is appropriate for the sanitary of phytosanitary objective sought.

The SPS Agreement has proved controversial because it is perceived as allowing trade officials to tell national regulators what health measures are allowable. The "hormone-beef"[36] dispute is a case where this happened. Canada and the U.S complained to the WTO's dispute settlement mechanism (DSM) against a European ban imposed in the 1980s on the sale of meat produced with several growth hormones, on the grounds that the hormones might be carcinogenic. The ban applied in conjunction with an EU-wide ban on the use of the same hormones, so in effect prohibited imports of beef from Canada and the U.S.. The main findings of the WTO dispute settlement Panel were that the import ban was inconsistent with the WTO's SPS Agreement as the EC's sanitary measures were not based on a risk assessment as required by the Article 5.1 of the Agreement, and that the EC had not met the conditions for applying a level of health protection that was stricter than international standards.

The EC appealed the decision to the WTO's Appellate Body, which also found in favour of Canada and the U.S., saying that the EC was in violation of the SPS Agreement in that it had not produced a scientific risk assessment to support its ban. The Appellate Body did acknowledge that hormone abuse could constitute a health risk, but did not agree with the EC that if there is the potential for harm, it is better to take precautionary steps and adopt protective measures even in the absence of full scientific certainty, and to give consumers the benefit of the doubt over the interests of farmers and pharmaceutical companies. The EC argued that the precautionary principle[37] was part of customary international law, but both the Panel and the Appellate Body were of the view that even if the precautionary principle were part of international law - and the Appellate Body specified that it was not clear that the precautionary principle had crystallised into a general principle of customary international law, and that its status outside of environmental law awaits more authoritative formulation - it would not override Article 5.1 of the SPS Agreement.

This decision fuelled the suspicion with which many environmentalists, public health and consumer groups view the WTO. Many commentators had previously suggested that the SPS Agreement prohibited banning imports of products that have been proved safe, but the Appellate Body decision in

[36] *European Communities - Measures Affecting Meat and Meat Products (Hormones), Report of the Appellate Body*, WT/DS26/AB/R & WT/DS48/AB/R, 19 February 1998.
[37] According to the precautionary principle, lack of scientific certainty should not be used as an excuse for delaying action when there is a risk of serious or irreversible damage. International human rights procedures implicitly acknowledge the necessity of a precautionary approach in some circumstances, by permitting measures to be taken before a violation has occurred, or to prevent

the hormone-beef case showed that SPS rules could be applied to disallow health regulations aimed at genuinely unsafe practices. Environmental, public health and consumer groups picked up on this case as evidence for their view that the WTO can and will give little weight to the precautionary principle, a key principle of modern environmental policy.[38]

The hormone-beef Panel solicited the advice of several scientists, but the fact that neither the Panel nor the Appellate Body took the views of food safety groups into account was further cause for suspicion on the part of already wary environmental, public health and consumer groups. Another concern that arose for many of these groups in this context was the lack of clarity of WTO rules regarding labelling - indeed, one suggestion to resolve the dispute between the EC and the North American complainants was to allow beef sold in European markets to be labelled to indicate whether or not it had been produced with the use of growth hormones, thus giving consumers the means to choose what they eat. This proposal was not put into practice for a variety of reasons,[39] including opposition from U.S. cattle producer associations. However, environmental and food safety groups also seized this case as an opportunity to declare that "the WTO creates obstacles to eco-labelling that discloses how a product is produced to enable consumers to identify and purchase environmentally friendly products."[40] Whilst it is true that the WTO-legitimacy of labelling schemes is far from clear it is not possible at this stage to say that the WTO prevents such schemes, proof being that many such schemes exist.

One of the main reasons why WTO Members have not been able to resolve the question of WTO-legitimacy of labelling or eco-labelling schemes is that it raises the question of "PPMs" (processes and production methods), which are not usually taken into account in the WTO. Indeed, WTO rules do not usually allow distinction between "like products" on the grounds that they were produced differently, if the production method does not have an impact on the final product. The question of PPMs has arisen both in the environmental and labour standards debates, in which some voices call for the WTO to allow differential treatment to products based on whether they were produced in a way that respects environmental or labour standards. Many WTO Members do not want to open the door in the WTO to measures that distinguish between products based on production methods, as they do not want to be penalised in export markets because of how they produce their products.[41] One of the reasons that WTO Members - particularly developing country Members - have opposed taking PPMs into account is that those who have been most vocal in calling for doing so have tended to either have a parochial view of what environmental or labour standards would be appropriate in other countries, or have served

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the risk of a violation occurring, see Caroline Dommen, *Claiming Environmental Rights, Some Possibilities Offered by the UN's Human Rights Mechanisms*, GEORGETOWN INT'L ENVTL L. REV. 1, 28 (1998).

[38] See EARTHJUSTICE LEGAL DEFENSE FUND, TRADING AWAY PUBLIC HEALTH (November 1999) on the web at <www.earthjustice.org/work/Toxicstext.html>

[39] See *U.S. Offers Country-of Origin Label To Resolve Beef Dispute*, 3 BRIDGES WEEKLY TRADE NEWS DIGEST, No 7 (February 22, 1999), on the web at <www.newsbulletin.org/bulletins/getbulletin.cfm?bulletin_ID=14&issue_ID=1255&browse=1&SID=>

[40] See EARTHJUSTICE LEGAL DEFENSE FUND, *supra* note 38.

[41] Doaa Abdel Motaal, *Eco-labelling in the Fisheries Sector*, paper presented to ICTSD's dialogue on Fisheries, International Trade and Sustainable Development, Geneva, 23 October 2000, see <www.ictsd.org/dialogueweb/Dialogues/23-10-00-desc.htm>

protectionist interests, or both.[42] In particular, many developing countries fear that attempts to impose higher standards on them through trade would remove an important element of their comparative advantage, such as low labour costs or low administrative costs related to environmental effects of their production facilities.

Recent developments in the WTO DSM may reassure environmental and consumer groups that the WTO is listening to non-governmental voices, and is not taking over the domestic health policy-making role that is best left in domestic the hands. The first is that the WTO's DSM has allowed non-governmental groups to submit *amicus curiae* briefs on several occasions since the hormone-beef Appellate Body decision.[43] Whilst non-governmental groups have welcomed this development, many WTO Members - including India, Egypt, Brazil and Australia - have been vocal in their criticism, saying for instance that this would allow non-governmental entities more rights than WTO Members who are not parties to the dispute. The issue came to a head in November 2000, after the Appellate Body announced criteria and procedures for groups wishing to submit *amicus* briefs in the asbestos case. A special urgent session of the WTO General Council was convened which resulted in the Appellate Body being told in no uncertain terms that the question of whether non-Members could participate in the DSM was not a 'procedural' issue but a very substantive one that only WTO Members can decide. Observers say this comes "against a background of a growing wider disquiet over the way the dispute system has been hijacked to impose new obligations on developing countries."[44] Many developing countries also fear that the only NGOs who will submit amicus briefs will be from Northern countries, and represent interests that differ significantly from developing countries' interests.

The second development that might reassure health and consumer groups that the WTO DSM is not stepping in to make policy on Member's behalf is the recent confirmation by the Appellate Body that the determination of the "appropriate level of protection," i.e. the level of protection deemed appropriate by the Member establishing a sanitary measure is a prerogative of the Member concerned and not of a panel or of the Appellate Body. However a proper risk assessment must still be carried out first, and only if this reveals an "ascertainable risk" may the WTO Member concerned make the "societal value judgement" of whether or not it can accept that risk.[45]

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[42] In the WTO, environment and labour issues are often referred to as "linkages" issues. In 2000 a number of Third World intellectuals released a statement saying inter alia that the demand for linkage, such as the demand for a social clause in the WTO, must be seen as a reflection of the growing tendency to impose an essentially trade-unrelated agenda on to the WTO and other trade treaties, reflecting an alliance between ... politically powerful and affluent lobbying groups that are protectionist in the sense that they want to blunt (by raising production costs abroad) the international competition from developing countries..." The statement is on the web at <www.cuts-india.org/WTO-Campaign.htm>

[43] See for instance *UNITED STATES – IMPOSITION OF COUNTERVAILING DUTIES ON CERTAIN HOT-ROLLED LEAD AND BISMUTH CARBON STEEL PRODUCTS ORIGINATING IN THE UNITED KINGDOM, Report of the Appellate Body*, WT/DS138/AB/R, 10 May 2000. All derestricted WTO documents are available on the web via <www.wto.org/wto/ddf/ep/search.html>

[44] *Trade: General Council to Discuss AB's Actions Over NGOs*, SOUTH-NORTH DEVELOPMENT MONITOR SUNS (14 November 2000).

[45] *AUSTRALIA – MEASURES AFFECTING IMPORTATION OF SALMON, Report of the Appellate Body*, WT/DS18/AB/R, 20 October 1998, at para 199.

This question is up for further clarification by the Appellate Body in its pending decision in the asbestos case. This case concerns a challenge by Canada of France's ban on the import and use of white (chrysotile) asbestos. France had introduced this ban - which was later backed by the EU - in 1996 on the grounds that certain asbestos fibres can cause cancer. Canada's primary argument was that a less trade-restrictive alternative was available to France, namely to ban only the most harmful type of asbestos and to require wearing of protective clothing and other measures when using other, less harmful, types of asbestos. Canada also argued that the asbestos ban could not be considered the least trade restrictive alternative until France had determined that the substances that would replace asbestos posed no health risks themselves. The WTO Panel ruled that the ban was legitimate because WTO rules allow countries to restrict trade where necessary to protect human health or the environment.[46] Interestingly, in its reasoning about whether France could invoke the GATT exception contained in Article XX(b) to derogate from its trade obligations to protect health, the Panel used a "reasonableness" standard of risk, rather than requiring scientific certainty - and found that it was reasonable for a public health official to conclude that asbestos posed a risk to health. Also, the French government had in some respects imposed a stricter standard than those required by international standards, and the Panel held that this extra caution was justified in light of the high level of risk. However, Canada has appealed the WTO Panel's decision,[47] so the final WTO DSM decision on whether or not France and the EU are allowed to ban asbestos to protect health is not expected until Spring 2001 at the earliest.

This discussion has illustrated that GATT then the WTO have had to be ever more vigilant against new non-tariff protectionist measures which also makes it harder to derogate from WTO rules on the grounds of legitimate public interest. The WTO DSM is made up of independent legal experts who will decide cases brought to them in accordance with principles of international law. Although in cases like hormone-beef they seem to have been fairly impermeable to developments in other areas of international law (for instance by taking such a cautious view of the precautionary principle) in others, such as the "shrimp-turtle" case,[48] they have given significant weight to international environmental law. Many human rights groups are eagerly awaiting the Appellate Body's decision in the asbestos case to see what, if any, weight it gives to international human rights law, particularly the right to health.

WTO Members have made little, if any, progress since 1995 on clarifying what environmental measures may be allowed under WTO rules, how labour standards should be dealt with, whether the DSM may receive amicus briefs and whether WTO rules permit labelling schemes, and no clarification is expected on any of these issues in the near future. This lack of movement must be seen primarily in the context of developing countries' fear of having new issues imposed on them, and that

[46] *EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS, Report of the Panel*, WT/DS135/R, 18 September 2000.
[47] *EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS, Notification of Appeal by Canada*, WT/DS135/8, 23 October 2000.
[48] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body*, WT/DS58/AB/R, 12 October 1998, 38 ILM 121 (1999).

the trade regime may be used to apply industrialised country environmental standards as a new form of conditionality or as a way of reducing their comparative advantage over industrialised countries. If attempts to obtain decisions in these areas from the WTO are successful, they will first have had to convince developing countries that their objective is not protectionism. In the meantime, countries which adopt trade-impacting domestic measures to protect their citizens' right to health will have to convince other WTO Members that the health objective is genuine and that there was no less trade-restrictive way of achieving it.

2.The TRIPs Agreement and Access to Pharmaceuticals

The right to health includes access to appropriate health care. Barriers to access in many developing countries include poor health care infrastructure, poor diagnosis, inadequate financing, and non-affordability of new drugs.[49] According to the World Health Organization, more than one third of the world's population lacks regular access to essential drugs, and this figure rises to over half in some parts of Africa. The present international intellectual property (IP) regime affects this by reducing the availability of pharmaceuticals in a number of ways,[50] and the question of whether or how the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) plays a role in hindering the realisation of the right to health is a difficult area to address, because of the complexity of the relevant legal provisions, and because of the large number of actors involved.

Prior to the Uruguay Round, countries had various approaches to drug patents, suited to their policies and needs, and many did not grant patents for pharmaceutical products per se. The situation was similar in several industrialised countries which did not have patent laws until the 1960s.[51] The TRIPs Agreement introduced the obligation on all WTO Members to provide patents for pharmaceuticals. The role of patents in reducing access to drugs include the fact that they hamper production of the usually less expensive generic[52] versions of patented drugs, and reduce the possibility for governments to allow compulsory licensing[53], and parallel imports[54] of pharmaceuticals.

[49] Most of the WHO-recognised "essential drugs" are not patented, so discussions about the TRIPs Agreement's impact on basic health care necessarily focus on a few recently patented or as-yet undisclosed drugs, rather than on those already on the "essential drugs" list. Particularly important amongst the former category are those to treat HIV/AIDS, resistant tuberculosis, and malaria. See René Loewenson, *Essential Drugs in Southern Africa Need Protection from Public Health Safeguards under TRIPs*, 4 BRIDGES BETWEEN TRADE AND SUSTAINABLE DEVELOPMENT (September 2000), on the web via <www.ictsd.org/html/arct_sd.htm>

[50] *Committee on Economic, Social and Cultural Rights, Approaching Intellectual Property as a Human Right, Discussion Paper by Dr Audrey Chapman*, E/C.12/1998/12, 3 October 2000, paragraph 61 + sqq.

[51] See Richard Gerster, *Patents and Development*, 1 JOURNAL OF WORLD INTELLECTUAL PROPERTY (1998).

[52] Generic dugs are drugs whose patents have expired.

[53] A compulsory license is a license granted by law regardless of the will of the rightholder, for instance, when the patent owner fails to fulfil its obligation to work the patented invention.

[54] Parallel import is import of a product with an IP content from another country where the product has been lawfully placed on the market by the IPR owner or with the owner's consent.

The TRIPs Agreement only sets *minimum* standards of patent protection. The limits it sets on parallel imports and compulsory licensing - albeit unclear - are not absolute. Moreover, the Agreement provides for wide-ranging exceptions. In its Article 7, it says that the protection and enforcement of

Intellectual Property in the WTO

Facts
The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is one of the three pillars of the WTO (the others being trade in goods and trade in services). The TRIPs Agreement incorporates the WTO principles of non-discrimination (most-favoured nation and national treatment) and transparency, and establishes minimum standards of protection to creators of intellectual property (IP). It covers *inter alia* copyright, trademarks, geographical indications, patents, and plant variety protection. The TRIPs Agreement sets out the procedures and remedies which should be available in Member States to enforce intellectual property rights (IPRs) and, like the other parts of the WTO Agreement it is subject to the WTO's DSM.

The TRIPs Agreement is unique in the WTO in that it imposes obligations on WTO Members to pursue specific, similar policies. This contrasts with other WTO agreements whereby Members agree *not* to use specific trade measures or policies. The standards established under the TRIPs Agreement are *minimum* standards, meaning that Members can introduce stricter, or other forms of protection that are not included in the Agreement.

Although the TRIPs Agreement is only one component of the world's IP regime, it is "the leading yardstick of contemporary IPR protection and its standards have been incorporated into a large number of bilateral agreements which will eventually coin national IP rules around the world."[1]

The TRIPs Agreement came into force on 1 January 1995. Industrialised WTO Members had until January 1996 to implement it, and developing countries had a further four years.[1] However, many developing countries have asked for extension of their implementation deadline, and at the time of writing the situation on whether developing countries are still bound by the January 2000 deadline is unclear.

Background
Prior to the TRIPs Agreement, national IPR protection varied from country to country. Industrialised country governments and private firms claimed that lax IP regimes in developing countries "distorted" markets and cost them millions of dollars in lost export sales. The launch of negotiations for a TRIPs Agreement which would address these market distortions was motivated by demands from industrialised country industries for protection of the increasingly important technology and creativity components of their exports and investments.[1] The technology-advanced countries chose the GATT/WTO over the World Intellectual Property Organisation (WIPO) as a forum for international regulation of IP because of the strength of the WTO's dispute settlement mechanism. Also, the likelihood of success of international IP negotiations was higher in a context like the GATT's Uruguay Round where TRIPs was just one of several agreements being negotiated - there was more chance that developing countries which were not keen on the TRIPs Agreement would accept it as a trade-off for concessions in other areas of interest to them, such as textiles and agriculture.

TRIPs was one of the most difficult issues on the Uruguay Round agenda, pitting industrialised against developing countries. There was a general concern amongst developing countries that greater IP protection would strengthen the monopoly power of multinational companies, and detrimentally affect poor populations by raising the price of medicines and food.[1] Finally developing countries did accept the TRIPs Agreement, not only as a trade-off for concessions in other areas, but also because they feared unilateral arm-twisting by the USA and the EU. A growing perception that intellectual property laws could provide benefits in terms of allowing developing country participation in knowledge-creating activities, providing consumers with access to new products and giving industries better opportunities of obtaining cutting-edge technologies also played a role.[1]

intellectual property rights (IPRs) should contribute not only to technical innovation but also to the "transfer and dissemination of technical knowledge ... in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Article 8 provides that WTO Members may "... adopt measures necessary to protect public health and nutrition, and to promote the public interest in

sectors of vital importance to their socio-economic and technological development, provided such measures are consistent with [the TRIPs] Agreement." Article 27, which specifies possible exceptions to the obligation of providing patent protection, says that Members can exclude inventions from patentability if inventions are contrary to *ordre public* or morality. Article 27 specifically allows the exclusion of inventions from patentability in order to protect human, animal or plant life or health or to avoid serious prejudice to the environment.

The TRIPs Agreement - Some General Criticisms

Three types of general criticism have often been formulated about the WTO IP regime: (1) it is inherently inequitable for developing countries, (2) it increases the monopoly power of the economically strong (including by favouring investors over inventors) and (3) it has not protected developing countries from bilateral pressures to adopt stricter IP protection than the minima set out in the TRIPs Agreement.[1]

There is wide agreement amongst specialists that understanding of the role of the TRIPs Agreement in the economic development process is incomplete.[1] Yet many arguments are put forward to support the view that the TRIPs Agreement is inherently inequitable for developing countries and their inhabitants. Critics point out that the procedures for applying for and guaranteeing IP protection are burdensome and not suited to the conditions or the culture of developing country businesses, governments or other intellectual property rights holders.[1] Also, many observers point out that the "minimum standards" of protection set out in the Agreement are industrialised country minima and industrialised country standards, often too high or inappropriate for developing countries, and can conflict with national interests and needs, for instance by increasing the cost of technology, excluding developing countries from critical knowledge sectors such as generic drugs, and threatening small farmers' control over the production process. This can result in a range of negative consequences for the economic and social rights of the weak and marginalized.[1]

There is broad agreement that the TRIPs Agreement will increase the economic strength of industrialised-country enterprises, at least in the early years of its implementation. This increase will flow from the existing dominance of these enterprises in technology-dependent fields and from the enhancement of their legal security in a wider portion of the world market.[1] Figures from a variety of sources show that transnational corporations own approximately 90% of technology and product patents in the world, and up to 80% of technology and product patents in developing countries.[1]

Given this apparent latitude in patent policy allowed by the TRIPs Agreement, one may wonder why there has been cause for concern. The reply to this question is twofold. The first regards how the WTO interprets the exceptions. In a recent case - known as the Canadian generic medicines case[55] - brought to the WTO's dispute settlement mechanism, the Panel largely ignored the TRIPs Agreement's wording about balance and mutual advantage, interpreting its patent provisions largely from the perspective of intellectual property rights holders, dismissing competing social interests, thus reducing the range of regulatory options permitted under TRIPs.[56] The measures complained about by the EC, which were struck down by the Panel, were aimed at achieving Canada's longstanding policy goal of providing low cost medicines to consumers as soon as possible.

The second - and main - concern about TRIPs implications for the right to health is not TRIPs provisions themselves but how they have been implemented in practice. A large number of countries have come under direct pressure from other countries or from

[55] *CANADA – PATENT PROTECTION OF PHARMACEUTICAL PRODUCTS, Complaint by the European Communities and their member States, Report of the panel*, WT/DS114/R, 17 March 2000.
[56] Robert Howse, *The Canadian Generic Medicine Panel - A Dangerous Precedent in Dangerous Times*, 4 BRIDGES BETWEEN TRADE AND SUSTAINABLE DEVELOPMENT 3 (April 2000).

pharmaceutical companies to provide strong patent protection on pharmaceutical products and to refrain from allowing compulsory licensing or parallel imports. South Africa for instance, adopted legislation in 1997 which enabled parallel import and compulsory licenses but had to revoke it after threats from the U.S. Government to take trade sanctions over the legislation. The South African Pharmaceutical Manufacturers Association and the European Union also put pressure on the South African government to revoke the legislation.[57] This case is far from isolated, as the U.S. government has exercised considerable bilateral diplomatic pressure or threatened trade sanctions against several countries, including Jordan, zin other countries.[58]

Several African countries have also committed to provide higher patent protection than that mandated by the TRIPs Agreement, by ratifying the revised Bangui Agreement[59] which was signed by sixteen French-speaking African nations. This Agreement brings States parties' IP laws up to TRIPs standards, although many of these States are not bound to comply with TRIPs until 2006.[60]

Even the liberal paper The Economist has pointed out that "tough as it is today to get cheap drugs to the poor, it is likely to get tougher still in the future," and has admitted that patents as currently awarded can obstruct rather than stimulate innovation.[61] Even if patents do stimulate innovation in the pharmaceuticals sector, this will not resolve the issue of access to the essential drugs necessary for basic health care worldwide. Indeed, what many countries, such as those with high levels of HIV/AIDS or malaria, need most is *access* to drugs rather than innovation, and the patent system as it currently operates is likely to hinder this. A related issue is that pharmaceutical companies tend not to invest as much in research and development of drugs to treat diseases that affect people in developing countries as they do in research for treatment of rich-country afflictions. Tropical diseases, chronic in the countries where incomes are also the lowest, are particularly neglected.

Access to essential drugs is difficult and increasingly so for many of those who most need them, thus hindering realisation of the right to health in many countries. We see that it is not the TRIPs Agreement or the WTO alone that are causing this situation, but rather the actions of pharmaceutical companies, or industrialised country governments acting on behalf of their companies. The WTO was set up precisely to provide a "rules-based system," to protect its Members from the kinds of bilateral pressures that many countries have been subject to from countries like the U.S., but small countries often do not have the necessary resources to stand up to the pressures imposed by large companies or powerful countries.

[57] Loewenson, *supra* note 49, at 4.
[58] *Approaching Intellectual Property as a Human Right, Discussion, supra* note 50, *at* para 71.
[59] The revised Bangui Agreement of 2 March 1977 was opened for signature on 24 February 1999.
[60] *Group Asks African Nations Not to Sign Drug Patents Pact*, Dow Jones Newswires (11 May 2000).
[61] *Who Owns the Knowledge Economy?*, THE ECONOMIST 17 (8 April 2000).

Some developments yet permit cautious optimism within the WTO for access to essential drugs. The TRIPs Agreement does not prevent modulation of the prices of pharmaceuticals to take into account the capacity of different countries to pay, and the WTO Secretariat and the World Health Organisation are currently examining the issue of differential pricing. At the domestic level, some civil society groups are lobbying their governments - industrialised and developed - to move away from the obligation to provide patents on pharmaceuticals. There is further scope for NGOs to bring international instruments such as the ICESCR to bear as support for ensuring IP laws do not hinder access to essential drugs, and to put pressure on pharmaceutical companies to ensure transparency in their pricing policies.

Meanwhile, there is a process underway in the WTO in which Members are considering developing countries' concerns about implementation of the WTO Agreement.[62] This process was launched to rebuild developing countries' confidence in the WTO, in the light of increasingly vocal complaints on their behalf that the WTO Agreement and its implementation have been skewed against them. Indeed, they made significant concessions in the Uruguay Round, expecting to reap benefits in other areas of interest to them, such as textiles, and agriculture. However, although they have had to revise their laws and trade policy to conform with industrialised countries' trade objectives, the benefits they had been expecting in exchange have been slow in coming, if at all. The objective of the WTO implementation concerns process is to assess the existing difficulties developing countries face in implementing the WTO Agreement, identify ways to resolve them and take decisions for appropriate action.

Amongst the concrete actions that developing countries would like to see are extensions of the deadlines for compliance with the WTO Agreement (including TRIPs) and rewording of some of the WTO Agreement's provisions to make them more responsive to developing countries' needs. Several Members have re-emphasised the importance of TRIPs Articles 7 and 8 in this context. India, for instance, has called for the review to focus on Articles 7 and 8, arguing that there should be an assessment of the social, economic and welfare impacts of the TRIPs agreement.[63] Here too, human rights groups can provide national trade ministries or Geneva delegates with information on the legally-binding human rights standards on which they can rely when arguing for better balance between the private and public interests that the TRIPs agreement is supposed to provide, and when arguing for less stringent patent protection on pharmaceuticals.

[62] See also below, p. xxxx and p. xxxx.
[63] *WTO Logjammed Over TRIPs*, 4 BRIDGES WEEKLY TRADE NEWS DIGEST, No 36 (26 September, 2000), on the web via <www.newsbulletin.org>

B WTO Agreements and the Right to Food

The Right to Food is recognised by a number of international legal instruments, including the International Covenant on Economic Social and Cultural Rights (ICESCR), and the 1996 Rome World Food Summit Political Declaration and Plan of Action.[64] Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to food, more than 820 million people throughout the world, over 95% of them in developing countries, are chronically hungry. Part of blame for this has been attributed to liberalised trade and the WTO.[65] The next sections of this article will examine two of the WTO-regulated areas which cause problems for the realisation of the right to food, i.e. agriculture and Intellectual Property Rights.[66]

1.The Agreement on Agriculture

Until the Uruguay Round, agriculture was considered an exception to the GATT trade regime, meaning that neither export subsidies nor import restrictions were prohibited as they were for trade in other goods.[67] After intense disagreements between the negotiators of the Uruguay Round (particularly the EU and the U.S.) the agreement on Agriculture (AoA) brought farm products and farm trade into the GATT/WTO fold. The AoA, which like the other parts of the WTO Agreement, entered into force in 1995, has three main components: reductions in farm export subsidies, increases in market access, and cuts in domestic producer subsidies. The AoA also stipulates that all nontariff import barriers are to be converted to tariffs (this process is known as "tariffication"), and that these tariffs are to be significantly reduced and bound.[68]

The regulation of agriculture and agriculture trade is of concern to large segments of the world's people because agriculture is the basic source of livelihood for so many, particularly in developing countries. Proponents of the AoA have claimed that "liberalisation in agriculture trade will have beneficial effects for aggregate world income, as inefficiencies in production and trade will gradually be removed."[69] However even they acknowledge that "the removal of past production and trade distortions may also

[64] Adopted on 13 November 1996, see <www.fao.org/wfs/homepage.htm>
[65] Asbjorn Eide, *The right to adequate food and to be free from hunger, Updated study on the right to food*, E/CN.4/Sub.2/1999/12, 28 June 1999; and *The Zeist Declaration on Trade Liberalisation and the Right to Food*, 22 April 1999, reprinted in JOHN MADELEY, TRADE AND HUNGER - AN OVERVIEW OF CASE STUDIES ON THE IMPACT OF TRADE LIBERALISATION ON FOOD SECURITY (2000), on the web via <www.forumsyd.se/globala.htm>
[66] The WTO's agreement on Trade-Related Investment Measures has also given rise to concerns that it could interfere with the realisation of the right to food. See Bipul Chatterjee, *Trade Liberalisation and Food Security*, CUTS Briefing Paper (1998) on the web at < http://www.cuts-india.org/1998-6.htm>
[67] For a brief historical overview of why agriculture was outside GATT and how it came to be included, see Walden Bello, *High Stakes for the 1999 Review of the Agreement on Agriculture*, 2 BRIDGES BETWEEN TRADE AND SUSTAINABLE DEVELOPMENt (June 1998). See also CROOME, *supra* note 28, at 87-88.
[68] A tariff binding (when tariffs are bound) is a legal obligation not to raise tariffs on particular products above the rates agreed in negotiations. Usually the tariff actually applied is lower than the tariff binding.
[69] *The Agreement on Agriculture and Food Agricultural Policy Options of Developing Countries*, paper presented at ACICI conference on the Uruguay Round Agreements (September 22-23 1998).

entail some initial costs and risks for those developing countries which imported a large share of their food consumption."[70]

Others are more critical, pointing out that the AoA was essentially an agreement designed by and for industrialised countries, and not responding to developing countries' needs. The 1999 Zeist Declaration, for instance, says the WTO agreement on Agriculture is unbalanced and unfair in that it applies similar rules to countries with very different agricultural sectors or needs, and prevents developing countries from using the support measures which enabled the EU and the U.S. to develop their agricultural strength.[71] Others say that the AoA deprives developing countries of the right to control imports of food and other agricultural products, and also forces the governments of those countries to reduce and eventually end their subsidies to farmers. Many also point out that the new international farm trade regime may be contributing to the concentration of control of food production in the hands of a few agrochemical companies.[72] This section will first discuss human rights concerns arising from the AoA itself and its implementation, then will address some of the relevant issues that have come up in the current WTO negotiations on Agriculture.

The term "food security" is often heard in discussions on the agreement on Agriculture. In the WTO context, the term is used both to mean access of States to food, and availability of food at the national, regional and household level. According to one definition, there is food security when local people have the means to access food that is "nutritionally adequate in terms of quantity, quality and variety, and acceptable within the given culture."[73] Discussions within the WTO, which normally focuses on the governmental level rather than on questions of distribution at the domestic level, have addressed countries' access to food as well as the availability of food to all sectors of a country's population. The Committee on Economic, Social and Cultural Rights' interpretation of the Right to Food is also that it imposes obligations both on the international community - to ensure that vulnerable States have access to food[74] - and on States - to ensure that those within their jurisdiction have access to food -, so this section will likewise consider both.

As mentioned above, it was acknowledged at the time the agreement on Agriculture was concluded that it might result in difficulties for food importing countries in accessing food, not only because of higher

[70] *Id.*
[71] See *supra* note 65.
[72] See for instance *The Realisation of Economic, Social and Cultural Rights, Written Statement Submitted by the Centre Europe Tiers-Monde*, Sub-Commission on Promotion and Protection of Human Rights.
[73] Food and Agriculture Organisation (1995). A 1986 World Bank definition says that food security is "access by all people at all times to enough food for an active, healthy life. Its essential components are the stable availability of adequate food and the ability to acquire it." Both quoted in Chatterjee, *supra* note 66.
[74] "States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. 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." *General Comment No 12 (1999), The Right to Adequate Food* , Committee on Economic, Social and Cultural Rights, E/C.12/1999/5, 12 May 1999.

prices, but also because reductions in governmental support would mean reduced production in major agriculture subsidising and exporting countries, particularly European Union members. The Ana's Article 12 states that in instituting new export controls on foodstuffs, a government "shall give due consideration to the effects of such prohibition or restriction on importing Members' food security." In further acknowledgement of the difficulties in accessing food that some countries might face, Ministers signing the WTO Agreement in 1994 in Marrakesh also adopted the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries. This called on developed countries to compensate Least-Developed Countries (LDCs) and Net Food-Importing Developing Countries (NFIDCs) should they be negatively affected as a result of higher food prices or reduced availability of food aid as a result of implementing the agreement on Agriculture.

In practice, an IMF study has estimated that several NFIDCs, including Egypt, Algeria, Yemen, Peru and Albania, would face vast increases in their food import bills.[75] Indeed an FAO study found that five years after the completion of the Uruguay Round, the 48 LDCs and the 18 NFIDCs were increasingly forced to buy food on commercial terms, whilst their incomes were declining.[76] Moreover, food aid deliveries have been steadily falling since 1983. Yet most sources agree that implementation of the Marrakesh Decision has been inadequate. FAO, for instance, pointed out in 1999 that implementation of the Marrakesh Decision was "long overdue."[77] In years when cereal prices were high and NFIDCs wanted to activate the Marrakesh Declaration, developed countries responded as an excuse for not applying it, that there was no evidence to show that higher world food prices were due to the AoA.

Overall, it is hard to assess whether the AoA has led to increased or decreased food security. An FAO study has attempted to do this but points out that the time elapsed since the AoA came into force is quite short.[78] It is however easy to see how the AoA's logic can lead to deleterious effects on agriculturally-dependent countries, even those which do not rely on imported farm products for their domestic needs. The underlying reason for this is that the AoA - like the rest of the GATT/WTO regime - is based on the theory of comparative advantage. The simplest illustration of this is based on a two-country, two-commodity model: if country A has a comparative advantage in producing commodity Y, and country B has an advantage in producing commodity Z, A should concentrate on producing Y, and should import Z from B. Doing so will be more efficient for A and for B than each producing smaller quantities of Y and Z.

[75] Quoted in Chatterjee, *supra* note 66.
[76] Panos Konandreas et al., *Continuation of the Reform Process in Agriculture: Developing Country Perspectives* (November 1998).
[77] Panos Konandreas et al., *The Agreement on Agriculture: Some Preliminary Assessment from the Experience So Far*, paper submitted to the CIIR/UK Food Group 13 (28 January 1999).
[78] *Id*.

Choosing which food a country should focus on producing based on the comparative advantage model can undermine food security in three ways. If a country has comparative advantage in producing wheat (produced mainly by large farmers), and comparative disadvantage in millet (produced by small, subsistence farmers), according to the theory of comparative advantage, the country should export wheat and import millet. This could jeopardize food security as the likely increase of wheat production for export will make it more difficult to access by domestic consumers, and the livelihoods of small farmers may be harmed because of competition from imported millet. Moreover, this kind of situation favours concentration of food production in the hands of a few. This, as well as the greater distance between producers and decision-makers, means that influence over food production moves from farmers to governments to agribusiness corporations, who are more likely to be concerned with profitable trade than with local-level food security.[79] Even small farmers in the North are being pushed out of existence by competition from agro-business.

The above example is far from theoretical: the Mexican maize market was opened following the signing of the North American Free Trade Agreement (NAFTA), and this is already having a significant effect on Mexican maize prices and undermining food security in poor regions.[80] In the Philippines, by governmental decision, an increasing amount of land is dedicated to producing livestock and horticultural products for export. Those who were displaced from growing traditional crops such as corn and rice were expected to go into the expanding export production sector, but in practice this has not happened, with a consequent decline into poverty for many households that were already marginalized.[81]

In India agribusiness companies are acquiring landholdings from small and marginal farmers. The bigger farms that survive produce products such as coffee, tea, sugar, flowers or shrimp for the export market. The agricultural sector in India has thus gone from being one of planning to increase domestic production to ensure food security, to one of increasing trade in mostly non-food agricultural commodities, with scant concern for domestic consumption needs.[82] A recent study of the cotton sector in India found that trade liberalisation is helping transnational corporations at the expense of Indian farmers.[83] India has seen an almost fourfold increase in imports of food and other agricultural products between 1996 and 2000, but India's exporters have not always gained a higher income from since prices of most agricultural products are declining in the world markets. India could increase subsidisation to its farmers and remain WTO-compliant, but World Bank and IMF adjustment policies prevent it from doing so.[84]

To some extent, the range of policies that developing countries are allowed to pursue has been determined by the specific commitments they made under the AoA. Here again, when criticising the role

[79] World trade in cereals is dominated by five transnational corporations. See Chatterjee, *supra* note 66.
[80] *Id*.
[81] *Id*.
[82] Minar Pimple, *Indian Agriculture, Farmers' Rights and the WTO, in* HUMAN RIGHTS AND ECONOMIC GLOBALISATION (Malini Mehra, ed.) 82 (2000).
[83] See MADELEY, *supra* note 65.

of the WTO and WTO Agreement in hindering realisation of the right to food, one must distinguish between those difficulties actually caused by the WTO and those caused by a particular country's implementing policy. The AoA, for instance, allows countries to subsidise agricultural producers in one of several ways. One of these is through the Aggregate Measurement of Support (AMS), which refers largely to commodity-specific price support. Although the AoA does not ban any specific production support policy, it put upper limits on the support that can be provided under policies that are production and trade distorting: the future aggregate level of support associated with all such policies (Current AMS) should not exceed that provided in the past (Base AMS), and has to be reduced over time. Thus, in essence, countries can provide support under the AMS if they have claimed such support in their schedules for the base period. Many developed countries registered high AMS rates, whilst most developing countries claimed low or zero AMS levels when the AoA was adopted, and the latter are therefore now precluded from using direct price support measures in the future.[85] Another area in which developing countries have themselves limited their agricultural policy options is that the special safeguards (SSG) clause allows countries to levy additional tariffs whenever import prices fall significantly or when import volumes surge. However, because the SSG clause was reserved for products which were subject to tariffication, only a small number of developing countries have resort to this provision, as only few used the tariffication formula to bind their tariffs.[86]

Other current problems for developing countries regarding the implementation of the AoA include the fact that industrialised countries - the main importers of developing countries' farm products - have not taken the necessary steps to respect the AoA's market access provisions. They have for instance maintained high tariff barriers to imports of agricultural products, and these tariffs tend to be much higher than those on other industrial products. At the same time, agricultural subsidies in OECD countries increased from U.S.$182 billion in 1995 to over $300 billion in 1998.[87]

At its adoption, the AoA was considered to be just the starting point of bringing agriculture under international trade rules, and it provided that negotiations for continuing the "reform process" would start in 1999. These negotiations are now effectively underway, and a number of important issues relating to the right to food are at the centre of discussions. Article 20 of the AoA sets out the scope of the agriculture negotiations, and says that these should take into account, inter alia, "non-trade concerns" and the "other objectives and concerns mentioned in the Preamble" of the AoA, which include food security and the need to protect the environment.

Non-trade concerns and especially food security are of great importance for many developing countries, and these issues have taken up a significant amount of time in the negotiations so far, covering food

[84] Devinder Sharma, SOUTH-NORTH DEVELOPMENT MONITOR SUNS (October 2000).
[85] *The Agreement on Agriculture and Food Agricultural Policy Options of Developing Countries*, *supra* note 69.
[86] *Id*.
[87] See Bello, *supra* note 67, at 2.

security, rural development, socio-economic issues (including rural employment and poverty and marginal and subsistence farmers) and environmental protection.[88] Industrialised countries, particularly those which high protection and subsidy levels for their farmers, such as Switzerland, Japan, and EU countries also raise non-trade concerns such as agriculture's role in maintaining rural communities or environmental protection, as arguments for being allowed to continue protecting their farm sector. Developing country and industrialised country non-trade concerns are quite different and some developing countries fear that theirs will get lost amongst those of industrialized countries.

Several Members have suggested that the current agriculture negotiations should lead to exempting from the obligation to reduce subsidies those subsidies that developing countries provide to boost food production and to help sustain the incomes of poor farmers dependent on agriculture for a living, to make up for lack of capital, or to prevent the rural poor migrating into already over-congested cities.[89] Some WTO Members (such as countries members of the Association of South East Asian Nations) say that these subsidies should be included in the existing "green box" of allowed subsidies (i.e. subsidies that meet the fundamental requirement of minimal or no trade distorting effects or effects on production) but others have suggested that a new "food security box" of permitted subsidies to support food security be created.

A submission from Mauritius to the agriculture negotiations will be particularly interesting for human rights groups, given the emphasis it places on the ICESCR. The submission says that Article 20 does not stand alone but "should be read in conjunction with other parts of the Agreement on Agriculture, mindful of various international commitments. In this context, the following are particularly relevant: the International Covenant on Economic, Social and Cultural Rights (ICESCR) which emphasises the importance of adequate food supply alongside the continuous improvement of living conditions; and the World Food Summit which highlights the multifunctional role of agriculture and the concerns surrounding issues such as rural development and out-migration, high and low potential areas and food security."[90]

Agriculture negotiations are to continue throughout 2001 and possibly beyond, as no quick conclusion is expected: many countries, like Japan and the EU, are insisting that these negotiations should be part of a wider round of multilateral trade talks, and no new round is expected to be launched before the end of 2001. The WTO is now, unusually, in somewhat more of a reflective mode than a negotiating mode, and this negotiating pause could provide a good time to bring human rights arguments in, by providing information on the relevant human rights provisions to national government trade officials or to

[88] See the WTO's agriculture negotiations page at <www.wto.org/english/tratop_e/agric_e/negoti_e.htm>
[89] Konandreas et al., *supra* note 75, at 13.
[90] *FOURTH SPECIAL SESSION OF THE COMMITTEE ON AGRICULTURE, Non-Trade Concerns, Statement by Mauritius*, G/AG/NG/W/75, 30 November 2000. For a more detailed exposition of Mauritius' arguments on the relationship between agriculture and the International Covenant on Economic, Social and Cultural Rights, see *Discussion Paper presented by*

negotiators in Geneva. Human rights groups might find allies amongst many developing countries on this. For instance, an ICESCR yardstick could help distinguish between industrialised countries' and developing countries' non-trade concerns, as well as help identify the minimum ICESCR-recognised levels of livelihood that a new international agriculture regime must preserve.

2. Plant Variety Protection, the WTO and Intellectual Property Rights

The key element of the TRIPs agreement for the right to food is its Article 27.3(b) requirement for WTO Members to provide patent or *sui generis* intellectual property (IP) protection for new plant varieties. There has been a great deal of concern that patent or other IP protection on plant varieties could limit farmers' access to seed, as well as having adverse and unethical effects on indigenous communities, and reducing biological diversity.

Patents are becoming increasingly important in the agricultural sector for two main reasons. Since the 1980s, public funding for agricultural research has decreased significantly - at the end of the 1990s in developed countries, almost half of agricultural research was funded by the private sector[91] - and the privatisation of agricultural research is leading to higher reliance on IPRs. The second reason is the rapid development of biotechnology and genetic engineering, which has multiplied the potential value of genetic resources.

Implicit in the TRIPs agreement's criteria for a patent claim is that there must be an identifiable inventor. This definition almost immediately dismisses the knowledge systems and innovations of indigenous peoples and farmers because they innovate communally, over long periods of time. Their innovations are often for the common good and are not intended for industrial application or financial benefit.[92] But if farmers or indigenous groups do not patent the seeds or plants which they have developed, someone else might.[93] Apart from threatening their right to food, by preventing rural and traditional communities from doing what they have always done (i.e. replanting their seeds from the previous crop each season, and freely exchanging seed with others) since they have to pay for seed instead, this undermines the ethos of many traditional societies that freely exchange knowledge, information and seeds. Patenting also introduces concepts (such as ownership of life) which are incompatible with, and often antithetical to, the values and worldview of many rural or traditional communities.[94]

Mauritius to the International Conference on non-trade concerns in agriculture, Ullensvang (July 2000) on the web at <www.dep.no/archive/ldbilder/01/06/NTCco020.rtf>

[91] Carlos A. Primo Braga & Carsten Fink, *Securing Intellectual Property Rights Regimes*, 1 J. INT'L ECONOMIC L. 540 (December 1998).

[92] Gurdial Singh Nijar, *TRIPs and Biodiversity. The Threat and Responses: A Third World View*, Third World Network, Paper (1996).

[93] The Canadian NGO RAFI claims to have uncovered 147 cases of requests for plant breeder's rights protection for landraces that they have subjected to little, if any, additional breeding. See GRAHAM DUTFIELD, INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY 50 (2000).

[94] Singh Nijar, *supra* note 92, at 17.

The TRIPs Agreement requires WTO Members to provide some form of "effective *sui generis*" protection for plant varieties. Patents are not required, nor is any system that might undermine traditional knowledge or farmers' rights to save seeds. However, in practice, over the last few years, the International Union for the Protection of New Varieties of Plants (UPOV) has put great pressure on developing countries to adopt its 1991 Act as a means of complying with TRIPs Article 27.3(b). Many developing countries thus adopted UPOV 1991 as the deadline for complying with the TRIPs Agreement drew near, rather than develop their own *sui generis* systems that might be more suited to their situation. The UPOV 1991 Act has been criticised as inappropriate for developing countries for several reasons, including that it can give a plant breeder rights over a farmer's harvest, that its IP protection system requires genetical uniformity, thus automatically discouraging genetically diverse and locally adapted seeds from the market and from the field, and that it promotes commercially bred plant varieties geared for industrial agricultural systems in which farmers have to pay royalties on seed, turning the seed sector into an investment opportunity for chemical and biotechnology concerns.[95]

This trend in towards stricter, patent-like IP protection of plant varieties also contributes to the monopolisation of seed production and distribution - by granting private control over knowledge and products which could previously be freely used and exchanged - and lack of biological diversity. In 1998, the top ten corporations controlled 32% of the commercial seed industry and 85% of the pesticide industry.[96] Once commercially viable products are patented, companies undertake marketing campaigns, often resulting in vast monocultures being planted with genetically identical seed. This can not only lead to the erosion of genetic stock and possibly the disappearance of local plant varieties, but renders production more vulnerable since new crops are also vulnerable to diseases and blights, and if thousands of acres are planted with identical seed, the whole crop will be lost.[97]

Another concern is that crops from seeds that are genetically-engineered to resist certain blights or respond to only certain kinds of pesticides will cross-pollinate with neighbouring, unengineered crops, thus rendering subsequent crops vulnerable to modification or inappropriateness for local conditions. The "terminator" seed has been particularly feared in this respect, as it produces plants whose seeds are incapable of germinating. The main purpose of this kind of seed is to make it impossible for farmers to save, replant or sell seed, thus they will have to rebuy seeds at the start of each growing season. According to a spokesperson from the U.S. Department of Agriculture, the aim is for these seeds to be patented and sold in many countries to "increase the value of proprietary seed owned by U.S. seed companies and to open up markets in Second and Third World countries."[98]

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[95] See GAIA FOUNDATION & GENETIC RESOURCES INTERNATIONAL, TEN REASONS NOT TO JOIN UPOV (1998) on the web via <www.grain.org>
[96] *Approaching Intellectual Property as a Human Right, Discussion, supra* note 50.
[97] *Id.*
[98] Quoted in DUTFIELD, *supra* note 93, at 51 (2000).

TRIPs Article 27.3(b) also provides that "[t]he provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement." That review did indeed begin in 1999, amongst disagreement on what the term "review" meant. Many developing Members of the WTO are of the view that it means a review of the substance of the provisions of Article 27.3(b), and provided the possibility of amending the provision, while some industrialised country Members (the U.S. in particular) emphasised its view that "review" simply meant review of implementation of the provision.

Developing countries have taken active part in the ongoing review of Article 27.3(b). Several - including India, Brazil and African countries - would like it to take issues such as biodiversity, traditional knowledge, benefit sharing, farmers rights to resow and share seeds, and the ethics of patenting of life forms into account.[99] The issue of the TRIPs agreement's compatibility with the Convention on Biological Diversity[100] is a particular focus - and discussions on this necessarily also touch on sharing of the benefits of biological diversity (including genetic resources), indigenous rights and rights to traditional knowledge.

The privatisation of agricultural research could mean that, like in the pharmaceutical sector, research focuses on agricultural inputs that increase financial returns rather than respond to the world's inhabitants' need to feed themselves, as evidenced by new products such as terminator technology. Meanwhile, the possibility of patenting seeds could also lead to higher input costs for farmers, many of whom find it hard to make ends meet as it is. Human rights concerns are lurking in the 27.3(b) review, although they generally are not referred to as such since the “non-trade” focus so far has tended to be on the compatibility of the provision with the Convention on Biological Diversity's benefit sharing provisions. However, here too, many developing country delegates might find the provisions of the ICESCR and other human rights instruments a useful legal tool for supporting their claims in the review of Article 27.3(b) of the TRIPs Agreement, as well as in the implementation of the provision.

IV THE WTO, TRANSPARENCY, PARTICIPATION, AND EQUITY

This section will discuss the two dimensions of the transparency and participation question within the WTO, and then raise some issues relating to equity in terms of participation in the elaboration and implementation of WTO-mandated policy. Although these issues do not always directly threaten rights protected by international human rights instruments, they should be mentioned as lack of transparency and inequity stand in contrast to the elements and principles required to ensure the rule of law and respect for human rights, such as the right of everyone to take part in the government of their country, embodied in the Universal Declaration of Human Rights.[101] Moreover, discussions on these issues help shed further

[99] *See WTO Logjammed Over TRIPs*, *supra* note 63.
[100] *Convention on Biological Diversity*, adopted 5 June 1992, in force 29 December 1993. Reproduced in 31 ILM 818 (1992), on the web via <www.biodiv.org>
[101][101] *Universal Declaration of Human Rights*, Article 21.

light on the political dynamics of the WTO, and on the origins and reasons for some of the anti-WTO criticisms.

A Internal transparency

The first dimension of the transparency and participation question within the WTO regards the extent to which WTO processes allows smaller or economically weaker countries to participate as equals in the trade policy-making. Developing countries have for years complained about being left out of GATT/WTO decision-making processes,[102] and in the lead-up to the WTO's Third (Seattle) Ministerial these complaints got louder, and one of the main reasons for the breakdown of the Ministerial Conference in December 1999 was that developing countries refused to agree to the draft Ministerial Declaration. Not only were they annoyed at being increasingly excluded from the Ministerial Conference preparatory process, they were also increasingly feeling that implementation of the WTO Agreement was biased towards developed countries' interests. Meanwhile developed countries were ignoring the issues that were dear to developing countries - particularly their call for assessment of the implementation of the Uruguay Round Agreements before agreeing to include new issues on the WTO agenda - whilst seeking to push for inclusion of new issues to which developing countries were totally opposed (such as labour standards). Small countries in particular felt themselves to be left completely in the cold, not having access to the negotiating fora where potential agenda-setting compromises were being crafted.[103]

To respond to developing countries' substantive concerns the WTO General Council, in June 2000, set up a process to examine implementation of the Uruguay Round Agreements, with the objective of assessing existing difficulties, identifying ways to resolve them and taking decisions for appropriate action. This initiative is one of a series of measures designed to raise confidence in the multilateral trading system by addressing developing countries' needs.[104] Developing countries claim that the Uruguay Round Agreement's Special and Differential treatment (SDT) provisions in their favour have only been partially implemented, and some are calling for changes in the wording of some of the SDT provisions to make them more responsive to developing countries' needs.[105] Issues of particular concern are anti-dumping measures, TRIMs, Agriculture and Textiles and Clothing. So far the discussions on implementation have been mostly procedural, and have not yielded any concrete results.

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[102] A 1998 study showed that of the 97 developing countries that were then Members of the WTO, 56 do not participate effectively in its work. Constantine Michalopoulos, *The Participation of the Developing Countries in the WTO*, World Bank Policy Research Paper (1998).
[103] See Rajesh Chadha et al., *Developing Countries and the Next Round of WTO Negotiations*, 23 THE WORLD ECONOMY 431, 432 (April 2000), and *Agreement on Ministerial Declaration Eluding Negotiators Before Seattle*, 3 BRIDGES WEEKLY TRADE NEWS DIGEST No 45 (15 November, 1999).
[104] See *General Council approves work programme on implementation problems of developing countries*, and *Problems with implementa*tion, WTO FOCUS No 46 (May-June 2000), on the web via <www.wto.org/english/res_e/focus_e/focus_e.htm>
[105] See *Chair's Statement Shows No Movement on Key Implementation Demands*, Bridges Between Trade and Sustainable Development 3 (October 2000).

B External transparency and Participation

The second dimension of the transparency and participation question concerns access of non-governmental entities to WTO documents and to the WTO's decision-making process. The WTO has no general rules regarding NGOs' role in its activities. This has been a source of strong criticism of the WTO, particularly by environmental groups who argue that NGOs can bring important and useful expertise and information to the WTO, but many Members insist that the character of the WTO as a negotiating forum necessarily make it different from other, more open, international organisations, and that Members must make appropriate arrangements at the domestic level for providing information to and consulting with NGOs.

Different elements of the transparency and civil society participation question have been on the WTO agenda for several years. The issue has taken on a new dimension since being increasingly in the limelight in the last couple of years, when a variety of groups unhappy with the effects of globalisation turned their attention to the WTO, increasing pressure on the Organisation to make documents and processes public, and to improve its public image. In 1996, the WTO adopted a decision establishing procedures for public dissemination of WTO documents which reversed GATT's presumption in favour of restricting access to documents.[106] Whilst this was a welcome step, many documents are still not made public for several months. The 1996 Decision provided that it would be reviewed in 1998, and this review did indeed begin before getting caught up in other pre-Seattle systemic issues and getting lost in the aftermath of the breakdown of the Seattle Ministerial. Meanwhile, over the last few years, the WTO Secretariat has taken some initiatives to facilitate access to WTO documents and information, such as the constant improvement of the Document Dissemination Facility on its website.[107]

The question of access to documents is now but one of several issues on the agenda of WTO discussions on external transparency. Others are whether the WTO DSM should be able to receive and consider amicus briefs,[108] and whether some WTO Committee and Council meetings should be open to the public, on an experimental basis at least. Whilst the U.S. has over the last two years been the most consistent in pushing for increased openness of WTO processes and accessibility of documents, its proposals have equally consistently met with a lukewarm or hostile welcome. Some Members are reluctant to derestrict documents or make meetings public given that this could provide indications of current or future negotiating positions. Many also fear that transparency could expose negotiators to contradictory (and potentially paralysing) pressures from domestic groups, preventing the government from articulating coherent negotiation strategies in the WTO. Indonesia for instance has said that "transparency means access to information without undermining confidentiality principles. In attempting to enhance transparency, Members should ensure that the intergovernmental and contractual nature of the WTO was

[106] *Procedures for Circulation and Derestriction of WTO Documents*, WT/L/160/Rev. 1 (22 July 1996).
[107] See also Jackson, *supra* note 16 for a description of some of the WTO secretariat initiatives for NGOs.
[108] See above, p. xxx.

not compromised,"[109] and in a recent submission to the WTO, Hong Kong China has said that civil society's direct participation in the WTO would "risk politicising the operations of the organisation due to sectoral and electoral interests." A recent proposal from Norway focuses on national-level consultative processes, and proposes more regular WTO seminars involving civil society.[110]

That the WTO is reluctant to open itself up to the public is further illustrated by the difficulty even inter-governmental organisations (IGOs) have in obtaining observer status. The language of the WTO Agreement only calls for an "appropriate" relationship with IGOs. Seven IGOs have observer status with the WTO General Council,[111] and several others have observer status with a specific WTO Council or Committee, which does not allow them to participate as observers in any other WTO bodies apart from that with which they have status. Several IGOs have recently been refused observer status, or granted it on an ad hoc basis only. The high tensions which have surrounded discussions of whether the Secretariat of the Convention on Biological Diversity should be granted observer status in the TRIPs Council shows that this issue is more than just a matter of procedure.

Given that there are currently a significant number of divergent proposals regarding external transparency on the table, WTO Members are unlikely to grant non-governmental groups more access than they have at present. However, there are other ways that human rights bodies can bring their concerns to the WTO. One is to follow the International Confederation of Free Trade Unions (ICFTU)'s initiative. Since 1996, ICFTU has prepared a report on respect for core labour standards in each country reviewed by the WTO's Trade Policy Review Mechanism. The ICFTU reports are sent to WTO delegations that are sympathetic to labour issues in advance of the relevant country's Trade Policy Review (TPR) and are also informally distributed to WTO secretariat staff.[112]

ICFTU publishes these reports to put pressure on WTO Members to comply with the commitment to respect core labour standards that they made at the WTO Ministerial Conferences in Singapore in 1996 and Geneva in 1998, and reiterated in the ILO's Fundamental Declaration of Principles and Rights at Work. Although labour issues are not always raised in the TPR, the ICFTU's parallel reporting process results in useful spin-offs: the fact of undertaking comprehensive reviews of most of the world's countries provides the international union movement with a valuable data-base whenever they need information on those countries. The ICFTU's reports have also been useful in other ways: the one on Fiji in 1997 was not only successful in garnering media coverage but also in effecting positive changes to Fijian labour law. Moreover, like the July 1999 report on the U.S., many have been widely quoted.

C Equity

[109] *Review of Procedures for the Circulation and Derestriction of WTO Documents*, WT/GCIW/1 17/Rev.1 (25 January 1999).
[110] Both quoted in *General Council's Crowded Agenda for Last Regular Meeting*, 4 BRIDGES BETWEEN TRADE AND SUSTAINABLE DEVELOPMENT 9 (November-December 2000).
[111] See <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>

There are several different aspects to the issue of equity in the WTO. Each of these leads directly to who the actors and beneficiaries of the WTO system are as we identify who benefits from WTO rules and who suffers the adverse effects, and how the WTO deals with this.[113]

As several of the above examples have shown, the WTO acknowledges that some countries or some sectors within countries will suffer adverse effects at some stage of moving towards more liberalised trade, as in the case of LDCs and NFIDCs and agriculture discussed above. It is also acknowledged in trade circles that at the domestic level there will be some need for adjustment. Putting it very schematically, the free trade model supposes that as countries focus on those goods and services in which they have a comparative advantage, jobs in the sectors in which there is no comparative advantage will be lost, but more jobs and wealth will have been created in the sectors in which the country does have comparative advantage, so everyone will be better off. Decisions regarding access to economic resources in the trade context tend to be presented as issues of economic efficiency, and disregard the fact that the very livelihood of one of the parties involved may be at stake. Livelihood can mean access to the very basics of existence such as the ability to feed oneself, or the factors that are essential to life for certain communities, such as culture, tradition or the ability for the community itself to maintain its cohesiveness. Jobs in a faraway city or new wealth in the form of foreign exchange flowing into the country cannot always replace the basics of livelihood.

The WTO Preamble acknowledges that trade should lead to raising standards of living, ensuring full employment and use of the world's resources in accordance with the objective of sustainable development, but the trade system assumes that these benefits will accrue naturally from free trade. The reality is very different many people finding themselves displaced from their means of livelihood with no substitute options. But the WTO and the international trade system are not equipped to concern itself with distribution of wealth or the adverse effects of trade on certain sectors of the population,[114] as that is a question of domestic policy, to be left to domestic policy-makers. And if domestic policy-makers cannot or do not take the necessary measures to ensure that everyone benefits from international trade, little can at present be done about it through the WTO system. The WTO thus does not address inequities between different domestic constituencies, some of who may have benefited, and some of who may have lost out due to liberalised trade.

Apart from the above illustrations, where WTO-related policies have adversely affected some sectors of the population, another way in which WTO-mandated measures have inequitable results is when trade sanctions are imposed pursuant to non-implementation of a WTO dispute settlement ruling. In 1999,

[112] All these reports, as well as further information about the process, are on the web via <www.icftu.org>
[113] For an economic analysis of who will gain and who will lose from the Uruguay Round agreements, see PHILLIP EVANS & JAMES WALSH, *supra* note 33.
[114] Recall that at the time of GATT's creation the UN Economic and Social Council was expected to play this role.

when the EU had failed to bring its beef import regime into compliance with WTO law within the set time-limit, the WTO authorised the U.S. and Canada to impose retaliatory tariffs against EU goods. The U.S. thus targeted U.S.$116.8 million worth of goods from France (including Roquefort cheese, truffles and goose liver pâté), Germany (pork, fruit juices, mustards and soups), Italy (canned tomatoes and fruit juices), and Denmark (pork).[115] The inequity in this is that regardless of whether these roquefort, mustard and canned tomato producers played a part in the elaboration of the European – WTO-inconsistent - hormone-free beef policy, they suffered the adverse consequences of U.S. punitive tariffs on their exports. The WTO-authorised economic retaliation measures can - and usually do - hit small producers who had nothing to do with the initial conflict, rather than the Government responsible for the policy. Observers have pointed out that this introduces a variation on the beggar-my-neighbour policies that the GATT was set up to prevent.[116] Defenders of the WTO system argue that it is a matter of domestic policy whether a government chooses to expose sectors of its economy to the adverse effects of retaliation by another WTO Member, in exchange for maintaining WTO-inconsistent policies in another area.

We have seen examples of who can be adversely affected by WTO-related policies but the key question to ask is who are the beneficiaries of the WTO? Although only States are WTO Members and the benefits of trade are supposed to accrue to all Members, the immediate and unequivocal beneficiaries are individual traders, and particularly the largest amongst them. Indeed, many companies spend large amounts of energy and money lobbying governments to adopt particular positions. A mild instance of this is several companies' practice of placing full-page advertisements disguised as articles in the international press supporting their views on free trade.[117] Persistent rumours abound that PhRMA (Pharmaceutical Research and Manufacturers of America) drafted the TRIPs Agreement during the Uruguay Round, that a coalition of agribusiness interests from the U.S. and the EU were behind the Agreement on Agriculture, and that routine large donations by Chiquita Brands majority-owner Carl Lindner both the U.S. Democratic and Republican parties ensure that the government take up the issues that concern him in the WTO.[118] That WTO Members represent their large business interests is not the slightest bit hidden - an illustration of this is clear to see in the name of an early WTO dispute known as the Kodak-Fuji case which "pitted photographic paper and film giants Kodak and Fuji against one another along with their respective governments, the U.S. and Japan."[119]

Many multinational enterprises are more powerful than individual countries, and their size can seem threatening even to rich, well-run countries. In Ireland, foreign firms account for almost half of their country's employment and two-thirds of its output, and each of the ten biggest industrial multinationals in

[115] *Big Mac Targeted By French Farmers*, 3 BRIDGES WEEKLY TRADE NEWS DIGEST No 34 (30 August 1999).
[116] *Id.*
[117] See *The Pfizer Forum*, and Commerzbank's *Viewpoint* series in THE ECONOMIST during 2000. The third piece in the *Viewpoint* series is entitled "Despite Seattle: liberalization is good for financial system."
[118] *WTO Banana Panel Releases Draft Ruling*, 1 BRIDGES WEEKLY TRADE NEWS DIGEST, No 8 (24 March 1997).

Australia has annual sales larger than their government's tax revenue.[120] These figures highlight the fact that economic and financial power is ever less controlled by political power exercised by governmental institutions - it has been said to be easier to change things in Nigeria these days by boycotting Shell than by lobbying the Nigerian government.[121]

Besides the equity points that large companies are more likely to pursue private than public interests, that they have more resources than public interest groups to dedicate to pressuring governments to adopt trade policy options that suit them, and that some companies are more powerful than many countries, the active role of large companies in international trade policy raises a more important issue. Given that companies are non-State actors not bound by international law, how can one ensure that they respect international legal norms, including human rights laws? A number of different groups, including big companies themselves, are working on ways in which business can be held accountable to human rights standards.[122] This article will not dwell on proposing solutions to this important question, but raises the point to further emphasise whom the real actors and beneficiaries of the WTO are.

A final point about equity in the WTO takes up several of the issues touched on earlier regarding developing countries' difficulties in adapting to WTO rules. Not only do staunch WTO supporters agree that developing countries agreed to substantially more obligations that developed countries did in the Uruguay Round,[123] but the "level playing field" that the GATT and WTO set out to create for trade is unfavourable for them, given that on a level playing field, the stronger will do better. "Entre le fort et le faible, c'est la liberté qui opprime et la loi qui affranchit."[124] Whilst this "level playing field" is inequitable on a macro-economic level as between the economically strong and the economically weak countries, it exacerbates the inequity to which the populations of the weaker are exposed, as industrialized countries on the whole had more sophisticated mechanisms for domestic redistribution of wealth when GATT came into force than many developing countries do today.[125]

V POSSIBLE STRATEGIES

Calls for the WTO to take human rights into account will not go away. On the contrary, they are likely to grow stronger. Experience with environment, labour and transparency issues has shown that WTO Members are unlikely to reach agreement on the relationship between the WTO and human rights *per se*.

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[119] Doug Daniels, *US-Japan Fairness Issues in the Kodak-Fuji Case*, THE FAIR TRADE PAGE (January 1998) on the web at <www.internationalecon.com/fairtrade/fairpapers/ddaniels.html>
[120] *The World's View of Multinationals*, THE ECONOMIST (29 January 2000).
[121] *Id.*
[122] See for instance, Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights*, HUMAN RIGHTS QUARTERLY 21 (1999). See also INTERNATIONAL COUNCIL FOR HUMAN RIGHTS POLICY, HUMAN RIGHTS OBLIGATIONS OF BUSINESS UNDER INTERNATIONAL LAW (Draft report, 2000).
[123] JEFFREY J. SCHOTT, WTO 2000: SETTING THE COURSE FOR WORLD TRADE (1998).
[124] Between the strong and the weak, freedom is oppression and the law is liberation, Lacordaire, quoted in Peter Leuprecht, *The World Trade Organisation – Another Playground of Pan-Economic Ideology ?*, in Malini Mehra (ed.) *supra* note 82.
[125] See Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARVARD INT'L L. J. 296 (2000).

But experience on the environmental front shows that it is possible to have the WTO take these issues into account in the course of its ongoing work in specific areas.

In some ways, the human rights cause is more advanced today than the environmental cause. Human rights are easier to defend from an international, legal point of view, since many basic principles have today clearly acquired the status or *erga omnes* obligations, binding on the international community as a whole. In international law, there is little questioning the primacy of human rights law. The WTO Appellate Body has acknowledged that the WTO DSM must not interpret international law in "clinical isolation,"[126] thus the human rights cause is more advanced in the WTO in that if a conflict between a WTO rule and a human rights provision were brought to the DSM, the DSM would clearly have to take international human rights law into account. Some of the legal principles of international environmental law being either more recent or less clear, the DSM may have more difficulty in giving them due reflection, as was the case with the precautionary principle in the hormone-beef case.

But on the political level, the human rights movement is less advanced than the environmental movement, who have been working on WTO issues for ten years. Many environmentalists are now familiar with the WTO Agreement and the WTO's methods of working, and know how and where in the WTO to raise their issues so that they get heard. Many groups concerned with trade and the environment work less at the level of the WTO in Geneva than at the national or regional levels, where they bring policy-makers from the environmental ministries together with trade policy officials in order to bridge the gaps in knowledge and understanding that have often led to inconsistencies in international policy-making. Environmentalists have also separated clearly into the group of those who wish to use trade or the WTO's strong enforcement mechanisms as weapons to thrust domestic environmental policy onto countries with lower environmental standards, and the group of those who wish to see safeguards built into the world's trade rules to ensure that free trade does not cause unwarranted environmental destruction.

Human rights activists could observe the paths followed by the environmental groups over the years and learn from them. Calls in human rights publications or human rights meetings for the WTO to take human rights into account are unlikely to be heard. But raising specific issues with specific WTO delegates, industry representatives, or ministry officials could bring human rights into the WTO system in a less polemical and more helpful way. The key is directing the call to the right actors in the right processes.

Meanwhile, human rights activists should not forget that they have strong tools of their own at their disposal for ensuring that States respect human rights standards in their trade policies. The UN human

[126] See Gabrielle Marceau, *A Call for Coherence in International Law*, 33 J. WORLD TRADE 87, 90 (1999).

rights treaty bodies, for instance, have reporting and monitoring systems, including invidual complaints mechanisms, that are almost unique in international law, and which non-governmental groups can easily use to ensure that State representatives are held to account if they do not respect their human rights obligations. After all, different people may attend human rights and WTO meetings in Geneva, but they represent the same States. Since international trade law is unlike international human rights law in that it does not establish norms for what a State owes its citizens, human rights activists should turn to the human rights mechanisms to ensure that the citizens of the world do indeed get what they are owed.

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