

International Trade and Human Rights: An Unfinished Debate

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A. Introduction

We are living in a world in which the moral legitimacy of cultures, religions, ideologies, and the practices of states, international organizations, and even corporations is being measured against human rights norms. The moral significance of and practical respect for human rights has grown so much that human rights have been described as a global religion,¹ and a new standard for civilization.² International trade, a popular and much debated issue of our time, is one of those phenomena that is currently being measured against the standards of human rights. Leading experts remain divided about whether global trade is good or bad for human rights. There are those who are utterly convinced that the world trade regime has a mutual basis with human rights and see potential in the growth of one as a positive sign for the other.³ There are also those who, on the other hand, are equally convinced that human rights and international trade regimes are in a relationship of enmity.⁴

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¹ Andrew Heard, *Human Rights: Chimeras in Sheep's Clothing?*, SIMON FRASER UNIV. ONLINE (1997), <http://www.sfu.ca/~aheard/intro.html>.

² See Jack Donnelly, *Human Rights: A New Standard of Civilization?*, 74 INT'L AFF. 1, 1 (1998).

³ See Ernst-Ulrich Petersmann, *Human Rights and International Trade law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 29, 31–34 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi eds., 2005) (attempting to prove that, and explain how, the values informing human rights and the general principles of international trade are similar); GAO, Pengcheng, *Rethinking the Relationship Between the WTO and International Human Rights*, 8 RICH. J. OF GLOBAL L. & BUS. 397, 398–99 (2009) (arguing that the value of non-discrimination underlie both regimes); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19, 22–23 (2000); Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 621 (2002) [hereinafter Petersmann, *Lessons from European Integration*]; Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and Constitutional Justice: A Rejoinder*, 19 EUR. J. INT'L L. 955, 955 (2008) [hereinafter Petersmann, *A Rejoinder*].

⁴ See Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 815 (2002); Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, in HUMAN RIGHTS IN DEVELOPMENT: YEARBOOK 1999/2000 51, 51 (Hugo Stokke & Arne Tostensen eds., The Millennium Ed. 2001); Robert Howse, *Human Rights in the WTO: Whose*

One should, however, conceive of the relationship between world trade and human rights as, fundamentally, a relationship in tension, but also as a relationship in which that tension can be significantly minimized through accommodation, convergence, and interpenetration. It is conceivable that solutions that are acceptable to the majority of political participants in the international community can be reached even where the two regimes—human rights and free trade—clash. This comment argues that the relationship between human rights and international trade is not, and should not be viewed as, a zero-sum game in which one's gain is necessarily the other's loss. The comment begins with an explanation of the core tension between the two regimes and goes on to explain, or at least make a proposal for, how this tension could be negotiated for optimum outcomes for both regimes.

B. The Tension

1. Theoretical Considerations (Issue of Approach)

Human rights and international trade diverge at the theoretical level.⁵ While the world trade regime has at its base the free movement of goods, services, capital, and persons, the human rights regime deals with the wellbeing and welfare of the individual human being and, sometimes, groups of human beings. When we talk about non-discrimination, free and fair trade, and transparency in the context of international trade, we are advocating these principles in a way that is at least neutral and at worst detrimental to human rights. This difference in approach has ramifications in that, while the human rights regime looks into the quality of life of individual human beings, the trade regime primarily focuses on equal opportunity of trading partners and not on what effects that equality has on human beings outside the purely economic realm.

Although it may be true that trade liberalization eventually benefits individuals because it provides a choice of products and qualities and stimulates economic growth, we should remember that governments represent their industries (or capital) when they negotiate in the World Trade Organization (WTO) or similar *fora*. This means that human rights are not being directly or purposefully represented as such during these negotiations. Even if the economic interest represented is not necessarily and always opposed to human rights, it

Rights, What Humanity? Comment on Petersmann, 13 EUR. J. INT'L L. 651, 651 (2002); Frank J. Garcia, *Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 51 (1999); Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 126 (2002); Andrew T.F. Lang, *Re-Thinking Trade and Human Rights*, 15 TUL. J. INT'L & COMP. L. 335, 335 (2007).

⁵ See Dan Seymour & Jonathan Pincus, *Human Rights and Economics: The Conceptual Basis for their Complementarity*, 26 DEV. POL'Y REV. 387, 387–89 (2008) (pointing out that they have differences in their theoretical approach and even in their lexicon).

nevertheless creates a vulnerable situation for human rights where there is a conflict between the two. Thus, it is easy for the international trade regime to achieve well intended results that are manifestly harmful from the perspective of human rights.

Whenever the effects of international trade are a point of contention in trade law (or economics), the arguments are always about some utilitarian calculation such as efficiency, increase in Gross Domestic Product (GDP), Gross National Product (GNP), ensuring a “large and steadily growing volume of real income and effective demand”, or other material indicators.⁶ The *homo economicus* approach is far from the concrete moral/ethical approach of human rights.⁷ The point of departure in human rights is always the setting of minimum standards for the protection and wellbeing of human beings, whether the protection is from trade, investment, politics, or war.⁸ In practice, this means that the positive achievements of international trade can hurt human rights as the later are not considered in the calculation of economic success or are mere externalities to the economic process.⁹

⁶ See General Agreement on Tariffs And Trade, preamble, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter the Marrakesh Agreement], available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm. For works capturing the gist of these debates, see PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 19–22 (2005); Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective*, in *INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES* 69, 69–72 (Frederick M. Abbott, Christine Breining-Kaufmann & Thomas Cottier eds., 2006); GRAHAM DUNKLEY, *FREE TRADE: MYTHS, REALITY AND ALTERNATIVES* 12–17, passim (2004) (providing a summary of critiques and alternative paradigms).

⁷ See Seymour & Pincus, *supra* note **Error! Bookmark not defined.**, at 389–92 (stating that economics’ focus on utility does not give much attention to moral rectitude of economic decisions); KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET* 36, 122–29 (2009) (noting that from the perspective of economics, rational human action—the assumption of “*homo economicus*”—leads to the practical principles of “maximizing shareholder value” and maximizing profits which take precedence over all other considerations including moral ones, based upon economic grounds); William Lazonick & Mary O’Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29 *ECON. & SOC’Y* 13, 13 (2000); Herbert Gintis & Rakesh Khurana, *Corporate Honesty and Business Education: A Behavioral Model*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 300, 300 (Paul J. Zak ed., 2008); DAVID CROWTHER & LEZ RAYMAN-BACCHUS, *PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY* (2004) (providing an alternative model to this view that emphasizes corporate social responsibility and “stakeholder,” not “shareholder,” value); SYBILLE SACHS & EDWIN RÜHLI, *STAKEHOLDERS MATTER: A NEW PARADIGM FOR STRATEGY IN SOCIETY* (2011); Joseph F. Johnston, Jr., *Natural Law and the Fiduciary Duties of Business Managers*, in *BUSINESS AND RELIGION: A CLASH OF CIVILIZATIONS?* 279, 292–95 (Nicholas Capaldi ed., 2005); DAVID E. HAWKINS, *CORPORATE SOCIAL RESPONSIBILITY: BALANCING TOMORROW’S SUSTAINABILITY AND TODAY’S PROFITABILITY* (2006) (providing the environmental aspect of the same view).

⁸ See generally GERHARD ERNST & JAN-CHRISTOPH HEILINGER, *THE PHILOSOPHY OF HUMAN RIGHTS* (2012).

⁹ See generally Sykes, *supra* note 6, at 74–76; JoonBeom Pae, *Sovereignty, Power, and Human Rights Treaties: An Economic Analysis*, 5 *NW. J. INT’L HUM. RTS.* 71, 71 (2006); Tarek F. Maassarani, *WTO-GATT, Economic Growth, and the Human Rights Trade-Off*, 28 *ENVTL. L. & POL’Y J.* 269, 269 (2005).

II. Practical Considerations and Specific Areas of Conflict

An important practical and normative result of the world trade regime is that it restricts the state in relation to human rights. First, it limits the prerogative of states to impose economic sanctions on other states so as to force them to comply with human rights standards.¹⁰ Second, it restricts the ability of states, especially less developed ones, to improve their labor standards by legislation. Due to competition to achieve comparative advantage, states “race to the bottom” with labor standards to attract capital and foreign direct investment. Third, trade rules limit the ability of states to take action to protect, ensure, and promote the exercise of rights within their territories where these actions infringe upon rules of international trade. Thus, the tension between international trade and human rights is not just a theoretical conflict. As it has been practically demonstrated, this conflict can and does occur. The following looks at some of the specific ways in which international trade may frustrate the attainment of international and domestic human rights standards.

1. The Right to Health

A right to an adequate standard of health was introduced into the normative world of international human rights immediately following the formation of the United Nations and has been affirmed by the Universal Declaration of Human Rights and numerous treaties.¹¹

¹⁰ We first need to clarify a set of related words used in relation to sanctions that may cause confusion if left for the reader to define at will. Literature on the subject use different, but related, words such as “embargo,” “sanction,” “action,” “trade measures,” “trade restrictions,” “trade related action,” “human rights related sanctions,” and similar words and expressions to describe one common phenomenon. In the context of this comment these usages are meant to describe any actions or steps taken by members of the WTO which might conflict with their obligations under the agreements of the WTO. For different usages of the word, see Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* 6–9 (Int’l Dev. L. Org., Voices of Dev. Jurists Paper Ser. vol. 2, no. 2, 2005), available at <http://www.worldtradelaw.net/articles/zagelhumanrights.pdf>; Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT’L ECON. L. 133, 189 (2002); Carlos Manuel Vásquez, *Trade Sanctions and Human Rights—Past, Present, and Future*, 6 J. INT’L ECON. L. 797 *passim* (2003) (distinguishing between general trade sanctions and tailored sanctions).

¹¹ See Universal Declaration of Human Rights, art. 25(1), G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (stating “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family”); World Health Organization, Constitution of the World Health Organization, preamble, Official Record World Health Org. 2, 100 (July 22, 1946), available at <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf> (“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being”); International Covenant on Economic, Social and Cultural Rights, art. 12(1), G.A. Res. 2200A (XXI) A, U.N. Doc. A/RES/2200A(XXI) (Jan. 3, 1976); Organization of American States, American Declaration on the Rights and Duties of Man, art. XI (1948); The International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e), (iv), G.A. Res. 2106 (XX) A, U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965); Convention on the Elimination of all Forms of Discrimination Against Women, art. 11.1(f), G.A. Res. 34/180, 12, U.N. Doc. A/RES/34/180 (Dec. 18, 1979); The Convention on the Rights of the Child, arts. 17, 23–25, 32, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); African Charter on Human and Peoples’ Rights, art. 16, June 27, 1981, OAU Doc. CAB/LEG/67/3, 21 I.L.M. 58 (“1. Every

In the last two decades, both international and constitutional bodies have fleshed out in greater detail the substance and implications of the right to health.¹² Conflict between the trade and human rights regimes arises where states are not able to protect, ensure, or promote the right to health of their citizens without having to violate rules of international trade such as those preventing states from banning certain imports that they deem harmful to health or those preventing the production of patented medicines.

Potential for conflict between international trade and the right to health has been highlighted in two situations. First, as the “Hormone-Beef” and “Asbestos” cases have illustrated, aside from the issue of protectionism and culture, measures taken for the protection of public health can be stricken down because they conflict with free trade rules.¹³ Second, and more blatant, is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that makes it more difficult for developing states to provide free or cheaper—or generic—versions of patented medicines.¹⁴ It should be noted that the human rights aspect may not be immediately apparent from the lexicon of international trade law since it sees the right to health, or any other human right, as no different from the general public interest exceptions to the rules (e.g. GATT Art. XX).

individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”); ANDREW CLAPHAM & MARY ROBINSON, *REALIZING THE RIGHT TO HEALTH* (2009); Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 *IND. L. REV.* 1457, 1457 (2001); Steven D. Jamar, *The International Human Right to Health*, 22 *S.U. L. REV.* 1, 1 (1994–1995); ANDREW CLAPHAM & MARY ROBINSON, *REALIZING THE RIGHT TO HEALTH* (2009).

¹² See General Comment No. 14, Comm’n on Economic, Social and Cultural Rights, Apr. 25, 2000–May 12, 2000, E/C.12/2000/4, 22 Sess. (Aug. 11, 2000); African Comm’n on Human and Peoples’ Rights [ACmHPR], Soc. & Econ. Rights Action Ctr. & the Ctr. for Econ. & Soc. Rights v. Nigeria, Comm. 155/96, Oct. 2001, 15th AAR 2001-2002 Annex V, (2001); Resolution on Access to Health and Needed Medicines in Africa, African Comm’n on Human and Peoples’ Rights Res. 44/141 (Nov. 24, 2008); D v. United Kingdom, 24 Eur. Ct. H.R. at 423 (1997); Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) (1994). For a brief review of both international and constitutional jurisprudence on the right to health, see Iain Byrne, *Enforcing the Right to Health: Innovative Lessons from Domestic Courts*, in *REALIZING THE RIGHT TO HEALTH* 525, 525 (Andrew Clapham & Mary Robinson eds., 2009); Vincent Chetail & Gilles Giacca, *Who Cares? The Right to Health of Migrants*, in *REALIZING THE RIGHT TO HEALTH* 224, 224 (Andrew Clapham & Mary Robinson eds., 2009).

¹³ See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, (Mar. 12, 2001) (adopted Apr. 5, 2001); TRACEY EPPS, *INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO’S SPS AGREEMENT* 10–15; Frederick M. Abbott, *Editorial. The Enduring Enigma of TRIPS: A Challenge for the World Economic System*, 1 *J. INT’L ECON. L.* 497, 501, 505 (2008).

¹⁴ Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies* 24 *HUM. RTS. Q.* 1, 24–30 (2002).

However, these examples not only show an overlap between the two regimes, but also that such overlaps form gaps in the trade regime's armor.¹⁵

2. *The Right to Food*

Similar to the right to health, the right to food is also recognized in numerous binding and non-binding international instruments. By Penny Overby's count, there are more than one hundred such documents.¹⁶ The right to food has also found expression in international and constitutional jurisprudence.¹⁷ Ying Chen makes an interesting case for the right to food to be considered a customary rule of international law by citing to state practice with the requisite *opinio juris*.¹⁸

The risk international trade poses to the right to food is that, because of trade liberalization, small-scale farmers might not be able to compete internationally and may be forced to abandon their land to sectors other than food production. This, according to the Office of the United Nations High Commissioner for Human Rights (UNHCHR) and the Food and Agriculture Organization of the United Nations (FAO), will eventually lead to the loss of a livelihood for these farmers who will then be unable to feed themselves.¹⁹

¹⁵ See generally Frederick M. Abbott, *The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 279, 279 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi eds., 2005); Gudrun Monika Zagel, *The WTO and Trade-Related Human Rights Measures: Trade Sanctions vs. Trade Incentives*, 9 AUSTRIAN REV. OF INT'L AND EUR. L. 119, 119 (2004); Sarah Joseph, *Trade and the Right to Health*, in REALIZING THE RIGHT TO HEALTH 359, 359 (Andrew Clapham & Mary Robinson eds., 2009); Phillip Countryman, *International Trade and World Health Policy: Helping People Reach Their Full Potential*, 21 PACE INT'L L. REV. 241 *passim* (2009).

¹⁶ PHILIP ALSTON & KATARINA TOMAŠEVSKI, THE RIGHT TO FOOD (1984); Penny Overby, *The Right to Food*, 54 SASK. L. REV. 19, 19 (1990).

¹⁷ See African Commission on Human and Peoples' Rights, Soc. & Econ. Rights Action Ctr. & the Ctr. for Econ. & Soc. Rights v. Nigeria, Comm'n 155/96, Oct. 2001, 15th AAR 2001-2002 Annex V, (2001); Supreme Court of Nepal, Prakash Mani Sharma v. His Majesty's Gov't Cabinet Secretariat, Mar. 11, 2003, WP 2237/1990 (2003); People's Union for Civil Liberties v. Union of India & Ors, (2007) 2001 S.C.C. 196 (India); The Equality Court held at the High Court of South Africa, Kenneth George et al. v. Minister of Env't. Aff. & Tourism, May, 02, 2007, EC 1/2005 (2007); CHRISTOPHE GOLAY, THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS (2009) (providing a discussion of the domestic and international developments).

¹⁸ Ying Chen, *The Right to Food*, 12 EUR. J.L. REF. 158, 158 (2010).

¹⁹ See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS AND WORLD TRADE AGREEMENTS: USING GENERAL EXCEPTION CLAUSES TO PROTECT HUMAN RIGHTS (2005), available at <http://www.ohchr.org/Documents/Publications/WTOen.pdf>; FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, 2 FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, AGRICULTURE, TRADE AND FOOD SECURITY: ISSUES AND OPTIONS IN THE WTO NEGOTIATIONS FROM THE PERSPECTIVE OF DEVELOPING COUNTRIES: COUNTRY CASE STUDIES (2000) (providing descriptions of specific food security issues that farm workers in developing countries face in the context of liberalization); ANTHONY CASSIMATIS, HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW: THE LEGALITY OF TRADE MEASURES IMPOSED IN RESPONSE TO VIOLATIONS OF HUMAN RIGHTS OBLIGATIONS UNDER GENERAL INTERNATIONAL LAW 429-30 (2007); Caitlin Firer, *Free Trade Area of the Americas and the Right to Food in International Law*, 1 U. ST.

Conflict between international trade and the right to food can also occur where populations, usually indigenous peoples, are uprooted from their ancestral lands to make way for (often foreign) agro-industry—a phenomenon that is commonly referred to as “land-grabbing.”²⁰ Although this is not a typical clash between the two legal-normative regimes, such a clash could occur because the trade regime prohibits third states from imposing trade related sanctions on, or discriminating against, agro-products that are produced in this way. The trade system’s “comparative advantage” oriented analysis is, generally, morally aloof from the human cost of these phenomena at the individual level.²¹

3. *Labor Standards*

Labor rights are one of the few human rights that were internationally recognized by the world community of states before the formation of the UN and were strengthened by post war treaties.²² The linkage between labor rights and international trade had also been recognized when the international community came together to form the failed International Trade Organization and, subsequently, the General Agreement on Tariffs and Trade (GATT).²³ The international trading system limits the ability of states to try to impose trade restrictions, for example by a generalized system of preferences, on foreign states to make them comply with labor standards, such as those proscribing child labor. Additionally, the international trading system curtails the negotiating ability of states to whom capital investment flows—host states—to regulate multinational corporations due

THOMAS L.J. 1054, 1054 (2004); Chris Downes, *Must the Losers of free Trade go Hungry? Reconciling WTO Obligations and the Right to food*, 47 VA. J. INT’L L. 619, 636–640 (2007).

²⁰ In recognition of this problem, the UN Special Rapporteur on the Right to Food has proposed ways in which to deal with the human rights consequences of land grabs. Olivier de Schutter, Special Rapporteur on the Right to food, *Large-Scale Land Acquisitions and Leases: A Set of Core Principles and Measures to Address the Human Rights Challenge* (June 11, 2009), available at <http://www.oecd.org/site/swacmali2010/44031283.pdf>.

²¹ Part of the problem is that the scientific and statistical method prevalent in economics does account for the micro-level effects on trade liberalization on families and individuals. See L. Alan Winters, Neil McCulloch & Andrew McKay, *Trade Liberalization and Poverty: The Evidence So Far*, 42 J. ECON. LIT. 72, 89–97 (2004).

²² JEAN-MICHEL SERVAIS, *INTERNATIONAL LABOUR LAW* 24 (2d ed. 2009). International labor law is one of the more complex international regimes, especially since the International Labour Organization (ILO) had sustained an intensive effort in its development. See Nicolas Valticos, *The Sources of International Labour Law: Recent Trends*, in *INTERNATIONAL LAW AND ITS SOURCES: LIBER AMICORUM MAARTEN BOS* 179, 179 (Wybo P. Heere ed., 1989); Shareen Hertel, *Human Rights and the Global Economy: Bringing Labor Rights Back In*, 24 MD. J. INT’L L. 283, 283 (2009).

²³ See Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT’L L. & POL’Y 13, 13 (2003).

to the competition for investment from such companies, —which must consider labor costs when deciding whether and where to invest.²⁴

The argument against such a “race to the bottom” is that, in the end, even the laborer who keeps her job because her country “won” the race does not receive as much income on the margin as a result of competitive bidding to reduce labor costs.²⁵ Although economists are still debating the conclusiveness of the evidence, a number of empirical studies have discovered a positive correlation between lower labor standards and international competitiveness in states exporting labor-intensive goods.²⁶ Another way in which the two regimes interact is the possibility of violations of the rights of employees who migrate across international borders in accordance with the General Agreement on Trade in Services (GATS) (Mode 4).²⁷ Both of the previously detailed examples illustrate how trade liberalization exposes human rights to new, or elevated, danger rather than a normative conflict *sensu stricto*.

4. Democratic Rights

Although the right to vote and to be elected—i.e., the right to democratic participation—was affirmed by the Universal Declaration of Human Rights, it was only after the Cold War that the assertion of this right became more concrete. In addition to citing human rights treaties that support this conclusion,²⁸ proponents of a human right to democracy argue that state practice justifies democratic governance to be a binding norm of international

²⁴ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 478–479 (2001) (discussing how labor standards are affected and proposing responsibility of multi-national corporations, on top of nation-states, for upholding these standards).

²⁵ See Anita Chan & Robert J. S. Ross, *Racing to the Bottom: International Trade Without a Social Clause*, 24 THIRD WORLD Q. 1011, 1011 (2003); Drusilla K. Brown, *Labor Standards: Where Do They Belong on the International Trade Agenda?*, 15 J. ECON. PERSP. 89, 89 (2001).

²⁶ See Cees van Beers, *Labour Standards and Trade Flows of OECD Countries*, 21 THE WORLD ECON. 57, 57 (1998); Jai S. Mah, *Core Labour Standards and Export Performance in Developing Countries*, 20 THE WORLD ECON. 773, 773 (1997); Matthias Busse, *Do Labor Standards Affect Comparative Advantage in Developing Countries?*, 30 WORLD DEV. 1921, 1921 (2002); Brown, *supra* note 25, at 89; Layna Mosley & Saika Uno, *Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights*, 40 COMP. POL. STUD. 923, 923 (2007).

²⁷ See Marion Panizzon, *How Close Will GATS Get to Human Rights?* 6 (N.C.C.R. Trade Reg., Working Paper No. 2006/14, 2006).

²⁸ See UDHR, *supra* note 11, at art. 21, 29(2); Convention for the Protection of Human Rights and Fundamental Freedoms, protocol I, art. 3, Sept. 3, 1953, Council of Europe Treaty Series (CETS) No. 005; Arts. of the International Covenant on Civil and Political Rights, arts. 14(1), 21(2), 22(2) & 25, G.A. Res. 2200A (XXI) A, U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966); Organization of American States, American Convention on Human Rights, art. 23, Nov. 22, 1969, B-32; African Charter on Human and Peoples' Rights, art. 13(1), June 27, 1981, OAU Doc. CAB/LEG/67/3, 21 I.L.M. 58.

human rights law.²⁹ Some have gone so far as to claim that there is a right to humanitarian intervention to install or restore democracy where it does not exist.³⁰

The World Trade Organization's (WTO) lack of democratic legitimacy and transparency can be posited as violative of citizens' right to take part in the direction of public and state affairs. There are two ways in which the WTO is said to lack democratic legitimacy.³¹ The lack of "input legitimacy" is a clear case in which citizens are deprived of the right to decide on public affairs. Imagine how much a parliamentarian (call her X) represents her electorate on issues on which she did no campaigning during elections (let's say that the main campaign rallying point for the candidate was withdrawal from Iraq). Parliamentarian X on the first day of the opening of the parliament votes for the appointment of Mr. Y as the Minister of Foreign Affairs because, among other things, he supports withdrawal from Iraq. The next day Mr. Y nominates, or appoints, his diplomatic staff and appoints Mrs. Z as the "ambassador for WTO affairs" because, in addition to her credentials and qualifications, Mrs. Z supported Mr. Y in his ascent through their party for the last 10 years. Mrs. Z appoints two former students, whose negotiation style and political view she likes, as negotiators in WTO proceedings. Trying to trace the "legitimacy chain" from these negotiators to the electorate who voted for X is illusory. This shows us how far the WTO processes are from the deliberation process of democratic societies. Additionally, the processes of the WTO, including all the technical matters that it handles,

²⁹ See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS AND MORALS 904–18 (2d ed. 2000); SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 30 (2000); BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 253 (2000); Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 495 (1997); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 77 (1988); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992); Henry J. Steiner, *Do Human Rights Require a Particular Form of Democracy?*, in DEMOCRACY, THE RULE OF LAW AND ISLAM 193, 193 (Eugene Cotran & Adel Omar Sherif eds., 1999); Same Varayudej, *A Right to Democracy in International Law: Its Implications for Asia*, 12 ANN. SURV. OF INT'L & COMP. L. 1, 1 (2006).

³⁰ Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 329 (1995); Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 3 HARV. INT'L L.J. 143, 143 (1993); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866 (1990); Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 516 (1990); David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 607 (1995). For an argument criticizing these views, see Sarah A. Ramage, *Panama and the Myth of Humanitarian Intervention in U.S. Foreign Policy: Neither Legal Nor Moral, Neither Just Nor Right*, 10 ARIZ. J. INT'L & COMP. L. 1, 1 (1993); W. Michael Reisman, *Coercion and Self-Determination: Constructing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 642 (1984).

³¹ See generally ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM, 75–86 (2004); ROBERT HOWSE, THE WTO SYSTEM: LAW POLITICS AND LEGITIMACY 57–73 (2007) (providing a critique of the 'democratic deficiency' thesis); Gregory Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 1 (2001).

are far too technical and complex to be a possible point of deliberation in society at large. Thus, it is only on important and politically controversial matters that the WTO process could have input legitimacy in democratic societies. If the input legitimacy of the WTO can be criticized in this way, in the context of democratic states, one can be assured of the lack of any sort of “legitimacy chain” in non-democratic and authoritarian states.

Even if we assumed a legitimacy chain in both democratic and non-democratic countries, the disproportionate power wielded by the most developed states in trade negotiation dispels hope that WTO decisions can have “input legitimacy”. This is evinced by how the most powerful trading nations have been dictating the results of WTO negotiations by deciding on outcomes among themselves and later impose their decisions on all the other members.³² This process has come to be described as the “Green Room Phenomenon” in reference to a conference room in GATT Director General’s office in which these states meet separate from other WTO members.³³ Given that no more than four WTO members, known as the “Quad”, decide who sits with them in the Green Room and what the likely outcomes of the meetings are,³⁴ the question is how can we say that there is a legitimacy chain between the decisions made in the “green room,” and the population of, say, Madagascar or Tuvalu? The “green room” and “Quad” phenomena are, therefore, indicators of the fact that there is no input legitimacy in the WTO in as far as citizens of a large majority of WTO members are concerned.

Least developed countries that house the majority of the world’s population not only do not participate in “green room” discussions, but many of them do not have sufficiently trained personnel to allow them to send experts, who are of their nationality, to the negotiating tables of the WTO. Additionally, the prohibitive cost of attending the forty or fifty meetings held in Geneva each year, inevitably result in missed meetings, which can leave the countries ill-prepared for negotiations. The same applies to dispute settlement mechanisms for which developing states do not have the requisite skilled personnel. Even if they wanted to employ qualified experts, the expense of retaining such specific expertise is extremely costly.³⁵ The WTO’s “output legitimacy,” whereby its decisions are disliked by

³² Bernard Hoekman, *The WTO: Functions and Basic Principles*, in *DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK* 41, 41 (Bernard Hoekman, Aaditya Mattoo & Philip English eds., 2002); Nicola Bullard & Chanida Chanyapate, *Ten Years of the WTO: Subordinating Development to Free Trade*, in 2 *INTERNATIONALE POLITIK UND GESELLSCHAFT* 21, 24 (2005).

³³ *Id.*

³⁴ Pieter Jan Kuijper, *WTO Institutional Aspects*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 79, 113–14 (Daniel Bethlehem et al. eds., 2009).

³⁵ See Hector R. Torres, *Reforming the International Monetary Fund—Why Its Legitimacy Is at Stake*, 10 *J. INT’L ECON. L.* 434, 434 (2007) (providing similar democratic-deficit criticisms raised against the IMF).

the citizens of member states who don't have a choice but to be bound by the WTO's decisions, has also provoked criticism.³⁶

C. Towards a Moderated Future

Despite the fact that there is tension between the human rights and trade regimes they are not mutually exclusive or completely contradictory. For the most part, the two regimes operate separately without affecting each other. When they do intersect, their interaction is not necessarily antagonistic. The two regimes do conflict, however, and such conflicts can and should be identified and moderated. Although there are various mechanisms to moderate intra-regime conflicts of values, there has not evolved a sound inter-regime mechanism to moderate and negotiate such conflicts between the two regimes.³⁷ As it stands now, nation-states are subject to the normative rules of both regimes, and when the regimes clash, states attempt to respect both, which may prove impossible. While this approach could be maintained and refined, the best-case scenario would be one in which the states have an integrated, normative, and institutional approach to apply towards such inter-regime conflicts.

1. *Theoretical Considerations (Issue of Approach)*

There is some foundational substance in international trade law that can be interpreted to support the protection of human rights. The preamble of the Marrakesh Agreement Establishing the WTO states that raising the living standards of individuals and ensuring full employment and sustainable development are among the objectives of the organization.³⁸ One could argue that this concept is useful to the extent that there is, in the objectives of the WTO, a concern for human beings which could be interpreted, or reinterpreted, to justify human rights concerns at the WTO. The GATS (Mode 4) also expresses concern for what can be interpreted as a human right as it defends the freedom of individual movement beyond national borders.³⁹ From this, we can at least see that trade and

³⁶ SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE 53 (2011); Manfred Elsing, *The World Trade Organization's Legitimacy Crisis: What does the Beast look like?*, 41 J. WORLD TRADE 75, 86–89 (2007); Elizabeth Smythe & Peter J. Smith, *Legitimacy, Transparency, and Information Technology: The World Trade Organization in an era of Contentious Trade Politics*, 12 GLOBAL GOVERNANCE 31, 31 (2006).

³⁷ The human rights regime constantly balances conflict between human rights. See Abadir Mohamed, *The Human Rights Provisions of the FDRE Constitution in Light of the Theoretical Foundations of Human Rights* 80–81 (Ethiopian Hum. Rts. L. Ser. vol. 1, 2008); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 1 (1986); Tom Farer, *The Hierarchy of Human Rights*, 8 AM. U. J. INT'L L. & POL'Y 115, 115 (1992).

³⁸ See the Marrakesh Agreement, *supra* note 6, para. 1, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

³⁹ Vincent Chetail, *Freedom of Movement and Transnational Migrations: A Human Rights Perspective*, in MIGRATION AND INTERNATIONAL LEGAL NORMS 47, 47 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

human rights issues are not fundamentally and mutually irreconcilable and there is, therefore, potential for the international trade regime to consider human rights concerns, and vice versa.

Human rights law also has some positive conceptual assertions with regards to international trade law. First, as pointed out by Petersmann,⁴⁰ the right to trade is itself partly justified by human rights, as it is an extension of the right to property.⁴¹ Likewise, the protection of intellectual property can also be based on the human right to property.⁴² The protection of commercial speech employed by traders and corporate entities is also an extension of the freedom of expression, and therefore, is another example where human rights ideals and mechanisms protect free trade.⁴³ Recently, in *Citizens United v. Federal Election Commission*, the United States Supreme Court took this right further by indirectly extending the freedom of political expression to corporate bodies.⁴⁴

Second, the promise of world trade—economic growth, full employment, and a rising standard of living—produces social circumstances that are conducive to human rights and democratization. This point can be proven, on the one hand, by the positive correlation between economic success and the growth of a middle class, and on the other, by respect for human rights and democracy.⁴⁵ Rather than conflicting, human rights and trade seem

⁴⁰ See Petersmann, *supra* note 3; see also Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28–55 (2002).

⁴¹ John Locke, a man who has earned a name for fathering human rights had: life, liberty, and property, in his mind when he wrote his theories on natural rights. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 118 (1962).

⁴² See Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1039 (2007); UNESCO, *Approaching Intellectual Property as a Human Right*, 35 Copyright Bulletin No. 3 (2001), <http://unesdoc.unesco.org/images/0012/001255/125505e.pdf>; PAUL L.C. TORREMANS, INTELLECTUAL PROPERTY AND HUMAN RIGHTS: ENHANCED EDITION OF COPYRIGHT AND HUMAN RIGHTS (2008); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 971 (2007).

⁴³ See generally CHRISTOPHER HARDING, UTA KOHL & NAOMI SALMON, HUMAN RIGHTS IN THE MARKET PLACE: THE EXPLOITATION OF RIGHTS PROTECTION BY ECONOMIC ACTORS 200 (2008); Maya Hertig Randall, *Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?*, 6 HUM. RTS. L. REV. 53, 53 (2006); A. Kamperman Sanders, *Unfair Competition Law and the European Court of Human Rights: The Case of Hertel v. Switzerland and Beyond*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 305, 305 (1999); Karl A. Boedecker, Fred W. Morgan & Linda Berns Wright, *The Evolution of First Amendment Protection for Commercial Speech*, 59 J. MKT. 38, 38 (1995).

⁴⁴ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 310, (2010); see also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 581 (2011); Woody R. Clermont, *Business Associations Reign Supreme: The Corporatist Underpinnings of Citizens United v. Federal Election Commission*, 27 T.M. COOLEY L. REV. 477, 477 (2010); James Bopp, Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251, 260–63 (2011).

⁴⁵ See Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 75 (1959); Phillips Cutright, *National Political Development: Measurement*

to overlap with, and sometimes complement, each other. Thus, even if there is a tension between the two regimes, the relationship is complex. Trade can be harmful or useful to human rights depending on the circumstances.

II. Practical Considerations

At a practical level, there is hope that the WTO has the potential to become infused with human rights issues and for the linkage between the international trade and human rights regimes to become stronger in the future. Despite the general restriction on state prerogatives, the existence of provisions in the international trade regime, such as the one in Article XX of GATT (1947), demonstrates that the international trade regime is, and/or can be, sensitive to domestic social objectives.⁴⁶ The framework of exceptions to trade liberalization shows us that: First, states can, through reinterpretation of “linkage indicators,” use the rules in Articles XX and XXI to accommodate human rights concerns in the short-run; and, second, they can expand those kinds of linkages and eventually incorporate human rights considerations as part of the exceptions regime in the long run.

An interpretative shift is already underway in the WTO dispute settlement process where the Panel and Dispute Settlement Understanding decided, particularly in the “Genetically Modified Organisms” (GMOs) Panel, to use precepts of general international law, including the Vienna Convention on the Law of Treaties, to interpret WTO norms.⁴⁷ EU practice, for instance, is a good example of how states concerned with both the protection of human rights and the promotion of trade can effectively utilize these exceptions.⁴⁸ This indicates

and Analysis, 28 AM. SOC. REV. 253–64 (1965) (providing empirical evidence to prove that economic development causes “political development” implying that the latter is synonymous with democratization); Arthur K. Smith, *Socio-Economic Development and Political Democracy: A Causal Analysis*, 13 MIDWEST J. POL. SCI. 95–125 (1969); Donald J. McCrone & Charles F. Cnudde, *Toward a Communications Theory of Democratic Political Development: A Causal Model*, 61 AM. POL. SCI. REV. 72–79 (1967); GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 2–4 (1963); Mick Moor, *Is Democracy Rooted in Material Prosperity?*, in *DEMOCRATIZATION IN THE SOUTH: THE JAGGED WAVE* 37, 42 (Robin Luckham & Gordon White eds., 1996) (concluding that, although there is a lot of research showing a correlation between economic development and democratization, GNP and per-capita energy consumption show the strongest correlation).

⁴⁶ See Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L L. 753, 753 (2002); see also Frank J. Garcia, *Building a Just Trade Order for a New Millennium*, 33 GEO. WASH. INT’L L. REV. 1015, 1056–1058 (2001); Elissa Alben, Note, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade link*, 101 COLUM. L. REV. 1410, 1422 (2001); Robert Howse & Michael J. Trebilcock, *Trade Policy and Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 289 (2005).

⁴⁷ See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535, 542 (2001); Stephen Joseph Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT’L L. 219, 224 (2004).

⁴⁸ See Olufemi O. Amao, *Trade Sanctions, Human Rights and Multinational Corporations: The EU-ACP Context*, 32 HASTINGS INT’L & COMP. L. REV. 379, 394–400 (2009); Lorand Bartels, *The WTO Legality of the EU’s GSP Arrangement*, 10 J. INT’L ECON. L. 869, 869 (2007); Barbara Brandtner & Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EUR. J. INT’L L. 468, 468 (1998).

that the interpretation, or reinterpretation, of international trade rules to bring them in compliance with human rights laws is a logical, doctrinal, and interpretative possibility.⁴⁹ A proposal to use the existing paradigm might not satisfy all critics, but it certainly proves that the irreconcilability assertion is far too pessimistic.

The WTO Agreements on Sanitary and Phytosanitary Measures and the Technical Barriers to Trade point to the possibility that states may enter agreements, within the ambit of the WTO, that allow them to take measures to protect life, health, and the environment.⁵⁰ Therefore, far from being a conflict lacking solutions, trade and human rights can coexist if the states are able, in the future, to incorporate human rights norms into international trade agreements. This could take the form of modifications to existing GATT and WTO rules or new treaties that amend the existing trade norms.

D. Conclusions and Recommendations

It should be noted that international institutions and regimes are not static and are often founded upon considerations that are less important now than at the time of their formation. Take the example of the United Nations. At the beginning, the United Nations was a Cold War institution that was formed to maintain international peace and security by negotiating the interests of Cold War rivals.⁵¹ Today, the UN stands as the most important player in human rights law. The World Bank is another institution that was initially established with a geographically and substantively limited mandate. However, its mandate has been expanded and made global, the World Bank now deals with issues of equitable income distribution, environmental sustainability, elimination of corruption, tax reform, and privatization.⁵² Therefore, it is a possibility, if not an inevitability, that the

⁴⁹ See Oscar I. Roos, *Exploring the Linkage Between WTO Dispute Resolution and International Human Rights Law*, 19 CURRENTS: INT'L TRADE L.J. 11, 11 (2011) (arguing that this linkage "is coming to the WTO, and that it is coming as a matter of law, rather than through a process of negotiation").

⁵⁰ See Denise Prévost, *Opening Pandora's Box: The Panel's Findings in the EC-Biotech Products Dispute*, 34 LEGAL ISSUES OF ECON. INTEGRATION 67, 67 (2007).

⁵¹ See HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 23–50, 24 n.8 (1966) (writing at a time when state sovereignty reigned supreme and the full impact of the human rights movement was not yet apparent—in 1950). Kelsen stated that not only could the UN Charter, or even the Universal Declaration of Human Rights (UDHR), not be interpreted as imposing any duty to respect the rights of their subjects, but the function of the UN regarding human rights is inconsistently set forth. *Id.* He extensively quotes the sub-committee that drafted article 1(3) which stated that "assuring or protecting such fundamental rights is the primary concern of each state." *Id.* But see THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS: IN A NUTSHELL* 23 (1988) (explaining why the superpowers of the time were not interested in human rights, arguing that sponsors of the Charter might have had to come to terms with their own human rights abuses if they were to allow a human rights enforcing organization to emerge from the San Francisco Conference). Buergenthal cited the Gulag of the U.S.S.R., the racial discrimination against African-Americans in the U.S.A., and the vast colonial empire of the U.K. as evidence of the reluctance of the masters of the Conference to address human rights. *Id.*

⁵² See José E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146, 149 (2002).

WTO will slowly evolve to accommodate the individual and social concerns that fall under the rubric of human rights.

It is to be expected that many will object to the introduction of human rights into the international trade regime. However, it is important to realize that human rights exceptions are already present, albeit in a generic form, as state prerogatives to protect the public interest and public morality. Additionally, the language of human rights is increasingly invoked by states as the intersection between the two regimes becomes clearer. For instance, Mauritius made a formal appeal to the WTO Committee on Agriculture contending that the right to adequate food be taken into consideration in WTO negotiations regarding agriculture.⁵³ The European Union and the United States, on the other hand, have led an initiative within the WTO to incorporate labor rights issues in the WTO.⁵⁴ Ultimately, participants in international trade are already party to human rights obligations that they intend to respect. It is only a matter of efficiency and effectiveness that the respect for these obligations be integrated into the international trade system.

Many proposals could be made suggesting how the WTO should incorporate human rights issues into its mandate. The most common proposal is that states should negotiate a social clause that sets out a minimum standard of human rights to be enforced by the WTO itself.⁵⁵ Once incorporated as part of the single undertaking, the WTO's Dispute Settlement Body could enforce these "social" standards—constituting the core of human rights.⁵⁶ Other proposals include the creation of new trade groups or committees at the WTO,⁵⁷ conducting human rights impact assessments before the implementation of investment projects,⁵⁸ and other non-coercive incentive based methods.⁵⁹ Direct involvement of civil society organizations and the "equalizing up" of developing and

⁵³ World Trade Organization, Committee on Agriculture, *Note on Non-Trade Concerns*, 1, 9, G/AG/NG/W/36/Rev.1 (Nov. 9, 2000); see also Marceau, *supra* note 46, at 787–88.

⁵⁴ Busse, *supra* note 26, at 1922.

⁵⁵ Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 819–20 (2001), Zagel, *supra* note 10, at 30; Joseph, *supra* note 36, at 271; Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT'L L. 597, 600 (2004); Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 177 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1997).

⁵⁶ See Gerard Greenfield, *Core Labor Standards in the WTO: Reducing Labor to a Global Commodity*, 5 WORKINGUSA 9, 12 (2001).

⁵⁷ Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CALIF. L. REV. 885, 902 (2003).

⁵⁸ See Zagel, *supra* note 10, at 30; Jonathan H. Marks, *9/11 + 3/11 + 7/7 =? What Counts In Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 101 *passim* (2006) (providing a general discussion of how to apply a Human rights impact assessment).

⁵⁹ *Id.*; Zagel, *supra* note 10, at 6–9.

developed states have also been suggested to address the right to democratic participation within the WTO's institutional framework by decreasing the democratic deficit of the WTO.⁶⁰ Although the WTO has begun taking measures to address these matters, human rights have not yet been introduced into the normative and institutional structure.⁶¹

One of the biggest obstacles in implementing these, or any other, potential solutions is the self-containment of the trade and human rights narratives in both their respective normative systems and the imagination of their participants. The human rights and international trade regimes were established separately following the formation of the UN, and have lived largely separate lives since. This bifurcation has created problems as each regime has evolved its own legal notions, lexicon, and institutions that are separate from each other, capable of describing the same things in different words, or different things in the same words. The self-referential and self-contained nature of the language of each discipline is reflected, for instance, in the trade and human rights debate (also known as the "Alston-Petersman debate").⁶² Recognizing this problem, Mary Robinson, the former United Nations High Commissioner for Human Rights, proposed a bilingualism of trade and human rights experts.⁶³ Bilingualism, however, is still the exception, as experts from the respective regimes continue to talk past each other.

Even more problematic than the lack of bilingualism in the normative systems, and their respective professional disciplines, are the human interests driving political decision-making. The mere fact that the tension between the two regimes is known, and numerous

⁶⁰ See Panizzon, *supra* note **Error! Bookmark not defined.**; Sarah Joseph, *Democratic Deficit, Participation and the WTO*, Research Paper No. 2009/48 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1899405 (suggesting "equalizing up"); Joseph, *supra* note 36, at 60–61; Daniel D. Bradlow, "The Times They Are A-Changin'": *Some Preliminary Thoughts on Developing Countries, NGOs and the Reform of the WTO*, 33 GEO. WASH. INT'L L. REV. 503, 503 (2000–2001); Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 709, 709 (1998); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 331 (1996); Christopher Butler, Comment, *Human Rights and the World Trade Organization: The Right to Essential Medicines and the TRIPS Agreement*, 5 J. INT'L L. & POL'Y 1, 1 (2007); Joost H.B. Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization, and Reforming the WTO*, 8 J. INT'L & ECON. L. 329, 341–343 (2005).

⁶¹ For information and analysis pertaining to the use of amicus briefs from NGOs and greater accommodation of public policy issues since the Doha initiative, see Charnovitz, *supra* note 60; Butler, *supra* note 60; Joseph, *supra* note 36, at 271; Abbott, *supra* note 15, at 283–84; Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT'L ECON. L. 469, 469 (2002).

⁶² See *supra* notes 3–4 and accompanying text; Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi, *Introduction: Linking Trade Regulation and Human Rights in International Law: An Overview*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 1, 7–8 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi eds., 2005); ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011).

⁶³ Mary Robinson, *The Fifth Annual Grotius Lecture Shaping Globalization: The Role of Human Rights*, 19 AM. U. INT'L L. REV. 1, 2 (2003).

potential solutions have been suggested, does not necessarily mean that any proposal will be enacted. Human rights activists should intensify their struggle to influence decision makers to give greater precedence to human rights interests. The focus of advocates should be on the best-case scenario: That is, a situation in which the normative and institutional system of human rights law is integrated with that of the international trade mechanism. However, advocates also need to recognize the inevitable liberalization of global trade and the effects it is having on international law. As the tension between trade and human rights will not always be resolved in favor of human rights, advocates should also consider which human rights standards are appropriate to specific normative issues. Given the lack of "bilingualism," discussion on what compromises should be struck may prove difficult. It is, nevertheless, a discussion that ought to take place.