

# **THE WTO AS A NODE OF GLOBAL GOVERNANCE: ECONOMIC REGULATION AND HUMAN RIGHTS DISCOURSES**

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*Introduction: Collision or Complementarity of Discourses?*

In the past few years there has been much impassioned debate about the compatibility of the WTO's agenda and principles for trade liberalisation with international human rights norms. Some critics of the WTO have attacked both its general orientation to trade liberalisation and specific WTO rules as undermining human rights. Issues which have been said to demonstrate the conflict between trade liberalisation and basic human rights include restrictions placed by WTO rules on economic boycotts of countries on the grounds of violations of human rights standards, the impact on access to medicines of strong patent rights under the TRIPS agreement, and the effects of liberalisation commitments under the GATS on essential services such as water.

At the same time, there have been significant initiatives and proposals, both political and academic, for a rapprochement of the free trade and human rights agendas. From the academic perspective the most fervent advocate of the complementarity of these two approaches is Ernst-Ulrich Petersmann, who has for some years and in many repeated writings proposed a combination of trade and human rights from a social-market perspective based on *ordo-liberal* theory (e.g. Petersmann 1993, 1998, 2000, 2002a, 2002b, 2003, 2004). This led to a memorably vehement clash with Philip Alston in the pages and on the website of the *European Journal of International Law*, in which Alston described Petersmann's approach as an attempt to 'hijack ... international human rights law in a way which would fundamentally redefine its contours'.<sup>2</sup>

Institutional initiatives have come from the UN High Commissioner and Commission on Human Rights, which have produced a series of reports both on the general theme of the impact on human rights of globalisation and on the effects of specific aspects of the WTO agreements, notably of the agreements on agriculture, intellectual property (TRIPS), and services.<sup>3</sup> Although these exercises seem to have been viewed initially with some suspicion

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<sup>2</sup> Alston 2002, 816; for the full exchange see the *European Journal of International Law's* Discussion Forum on Trade and Human Rights at [http://www.ejil.org/forum\\_tradehumanrights/](http://www.ejil.org/forum_tradehumanrights/).

<sup>3</sup> See UN Commission on Human Rights 2000, 2004; UN High Commissioner for Human Rights 2001, 2002a, 2002b, 2003, 2004a, 2004b.

and concern by the trade community, it seems that, as they have proceeded, some fruitful interchange of views has developed between the human rights and trade perspectives.<sup>4</sup>

This paper will explore the implications of introducing human rights discourses and principles into the framework of economic regulation institutionalised in the WTO, around three aspects. First is the procedural and institutional question of the possible inclusion of human rights principles explicitly within the WTO framework. This leads on to the second and more substantive question of the relationship between the perspectives and discourses of trade and human rights and whether and how they could be reconciled. In conclusion, I will return to the institutional aspect by discussing the strategic aspects of the trade-human rights debates in the context of the role of the WTO as a node of global governance, and the critiques and challenges to it.

## **A. LAW AND HUMAN RIGHTS IN THE LEGITIMATION OF THE WTO**

### *The Rule of Law in the World Economy*

From the perspective of free trade advocates, the inclusion of human rights formally within the WTO system could help further to legitimate the WTO as an organisation. Already, the legitimacy of the WTO is seen to derive from law, demonstrated by the great stress placed on the WTO as embodying the Rule of Law in world trade, in public statements from the organisation. Thus, in a speech delivered shortly after the establishment of the WTO, its first Director-General Renato Ruggiero stated:

That is why we need to keep the multilateral system, with its reliable framework of principles and rules in good repair; it is a firm foothold in a shifting world. Liberalisation within the multilateral system means that this unstoppable process can be implemented within internationally agreed rules and disciplines. This is the

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<sup>4</sup> The preliminary report submitted to the UN Sub-Commission on the Promotion and Protection of Human Rights in June 2000 by J. Oloka-Onyango and Deepika Udagama provoked a letter of complaint from the WTO to the High Commissioner for Human Rights in August 2000 (reported in Singh 2000). The objection was in particular to a reference to the WTO as a 'nightmare' for human rights, in the following context: 'WTO has been described as the "practical manifestation of globalisation in its trade and commercial aspects". A closer examination of the organisation will reveal that while trade and commerce are indeed its principle focus, the organisation has extended its purview to encompass additional areas beyond what could justifiably be described as within its mandate. Furthermore, even its purely trade and commerce activities have serious human rights implications. This is compounded by the fact that the founding instruments of WTO make scant (indeed only oblique) reference to the principles of human rights. The net result is that for certain sectors of humanity - particularly the developing countries of the South - the WTO is a veritable nightmare. The fact that women were largely excluded from the WTO decision-making structures, and that the rules evolved by WTO are largely gender-insensitive, means that women as a group stand to gain little from this organisation.' (UN Commission on Human Rights 2000, para 15). This document was referred to in the WTO as the nightmare report (Marceau, 2002); the term did not appear in subsequent reports. This may be compared with the report of the Mission to the WTO in July-August 2003 of the Special Rapporteur for the UN Commission on Human Rights on the right to health (UN Commission on Human Rights 2004, Addendum 1 to the Report), especially paras. 4-5, which refers in much more diplomatic terms to constructive, helpful and informative discussions.

opposite of a chaotic and unchecked process - without the security of the multilateral system, change would indeed be a leap in the dark. (Ruggiero 1995).

Five years later, after the organisation was shaken by the debacle at Seattle, his successor Mike Moore delivering a speech on 'The Backlash against Globalisation?' concluded as follows:

The WTO is a powerful force for good in the world. Yet we are too often misunderstood, sometimes genuinely, often wilfully. We are not a world government in any shape or form. People do not want a world government, and we do not aspire to be one. At the WTO, governments decide, not us.

But people do want global rules. If the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business. And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn't get a look in. (Moore 2000).

The theme of the WTO as an institutionalisation of the rule of law in the world economy has been debated among academic commentators under the rubric of the 'constitutionalisation' of international economic law. The term was applied to the GATT by the doyen of trade lawyers, John Jackson, who coined the term the 'trade constitution' in the following terms:

It is a very complex mix of economic and governmental policies, political constraints, and above all ... an intricate set of constraints imposed by a variety of "rules" or legal norms in a particular institutional setting. ...

This "constitution" imposes different levels of constraint on the policy options available to public or private leaders.<sup>5</sup>

From a political perspective, Stephen Gill has attacked the 'new constitutionalism' represented not only by the WTO but other institutions of global governance as a 'project of attempting to make transnational liberalism, and if possible liberal democratic capitalism, the sole model for future development' (Gill 2003, 132).

Gill argues that the global constitutionalisation project is well under way, and headed in a clearly undesirable, neo-liberal direction. The recent study by Deborah Cass, however, suggests that it is inappropriate or premature to assume that the constitutionalisation of the WTO is a *fait accompli* (Cass 2005). Having identified six core elements of the accepted meaning of the term, she outlines three models or 'visions' of WTO constitutionalisation:

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<sup>5</sup> I cite this statement from the first edition of his text (Jackson 1989: 299), where the word 'constitution' is put in inverted commas; the wording remained very similar in the second edition (1997), but the inverted commas had gone.

institutional managerialism, rights-based, and judicial norm-generation. The formal inclusion of human rights into the WTO could form part of the latter two models. This poses the additional question of whether, if the WTO were to evolve in a 'constitutionalising' manner, the inclusion of human rights in its core principles might ameliorate, or only enhance, the neo-liberal dominance denounced by Gill and others. The next two sections will consider the implications and prospects for inclusion of human rights within a project of WTO constitutionalisation, first via judicial norm-generation, and then in a more formal rights-based system.

#### *Judicial Constitutionalisation: WTO Rules OK?*

Constitutional norms could emerge through the potential role of the WTO's Appellate Body (AB), as the apex of its dispute settlement system (DSS), in developing the jurisprudence of the WTO. This would follow the trail blazed by the European Court of Justice, which Joe Weiler has convincingly argued played a transformative role by developing doctrines such as supremacy and direct effect of European law, to help reconfigure the European Communities as more than merely international organisations. There are nevertheless clear limitations on the role a judicial body can play in this respect. This has been clearly demonstrated by the EU's failure to create the political basis for any kind of 'constitution', leaving it in the institutional limbo of 'multi-level governance'. These limitations are even more clear for the AB, which has been kept on a very tight leash by the WTO's member states, as well as lacking the channels for networking with national judiciaries which have been an important element of the ECJ's relative success (Helfer & Slaughter 1997). Although the AB is indeed an international economic court in all but name (Weiler 2001), and has been gradually developing a coherent body of jurisprudence, it has done so under the cloak of a strict formalism (Picciotto 2005). It is clearly mindful that under the WTO agreements its role is 'to provide security and predictability to the multilateral trading system' by *clarifying* the rules, and that only the WTO's political bodies are empowered to provide *interpretations* of them.<sup>6</sup>

Nevertheless, the basis exists for the AB to seek to enhance both its own and the WTO's legitimacy by incorporation of human rights norms. As Pauwelyn points out, although it may have come as a surprise to some trade negotiators, general rules of international law necessarily apply to the relations between WTO member states, and the WTO agreements form part of that general body of law and must be accommodated to it in some way (Pauwelyn 2001). Indeed, the AB has often stressed that the reference to clarification of the WTO agreements 'in accordance with the customary rules of interpretation of public international law' requires it to apply the principles of the Vienna Convention on the Law of

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<sup>6</sup> Formally, the AB's decisions take the form of Reports to the Dispute Settlement Body (DSB), although these are automatically adopted unless there is a consensus decision to reject. Art. 3.2 of the DSU firmly states that the role of the dispute settlement system is 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements', while the WTO Agreement itself (art. IX.2) specifies that 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations ... of the ... Agreements', which requires a 75% majority of states; art.X provides for the adoption of amendments.

Treaties, which include 'any relevant rules of international law applicable in the relations between the parties' as relevant context for treaty interpretation. Since many human rights principles are recognised as obligations *erga omnes* in general international law, and WTO member states are all parties to the UN Charter as well as in many cases other specific human rights conventions, the legal route lies open for the AB to assert that WTO obligations should be interpreted in line with obligations under international law, including human rights principles.

Yet there has been a marked reluctance to do so, not only on the part of the AB but also (indeed perhaps more so) of WTO diplomats and officials.<sup>7</sup> In any case, a claim under the dispute settlement procedure must allege a breach of WTO rules, and other rules can only be applied if they are invoked by the defendant state. Hence, the fact that no state has yet invoked human rights obligations in a dispute under the WTO (or for that matter the GATT), has been said to demonstrate that there is no incompatibility (Lim 2001, 284).

Even when non-WTO rules applicable between the parties are invoked, there is considerable scope for an adjudicator to decide whether to adopt a bold or cautious approach to the general question of the relationship between WTO rules and other international law obligations. Generally, from the side of the WTO, the preference has been for caution. First, the issue can be construed narrowly so as to confine it to WTO rules. This fits well within the AB's emphasis on the principle of 'judicial economy', or avoiding pronouncing on issues which are not necessary to resolve the specific complaint before it. In particular, consideration of non-WTO rules can be avoided unless they are clearly in conflict with WTO obligations. A key tactic then is to adopt a strict approach which assumes that rules are compatible unless it is impossible to comply with both. This has been the view of the AB, which has defined a conflict as 'a situation where adherence to one provision will lead to a violation of the other provision'.<sup>8</sup>

Legal indeterminacy leaves much room to interpret rules so as to find them compatible. Thus, the AB has rejected arguments by the EU that the WTO rules on food safety should be interpreted in the light of the 'precautionary principle', by taking the view that (i) opinions differ as to whether this principle is accepted as binding in international law, (ii) that it would therefore be 'unnecessary, and probably imprudent ... to take a position on this important, but abstract, question', and that in any case (iii) the principle is reflected in WTO rules, notably articles of the SPS Agreement.<sup>9</sup> Finally, even if a conflict were to be found, there is

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<sup>7</sup> WTO staff members have published academic articles on the subject (notably Lim 2001, Marceau 2002), although of course stressing that the views expressed are strictly their own and do not bind either the WTO secretariat or its member states. It is nevertheless interesting to note that one article by a member of the External Affairs division (Lim 2001) appeared a year or so after the WTO's sharp response to the UN High Commissioner over the 'nightmare report'.

<sup>8</sup> *Guatemala - Cement* 1998, para. 65, cited by Pauwelyn (2001, 551), who points out that this approach means that a state may be unable to exercise a right created under international law subsequent to the WTO agreements.

<sup>9</sup> See *EC Hormones* (1998) para 123. Not surprisingly, the Panel in the recent report in *EC Biotech Products* followed this view (para. 7.89; the report is not yet officially released, but available on the FoE website).

considerable rule for debate on how it should be resolved under the various accepted treaty interpretation principles. In particular, the principle *generalia specialibus non derogat* (a general rule cannot override a more specific one) is likely to lead to the view that WTO trade rules cannot be overridden by general human rights obligations (unless, of course, the latter are considered *jus cogens*). Indeed, even authors who consider that the AB should apply non-WTO rules where relevant tend to accept that in case of a conflict the WTO rules should prevail (Bartels 2001).<sup>10</sup>

The general approach has been to stress the strictly limited function of WTO's dispute settlement system, to the point where it is said to be a *lex specialis*, or a self-contained legal system (Marceau 2002, 32ff). It is nevertheless conceded that 'if the WTO system is self-contained, it is not entirely self-contained' (Palmer & Mavroidis 1998, 413), in that WTO rules may themselves refer to or incorporate other international law rules (Trachtman 1999, 343). This is most notoriously the case for the TRIPS agreement, which incorporates (and therefore makes binding on all WTO members) the major provisions of key intellectual property conventions administered by WIPO. Slightly more indirectly, the SPS and TBT agreements create an obligation for WTO member states to use standards developed by relevant international organisations where they exist.<sup>11</sup> Such provisions in effect make the WTO's DSS an enforcement body also for these other areas of international law.<sup>12</sup>

Hence, the 'partly self-contained' view of the WTO means that it is a matter for each state to ensure compatibility of WTO rules with international obligations, such as human rights norms, which are not specifically incorporated into the WTO agreements. 'States, members of the WTO, remain fully bound and responsible for any violation of their international law obligations but they cannot use the WTO remedial machinery to enforce them.' (Marceau 2002, 34). Furthermore, the WTO is considered to be no more than a forum for states, with no executive powers, unlike the IMF and World Bank, so that neither the organisation itself nor its secretariat can have any direct obligations to ensure compatibility of its work with human rights obligations (Lim 2001, 280).

Although this approach suggests a modest role for WTO rules and their enforcement, the effect is in fact quite the opposite one of reinforcing their power. The WTO is exceptional, indeed unique, among international organisations as regards the range and effectiveness of its

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<sup>10</sup> Bartels bases this on treating articles 3.2 and 19.2 of the DSU as a 'conflicts' rule, since they specify that DSS decisions cannot add to or diminish rights or obligations of WTO members, Panels and the AB must apply the WTO rule in case of a conflict. Marceau does not agree with this reasoning but comes to the same conclusion. Pauwelyn (in my view rightly) says that these provisions actually aim at reining in the DSS from expansive or adventurous interpretations of WTO trade rules, but provides only a very egregious example of a situation in which a Panel might be obliged to find a WTO rule invalid, viz. if the WTO were to conclude a slave trading agreement (564).

<sup>11</sup> TBT art. 2(4), and SPS art. 3(1).

<sup>12</sup> Thus the AB has ruled on whether food labelling regulations complied with a Codex standard (*EC Sardines* 2002), and a Panel has ruled on the validity of copyright exceptions under the 'three-step test' of the Berne Copyright Convention (*US - Copyright Act* 2000).

compliance mechanisms. Most prominent is the DSS, which provides independent adjudication providing a complainant with a guarantee of a decision within a relatively short timescale, and the possibility of applying what amount to trade sanctions if the decision is not complied with. Less visible, but also effective, are the more extensive procedural arrangements for supervision of member state compliance through the range of WTO committees. In contrast, the compliance mechanisms of international human rights instruments must be described as weak. They rely mainly on self-reporting by states and scrutiny by committees of experts. Some (notably the ICCPR) also provide options for states to allow complaints by other states, as well as individual petitions, and other mechanisms such as fact-finding missions have also been developed. Crucially, however, compliance depends on 'naming and shaming', and lacks the harder economic impact of the WTO's ultimate weapon of withdrawal of trade advantages. Hence the potential attractions of a more formalised inclusion of human rights principles within the WTO framework.

### *Formalising a Rights-Based Constitution?*

In the face of such a broad consensus for maintaining a distance between the WTO and human rights norms, one has a certain admiration for the iconoclasm of Petersmann in persisting with his proposals. They can certainly be said to have merit in resolving some of the uncertainties and difficulties of the present situation of a 'not entirely self-contained' WTO legal system. In particular, the explicit inclusion of human rights principles within the WTO would overcome the problem that judicialisation would face, that adjudicators would have to apply only universally applicable human rights norms, or else generate non-uniform interpretations of WTO rules dependent on which human rights obligations are applicable between the parties to a particular dispute.<sup>13</sup> As Petersmann points out, this is especially problematic as over 30 WTO members, including the USA, are not parties to the 1966 UN Covenant on Economic, Social and Cultural Rights (ICESCR) (2004, 607).

Hence, Petersmann's project is to effectuate a substantive rapprochement between traditional human rights norms and the economic rights and liberties that he sees as central to the WTO:

'Just as UN human rights conventions do not refer to international division of labour, "market freedoms", and property rights as essential conditions for creating the economic resources needed for the enjoyment of human rights,<sup>14</sup> so WTO law does not explicitly refer to respect and protection of human rights as necessary means for realizing the WTO objectives of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective

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<sup>13</sup> Pauwelyn opts for the latter, conceding that it 'may complicate the matrix of rights and obligations between WTO members. But this is an unavoidable consequence of not having a centralised legislator in international law.' (Pauwelyn 2001, 567).

<sup>14</sup> 'It is only in the context of the right to work (Article 6) that the ICESCR of 1966 refers to the need for government policies promoting "development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual" (Article 6.2).' [Footnote in the original.]

demand, and expanding the production of and trade in goods and services” (WTO Preamble).’ (Petersmann 2004, 607-8).

This clearly raises the question of *which* economic human rights should be recognised by the WTO, and *in what form*.

Of course, human rights, as they have developed historically, have been most strongly articulated in the ‘first generation’ civil and political rights, while the ‘second generation’ economic, social and cultural rights are often considered to be aspirations at best; and ‘third generation’ collective rights such as self-determination and sustainable development are hard to operationalise as enforceable rights. Alston, in his critique of Petersmann, distinguishes between the ‘instrumental’ nature of the guarantees of economic liberties recognised by the WTO and the fuller ‘political’ character of rights as seen from the human rights perspective:

‘any such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognised for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, but not as political actors in the full sense and nor as the holders of a comprehensive and balanced set of individual rights. There is nothing per se wrong with such instrumentalism but it should not be confused with a human rights approach.’ (Alston 2002, xx).

This seems linked to Alston’s next point, which doubts whether Petersmann properly includes in his schema ‘social’ rights such as the rights to education, health care and food, which are certainly rejected by fundamentalist liberal theorists of whom Petersmann approves, such as Hayek.

Yet education, health, food, and shelter are very much economic matters. I suggest that the distinction is not so much between ‘social’ and ‘economic’ rights, as between individual rights and socio-economic policies. The emphasis on individual rights in liberalism aims to protect individual freedoms from the potentially autocratic power of the state. Hence, the traditional human rights were civil and political rights. Their extension to individual economic rights would entrench liberal economic principles which assume that the pursuit of individual self-interest, especially through economic exchange, is ultimately beneficial to all. This would limit and constrain collective action or regulation through the state or public bodies. In contrast, second and third generation human rights are cast more as obligations on the state, to develop economic policies that achieve certain social objectives.

Indeed, neo-liberal constitutionalism aims to entrench internationally-agreed principles to secure the ‘effective judicial protection of the transnational exercise of individual rights’ (Petersmann 1998, 26). It would enshrine economic rights such as the ‘freedom to trade’ as fundamental rights of individuals, legally enforceable through national constitutions in national courts (Petersmann 1993). While accepting that freedom of trade should also be accompanied by other human rights, which should all be enshrined in the WTO ‘constitution’,

Petersmann's emphasis is on rights of private property and market freedoms. He points out that the right to property recognised in classic human rights instruments such as the Universal Declaration of Human Rights (UDHR) of 1948 is complemented by the protection of intellectual property rights in the TRIPS agreement (Petersmann 2000, 21). However, he goes further and argues that liberal traders should welcome the inclusions of human rights protecting individual freedom, non-discrimination and equal opportunities, and that the mercantilist bias of WTO in favour of producers could be corrected by the protection of competition and of the rights of 'the general consumer and citizen interest in liberal trade and ... human rights' (Petersmann 2000, 22).

The stress is on equality of rights, which appears to protect the weak. However, it conveniently overlooks the realities of inequalities of power. In practice, the rights which would be most firmly entrenched are the market-access and private-property rights, which mainly benefit large firms, and transnational rights would benefit TNCs. The traditional civil and political rights were conceived as the rights of human beings, hence 'human' rights. Even economic rights when cast as human rights are seen as personal individual rights, hence the right to property finds broad acceptability as a right to personal property. However, economic development has resulted in ever more complex forms of institutionalisation of socio-economic activity. Yet from the perspective of liberal capitalism, these are viewed in terms of 'private' property rights. This generates all sorts of fantastical and fictitious forms of 'intangible' property rights, from shares in a company to today's complex financial derivatives, and the contradictory concept of intellectual property rights. All these rights of 'investors' would come to be protected under the concept of the human right to the protection of property. Then, to cap it all corporations, as fictitious 'legal persons', are also recognised as bearers of human rights.

The effect of institutionalisation of the WTO is to constrain national policy choices by embedding broad and stringent international obligations to liberalise international economic flows. WTO enthusiasts argue that this is necessary since national state regulation tends to be protectionist because it is the product of the 'capture' of states by special interests. For example:

'Free trade and democratic government face a common obstacle - the influence of concentrated interest groups. ... The WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting free trade and democracy.' (McGinnis and Movesian 2000: 515).

The anti-democratic implications of this view are justified by its roots in a particular concept of liberal democracy, in which state power must be confined, in order to safeguard individual rights and liberties. This would be further reinforced by the 'strong' neo-liberal vision of constitutionalisation of the WTO, put forward especially by Petersmann. Giving individuals, including 'investors' and corporations, rights which they could enforce directly, in national courts or through the WTO's DSS or both, would further constrain the possibilities of collective action through the state or public bodies, and operate to exacerbate economic inequalities by handing a powerful weapon to those whose economic power can be defended in terms of economic rights.

Other forms of recognition of human rights within the WTO could, of course, be envisaged. Most easily compatible with the original structure of the GATT as a type of 'embedded liberalism' (Ruggie 1982) would be to allow exceptions from trade liberalisation obligations in favour of actions to protect and promote human rights. This approach has been most thoroughly explored in the debate about the linkage between trade and labour rights (Leary in Bhagwati & Hudec 1996, Hepple 2001). It has of course been strongly criticised from the viewpoint of developing countries as a protectionist move by the rich (TWIN-SAL 1999). Some of the arguments have largely echoed trade liberalisation perspectives, by suggesting that the comparative advantage of countries with low labour costs should not be undermined. From the human rights perspective the issue is not comparative wage rates, but violations of rights such as freedom of association and free collective bargaining. A more cogent criticism is that the GATT approach of allowing exceptions for types of state action recognised as being in the public interest<sup>15</sup> would legitimate unilateral state action, and allow selective targeting. Inevitably, of course, such action is generally taken by economically powerful states, wishing to deny or control access to their markets to economically weaker states, sometimes using human rights violations as a pretext. Accusations of human rights violations have been used to justify trade and economic boycotts in the US actions against Myanmar and Cuba (McCrudden 1999), which might have been found in violation of WTO rules had not an accommodation been reached. Other methods which have been considered which might help reinforce international labour standards by strengthening the role of the ILO through a linkage with the WTO (ILO 1994, Charnovitz 1995) have not been pursued, largely due to the strength of feeling about comparative advantage.

Human rights could be recognised within the WTO in ways which might maintain the view of them as requiring the pursuit of socio-economic policies to achieve universal basic economic standards, simply by adding them as aims of the organisation. The WTO Agreement currently expresses its broad aims as follows:

'relations in the field of trade and economic endeavour should 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...'

Although there is some recognition of social objectives, such as the pursuit of full employment and sustainable development, the statement does reflect the neo-classical economic assumptions underpinning trade liberalisation, generally that 'a rising tide lifts all boats'. Inclusion of the achievement of basic socio-economic human rights such as food, water, shelter, health and education could inject concerns to ensure that policies should aim to achieve basic economic standards for all, rather than assuming that overall economic growth

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<sup>15</sup> In the GATT this is done in the Exceptions in article XX.

will automatically 'trickle down'. Thus, such a move might create space to debate the directions of trade and economic policies, going beyond the assumptions underpinning liberalisation. The next section will explore how far human rights perspectives and discourses would help open up such alternative perspectives.

## **B. DEBATING RIGHTS**

Three perspectives may be discerned on the relationship between human rights norms and economic liberalisation. For some there is a fundamental conflict: 'neoliberal globalisation is incompatible with the globalisation of human rights' (George 1999, 15). Others consider that human rights, understood as liberal rights protecting both economic and political freedom of individuals, would complement and even reinforce the WTO's free trade mission, as shown above in the discussion of constitutionalisation. A middle view argues that although the two have developed in isolation, they have much in common and are converging: human rights are not confined to restricting the state but also prescribe positive state action, but equally trade regulation cannot aim only at negative integration but must provide a basis to balance the costs of liberalisation and make them socially acceptable; hence, it could be helpful to develop debate between the two perspectives (Cottier 2002). This section will explore these viewpoints in relation to a couple of specific examples.

### *Access to Medicines*

One much-debated issue has been the impact of the strong patent rights required by the TRIPS agreement on access to medicines. This of course is not just a trade matter, and trade purists as well as critics of the WTO have attacked the inclusion of intellectual property protection, which has greatly expanded the scope of the WTO. The effect of the TRIPS agreement was not only to oblige all WTO member states to comply with the basic provisions of the key IP treaties, but also to establish a uniform minimum level of protection, going well beyond existing treaties. In particular, art. 27 TRIPS required that patents be made available 'for any inventions, whether products or processes, in all fields of technology'. At one stroke this deprived states of a policy option which many, especially developing countries, had previously chosen, by requiring patent protection for pharmaceutical drugs (subject to the transition periods allowed for developing and least developed countries). Unless the 'flexibilities' for which developing countries had pressed in the TRIPS could be exploited, those countries which had succeeded in establishing a thriving and competitive generic industry producing low-cost essential drugs might be obliged to shift towards R&D-based production, while others which had not yet managed to stimulate low-cost drugs production would have that policy option restricted.

The desirability of patent protection for pharmaceuticals has long been debated both nationally and internationally, as indeed have the broader questions of whether and how far IP protections should be granted to stimulate innovation and creativity. The older IP treaties, especially the Paris Industrial Property Convention of 1883, had left states considerable leeway in deciding what the extent and level of protection should be, as well as exceptions which could be provided, in particular through compulsory licensing. In the battle over negotiation of the TRIPS in the Uruguay Round some of these exceptions were preserved, although with some significant modifications, notably in TRIPS articles 30 and 31. The

TRIPS agreement also included two general articles (7 and 8) with broad statements of Objectives and Principles. In particular, article 8 provides:

‘Members may, in formulating or amending their laws and regulations, 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 that such measures are consistent with the provisions of this Agreement.’

A number of human rights impinge on this issue. What is striking however is that such arguments could be made both for and against patent protection for drugs. The UDHR art. 27 states that ‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’. This is expressed in similar terms in ICESCR article 15, but it is balanced by the right of everyone to ‘enjoy the benefits of scientific progress and its applications’. This need to balance the private right of appropriation with the public interests in diffusion is also central to intellectual property laws (UNHCHR 2001, 5). Thus, human rights may be used as a basis for claiming intellectual property protection, as well as for restricting it.

This is well illustrated by the constitutional challenge brought by pharmaceutical firms against South Africa's medicines laws in 1998. Strikingly, this case was based on claims of human rights violations, especially the deprivation of property without compensation.<sup>16</sup> This case raised echoes of the successful constitutional challenge brought by pharmaceutical companies in Italy in 1978, on the grounds that the exclusion of medicines from patent protection was unfairly discriminatory, which dealt a mortal blow to the once-flourishing Italian generic drug manufacturing industry.<sup>17</sup> Certainly, strong counter-arguments could be made,<sup>18</sup> especially since the South African constitution is in some respects post-liberal, and recognises rights to housing (article 26), as well as health care, food, water and social security (article 27). These provisions place an obligation on the government to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’. Few other constitutions provide such a basis to balance vested property rights against the rights of the dispossessed. However, the collapse of the case was due to the global attention attracted by the access to medicines campaign, which was able to build international support around the issue of HIV-AIDS, and gave a new impetus to the political debates around the TRIPS agreement (Drahos and Mayne 2002, 248-250). In the

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<sup>16</sup> See Notice of Motion in the High Court of South Africa, Case number: 4183/98, 42 applicants, against the Government of South Africa (10 respondents). Article 25 of the constitution prohibits the taking of property except in terms of a law of general application, for a public purpose and with the provision of compensation.

<sup>17</sup> Grubb 1999, 67; according to one study, the effects of the extension of patenting to pharmaceuticals in Italy were an increased propensity to patent, but no increase in R&D (Scherer 1995).

<sup>18</sup> For example, as formulated in the Amicus Curiae brief by the Treatment Action Campaign, available from <http://www/tac/org/za>, accessed 10<sup>th</sup> June 2001.

absence of this political debate, the South African courts might easily have upheld the pharmaceutical companies' rights to their patents.<sup>19</sup>

Certainly, activist bodies such as the Treatment Action Campaign (TAC), have successfully integrated legal strategies into their broader campaigns,<sup>20</sup> but these have necessarily entailed detailed and complex economic arguments about drug pricing in segmented markets with public procurement. Although the political impact of the campaign has been very important, especially due to the global awareness of the AIDS issue, it is doubtful that the invocation of human rights discourses has had more than a marginal effect. The same can be said of the global campaign that resulted in the compromise in the Doha Ministerial Declaration on the TRIPS Agreement and Public Health and its subsequent implementation by WTO Council Decisions.<sup>21</sup> Although this was portrayed as a victory for developing countries, it is a modest modification establishing a cumbersome procedure, which states show little signs of utilising.

There are a number of ways in which greater flexibility could be introduced into the TRIPS agreement to permit and encourage states to remodel their intellectual property protection to favour the diffusion of innovations in the public interest. The provision in TRIPS article 8 permitting states to 'adopt measures necessary to protect public health and nutrition' could perhaps be strengthened by adding more explicit and detailed references to human rights to health. Of greater importance would be the removal of the proviso 'that such measures [should be] consistent with the provisions of this Agreement.' This could also be achieved if human rights obligations were accepted as overriding the more specific provisions of the TRIPS agreement. However, this would be highly controversial and strongly resisted.

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<sup>19</sup> Thus it is hard to understand Petersmann's assertion that the withdrawal of the pharmaceutical companies' claim 'demonstrated the importance of civil society support and of judicial remedies for reconciling national and international economic law ... with social human rights' (Petersmann 2002a). His suggestion that the withdrawal by the USA of its WTO complaint against Brazil's local working requirement for patents also demonstrates the responsiveness of WTO procedures to social human rights concerns (ibid., footnote 70) is equally fanciful. It was the civil society campaign around access to medicines that persuaded the companies to withdraw their legal claims based on their human rights, and made the US challenge against Brazil politically inopportune.

<sup>20</sup> For an account and evaluation of the Medicines Act case see Heywood 2001; TAC and a number of other NGOs subsequently also brought a case against the Minister of Health to make the antiretroviral drug nevirapine available in the public health sector, which resulted in a thoughtful opinion by the South African constitutional court focusing on the extent of the state's obligation to take 'reasonable measures' to achieve socio-economic rights (such as health) provided for in the constitution, while stressing that 'in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards ... should be, nor for deciding how public revenues should most effectively be spent' (para. 37). It nevertheless did grant an order that the government should devise and implement a programme to combat mother-to-child HIV transmission, although 'within its available resources', and to allow doctors to prescribe nevirapine when they considered it medically indicated. [Also Competition Commission reference].

<sup>21</sup> A General Council Decision of 6 December 2005 agreed a Protocol amending the TRIPS Agreement (WT/L/641 8 December 2005), formally enacting the previous decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. This is the first time a core WTO agreement has been amended.

## *Food*

Central to the trajectory of the WTO, and the crucial element in the current Doha 'development' round of trade negotiations, is agriculture. This is both the key sector for most developing countries and a vital one for the well-being of the world's poor. It is a concern from the human rights perspective in relation to the right to food and the right to development. Consequently it was selected for examination by the UN High Commissioner for Human Rights in response to the call from the Human Rights Commission for a report on 'Globalisation and its impact on the full enjoyment of human rights' (UN HCHR 2002). This examined the WTO's Agreement on Agriculture (AoA), which provides the framework for the WTO's approach to liberalisation of this sector.

The Report accepts that

'Increased levels of trade in agriculture can contribute to the enjoyment of the right to food by augmenting domestic supplies of food to meet consumption needs and by optimizing the use of world resources. Similarly, on account of the AoA, international trade in agriculture is now subject to rules, which promotes transparency and accountability - important prerequisites for the enjoyment of human rights' (ibid., 13).

However, it stresses that:

'Human rights law concerns itself in particular with the situation of the individuals and groups who might suffer during the reform process. Indeed, this is one of the key issues concerning globalisation and human rights. Even where the net social benefit from trade liberalisation favours the majority in a certain country, the principle of non-discrimination under human rights law requires immediate action to protect the human rights of those who do not benefit. In the case of the AoA, this means that States should use existing flexibilities in the Agreement where they exist, and WTO members should consider improving or adding flexibilities where appropriate.'

Areas in which it suggests such flexibilities should be considered include permitting protection 'where trade liberalisation affects the availability, accessibility or sustainability of food supplies', and measures to deal with the vulnerability of primary producing countries to price fluctuations and consequently balance of payments problems. It also made an interesting distinction between the perspectives towards the principle of non-discrimination of trade law and human rights law.

'"National treatment" envisages equal treatment for nationals and non-nationals - whether they are poor farmers or large agrobusiness or industrial firms. Treating unequals as equals is problematic for the promotion and protection of human rights and could result in the institutionalisation of discrimination against the poor and marginalised. Under human rights law, the principle of non-discrimination does not envisage according equal treatment to everyone in all cases. Affirmative action is necessary in some cases to protect vulnerable people and groups.'

But here again it concedes that trade law has made some recognition of this, in the principle of 'special and differential treatment', which is of long-standing in the GATT and WTO, and has been reaffirmed in the Doha Declaration as the basis of the current trade round.

The issues in the agriculture negotiations centre on the phasing out of subsidies in rich countries, and the extent to which other forms of farm support, which in principle are non-price-related, should be acceptable. While there is certainly evidence that trade liberalisation has affected food supplies and security in many developing countries, they often do not result from WTO commitments, but from the more rapid pace of liberalisation required as a condition of support especially by the IMF.<sup>22</sup> An alternative vision of how agriculture could be regulated to safeguard human rights to food, based on food sovereignty, has been put forward by a coalition of NGOs (Coordination Sud 2005). Although they do represent a very cogent view of how agricultural trade should be managed, it is not the only one which would be compatible with the right to food. Its strength is not its reference to human rights principles, but its articulation of detailed policy proposals based on the perspectives of small farmers and conscientious consumers.

### C. CONCLUSIONS

It seems hard to sustain the view that there is a fundamental conflict between human rights norms and principles of economic liberalisation as reflected in the WTO. Human rights had their origins in the liberal impulse of the Enlightenment, to expand the realm of individual freedoms against the autocratic state. However, the guarantee and protection of individual freedom in the economic sphere tends to exacerbate social inequalities, and could undermine collective action through public bodies and states. Recognising this, ideas and principles of human rights have undergone considerable development in the past half-century. Their formulation has evolved to a considerable extent towards articulating the protection of individuals within a perspective of social, cultural and economic rights, expressed as policy obligations on states. However, human rights norms are still open to alternative, competing, and conflicting interpretations. Issues which would be central to a meaningful debate about their application to economic regulation remain open, such as whether their subjects are individuals or social groups, human beings or legal persons (including corporations).

Trade rules are a combination of broad principles and more detailed regulation.<sup>23</sup> Many of the general principles are couched in universalistic terms which appear to have much in common with basic human rights principles, notably non-discrimination. In addition, the WTO agreements include some general principles recognising the need to take account of the social impact of economic liberalisation, notably 'special and differential treatment' for developing countries, and the public interest objectives in the TRIPS, mentioned above. However, the general principles are usually expressed in such a way that they cannot be used to override the more specific provisions, except when formulated as exceptions permitting national state

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<sup>22</sup> E.g. Ghana poultry imports [amplify].

<sup>23</sup> The WTO itself comprises a complex package of agreements consisting of some 26,000 pages, undoubtedly the most extensive international convention ever negotiated.

action. However, the strength of the WTO system depends on limiting and constraining such exceptions, since experience shows that they can be abused especially by the more powerful states, leading to a fragmentation of the trading regime.

Greater interaction between the trade and human rights viewpoints could have a variety of effects. One might be the (re)assimilation of human rights into the neo-liberal perspective of individual freedoms. As we have seen, that is the thrust of Petersmann's proposals for the integration of human rights into a 'constitutionalised' WTO. At the opposite pole, human rights discourses could be counterposed to the liberalisation principles of the WTO, to challenge its underlying assumptions, and help provide a basis for radical alternative policies. A middle outcome might be that the introduction of human rights concerns might help temper the negative effects of liberalisation by encouraging measures aimed at achieving basic standards of socio-economic provision.

The outcomes of such interactions would also depend on the institutional form it takes. As shown by the analysis in the first section of this paper, the dominant view of the WTO's rule-based system is that it is and should remain largely self-contained from other areas of international law, including human rights. Paradoxically, however, this reinforces the power of the WTO as a node of global regulatory networks (Braithwaite & Drahos 2000, Picciotto 1997). On the other hand, inclusion of human rights norms within the WTO system might serve to strengthen the WTO's institutional legitimacy.

In my view a major problem with current debates about global economic governance is the wide gap between the clash of rhetoric and the cogency and constructiveness of detailed policy proposals and arguments. I suggest that debates about economic liberalisation and human rights would simply turn up the rhetorical decibel level, and contribute little to the much-needed democratisation of debates about global economic governance.

## BIBLIOGRAPHY

- Alston, Philip (2002), 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *European Journal of International Law*, 13, 815-44.
- Bhagwati, Jagdish and Hudec, Robert E. (eds.) (1996), *Fair Trade and Harmonisation. Prerequisites for Free Trade?. Vol. 2 Legal Analysis* (Cambridge, Mass.: MIT Press).
- Braithwaite, J and Drahos, P (2000), *Global Business Regulation* (Cambridge: Cambridge University Press).
- Charnovitz, Steve (1995), 'The World Trade Organisation and Social Issues', *Journal of World Trade*, 29, 17-33.
- Coordination Sud (2005), *Agriculture: for a regulation of world trade*, available from [http://www.coordinationsud.org/IMG/pdf/Agriculture\\_-\\_For\\_a\\_regulation\\_of\\_world\\_trade.pdf](http://www.coordinationsud.org/IMG/pdf/Agriculture_-_For_a_regulation_of_world_trade.pdf) accessed 20 March 2006.
- Cottier, Thomas (2002), 'Trade and Human Rights: A Relationship to Discover', *Journal of International Economic Law*, 5 (1), 111-32.
- Drahos, Peter, and Ruth Mayne, eds. (2002) *Global Intellectual Property Rights*. Basingstoke: Palgrave-Macmillan/Oxfam.
- Helfer, Laurence R. and Slaughter, Anne-Marie (1997), 'Toward a Theory of Effective Supranational Adjudication', *Yale Law Journal*, 107, 273-391.
- Hepple, Bob (2001), *Labour Laws and Global Trade* (Oxford: Hart).
- Heywood, Mark (2001), 'Debunking Conglomo-talk: A Case Study of the Amicus Curiae as an Instrument for Advocacy, Investigation and Mobilisation ', *Health, Law and Human Rights: Exploring the Connections, An International Cross-Disciplinary Conference Honoring Jonathan M. Mann* (Philadelphia, Pennsylvania.).
- Howse, R. and Nicolaidis, K. (2003), 'Enhancing WTO Legitimacy: Constitutionalisation or Global Subsidiarity?' *Governance*, 16 (1), 73-95.
- ILO(1994), *The social dimensions of the liberalisation of world trade*, Geneva: International Labour Office. Working party on the Social Dimensions of the Liberalisation of International Trade. GB.261/WP/SLD/1, November.
- Marceau, Gabrielle (2002), 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, 13, 753.
- McCrudden, Christopher (1999), 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of `Selective Purchasing' Laws Under the WTO Government Procurement Agreement', *Journal of International Economic Law*, 2 (1), 1-48.

- McGinnis, John O. and Movesian, Mark L. (2000), 'The World Trade Constitution', *Harvard Law Review*, 114, 512-605.
- Moore, Mike (2000), 'The Backlash against Globalisation?' speech given at Liberal International, Ottawa, October 26; available from D:\My Documents\Article Collection\Moore00-Glob.htm accessed 27<sup>th</sup> Jan 2001.
- Pauwelyn, Joost (2001), 'The Role of Public International Law in the WTO: How Far Can We Go?' *American Journal of International Law* 95, 535-78.
- Petersmann, Ernst-Ulrich (1993), 'National Constitutions and International Economic Law', in Meinhard Hilf and Ernst-Ulrich Petersmann (eds.), *National Constitutions and International Economic Law* (Deventer: Kluwer), 3-53.
- Petersmann, Ernst-Ulrich (1998), 'How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society', *Michigan Journal of International Law*, 20, 1.
- (2000), 'The WTO Constitution and Human Rights', *Journal of International Economic Law*, 3 (1), 19-25.
- (2002a), 'Constitutionalism and WTO law: from a state-centered approach towards a human rights approach in international economic law', in Daniel L. M. Kennedy and James D. Southwick (eds.), *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec* (Cambridge: CUP), 32-67.
- (2002b) 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration.' *European Journal of International Law* 13: 621.---- (2003), 'Human Rights and the Law of the World Trade Organisation', *Journal of World Trade*, 37 (2), 241-81.
- (2004), 'The 'human rights approach' advocated by the UN High Commissioner for Human Rights and by the International Labour Organisation: Is it relevant for WTO law and policy?' *Journal of International Economic Law*, 7 (3), 605-27.
- Picciotto, Sol (1997), 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism', *Northwestern Journal of International Law and Business*, 17 (2/3), 1014-56.
- Picciotto, Sol (2005), 'The WTO's Appellate Body: Formalism as a Legitimation of Global Governance', *Governance*, 18 (3), 477-503.
- Ruggie, John G. (1982), 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', *International Organisation*, 36 (2), 379-415.

- Ruggiero, Renato (1995), 'The global challenge: opportunities and choices in the multilateral trading system', the Fourteenth Paul-Henri Spaak Lecture, Harvard University, Harvard, 16 October 1995, available from D:\My Documents\Article Collection\Ruggiero95-Harvard.htm, accessed 20<sup>th</sup> March 2006.
- Scherer, F. M. and Weisburst, Sandy (1995), 'Economic Effects of Strengthening Pharmaceutical Patent Protection in Italy', *International Review of Intellectual Property and Copyright Law (IIC)*, 26, 1009.
- Singh, Someshwar (2000), 'UN Human Rights Commissioner Responds to the WTO. The UN Commissioner for Human Rights has responded to the complaints made to it by the WTO over an expert study on the human rights implications of globalisation.' 29 Aug. SUNS4729, available from www.twinside.org.sg.
- TWIN-SAL (1999), 'Enough is Enough', (Economicity, Jaipur: CUTS Centre for International Trade), 2-4; available from <http://www.cuts-international.org/linkages-twinsal.htm>, last accessed 20<sup>th</sup> March 2006.
- UN Commission on Human Rights(2000), *Intellectual Property Rights and Human Rights*, Geneva: Sub-Commission on the Promotion and Protection of Human Rights. E/CN.4/Sub.2/2000/7, 17 August.
- (2004), *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Report of the Special Rapporteur, Paul Hunt. E/CN.4/2004/49, 16 February 2004.
- UN High Commissioner for Human Rights(2001), *The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights*, E/CN.4/Sub.2/2001/13, 27 June 2001.
- (2002), *Globalisation and its impact on the full enjoyment of human rights*, E/CN.4/2002/54, 15 January 2002.
- (2002), *Liberalisation of trade in services and human rights*, E/CN.4/Sub.2/2002/9, 25 June 2002.
- (2003), *Human rights, trade and investment*, E/CN.4/Sub.2/2003/9, 2 July 2003.
- (2004), *Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalisation*, E/CN.4/2005/41, 23 December 2004.
- (2004), *Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalisation*, E/CN.4/2004/40, 15 January 2004.
- Weiler, J. H. H. (2001), 'The rule of lawyers and the ethos of diplomats - Reflections on the internal and external legitimacy of WTO dispute settlement', *Journal of World Trade*, 35 (2), 191-207.