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WTO & Human Rights: Examining Linkages and Suggesting Convergence

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Abstract

The paper examines some aspects of the relationship between trade liberalization and human rights. Whereas there are a lot of policy proposals to avoid the negative effects of trade liberalization on the human rights situation in WTO Member States, not all approaches are feasible to improve the trade and human rights relationship. One of the most controversial issues is the use of trade measures to enforce human rights or social standards. Apart from the legal constraints stemming from the WTO agreements, it is, however, doubtful from an economic and political point of view, whether such measures are suitable, as they harm rather than improve the human rights situation in the target country. A more effective way to address negative impacts of trading rules on the human rights situation is the 'human rights approach' proposed by the UN human rights bodies, which have identified a number of possibilities to incorporate human rights considerations into the work of the WTO. There are, however, limits to the WTO possibilities, which can only be overcome through cooperation with and flanking policies of other relevant international organizations. Although the WTO cannot mutate to a human rights organization, it must take steps to acknowledge the human rights effects of its work in order to maintain credibility. As a member-driven organization, the main responsibility for action lies with the Member States of the WTO. As a satisfactory human rights situation also improves the economic development and attractiveness of a state, human rights and economic development are not contradictory but mutually support each other.

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I. Introduction

In recent years, the linkage of human rights standards and trade measures has become a much-discussed topic in international relations. Examples of human rights issues interfering with WTO principles and obligations are numerous. For instance, the right to health was encroached upon by the *Thai Cigarettes case*, the *Hormone Beef case* and the *Asbestos case*, as well as by the TRIPS agreement which impedes poor people from access to affordable medicine, namely generic drugs, which are produced, imported or sold without respecting existing intellectual property rights as protected under the TRIPS agreement. Furthermore, human rights policies of WTO members are also impaired by WTO principles and obligations. The Burma law, enacted by the US State of Massachusetts to pressure Burma to improve its human rights conditions through restrictions of economic relations with Burma, was at issue before the WTO, because it violated the non-discrimination principle enshrined in the WTO Agreement on Government Procurement (GPA).

The most controversial question is, whether trade-related measures are a feasible instrument to improve the human rights situation in the target country. From an ethical point of view, trade measures, e.g. the prohibition of the import of goods produced with child labor, seem to be justified. Whereas from an economic standpoint, the effect of such trade sanctions often harms the people in the target country more than it actually helps improve the human rights situation. In the WTO, the issue reflects a conflict of interests between industrialized and developing countries. While industrialized countries claim a need for a social clause in order to protect human rights and social standards, and avoid social dumping, developing countries fear that such demands are merely an excuse for industrialized countries to take measures to protect their national job market. From a legal point of view, discussion on the possibility of adopting trade-related human rights measures under the current WTO legal framework, or on necessary and feasible amendments, is again overshadowed by the underlying conflict of interests between industrialized and developing countries.

The goal of the present paper is to discuss the trade and human rights linkage from not only a legal, but also political and economic perspective, and to propose some feasible approaches to eventually achieve the goal of ‘improving standards of living’² for everyone. To this end, not only is the human

² Agreement establishing the World Trade Organization, Marrakech, 15 April 1994, 33 ILM (1994) 1143, http://www.wto.org/english/docs_e/legal_e/legal_e.htm, preamble, first recital.

rights situation, but also the economic well-being crucial.³ Firstly, I will introduce the kind of trade-related human rights measures that exist. Secondly, I will describe the legal framework of the WTO and analyze under what conditions trade-related human rights measures are permitted under the current legal framework. Thirdly, I will examine whether trade-related human rights measures are a feasible instrument for improving the human rights situation. This approach is not only questionable from an economic point of view, but also corresponds with the WTO position that it is not the right forum to address human rights problems. Lastly, I will explore the trade and human rights discussions in the UN framework, which propose a ‘human rights approach’ to international trade and investment. I will describe some measures suggested by those institutions as a feasible way to improve the ‘human rights records’ of the WTO, and the limitations of the WTO in addressing this issue.

II. Trade-related human rights measures

In recent years, states increasingly have adopted trade measures to address human rights concerns. For the purpose of this paper, trade measures are to be interpreted broadly to include all measures that affect international trade and thus potentially conflict with WTO agreements. These are not only trade measures *strictu sensu*, but also internal regulations, which affect trans-national trade. Human rights are also to be understood generally to encompass not only the rights contained in the ‘International Bill of Rights,’ but also basic social standards, as protected by the International Labour Organization (ILO).⁴

The goal of trade-related human rights measures is to improve the human rights situation in the target country through the prohibition or restriction of economic relations. There are a great variety

³ For many Charta of the United Nations, San Francisco, 26 June 1945, 1946/47 YBUN 831, <http://www.un.org/aboutun/charter/>, preamble, Art. 1, 55 and 56; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, GA res. 217 A (III), <http://www.unhchr.ch/udhr/lang/eng.htm>; UNGA, Declaration on the Right to Development, 4 December 1986, GA res. 41/128, [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.141.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.141.En?Opendocument); UN, Vienna Declaration and Programme of Action, 25 June 1993, A/CONF.157/23, <http://www.ohchr.org/english/law/vienna.htm>; also World Bank, World Development Report 2000/2001: Attacking Poverty, Washington 2001, pp. 45.

⁴ The ‘International Bill of Human Rights’ is formed by the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, GA res. 217 A (III), <http://www.unhchr.ch/udhr/lang/eng.htm>, the International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171, <http://www.ohchr.org/english/law/ccpr.htm> and the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 993 UNTS 3, <http://www.ohchr.org/english/law/cescr.htm>. Basic social standards are defined in the ILO Declaration on Fundamental Principles and Rights at Work, 18 June 1998, at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT, and further developed in the various ILO Conventions, which are based upon the economic and social rights guaranteed in Art. 23 and 24 of the UDHR and the UN Covenant on Economic, Social and Cultural Rights (Preamble and Art. 6 - 8), at <http://www.ilo.org/ilolex/english/index.htm>.

of trade-related human rights measures. Measures can either be imposed upon a good related to a specific human rights violation (e.g. child labor), or they can generally address the human rights situation in the target state.⁵

Trade restrictions can either be authorized as economic sanctions by the UN Security Council within the system of collective security under Chapter VII of the UN Charter, or they can be imposed unilaterally. Examples of economic sanctions imposed by the UN Security Council are sanctions issued against Iraq, Sierra Leone, or Somalia.⁶ Gross violations of human rights were specifically targeted by the sanctions against Haiti, Rwanda, and Congo.⁷ Under WTO law, such sanctions would qualify as discriminatory trade restrictions, which are prohibited according to Art. I and XI GATT.⁸ They are however covered by Art. XXI (c) GATT, which allows deviating from GATT obligations, if in pursuance of a Member State's obligations under the UN Charter.⁹

The other possibility is that trade-related human rights measures are imposed unilaterally. This can be a unilateral trade embargo against a country where severe human rights violations take place.¹⁰ In this case, the general human rights situation in a country is addressed. An example for such a trade-related human rights measure is the Burma law, which the State of Massachusetts enacted in 1996 as a reaction to the long history of violence and severe human rights violations by the Burmese Government (now Myanmar).¹¹ The law restricted the procurement of goods or services by

⁵ C. M. Vázquez, Trade Sanctions and Human Rights - Past, Present, and Future, 6 *Journal of International Economic Law* (2003) 797 - 839, distinguishes between general trade sanctions and tailored sanctions; see also S. H. Cleveland, Human Rights Sanctions and International Trade: A Theory of Compatibility, 5 *Journal of International Economic Law* (2002) 133 - 189, pp. 138.

⁶ An overview about the existing sanctions can be found at <http://www.un.org/Docs/sc/committees/INTRO.htm>. For a detailed discussion of the UN Security Council Sanctions cf. M. P. Doxey, *International Sanctions in Contemporary Perspective* (2nd edition), London (1996); V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, The Hague, Boston, London (2001) with further reference.

⁷ Cf. C. J. Le Mon and R. S. Taylor, Security Council Action in the Name of Human Rights, 11 *African Yearbook of International Law* (2003) 263 - 298.

⁸ General Agreement on Tariffs and Trade (GATT 1947), Geneva, 30 October 1947, 55 UNTS 194, http://www.wto.org/english/docs_e/legal_e/legal_e.htm, now integrated in General Agreement on Tariffs and Trade (GATT 1994), Geneva, 15 April 1994, 33 ILM (1994) 1154, http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

⁹ Art. XXI (c) GATT: 'Nothing in this agreement shall be construed ... (c) to prevent any contracting party from taking any action under the pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

¹⁰ E.g. US against Cuba, US against Libya and Iran, EC against Serbia and Montenegro. So far such cases have not been brought before the WTO dispute settlement organs, although unilateral embargos are not covered by the Art. XXI GATT exception.

¹¹ Massachusetts Act of 25 June, 1996, chapter 130, §1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch.7, §§ 22G-22M. For a detailed description see S. Fullerton, State Foreign Policy: The Legitimacy of the Massachusetts Burma Law, 8 *Minnesota Journal of Global Trade* (1999) 249 - 288; P. L. Fitzgerald, Massachusetts, Burma and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Area, 34 *Cornell International Law Journal* (2001) 1 - 53.

Massachusetts public authorities from any person--whether US or foreign national—doing business with Myanmar. The law called for a 10 percent surcharge to bids from those companies. This restriction on government procurement violated various provisions of the WTO Government Procurement Agreement (GPA).¹² The EC and Japan brought the case before the WTO;¹³ however, the US Supreme Court struck down the Massachusetts law in June 2000 as unconstitutional, in violation of the federal exclusive powers to regulate foreign affairs.¹⁴

Trade measures can also involve specific import bans against products linked to the targeted human rights violation, for instance an import ban for products produced by children, or by workers without basic labor or social rights. Trade-restrictive measures may also be used to protect human rights in the country imposing the restriction, e.g. the import ban of cigarettes, hormone beef or asbestos, as measures to protect public health — one aspect of the right to health.¹⁵

The common denominator of these cases is that the use of trade measures is linked to human rights considerations. The legal problem is, however, that international human rights law and international trade law have ‘developed in splendid isolation’,¹⁶ even though both sets of rules were created roughly at the same time, and pursue the same goal, namely ‘higher standards of living’ for everyone.¹⁷ The convergence of these areas of law and the potential conflicts in legal obligations stemming from the WTO and human rights instruments have only become apparent with increasing globalization and interdependence on all levels, i.e. globalizing markets, but also the globalizing information and civil society, which points its fingers on the issues.¹⁸ Although international human rights instruments generally ensure compliance through monitoring and in some cases through

¹² Agreement on Government Procurement (GPA), Marrakech, 15 April 1994, http://www.wto.org/english/docs_e/legal_e/legal_e.htm

¹³ C.f. US – Measures affecting Government Procurement (WT/DS88 and WT/DS95), at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. The EC and Japan had requested consultations about the Burma law in June 1997 at the WTO and then requested the establishment of a Panel on 8 September 1998. The Panel was established in January 1999. In February of 1999 the Panel suspended its work. The authority has lapsed in 2000.

¹⁴ The question of the legality of such trade-related measures was not addressed.

¹⁵ In all cases, specific human rights issues was never brought up by the parties to the dispute.

¹⁶ T. Cottier, Trade and Human Rights: A Relationship to Discover, 5 *Journal of International Economic Law* (2002) 111-132, p. 112.

¹⁷ Cf. C. M. Vásquez, Trade Sanctions and Human Rights - Past, Present, and Future, 6 *Journal of International Economic Law* (2003) 797 - 839, pp. 797 for the development of international trade law and international human rights law.

¹⁸ For an overview over the trade and human rights linkages with further reference cf. H. Lim, Trade and Human Rights. What's at Issue?, 35 *Journal of World Trade* (2001) 275 - 300; T. Cottier, Trade and Human Rights: A Relationship to Discover, 5 *Journal of International Economic Law* (2002) 111-132; R. Howse and M. Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, Rights & Democracy. International Centre for Human Rights and Democratic Development (2000) at: <http://serveur.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>.

individual complaint mechanisms, there are no strong enforcement measures, let alone trade measures, to make states comply with international standards.¹⁹ Thus states use trade-sanctions to enforce human rights violations. As the measures to enforce human rights are trade-related measures, they have to comply with WTO standards, yet neither the WTO nor the former GATT mentions human rights.

III. The WTO legal framework for trade-related human rights measures

A. General principles of the WTO

The rules of the WTO aim at the creation of a stable and predictable trading system, which consists of fair and transparent trade rules for all participants in international trade.²⁰ The areas covered are trade with goods and services and also intellectual property. According to the theory of comparative advantage, the underlying economic model of the WTO, each country should produce what it can do best, and trade that good with the products other countries are able to produce best. With the profit from exports, countries can buy goods that they cannot reasonably produce themselves. This increases trade and promotes the economic performance of all Member States, which eventually raises the standard of living, and ensures full employment and the growth of real income. Following this economic theory, all countries participating in the international trading system will be better off.²¹

The rules of the WTO aim at the reduction of barriers to trade.²² Besides periodic tariff negotiations to lower tariffs, any other barriers to trade, such as quotas, or import and export restrictions are prohibited.²³ National trade regulations have to comply with GATT principles. The core principle is the principle of non-discrimination, which is enshrined in all WTO Agreements and has two

¹⁹ The first time that such trade related measures are provided for is in the 2003 WHO Framework Convention on Tobacco Control, which has however not yet entered into force, cf. at <http://www.who.int/features/2003/08/en/>.

²⁰ For a general overview see J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge (1997); A. F. Lowenfeld, *International Economic Law*, Oxford; New York (2002); S. Dillon, *International Trade and Economic Law and the European Union*, Oxford, Portland (2002).

²¹ This theory was developed by David Ricardo, cf. J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge (1997), pp. 14; A. F. Lowenfeld, *International Economic Law*, Oxford; New York (2002), pp. 1.

²² Cf. J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge (1997), pp. 139; A. F. Lowenfeld, *International Economic Law*, Oxford; New York (2002), pp. 28; S. Dillon, *International Trade and Economic Law and the European Union*, Oxford, Portland (2002), pp. 25.

²³ Art. XI GATT.

components. According to the principle of most-favored-nations treatment, goods from different countries must be accorded the same treatment at the border, when entering the country.²⁴ Following the principle of national treatment, foreign products must be accorded the same treatment as national products once they are in the country.²⁵ The GATT also contains rules to avoid disguised trade restrictions, i.e. national rules, non-discriminatory on the surface, which constitute a *de facto* discrimination of foreign products. The most important examples of these are technical standards and sanitary standards, which have to comply with the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).²⁶ The principle of non-discrimination applies to ‘like products,’ meaning products with the same properties, nature and quality, function, or end-use in the market.²⁷

The GATT provides for some exceptions, which allow states to deviate from the WTO principles in order to pursue specifically defined political interests.²⁸ The possibilities for states to restrict trade in order to pursue such interests are limited, and strict requirements contained in the exception clauses need to be satisfied. The reason for the narrow scope of possible exceptions is that Member States often try to justify protectionist measures with the need to protect non-economic concerns.

Art. XX GATT is the general exception clause, which lists specific public policy reasons that justify the deviation of GATT principles. Those relevant for trade-related human rights measures are the protection of public morals (para. a), the protection of human, animal or plant life or health (para. b), measures relating to prison labor (para. e), and the conservation of exhaustible natural resources (para. g). In addition to fulfilling the requirements of the specific policy goals, the protective measure has to fulfill the general requirements of Art. XX (‘chapeau’): it must comply with the

²⁴ Art. I GATT, this principle is enshrined in all WTO agreements, e.g. General, Art. II; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Marrakech, 15 April 1994, 33 ILM (1994) 1197, http://www.wto.org/english/docs_e/legal_e/legal_e.htm, Art. 4; for details cf. J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge (1997), pp. 157.

²⁵ Art. III GATT; cf. also Art. XVII GATS, Art. 3 TRIPS Agreement; for details cf. J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge (1997), pp. 213.

²⁶ Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), both Marrakech, 15 April 1994, accessible at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

²⁷ These criteria were developed by the 1970 Working Party Report on Border Tax Adjustments, 2 December 1970, cf. *Japan - Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages* (L/6216 - 34S/83), GATT Panel Report, 10 November 1987, para. 5.6; *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products* (WT/DS135), Appellate Body Report, adopted on 5 April 2001, para. 101.

²⁸ Art. XX and XXI GATT, similar exception clauses are contained in other WTO Agreements, such Art. XIV GATS, or Art. XXIII Agreement on Government Procurement (GPA), Marrakech, 15 April 1994, http://www.wto.org/english/docs_e/legal_e/legal_e.htm; details at J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge (1997), pp. 229.

principle of non-discrimination, and must not constitute a disguised restriction to international trade.²⁹

B. Legal constraints for trade-related human rights measures

If trade-related human rights measures are imposed unilaterally on a country, such measures have to comply with the rules of the GATT. Under Art. I of the GATT, providing for most-favored nations treatment, trade measures must not discriminate between like products from different countries. A trade embargo for products from a specific country will violate Art. I, since the human rights situation does usually not influence the quality of the products. An import ban on a specific product, e.g. goods produced with child labor or under very hard working conditions in violation of basic working standards, violates Art. XI, which prohibits all trade restrictions but tariffs. An alternative to an import restriction would be to allow the import, but impose a specific tax on either all products from a specific country or on all products produced under certain conditions. This would be a violation of the national treatment principle in Art. III GATT, as a similar tax is not imposed on like national products.

Unilateral trade embargoes may be justified by the general policy exception of Art. XX GATT. As states are fairly inventive in finding 'non-economic reasons' as excuses for protectionist measures, the difficult task of the WTO Dispute Settlement institutions is to examine whether the measure aims to genuinely protect the non-economic concern or rather to protect the national industry. States have often tried to fit trade-related measures under Art. XX to protect certain public policy goals. So far this was mainly done for environmental or public health measures. In order to keep up with GATT principles, the Panels and Appellate Body have always interpreted Art. XX very strictly, which led to the WTO's reputation of failing to respect human rights, environmental, or social standards.³⁰

The approach of the Dispute Settlement institutions of recognizing and balancing these non-trade

²⁹ Cf. United States - Standards for Reformulated and Conventional Gasoline (WT/DS2 and WT/DS4), Appellate Body Report, adopted on 20 May 1996, pp. 22; for further details and the jurisprudence on Art. XX cf. WTO Analytical Index — Guide to WTO Law and Practice, Art. XX, at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_e.htm.

³⁰ E.g. Thailand - Restrictions on Importation of an Internal Taxes on Cigarettes (DS10/R-37S/200), GATT Panel Report, adopted on 7 November 1990; United States - Restrictions on Imports of Tuna (DS21/R - 39S/155), GATT Panel Report, circulated on 3 September 1991 (not adopted); United States - Restrictions on Imports of Tuna (DS29/R), GATT Panel Report, circulated on 16 June 1994 (not adopted); United States - Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58), Appellate Body Report, adopted on 6 November 1998; European Communities - Measures Affecting Meat and Meat Products (Hormones) (WT/DS26 and WT/DS48), Appellate Body Report, adopted on 13 February 1998; for details see S. Dillon, *International Trade and Economic Law and the European Union*, Oxford, Portland (2002), pp. 122; N. Notaro, *Judicial Approaches to Trade and Environment. The EC and the WTO*, (2003), pp. 141.

aspects with WTO law can provide insight on how the WTO may deal with possible trade-related human rights measures. In general, the panel did not reject environmental or public health measures *per se*, but rejected the way the measures were formulated or applied.³¹ Several legal concepts provided under the GATT, as written in the text of the WTO agreements, and further developed by the Panel and Appellate Body practice pose restrictions for trade-related human rights measures. Besides the strict interpretation of the criteria of Art. XX GATT, the most important questions are whether a state may treat products differently depending on the process and production methods (PPMs), whether the national standard may be applied extraterritorially, and what the relevant international human rights standard is.

1. Art. XX GATT

Art. XX and similar provisions in other WTO agreements, such as Art. XXIII GPA do not contain a human rights or social clause. Some human rights violations could however be covered by the existing specific exceptions. The legal bases for the implementation of social or human rights standards through trade measures could be the public morals exception (para. a), the protection of human, animal or plant life or health exception (para. b), the prison labor exception (para. e) or measures relating to the conservation of exhaustible natural resources (para. g). Whereas paras. (a) and (e) have hardly been applied or mentioned in any reports of the Dispute Settlement institutions, paras. (b) and (g) have often been invoked to justify environmental or public health measures.

Art. XX para. (e) allows measures relating to the products of prison labor, and covers measures directed at goods produced by prison labor. The exception could probably be extended to workers' situations, which are similar to enslavement.³² Another potential legal basis is the public morals exception contained in para (a) which could be interpreted as prohibiting e.g. pornographic material produced under the serious mistreatment of women or even children.³³ Other gross violations of

³¹ Cf. e.g. Thailand - Restrictions on Importation of an Internal Taxes on Cigarettes (DS10/R-37S/200), GATT Panel Report, adopted on 7 November 1990, paras. 73 et seq.; United States - Standards for Reformulated and Conventional Gasoline (WT/DS2 and WT/DS4), Appellate Body Report, adopted on 20 May 1996, pp. 29; United States - Restrictions on Imports of Tuna (DS29/R), GATT Panel Report, circulated on 16 June 1994 (not adopted), para. 5.42.

³² F. Francioni, Environment, Human Rights and the Limits to Free Trade, in F. Francioni (ed.), Environment, Human Rights and International Trade, Oxford, Portland (2001), 1-26, 11; cf. however United States - Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58), Panel Report, circulated on 15 May 1998 (appealed), para. 7.45, note 649.

³³ Cf. S. Bal, International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT, 10 Minnesota Journal of Global Trade (2001) 62 - 108, pp. 76 with further reference; F. Francioni, Environment, Human Rights and the Limits to Free Trade, in F. Francioni (ed.), Environment, Human Rights and International Trade, Oxford, Portland (2001), 1-26, 18; Art. XX (a) GATT was invoked as a defence for the first time in United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services (WT/DS285), Panel Report, circulated on 10 November 2004 (appealed), where the Panel interpreted the

human rights could similarly be covered by para. (a). Both exceptions could serve as a justification for trade restrictions on goods related to a violation of these standards.

Of relevance for the human rights protection could also be Art. XX para. (b) which allows measures necessary to protect human life and health. This exception could be used to justify public health measures, which are an aspect of the human rights to health. One example is the Asbestos case, where the import ban of asbestos containing substances was a justified measure to protect public health.³⁴ Similarly, measures to prevent extremely dangerous working conditions could be covered by para (b).³⁵ The exception for the protection of living and non-living natural resources (para. (g)) could probably be used to justify measures to protect the right to food.³⁶

Art. XX (a) and (b) contain a necessity test that requires that measures pass a ‘weighting and balancing test,’ which evaluates a series of factors to determine whether a measure is necessary to achieve the intended goal. The factors evaluated include the importance of the interest or value that is protected by the measure; the extent to which the measure contributes to the realization of the intended goal; and the trade impact of the challenged measure.³⁷ Measures that are consistent with WTO rules are preferable, and if such measures are not available, the least trade restrictive means possible to reach the goal must be applied.³⁸ What is questionable is whether an import restriction is the least restrictive trade measure to achieve e.g. the goal of fighting child labor. An import ban will probably not only worsen the situation of the children concerned, but perhaps is not the least trade-restrictive measure, as other means, such as product labeling, may be sufficient and more effective.

If the trade-related human rights measures fall under one of the specific exceptions, they must fulfill

meaning of ‘public morals’, at paras. 6.459 et seq.

³⁴ European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products (WT/DS135), Appellate Body Report, adopted on 5 April 2001, paras. 155 et seq.; Art. XX was also used as a defence in Thailand - Restrictions on Importation of an Internal Taxes on Cigarettes (DS10/R-37S/200), GATT Panel Report, adopted on 7 November 1990, at paras. 14 and 21.

³⁵ Cf. S. Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT*, 10 *Minnesota Journal of Global Trade* (2001) 62 - 108, p. 80.

³⁶ Both exceptions were mainly used in environmental cases, e.g. US – Gasoline (WT/DS2 and WT/DS4), US – Shrimp (WT/DS58). For details on Art. XX jurisprudence see WTO Analytical Index — Guide to WTO Law and Practice, at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_e.htm.

³⁷ Cf. Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (WT/DS161 and WT/DS169), Appellate Body Report, adopted on 10 January 2001, paras. 163 et seq., European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products (WT/DS135), Appellate Body Report, adopted on 5 April 2001, paras. 170 et seq.; United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services (WT/DS285), Panel Report, circulated on 10 November 2004 (appealed), paras. 6.476 et seq.

³⁸ Cf. United States - Standards for Reformulated and Conventional Gasoline (WT/DS2 and WT/DS4), Panel Report, circulated on 29 January 1996 (appealed), paras. 6.24 et seq. and Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (WT/DS161 and WT/DS169), Appellate Body Report, adopted on 10 January 2001, para. 166, which both refer to United States - Section 337 of the Tariff Act of 1930 (L/6439 - 36S/345), GATT Panel Report, adopted on 7 November 1989.

the requirements of the chapeau of Art. XX. Thus, the measure must not be applied in a manner which constitutes an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or which forms a disguised restriction to international trade.³⁹ The purpose of the requirements in the chapeau is to avoid the abuse of the exceptions of Art. XX.⁴⁰ Demonstrating that the requirements of the chapeau have been fulfilled, is generally a difficult task, and existing case law regarding environmental matters and public health concerns shows that the Dispute Settlement institutions have so far been quite restrictive in their jurisprudence.⁴¹ General sanctions against a country for its human rights violations will most likely be qualified as an arbitrary and unjustifiable discrimination. For example, the sanctions against Burma would be justified for other countries where a similar human rights situation exists, and therefore, are arbitrary and discriminatory. Moreover, sanctions against products produced in disregard of basic social standards will very likely be qualified as a disguised trade restriction, as the purpose is very often to protect the national industries.

2. The PPM debate

Human rights are often violated through working conditions. In WTO language, this would be a process and production method (PPM).⁴² Examples are child labor or workers working in slave-like situations or without enjoying basic worker's rights. A method to fight such conditions is through import restrictions on products manufactured under such conditions. This is done through the prescription that imported goods be produced in a way that satisfies national or international production/process norms.

According to GATT jurisprudence, PPMs violate the principle of non-discrimination, which applies to 'like products.' The likeness of a product is determined through the quality, function, or end-use in the market.⁴³ As the process and production method do not usually influence the quality of the

³⁹ Cf. S. Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT*, 10 *Minnesota Journal of Global Trade* (2001) 62 - 108, pp. 72.

⁴⁰ *United States - Standards for Reformulated and Conventional Gasoline (WT/DS2 and WT/DS4)*, Appellate Body Report, adopted on 20 May 1996, pp. 22; *United States - Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58)*, Appellate Body Report, adopted on 6 November 1998, paras. 156 et seq.

⁴¹ Cf. WTO Analytical Index — Guide to WTO Law and Practice, Art. XX, at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm.

⁴² For an overview cf. C. Stevens, *Trade and the Environment: The PPM debate*, in W. Lang (ed.), *Sustainable development and international law*, London/Norwell (1995), 239 - 247; F. Francioni, *Environment, Human Rights and the Limits to Free Trade*, in F. Francioni (ed.), *Environment, Human Rights and International Trade*, Oxford, Portland (2001), 1-26, pp.13.

⁴³ Cf. *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (L/6216 - 34S/83)*, GATT Panel Report, 10 November 1987, para. 5.6; *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products (WT/DS135)*, Appellate Body Report, adopted on

product, a different treatment due to PPMs is not allowed, if the quality of a product is the same. This doctrine was established when environmental measures were at stake. In the *Tuna Dolphin II case*, a differentiation between tuna which was caught with dolphin excluding devices and tuna which was caught without protecting dolphins, was prohibited, as there was no different quality of the products.⁴⁴ A similar situation occurs concerning child labor or the granting of basic labor standards to workers: a state who wants to prohibit the import of products produced with child labor through an import ban or an additional tax, violates Art. III or XI GATT, as there is no difference in quality, function or end-use between e.g. a sneaker produced by an adult worker and a child.

Some commentators argue that Art. XX (e) GATT would suggest that PPMs are allowed, as measures relating to the products of prison labor are a valid exception, and this standard constitutes a PPM standard, which does not influence the product properties.⁴⁵ The historical context however suggests that the object and purpose of this provision is not a humanitarian one, i.e. to prohibit prison labor in general, but to protect competition of national products produced with regular work force, which is of course more expensive than products produced with prison labor. Others conclude from Art. XX (e) GATT *ad minore ad majus* that if the protection of competition is a legitimate goal, then *a fortiori* the protection of human rights must be recognized.⁴⁶ So far, this provision has never been invoked or dealt with by the Dispute Settlement Body. However, in the *US Shrimp case*, the Appellate Body stated in a footnote, that the provision does not allow Member States to make the import of products conditional on the exporting country's policy on prison labor,⁴⁷ hence the provision would very likely be interpreted restrictively.

3. The extraterritoriality debate

Generally, Art. XX GATT allows a state to protect the non-economic concerns only in its own country. This means that e.g. measures to protect public health in the country imposing the measure

5 April 2001, paras. 101 et seq.

⁴⁴ United States - Restrictions on Imports of Tuna (DS29/R), GATT Panel Report, circulated on 16 June 1994 (not adopted), para. 5.9; cf. also F. Francioni, Environment, Human Rights and the Limits to Free Trade, in F. Francioni (ed.), Environment, Human Rights and International Trade, Oxford, Portland (2001), 1-26, p. 14; S. Bal, International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT, 10 Minnesota Journal of Global Trade (2001) 62 - 108, pp. 80 for details.

⁴⁵ F. Francioni, Environment, Human Rights and the Limits to Free Trade, in F. Francioni (ed.), Environment, Human Rights and International Trade, Oxford, Portland (2001), 1-26, p. 17; L. Bartels, Art. XX of GATT and the Rules of Public International Law on Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights, 36 Journal of World Trade (2002) 353 - 404, pp. 355 with further reference.

⁴⁶ F. Francioni, Environment, Human Rights and the Limits to Free Trade, in F. Francioni (ed.), Environment, Human Rights and International Trade, Oxford, Portland (2001), 1-26, 18.

⁴⁷ United States - Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58), Panel Report, circulated on 15 May 1998 (appealed), para. 7.45, note 649.

would be allowed under the WTO rules. An example for this is the *EC - Asbestos case*, where the goal of the import ban for asbestos containing substances was the protection of the health of workers in France. However, many trade-related human rights measures, like the Burma law, or an import restriction to avoid child labor, concern human rights violations in the target country.

The WTO Dispute Settlement institutions established jurisprudence that is fairly restrictive to extraterritorial measures. The *US – Tuna case I* stated that measures with extraterritorial effects are prohibited, as they would allow Member States to unilaterally determine the life and health policies other Member States have to adopt, to enjoy their rights under the GATT agreement.⁴⁸ In *Tuna Dolphin II*, the Panel recognized the application of a national standard extraterritorially in principle, but the measure was considered too strict, and thus in violation of criteria set forth under Art. XX (b) and (g), as it forced other countries to adopt the US policy, but did not recognize other forms of protecting dolphins.⁴⁹ In the *Turtle Shrimp case*, the conservation measure for sea turtles was accepted, as there was at least a potential territorial effect, because sea turtles are a migratory species. However, it did not fulfill the criteria of the chapeau of Art. XX, as the conservation measure was again too restrictive.⁵⁰ This jurisprudence is consistent, because it addresses the concern of the Dispute Settlement institutions in preventing states from using trade-restrictive measures to force other WTO Members to apply the imposing state's national standards, which may make a product more expensive. Similar concepts would most likely be applied, if Member States tried to force other states to implement certain health, social, and/or labor standards.

Looking at the territorial scope of human rights obligations, we have a similar coverage. States human rights obligations have to be granted to all persons present in a country, but there is generally no obligation to promote or protect human rights extraterritorially, i.e. to enact laws, which have effect beyond one's national jurisdiction.⁵¹ Thus, the prohibition of child labor is applicable for all children on the territory of the Member State. The extraterritorial application of national laws is also problematic under general international law, as it interferes with the

⁴⁸ United States - Restrictions on Imports of Tuna (DS21/R - 39S/155), GATT Panel Report, circulated on 3 September 1991 (not adopted), paras. 5.25 et seq.

⁴⁹ United States - Restrictions on Imports of Tuna (DS29/R), GATT Panel Report, circulated on 16 June 1994 (not adopted), paras. 5.16 and 5.31.

⁵⁰ United States - Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58), Appellate Body Report, adopted on 6 November 1998, para. 133 and paras. 164 et seq.

⁵¹ E.g. International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171, <http://www.ohchr.org/english/law/ccpr.htm>, Art. 2 (1); Art. 1 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4 November 1950, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>; cf. however for recent jurisprudence C. Tomuschat, Human Rights. Between Idealism and Realism, Oxford (2003), pp. 106.

sovereignty of other countries.⁵²

Some human rights conventions contain however a more generalized obligation to promote human rights through international cooperation.⁵³ The UN Declaration on the Right to Development contains even an explicit obligation to promote human rights on the international level, which means that it is more focused on international cooperation and the work of international organizations.⁵⁴ One possible interpretation of this is that states have an obligation to consider the promotion of human rights when acting in international organizations, such as the WTO. However, this does not authorize the enforcement of national laws extraterritorially, which violates the national sovereignty of other states.

4. The relevant international human rights standard

Closely related to the question of extraterritorial application is what standard of human rights to apply when trade-related human rights measures are adopted. This may be the national or the international human rights standard. As the extraterritoriality debate above has shown, it will have to be the international human rights standard, which has to be applied, if at all. Yet, the problem is to define the applicable human rights standards. Although all WTO Member States have ratified at least one human rights treaty, not all WTO Members are parties to the same conventions.⁵⁵

The exact scope of the 'international human rights standard' is a disputed subject between human rights lawyers as well. The determination is however necessary to analyze the claim that the WTO endangers or ignores *human rights*. As those discussions usually occur in the context of industrialized country's measures against the human rights situation in developing countries, we have to examine the universal human rights standard. The human rights system of the UN consists of the Universal Declaration of Human Rights 1948 and the two 1966 UN Covenants, which today comprise the 'International Bill of Rights.' In addition, there are a number of specialized UN

⁵² Cf. W. Meng, Extraterritorial Effects of Administrative, Judicial and Legislative Acts, in R. Bernhardt, et al. (ed.), *Encyclopedia of Public International Law*, Volume 2, Amsterdam (1995), 337 - 343; M. N. Shaw, *International Law* (5th ed.), Cambridge (2003), pp. 611.

⁵³ International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 993 UNTS 3, <http://www.ohchr.org/english/law/cescr.htm>, Art. 2 (1), for details see M. Novak, in R. Hanski and M. Suksi, *An introduction to the international protection of human rights: a textbook* (2nd edition), Turku (1999), pp. 86.

⁵⁴ UNGA, Declaration on the Right to Development, 4 December 1986, GA res. 41/128, [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.141.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.141.En?Opendocument), Art. 3 and 6; on discussions about the binding nature of the right to development see UN, The legal nature of the right to development and enhancement of its binding nature, 1 June 2004, E/CN.4/Sub.2/2004/16.

⁵⁵ For the status of ratification of the main UN human rights instruments see <http://www.ohchr.org/english/countries/ratification/index.htm>.

conventions protecting the rights of especially vulnerable groups, such as women or children.⁵⁶

Although all human rights are recognized as being equal, interdependent and indivisible,⁵⁷ meaning that all human rights are equally important, there is a difference *de facto*. There is a clear distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other hand, and also within those groups.⁵⁸ There are different levels of obligations, a broad leeway for states to implement their human rights obligations, and different means of enforcement.

Although all states are parties to at least one human rights convention, and bound by the customary international law principles of the Universal Declaration on Human Rights, all States have slightly different obligations. Human rights may be restricted through reservations to human rights treaties, which are often quite far-reaching.⁵⁹ In addition, the treaties themselves allow for the restriction of most human rights in states of emergencies.⁶⁰ Further, many human rights provisions have a built-in exception that permits the restriction of the rights where necessary for the protection of certain public policy interests.⁶¹ Furthermore, the enjoyment of human rights may be restricted by other peoples' enjoyment of human rights. For example, the freedom of speech is limited by the right to privacy and personal integrity of another person. The criteria for balancing the scope of both rights is the principle of proportionality.

In addition, the degree of states' obligations varies, and has to be determined on the basis of each individual human right. The 'International Bill of Rights' contains the obligations to respect, protect and promote human rights. There is a clear distinction in state obligations between 1st generation (civil and political rights) and 2nd generation (economic, social and cultural rights) rights in terms of obligation to implement. States have an obligation to refrain from interfering with civil and

⁵⁶ Cf. <http://www.ohchr.org/english/law/>; for details see R. Hanski and M. Suksi, *An introduction to the international protection of human rights: a textbook* (2nd edition), Turku (1999); J. Symonides (ed.), *Human rights: international protection, monitoring, enforcement*, Aldershot, Burlington (2003).

⁵⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, GA res. 217 A (III), <http://www.unhcr.ch/udhr/lang/eng.htm>, Art. 2; UN, *Vienna Declaration and Programme of Action*, 25 June 1993, A/CONF.157/23, <http://www.ohchr.org/english/law/vienna.htm>, para. 5.

⁵⁸ A. Rosas and M. Scheinin, in R. Hanski and M. Suksi, *An introduction to the international protection of human rights: a textbook* (2nd edition), Turku (1999), pp. 49.

⁵⁹ For an overview on existing reservations to UN human rights instruments see <http://www.ohchr.org/english/countries/ratification/index.htm>.

⁶⁰ E.g. *International Covenant on Civil and Political Rights*, New York, 16 December 1966, 999 UNTS 171, <http://www.ohchr.org/english/law/ccpr.htm>, Art. 4; *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, 993 UNTS 3, <http://www.ohchr.org/english/law/cescr.htm>, Art. 4.

⁶¹ E.g. *International Covenant on Civil and Political Rights*, New York, 16 December 1966, 999 UNTS 171, <http://www.ohchr.org/english/law/ccpr.htm>, Art. 12 (3) and 13 4; *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, 993 UNTS 3, <http://www.ohchr.org/english/law/cescr.htm>, Art. 8 (2).

political rights, while states must take positive action to grant economic, social and cultural rights in a progressive manner.⁶² Also important is that the measures states must take to implement specific human rights are generally not prescribed by the human rights instruments, but states have considerable leeway in implementing different rights.

Another crucial difference is the various methods of enforcing human rights.⁶³ Whereas all states are obliged to implement their human rights obligations, the monitoring of compliance is different for civil and political rights and economic, social and cultural rights. All human rights instruments provide for periodic state reports, where states describe the human rights situation and the steps needed to implement those obligations. The reports are then examined by a committee and discussed with the state concerned.⁶⁴ Instead of using an enforcement mechanism, the method is to monitor implementation and raise awareness for human rights, with the expectation that the state will improve the situation in order to avoid similar complaints on the next report.

For civil and political rights, there is usually an individual complaint mechanism, whereby individuals, whose rights are violated, may use an individual complaint procedure, after the exhaustion of local remedies. Such mechanisms are established for the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).⁶⁵ For a long time, only civil and political rights were considered suitable for enforcement in court, now the recently established individual complaints mechanisms for the CRC and the CEDAW will open up the possibility for economic, social and cultural rights. Thus, the distinctive feature between civil and political rights and economic social and cultural rights has been blurred. An optional protocol establishing an individual complaint mechanism for the International Covenant on Economic, Social and Cultural Rights (CESCR) is under discussion.⁶⁶

What emerges from all these differences is the difficulty in establishing a set of 'core human rights standards,' which is apt for implementation through trade measures and should be recognized by the WTO. There is in fact no clear definition of the 'core human rights standard' and the means to

⁶² Cf. M. Novak, in J. Symonides (ed.), *Human rights: international protection, monitoring, enforcement*, Aldershot, Burlington (2003), pp. 69 and A. Eide, in J. Symonides (ed.), *Human rights: international protection, monitoring, enforcement*, Aldershot, Burlington (2003), pp. 109.

⁶³ Cf. C. Tomuschat, *Human Rights. Between Idealism and Realism*, Oxford (2003), pp. 112.; M. Scheinin, in J. Symonides (ed.), *Human rights: international protection, monitoring, enforcement*, Aldershot, Burlington (2003), pp. 429 with further reference.

⁶⁴ For details cf. C. Tomuschat, *Human Rights. Between Idealism and Realism*, Oxford (2003), pp. 136; all conventions accessible at <http://www.ohchr.org/english/law/>.

⁶⁵ Cf. C. Tomuschat, *Human Rights. Between Idealism and Realism*, Oxford (2003), pp. 160.

⁶⁶ Cf. for details <http://www.ohchr.org/english/issues/escr/group.htm>.

enforce human rights are manifold. Standard setting is one of the main tasks of the UN Human Rights bodies.⁶⁷ The establishment of human rights standards to be recognized by the WTO cannot be expected by the WTO, which lacks the resources. Moreover, this would double the efforts of the UN Human Rights bodies. Further, if the WTO started to set its own standards of recognized human rights, inevitably the danger of parallel standards would occur.

Regarding the enforcement of human rights, the main way to ensure the observance of human rights standards is through state reporting, and monitoring, since changes to Member States' legal systems through awareness-raising has in the long run been considered to be more appropriate than sanctioning individual violations. If the human rights community wanted the enforcement of standards through trade restrictions, this would have been established through the existing human rights instruments,⁶⁸ not in an entirely different organization - whose task is to promote fair trade. Whereas Art. XXI GATT permits the enforcement of gross human rights violations through economic sanctions enacted by the UN Security Council, the possibility to enforce human rights is fairly limited under any other GATT exception. It is doubtful whether the WTO should be more responsive to trade-related human rights measures, since this would mean that Member States could unilaterally determine what human right standard to apply. Further more, this would most likely be a one-way enforcement of human rights, as developing countries do not usually have the economic strength to effectively make use of the possibilities under the Dispute Settlement Understanding (DSU)⁶⁹ to enforce their rights. Multilateral human rights action seems more convincing, as it is more impartial and credible than unilateral action, which is often guided by political motives rather than true human rights concerns.

A technical question is whether the Dispute Settlement Understanding (DSU) allows applying international law resources other than WTO law. According to Art. 3.2 of the DSU, the Dispute Settlement institutions' jurisdiction is limited to the clarification of the existing provisions of the WTO agreements, which may be interpreted in accordance with the customary rules of interpretation of international law, as provided for in the Vienna Convention on the Law of Treaties.⁷⁰ Unclear is, in how far the Panels and the Appellate Body have jurisdiction to apply other

⁶⁷ Cf. UN, Compilation of general comments and general recommendations adopted by human rights treaty bodies, 12 May 2004, HRI/GEN/1/Rev.7, <http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f?Opendocument>.

⁶⁸ The first time that such trade-related measures are provided for is in the 2003 WHO Framework Convention on Tobacco Control, which has however not yet entered into force, cf. at <http://www.who.int/features/2003/08/en/>.

⁶⁹ Dispute Settlement Understanding (DSU), Marrakech, 15 April 1994, 33 ILM (1994) 1226, http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

⁷⁰ Cf. e.g. United States - Standards for Reformulated and Conventional Gasoline (WT/DS2 and WT/DS4), Appellate Body Report, adopted on 20 May 1996, pp. 16.

international law obligations of the Member States, and the practice has so far been restrictive in applying other sources of international law.⁷¹

In some cases, the WTO agreements explicitly recognize extra-WTO legal resources. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement)⁷² apply the Codex Alimentarius as the binding standard. The Codex Alimentarius is a non-binding instrument that contains standards for producing and processing food.⁷³ The standard is one of the accepted guidelines for technical, sanitary, as well as phytosanitary standards permitted under the SPS and TBT Agreement.⁷⁴ Apart from explicit references in the WTO Agreements, the kind of international standards of relevance is questionable. In the *US Shrimp case*, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention)⁷⁵ was used as reference for determining whether sea turtles are an 'exhaustible natural resource.'⁷⁶

Although some commentators criticize that the WTO applies international sources selectively and unequally, i.e. is restrictive and does not recognize e.g. human rights instruments, the difference between the just mentioned standards and the human rights standards is that the Codex Alimentarius as well as the CITES Convention contain clear obligations, and a detailed list of recognized items protected by the convention. This makes the application of those instruments and the use for interpretation much easier than the standards of the human rights conventions, which do not contain clearly formulated and explicit standards.

5. Summary

The above analysis shows that under the current WTO legal framework there is only a very limited possibility to apply trade-related measures to enforce human rights standards. Due to the concept of like products, discriminatory treatment due to the human rights conditions in the exporting country or the production and process methods is not possible. The extraterritorial application of national

⁷¹ Cf. D. Palmetier and P. Mavriodis, *The WTO Legal System: Sources of Law*, 92 *American Journal of International Law* (1998) 398 - 413, pp. 409.

⁷² Both available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

⁷³ Cf. http://www.codexalimentarius.net/web/index_en.jsp.

⁷⁴ *European Communities - Measures Affecting Meat and Meat Products (Hormones)* (WT/DS26 and WT/DS48), Appellate Body Report, adopted on 13 February 1998; *European Communities - Trade Description of Sardines* (WT/DS231), Appellate Body Report, adopted on 23 October 2002.

⁷⁵ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Washington, 12 ILM (1973) 1055, <http://www.cites.org/eng/disc/text.shtml>.

⁷⁶ Cf. *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58), Appellate Body Report, adopted on 6 November 1998, para. 132.

standards does not only constitute a problem under the current WTO legal system, but also in general international law, as it interferes with the sovereignty of other states. The strict requirements of Art. XX are designed to avoid the abuse of allegedly non-economic concerns for protectionist purposes. Such purposes were often identified by the Panels when non-economic concerns were at stake. Although some human rights could be enforced under the current legal system, if in compliance with the requirements contained in the general exception clauses, it would be impossible to protect all human rights under the current legal framework of the WTO. From a human rights perspective, it is disputable whether the partial protection of only some rights is desirable, as generally all human rights are indivisible and equal, therefore, the enforcement of only some rights would contradict this concept.

An amendment of the WTO Agreements would be necessary to reach full coverage of basic human rights through trade-related measures. Although an amendment is factually more than unlikely, the question is whether a broader legal framework is desirable. This is doubtful, since other problems arise if WTO members were allowed to enforce human rights through trade measures. For instance, the applicable human rights standard is difficult to determine, and the exact scope of states' human rights obligations is unclear; moreover, it cannot be the task of the WTO to multiply the efforts of the existing human rights organization to determine the meaning of human rights obligations. This would not only be a waste of resources, but also lead to a double standard, unless it works in cooperation with the UN human rights organizations.⁷⁷ In addition, it is problematic from a political point of view to allow a state to unilaterally determine, which states violate human rights and for which states it enforces human rights through trade sanctions. To use the WTO legal system for such a politicized action would not only endanger its credibility, but also the international human rights concept.

IV. Political and economic aspects of trade-related human rights measures

The discussion on the relationship between trade and human rights reflects the conflict of interest between industrialized and developing countries. The divergent views are also the cause for the lack of agreement as to how to address the issue properly within the WTO. There are various reasons why a state decides to adopt trade measures to enforce human rights. From an ethical point of view,

⁷⁷ Similar problems occur between the European Court of Human Rights and the European Court of Justice, cf. D. Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, in P. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford (1999), 757 - 780.

it seems justified that a state prohibits the import of products produced with child labor or interrupts economic relations with countries that commit severe human rights violations, in order to avoid supporting the regime. The true motives of such allegedly selfless trade measures are however very often economic or political reasons, and human rights concerns many times merely masquerade measures that serve other goals.

Political interests that industrialized countries pursue through human rights measures are two-fold. On the one hand, there is the true human rights concern, i.e. the conviction that child labor is bad, that workers should enjoy basic labor standards, and/or that a regime like the Burmese government should not be supported. Such concerns are also endorsed by labor unions and NGOs. On the other hand, there is the interest to protect national industries, which is also backed by labor unions. Industrialized countries are afraid that by 'social dumping' their products become uncompetitive with respect to developing countries' products, due to higher production costs resulting from higher wages and social standards. As a result, the labor standards and wages will have to be lowered. In addition, their work places and standards are endangered through cheaper labor conditions in other countries, which might form an incentive for companies to move the production there. As there is no other possibility to effectively enforce human rights and labor standards, this should be done through trade measures. If trade-related human rights measures were prohibited by the WTO system, the world trading system would punish countries with high social and human rights standards.

The developing countries arguments are that low labor costs and social standards are their competitive advantage. The claim from developed countries for higher human rights and social standards is merely a hidden form of protectionism and aims to decrease the competitive advantage of developing countries. What developing countries need is economic development which leads to a higher income and produces a positive effect on the standard of living and enjoyment of human rights. The imposition of human rights standards from the outside through trade measures hampers the human rights situation more than it helps, and hinders economic development.⁷⁸

From an economic standpoint, two questions need to be addressed. The first question is, whether and to what extent the granting of certain minimum social standards or human rights standards and international trade—i.e. the competitiveness of products on the international market—relate to each

⁷⁸ Cf. J. Bhagwati, *Free Trade and Labor*, Financial Times, 29 August 2001; for further reference regarding the positions of industrialized as well as developing countries cf. S. Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT*, 10 Minnesota Journal of Global Trade (2001) 62 - 108, pp. 64.

other. Various economic studies show that the mutual impacts are not as strong as asserted.⁷⁹ A study from Hermann Sautter finds that the actual increase in labor costs, if social standards are met, forms an insignificant part of the overall production costs, which will hardly influence the competitiveness of the products on the international market.⁸⁰ Although products from low-wage countries may be cheaper than products from high-wage countries, they only count for a small portion of total imports of industrialized countries.⁸¹ These studies conclude that the impact of lower social standards in developing countries on the wages and working conditions in industrialized countries is less than proponents of the trade and social standards connection like to assert.

Another argument advanced by industrialized countries is that foreign investment is attracted by lower social standards, which results in loss of jobs in industrialized countries. Neither is this argument supported by studies.⁸² The level of wages and social standards does not seem to be the only decisive factor for companies to move production to low level standard countries. Other factors such as the political stability, infrastructure, legal certainty, as well as the education of workers are as important for an investment decision. As higher social and working standard are conducive to the political stability and security in a country, foreign investors are likely to accept higher standards and wages, and also grant such standards to their workers in order to enhance productivity and satisfaction of their employees.

This leads us to the second question, whether trade-measures are actually a feasible instrument to enforce human rights standards. Experience has shown that trade-related human rights measures aimed at changing human rights policies often do not have their intended effect and, on the contrary, aggravate the situation. For example, general economic embargoes usually harm the population of the target country by reducing the supply of their economic needs, whereas the political elite, who is responsible for the violations, maintains the necessary monetary resources and ways to overcome such embargoes.⁸³ A different example is the restriction of the import of goods

⁷⁹ Cf. for many R. M. Stern and K. Terrell, *Labor Standards and the World Trade Organization*, Ann Arbor (2003); M. J. Slaughter and P. Swagel, *Does Globalization Lower Wages and Export Jobs?*, Washington (1997).; OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, Paris (1996).

⁸⁰ H. Sautter, *Sozialklauseln für den Welthandel - wirtschaftsethisch betrachtet*, 40 *Hamburger Jahrbuch für Wirtschafts- und Gesellschaftspolitik* (1995) 227 - 245, p. 231.

⁸¹ R. M. Stern and K. Terrell, *Labor Standards and the World Trade Organization*, Ann Arbor (2003), p. 6; cf. also OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, Paris (1996), pp. 101.

⁸² OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, Paris (1996), pp. 112; R. M. Stern and K. Terrell, *Labor Standards and the World Trade Organization*, Ann Arbor (2003), p. 6

⁸³ E.g. M. P. Doxey, *International Sanctions in Contemporary Perspective* (2nd edition), London (1996); M.

produced by child labor. This trade-restrictive measure ideally leads to a reduction in child labor; however, in practice there are few alternatives to sending children to work, which helps to feed the family, or finance schooling for other children of the family. Thus such measures, if unaccompanied by suitable schooling programs including stipends, can lead to more poverty in the target country.

Another aspect is that social and human rights conditions can be raised by international trade,⁸⁴ therefore, trade sanctions are counter-productive. Through increased exports, the economic welfare of developing countries and standard of living will rise. Jobs provided for by foreign investors are an alternative to no jobs. Further, a study has shown that the wages and social standards in the exporting industry are generally higher than in companies producing for the local market (agricultural and services sector).⁸⁵ Thus, trade restrictions to enforce human rights will harm, rather than help improve the human rights situation in a country, as the target industries are not the perpetrators.

History has proven that the imposition of certain human rights and social standards from the outside has almost always been a failure.⁸⁶ Raising human rights standards can only work if the target country's institutions and politicians are involved, and feasible programs, which consider the countries' needs are drafted. This goal will not be reached through unilaterally imposed sanctions, which are usually unwelcome by the state including the population, which tend to perceive them as interference with national sovereignty. A true improvement can only work, if all parts of society cooperate. A mere imposition of minimum standards from outside, in the form of minimum wages or other benefits will lead to a loss of jobs in the long run, unless the productivity of the workers is improved as well.

The above considerations show that trade-related human-rights measures are neither a suitable instrument to improve the human rights situation in a country, nor are they apt to protect the economy of the state imposing the trade sanction. Furthermore, the level of human rights and social standards in a country has only a marginal influence on the economic performance and exports of that country. Human rights and social standards neither influence the price of a product sufficiently

Brzoska (ed.), *Smart Sanctions: The Next Step*, Baden-Baden (2001); V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, The Hague, Boston, London (2001).

⁸⁴ This was recently also acknowledged by UNDP (ed.), *Making Global Trade Work for People*, New York (2003); World Commission on the Social Dimension of Globalization (ed.), *A Fair Globalization - Creating Opportunities for All*, Geneva (2004).

⁸⁵ R. M. Stern and K. Terrell, *Labor Standards and the World Trade Organization*, Ann Arbor (2003), pp. 5 referring to a study from M. Aggarwal, *International Trade, Labor Standards, and Labor Market Conditions: An Evaluation of Linkages*, USITC, Office of Economics Working Paper No. 95-06-C (1995).

⁸⁶ Cf. R. M. Stern and K. Terrell, *Labor Standards and the World Trade Organization*, Ann Arbor (2003), p. 8.

to displace industrialized country products, nor is the lack of minimum social standards a danger for the social standards and job market of industrialized countries. In addition, trade measures cannot usually be targeted in a way that helps reach the goal.

However, one should not conclude that it is not worthwhile to improve the human rights situation and social standards, as mandated in international human rights instruments. From an economic point of view, it is a 'wise investment' that will pay off in the long run. An increase of social standards, such as limited work hours, basic social benefits, or education for workers has a positive impact on the overall attractiveness of a country for foreign investors, as the productive capacity of labor forces who enjoy basic human rights and social standard, will raise, which will benefit the economic performance of an enterprise and the economy of a state in general.⁸⁷ Therefore, the additional costs related to the creation of a stable investment climate are outweighed by the complete ignorance of social and human rights standards that leads to political instability, scares off investors, thereby harming the economic development.

To sum up, even though the improvement of human rights standards is also desirable for economic reasons, trade measures are an inappropriate means to achieve that goal. Hence, from an economic point of view, the authorization of trade-related human rights measures within the WTO legal framework should not be supported.

V. Ways to improve the trade and human rights relationship

While the WTO has so far not been very receptive to the discussions on the trade and human rights relationship, UN human rights bodies, under the auspices of the Economic and Social Council (ECOSOC), have been very active in researching the topic. Numerous studies focus on the relationship between trade liberalization and human rights and analyze the impact of trade liberalization on the human right situation. These studies propose expedient action that could be taken in the WTO context to avoid the negative impacts of trade liberalization on the human rights situation. Interestingly, those studies hardly suggest the use of trade-restrictive measures to improve human rights situation, but rather propose other means to mainstream human rights into the work of the WTO.

A. The work of the UN Human Rights Bodies

The trade and human rights debate within the UN started in the wake of the Vienna Human Rights

⁸⁷ H. Sautter, *Sozialklauseln für den Welthandel - wirtschaftsethisch betrachtet*, 40 *Hamburger Jahrbuch für Wirtschafts- und Gesellschaftspolitik* (1995) 227 - 245, p. 231; R. M. Stern and K. Terrell, *Labor Standards and the World Trade Organization*, Ann Arbor (2003), p. 6.

Conference of 1993, which stressed the indivisibility and interdependence of human rights.⁸⁸ To realize human rights and better integrate human rights in the work of the UN institutions, the office of the UN High Commissioner of Human Rights was established.⁸⁹ At the time, economic development was characterized by neo-liberalism. Neo-liberalism is not only reflected in the reform of national economic policies, liberalization of national trade and investment laws, deregulation and privatization, but also in increased international economic integration at the universal and regional level (Andean Community, Southern African Development Community, European Union, WTO). This development led to globalized markets, increasing international trade and investment, and accelerating the interdependence of states.

Very soon, the shortcomings of liberalism without any flanking policies became obvious. Civil society and NGOs pointed to environmental, social and human rights deficits. Various UN Conferences addressed the negative impacts of economic globalization on the enjoyment of human rights.⁹⁰ The International Monetary Fund (IMF) and World Bank reacted to international criticism by incorporating human rights, social and environmental standards in their lending and structural adjustment programs.⁹¹ The failure of the Multilateral Agreement of Investment in 1998, negotiated within the framework of OECD, can be traced back to increased activities of the anti-globalization movement. The WTO Ministerial Conference in Seattle in 1999 eventually showed that the trading regime of the WTO also produces negative effects on the poor, especially in developing countries, and that the WTO legal framework to a certain extent restricts economic and social policies. In the wake of Seattle, the WTO increasingly became the target of international critique.

At that time, the UN human rights institutions started to examine the effects of globalization on the enjoyment of human rights,⁹² and the relationship and interaction between international economic law and human rights. The institutions concerned with the question are subsidiary bodies of the Economic and Social Council (ECOSOC), namely the Sub-Commission on the Promotion and

⁸⁸ UN, Vienna Declaration and Programme of Action, 25 June 1993, A/CONF.157/23, <http://www.ohchr.org/english/law/vienna.htm>, para. 5.

⁸⁹ UN General Assembly, High Commissioner for the promotion and protection of all human rights, 20 December 1993, A/Res/48/141; further information at <http://www.ohchr.org/english/>.

⁹⁰ E.g. International Conference on Population and Development (Cairo 1994), World Summit for Social Development (Copenhagen 2005), Fourth Conference on Women (Beijing 1995); further reference at <http://www.un.org/events/conferences.htm>.

⁹¹ IMF and World Bank are however strongly criticized that their required economic reforms lead to increased poverty and dismantling of social structures, for details see M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, Oxford, Portland (2003), pp. 53.

⁹² Cf. UN Secretary General, *Globalization and its impact on the full enjoyment of all human rights: Preliminary Report*, 31 August 2000, A/55/342, which calls for a 'human rights approach' to globalization.

Protection of Human Rights and the Committee on Economic, Social and Cultural Rights, whose main task is the implementation of the CESCR.⁹³

The relationship between trade, investment and human rights was first elaborated in a working paper by Mr. J. Oloka-Onyango and Ms. Deepika Udagama.⁹⁴ Hereupon, they were appointed by the UN Human Rights Commission as Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights.⁹⁵ The mandate was to find the various forms of interaction and propose 'ways and means by which the primacy of human rights norms and standards could be better reflected in, and could better inform, international and regional trade, investment and financial policies, agreements and practices'.⁹⁶ After two preliminary reports,⁹⁷ the final report was submitted in 2003.⁹⁸

A detailed analysis of the trade and human rights relationship was also provided for by a number of reports submitted by the High Commissioner for Human Rights.⁹⁹ The reports analyze the effects of various areas covered by the WTO, namely the liberalization of trade in services, of the TRIPS Agreement, of trade in agricultural products, and of investment liberalization, on the human rights situation in WTO Member States. Although it is undisputed that the liberalization of international trade has increased economic development, the reports found that trade liberalization can have

⁹³ For further reference see http://www.un.org/esa/coordination/ecosoc/sub_bodies.htm.

⁹⁴ UN ECOSOC, The Realization of Economic, Social and Cultural Rights. Human Rights as the primary objective of international trade, investment and finance policy and practice. Working Paper submitted in accordance with Sub-Commission resolution 1998/12, 17 June 1999, E/CN.4/Sub.2/1999/11.

⁹⁵ Commission on Human Rights Decision 2000/102, 17 April 2000.

⁹⁶ Sub-Commission resolution 1998/12, Human rights as the primary objective of trade, investment and financial policy, 20 August 1998, para. 4.

⁹⁷ UN ECOSOC, The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights. Preliminary report submitted by J. Oloka Onyango and Deepika Udagama, in accordance with Sub Commission resolution 1999/8, 15 June 2000, E/CN.4/Sub.2/2000/13, and UN ECOSOC, Economic, Social and Cultural Rights: Globalization and its impact on the Full Enjoyment of Human Rights. Progress Report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8 and Commission on Human Rights decision 2000/102, 2 August 2001, E/CN.4/Sub.2/2001/10.

⁹⁸ UN ECOSOC, Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights. Final Report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission decision 2002/105, 25 June 2003, E/CN.4/Sub.2/2003/14.

⁹⁹ UN ECOSOC, Economic, Social and Cultural Rights: The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights. Report of the High Commissioner, 27 June 2001, E/CN.4/Sub.2/2001/13, UN ECOSOC, Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights. Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32, 15 January 2002, E/CN.4/2002/54, UN ECOSOC, Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights. Report of the High Commissioner, 25 June 2002, E/CN.4/Sub.2/2002/9, UN ECOSOC, Economic, Social and Cultural Rights: Human Rights, Trade and Investment. Report of the High Commissioner for Human Rights, 2 July 2003, E/CN.4/Sub.2/2003/9.

negative impacts on the enjoyment of human rights. Economic, social and cultural rights are particularly endangered by trade and investment liberalization. As it is the primary responsibility of states to protect human rights and pursue human rights principles, the challenge posed by globalization is to ensure that states liberalize trade in ways that are in harmony with their obligations to respect, protect and implement human rights.

Two recent studies describe how the WTO could contribute to the improvement of the trade and human rights relationship, and avoid, as far as possible, the negative human rights impacts of trade liberalization. Robert Howse¹⁰⁰ analyzes the scope and obligations of the right to development, which comprises not only economic development, but also the realization of human rights, especially economic, social and cultural rights.¹⁰¹ Howse states that the realization of the right to development is unlikely to be achieved through judicial or other centralized enforcement, but requires a wide range of public policies and actions on the domestic, as well as international level.¹⁰² The same is true for an improved human rights situation. The main obligation lies however with the individual states, which also have the obligation to realize human rights on the international arena.¹⁰³ These findings are supported by a study by Paul Hunt, which analyzes the right to health and the relationship to WTO Agreements.¹⁰⁴

The debate on how trade, investment and finance interfere with human rights has led to a successful dialogue with economic institutions, such as World Bank and IMF,¹⁰⁵ which have already reacted

¹⁰⁰ UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17.

¹⁰¹ UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17, pp. 4, paras. 7 et seq.; cf. also UNGA, Declaration on the Right to Development, 4 December 1986, GA res. 41/128, [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.141.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.141.En?Opendocument), Art. 6.

¹⁰² UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17, para. 11.

¹⁰³ UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17, para. 16; cf. also UNGA, Declaration on the Right to Development, 4 December 1986, GA res. 41/128, [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.141.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.141.En?Opendocument), Art. 3.

¹⁰⁴ UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1.

¹⁰⁵ The meetings take place since 1998, cf. UNGA Res. 50/227, Further measures for the restructuring and revitalization of the United Nations in the economic, social and related fields, 1 July 1996; a representative of the WTO participated for the first time in 2003, cf. Summary by the President of the Economic and Social Council of the special high-level meeting of the Council with the Bretton Woods institutions and the World Trade Organization (New York, 14 April 2003), 9 May 2003, A/58/77 – E/2003/62.

and now incorporate certain human right standards in their work. The WTO however has been quite reluctant to open up the trade regime to non-trade concerns. The WTO position has for a long time been dominated by the ‘watertight compartment’s view’,¹⁰⁶ i.e., the WTO is a trade organization, not a human rights organization. If there are human rights concerns, these should be addressed in the relevant fora.¹⁰⁷

The findings of the aforementioned studies support the WTO position to the extent that it cannot serve as an organization to enforce human rights. Nevertheless, these studies show that the WTO should be more receptive to proposals to scrutinize its activities and to a ‘human rights mainstreaming process.’¹⁰⁸ Since the Member States of the WTO must guarantee that their human rights obligations are realized, and the WTO is a member-driven organization, it is up to the Member States to ensure that the WTO decisions and rules do not negatively impact on the human rights situation in the WTO Member States.¹⁰⁹

B. Feasible approaches within the WTO

1. Human rights impact assessment at the negotiating and the implementing stage

One way to avoid negative impacts of trade regulation on the human rights situation in the Member States is through a ‘human rights impact assessment’ of WTO decisions and rules.¹¹⁰ This should already be done at the negotiating stage, as well as the implementing stage. Human rights impact assessment considers the likely impacts of trade rules on the enjoyment of human rights. The criteria have to be established for all human rights separately. For the right to health, criteria such as

¹⁰⁶ UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17, para. 20.

¹⁰⁷ Cf. WTO (ed.), *The Future of the WTO. Addressing Institutional Challenges in the New Millennium*, Geneva (2004): The report addresses for the first time the trade and human rights discussion, it draws however the conclusion, that it is not the WTO, who should address these issues, which reflects the position on the respect of labor rights contained in the Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC, at para. IV.

¹⁰⁸ UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17, paras. 25 et seq.

¹⁰⁹ UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, paras. 7 and 11.

¹¹⁰ Cf. UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, para. 53.

the availability, accessibility and quality of health goods, services and facilities, could be considered when new regulations are negotiated (e.g. the GATS regulations regarding trade in services).¹¹¹ Art. XIX of GATS authorizes the Council for Trade in Services to assess the trade rules. Similar assessments could also be done by the other Councils and Working Groups in charge for other WTO agreements.

The existing Trade Policy Review Mechanism (TPRM) could also carry out an important function in the human rights impact assessment of trade regulation. The task of the TPRM is to assess the impact of a Member's trade policies and practices on the multilateral trading system.¹¹² The Member States have to present their national trade policies, and the Trade Policy Review Body assesses the impact on the functioning of the world trading system. According to the preamble of the WTO, one of the goals of the world trading system is to raise the standard of living and sustainable development.¹¹³ As stated earlier, the right to development comprises also the enjoyment of basic human rights standards. Thus, it can be deduced from the preamble that the WTO mandate extends to ensure economic development, which does not impair the human rights situation in a country. This could be done through the inclusion of the human rights impact of trading rules in the state reports for the Trade Policy Review. The Trade Policy Review Body could then examine how the national trade policies contribute to the creation of a fair and transparent trading system, and in particular, whether those trading rules comply with the criteria of sustainable development and raising standards of living.¹¹⁴

2. Interpreting trade rules in conformity with human rights obligations

In order to avoid a conflicting situation in exceptional circumstances, it is possible to interpret WTO rules in conformity with Member States' human rights obligations.¹¹⁵ This interpretation would enable the Dispute Settlement institutions to allow trade measures, which avoid, or minimize

¹¹¹ Cf. UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, para. 53.

¹¹² Trade Policy Review Mechanism (TPRM), Marrakech, 14 April 1994, http://www.wto.org/english/docs_e/legal_e/legal_e.htm, Art. A. i).

¹¹³ Cf. also Art. A.ii) TPRM.

¹¹⁴ For details compare UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17, para. 26 et seq.; UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, paras. 64 et seq.

¹¹⁵ G. Marceau, WTO Dispute Settlement and Human Rights, 13 *European Journal of International Law* (2002) 753 - 814, pp. 779.

human rights violations. An example where such a non-economic concern was accepted without much discussion was the *EC - Asbestos* case, where the import prohibition of asbestos-containing substances for public health reasons was accepted by the Panel without thoroughly examining whether the restriction would be justified under Art. XX.¹¹⁶ Seen from a human rights angle, this decision favors a Member State's implementation of the right to health, i.e. to protect its inhabitants from dangers to their health.

Similarly, the Dispute Settlement institutions could consider human rights concerns when interpreting other disputes.¹¹⁷ In the case of the *US - Shrimp case*, the CITES Convention was brought as an argument to justify the measure in question, and the Panel was ready to examine it.¹¹⁸ Although the Dispute Settlement institutions have some leeway within the existing legal framework to address human rights considerations in their work, as yet no complaining party or defendant has brought up human rights as a justification for trade measures. The Panels cannot be expected to bring up human rights concerns on their own, and an obligation to do so cannot be inferred from the human rights obligations of the WTO Member States.

3. Trade incentives

Another way to promote human rights is through trade incentives. This method has been pursued for years by the EU and the US.¹¹⁹ The EU has a long tradition of adding human rights clauses to cooperation agreements with third countries.¹²⁰ Trade preferences are offered to countries for the promotion of human rights generally, or for programs directed at a specific aspect of human rights. In this manner, the improvement of the human rights situation is not reached through coercive measures, but through the voluntary compliance with certain human rights standards, which is rewarded by trade preferences.

The European Communities' (EC) General System of Preferences (GSP) scheme was recently

¹¹⁶ Cf. *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products (WT/DS135)*, Panel Report, circulated on 18 September 2000 (appealed), paras. 8.186-1.893, regarding the necessity test, the panel found that 'controlled use' is no reasonable alternative to reach the intended effect., cf. paras. 8.217 and 8.222.

¹¹⁷ Cf. for an example UN, *Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization (Study by Robert Howse)*, 9 June 2004, E/CN.4/Sub.2/2004/17, paras. 47 et seq.

¹¹⁸ Cf. *supra* at p. 21.

¹¹⁹ Cf. B. Simma, J. B. Aschenbrenner and C. Schulte, *Human Rights Considerations in the Development Cooperation Activities of the EC*, in P. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford (1999), 571 - 626.

¹²⁰ E.g. *Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part*, Official Journal of the European Union 2000 L 276/45, Art. 1.

challenged by India, Thailand and other WTO Member States. Under this scheme, the EC offered, in addition to the general system of preference program accessible for all developing countries, a number of special preferential treatment programs, on the condition that the receiving country implement certain labor, environmental standards, or measures to combat drug trafficking.¹²¹ Viewed from a human rights perspective, these measures could be seen as promoting human rights in the targeted state. These special programs were challenged by India, as they were not accessible to all developing countries but only to the countries chosen by the EC. Consequently, India complained that the EC's GSP scheme discriminated between different developing countries. Regarding the drug arrangement, the Panel held that it constituted a violation of Art. I GATT.¹²² The Panel ruled that, under Art. I GATT, countries had to extend most-favored nation (MFN) treatment to products from all Members equally, not to individual or selected developing countries. Moreover, the different treatment could not be justified by the Enabling Clause,¹²³ which allows developed countries to maintain GSP programs that provide "differential and more favorable treatment to developing countries without according such treatment to other contracting parties." Thus, GSP schemes must be offered to all developing countries equally and under the same conditions.

The EC appealed against the Panel Report and claimed that the Enabling Clause provides an exception to Art. I GATT. The Appellate Body modified the Panel Report and ruled that the EC may grant additional preferences to developing countries with particular needs, as long as such preferences are consistent with other provisions of the GATT and the Enabling Clause.¹²⁴ Nonetheless, the Appellate Body found that the EC's GSP scheme is inconsistent with WTO rules, because although the drug arrangement is allegedly available to all developing countries that are similarly affected by a drug problem, it fails to set out clear criteria for determining which countries are eligible. As a result, there is no basis to determine whether those criteria or standards are discriminatory.

The GSP case provides guidance for establishing criteria for the permissibility of trade incentives for the promotion of human rights. States are allowed to include non-economic criteria like sustainable development, or even human rights and social standards as conditions for trade

¹²¹ Cf. EC Council Regulation 2501/2001, 10 December 2001, Official Journal of the European Union 2001 L 346/1.

¹²² European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246), Panel Report, circulated on 1 December 2003 (appealed).

¹²³ Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Document L/4903, 28 November 1979, BISD/203.

¹²⁴ European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246), Appellate Body Report, adopted on 20 April 2004.

incentives. The program must however be formulated generally and not be applied in a discriminatory manner.

In contrast to trade restrictions, trade incentives do have positive aspects. Firstly, trade incentives do not infringe on another state's sovereignty and cannot be considered as an interference with internal affairs. Secondly, trade incentives can better target the population's needs than trade sanctions.¹²⁵ It remains doubtful whether trade incentives are less influenced by foreign policy considerations than trade sanctions. Another issue is whether human rights conditionality alone is a suitable instrument to improve the human rights situation of the target country. Technical assistance and programs to promote the awareness for human rights are also needed to effectively change the human rights situation in the target country.

4. Technical assistance for the implementation of trade rules and policies

An additional approach to improving the human rights situation in Member States is to incorporate human rights aspects in the technical assistance programs. Such programs are an important feature of the WTO work, namely for developing countries,¹²⁶ which get support in implementing the trade rules required to comply with the WTO regime, and creating the necessary national institutions to administer those rules.¹²⁷ These technical assistance programs could integrate human rights considerations into the process of drafting trade policies and regulation. Trade Policy Reviews could provide the necessary assessments for specific countries. In order to avoid the duplication of efforts, and to acquire the necessary know-how, cooperation and coordination with already existing technical assistance programs of other UN organizations, such as the International Labor Organization (ILO), or the UN Human Rights Bodies, is essential.¹²⁸

Some of the principles enshrined in the WTO agreements are very similar to human rights concepts, and can serve as a starting point. The principle of transparency, requiring that all trade rules be published and accessible for everyone, and that all countries provide fair and impartial court

¹²⁵ B. Simma, J. B. Aschenbrenner and C. Schulte, *Human Rights Considerations in the Development Cooperation Activities of the EC*, in P. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford (1999), 571 - 626, pp. 579.

¹²⁶ Cf. also the Doha Ministerial Declaration, adopted on 14 November 2001, paras. 38 et seq.

¹²⁷ UN, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, paras. 59 et seq.; UN, *Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization* (Study by Robert Howse), 9 June 2004, E/CN.4/Sub.2/2004/17, paras. 31 et seq.

¹²⁸ Cf. UN, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, para. 60.

procedures, reflect some of the basic civil and political rights contained in the CCPR.¹²⁹ Furthermore, the principle of non-discrimination, a core principle of the WTO, is also one of the key principles of human rights protection.¹³⁰ The goals of sustainable development and raising the standard of living can also be interpreted to encompass all other human rights.

C. Cooperation with other International Organizations

The proposed activities of the WTO to mainstream human rights in its work will need the strong support of human rights organizations. Standard setting and monitoring of implementation is the main task of UN human rights bodies and the International Labor Organization (ILO). Nevertheless, the elaboration of standards to implement the right to health or the right to food, for instance, will be difficult, as these human rights issues are heavily disputed among Member States of the relevant organizations, as well as parties to the relevant agreements. Clearly this is a difficult issue for human rights experts to solve, and therefore, cannot be expected to be resolved by the WTO. The same is true for the monitoring of the implementation.

The UN human rights bodies have not only started to examine the relationship between trade and human rights, but also started to elaborate approaches to mainstream human rights in the WTO. A first step is Paul Hunt's in-depth study on the right to health, which analyzes what the WTO and human rights bodies could do to avoid the negative impact of trade rules on the right to health.¹³¹ Another attempt is the UNDP study 'Making Global Trade Work for People' which examines the trade and development linkage and serves as a basis for projects to improve national trade policies.¹³²

If the WTO is to integrate human rights aspects into its work, it will need suitable techniques and standards to conduct this undertaking. For example, if the WTO is expected to perform a human rights impact assessment, it not only needs a methodology for the impact assessment, but also substantive criteria. Assistance will also be needed, if the Trade Policy Review Body is expected to

¹²⁹ General Agreement on Tariffs and Trade (GATT 1994), Geneva, 15 April 1994, 33 ILM (1994) 1154, http://www.wto.org/english/docs_e/legal_e/legal_e.htm, Art. X; International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171, <http://www.ohchr.org/english/law/ccpr.htm>, Arts. 14 – 16.

¹³⁰ Cf. for a comparative study of the principle of non-discrimination in WTO law and in human rights law UN ECOSOC, Economic, Social and Cultural Rights: Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-discrimination in the Context of Globalization, 14 January 2004, E/CN.4/2004/40.

¹³¹ UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, paras. 70 et seq.

¹³² UNDP, Making Global Trade Work for People, New York (2003).

include a human rights impact assessment in its work. Similar guidance is also necessary for technical assistance programs provided for by the WTO. If this assistance includes human rights aspects, the human rights bodies will have to submit substantive proposals. Last, but not least, the Dispute Settlement institutions' lack of expertise on human rights issues could be addressed by integrating human rights experts to examine the case from a human rights perspective.

VI. Conclusion

Trade and human rights linkages are manifold, and there are numerous policy proposals to avoid the negative impacts of trade liberalization on the human rights situation in the WTO Member States. Even so, not all approaches to address the existing conflicts of interest and improve the trade and human rights relationship are feasible. One of the main points of criticism of anti-globalists is that WTO rules prohibit the enforcement of human rights or social standards through trade sanctions. Apart from the legal constraints of the WTO agreements, it is however doubtful whether trade-related human rights measures are a viable instrument to promote human rights in the target country. From an economic point of view, trade sanctions harm, rather than improve the human rights situation in the target country. Hence, an amendment to the WTO agreements to enable Member States to pursue human rights interests through trade measures, is not only highly unlikely—due to the existing conflict of interest between industrialized and developing countries—but also does not actually contribute to the improvement of the human rights situation and the 'standard of living' in WTO Member States.

A more effective way to address negative impacts of trading rules on the human rights situation is to incorporate human rights considerations into the work of the WTO. The UN human rights bodies have identified a number of measures that can improve the 'human rights records' of the WTO and promote 'higher standard of living' and 'sustainable development' in its Member States. One possibility to incorporate human rights considerations in the work of the WTO is through a human rights impact assessment of trade rules at the negotiation stage, or during the examination of TPRM reports. Technical assistance can also play an important role.

There are however limits to the WTO facilities that can only be overcome through cooperation with other International Organizations. The WTO needs know-how from the relevant UN institutions, like the UN human rights bodies or the ILO, not only in determining the applicable human rights standard, but also for monitoring human rights obligations and mainstreaming human rights into its work. In addition, it is important that those institutions specialized in labor, human rights or social issues supplement the WTO efforts to address human rights concerns through technical assistance and training programs for the improvement of the human rights situation in the countries concerned.

Although the WTO cannot mutate into a human rights organization, in order to maintain credibility, it must take steps to acknowledge the human rights effects of its work. It is the responsibility of the Member States of the WTO to ensure that human rights considerations are incorporated in the work of the WTO Councils and Working Groups. Disregarding all political disputes, namely between industrialized and developing countries, the reluctance towards human rights is difficult to grasp. The creation of an acceptable human rights framework is often perceived as a cumbersome and expensive duty, yet it actually improves the economic situation and attractiveness of a state. If the population is provided with basic labor standards, education or health care facilities, the political climate in a country will stabilize and the productivity of the work force will improve. If a state respects the rule of law, and provides for fair and non-discriminatory administrative and court procedures without corruption, this will lead to a more attractive business environment. Hence, the respect and promotion of human rights and economic development are not contradictory, but mutually reinforcing.