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AN ECONOMIC PERSPECTIVE

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The economic study of human rights is a potentially vast subject. Its breadth results in part from the wide array of "human rights" now said to exist—all manner of economic rights, labor rights, cultural rights, civil and political rights, rights to a clean environment, and perhaps others.[1] The set of economic questions that one might ask about each "right" is also extensive. For example, is the right in question efficient (do those who benefit from it gain enough to be able to compensate those who lose) or is it redistributive? What can one say about the political economy of the right—how do we explain which rights are recognized under national and international law and which potential rights are not, and how do we explain the emergence of particular rights over time? What is the function of international human rights treaties, especially when many of them merely bind nations to do what they would do anyway? What is the relationship between human rights and economic development? These are but a subset of the possible lines of economic inquiry, and of course they intersect considerably with the work of political science.

As an initial foray into the economics of human rights, I focus on the relationship between international trade and human rights, and particularly the relationship between the World Trade Organization (WTO) and human rights.[2] The emphasis is on the arguments of WTO critics who suggest that the growth of the WTO is in one manner or

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[1] The central instruments under international law are the United Nations Universal Declaration of Human Rights (1948), bifurcated into the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). Other UN conventions pertain to such matters as torture and genocide, racial discrimination, and rights of the child. Regional conventions also exist. See generally Louis Henkin, The Age of Rights (New York: Columbia 1990).

[2] There is a substantial literature on this general subject, though relatively little of it is expressly economic. For some recent contributions, see Jeffrey Dunoff, Does Globalization Advance Human Rights, 25 Brooklyn L.J. 125 (1999); Frank Garcia, Trading Away the Human Rights Principle, 25 Brooklyn L.J. 51 (1999); Mark Warner, Globalization and Human Rights: An Economic Model, 25 Brooklyn J. Int'l L. 99 (1999); Ernst-Ulrich Petersmann, Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships, 4 J. Int'l Econ. L. 3 (2001).

another a threat to human rights. These arguments include the following:[3] (*i*) The admission to the WTO of nations that violate human rights extinguishes opportunities for valuable sanctions to discourage such violations. (China is the usual focus of this concern.) (*ii*) Open trade causes production to relocate to areas where environmental standards are lax and results in environmental degradation. Likewise, the competitive pressures that result from open trade cause regulators to lose control over local regulatory matters and precipitate a race to the bottom over matters such as social welfare standards, environmental standards, and worker protection legislation. (*iii*) Open trade exacerbates inequality in the distribution of income.

Although none of these arguments should be dismissed out of hand, I will suggest that none of them are terribly persuasive objections to more open trade under the auspices of the WTO. To the contrary, a more open trading system generally tends to promote most of the concerns that come under the rubric of human rights. And to the extent that exceptions arise, conventional economic arguments regarding optimal policy instruments strongly counsel against curtailment of open trade as a solution, and instead argue for tailored measures that directly address the issue in question. I will develop these themes in general terms in Sections I and II, and then deal with the arguments more specifically in Section III.

Section III also briefly addresses a narrower issue that has received considerable attention lately—whether the TRIPS agreement collides with human rights by making essential medicines unaffordable in developing countries. On that issue, the economic response is rather more agnostic, but it is important to underscore the fact that credible patent rights for pharmaceuticals in developing economies may be essential to any progress in the treatment of tropical diseases.

I. Human Rights as a "Normal Good"

Jokes about economists often build on the notion that economists rarely agree with each other. Yet, there is at least one proposition on which virtually all economists agree—trade liberalization raises living standards in the aggregate. As Paul Samuelson once put it: "[T]here is essentially only one argument for free trade or freer trade, but it is

[3]Here I paraphrase the arguments set forth in Human Rights and International Trade: Narrative Project Description, the proposal that forms the basis for this project.

an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe."[4] The central agenda of the WTO, of course, is trade liberalization. As WTO membership expands and trade barriers decline over time, therefore, the result will tend to be an increase in the real national product of member nations.[5] This proposition is not merely theoretical—empirical research generally confirms that more open trading systems experience higher rates of economic growth.[6]

In turn, the growth in real income that results from more open trade will promote human rights to the degree that the demand for human rights is likely "income elastic." There are good reasons to believe that this will be true for many rights. Note that almost all human rights are, in one manner or another, costly. The protection of rights generally requires a legal system that is effective and credible, and such systems do not come free. Moreover, many rights require some additional sacrifice of other human wants—minimum wages, rights to unionize, environmental standards, and social security systems, for example, all come at the price of an increase in the cost of goods and services, or an increase in taxation. At some level, therefore, human rights must be "financed" by a reduction in other consumption expenditures that would be made in their absence. Human rights are in this sense akin to ordinary goods and services—they cost money, and because of the budget constraint that all individuals and societies ultimately face, an increase in "expenditures" on human rights must be accompanied by a decrease in expenditures on other things that people desire.

The expenditures necessary to create and enforce human rights will tend to be less burdensome, other things being equal, in wealthier societies. For in such societies, basic human needs for food, clothing, shelter and the like are more likely to have been met, and more resources will be available for other things. We might therefore expect that wealthier societies will tend to expend more resources (proportionally) on the creation

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[4]Paul A. Samuelson, Economics 692 (9th ed. 1973).

[5]Some caveats must be noted. For example, the growth of regional trading arrangements raises the danger of "trade diversion" which could lower real global output if severe enough. Similarly, some WTO rules pertain to matters other than trade liberalization. The rules on intellectual property protection contained in TRIPS, in particular, have an uncertain impact on global output.

and protection of human rights[7]—that is, we might expect that human rights will tend to be "normal goods" in the language of economics.[8] Anecdotal evidence hints at the correctness of this hypothesis. I suspect that most readers will concur that more developed nations tend to have stronger guarantees of worker rights, higher minimum wages, and greater restrictions on child labor; more developed nations tend to have stronger safety net programs; more developed nations tend to impose greater restrictions on activities that degrade the environment; more developed nations tend to have stronger anti-discrimination norms, more developed nations tend to have stronger protections for the rights of the accused, and so on.

Yet another mechanism may exist to create a favorable linkage between openness to trade and human rights. Openness to trade likely begets a higher rate of interchange of ideas and information between countries. In turn, as people in nations with fewer rights and freedoms become aware of conditions elsewhere, internal pressures for improvement may grow. Isolated societies, by contrast, may be more subject to human rights abuses.

But we need not rely on anecdotes and casual empiricism to believe that rising real incomes and greater openness to trade tends to promote human rights—these tendencies can be seen in empirical data. I assembled per capita GDP data for 195 countries,[9] along with data from third-party sources regarding the quality of human rights country-by-country. I include the so-called "Humana rating" from the 1991 World Human Rights Guide (higher ratings reflect better human rights conditions),[10] the

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[6]See Jeffrey Sachs & Andrew Warner, Economic Reform and The Process of Global Integration, 1995 Brookings Papers on Economic Activity 1; Sebastian Edwards, Openness, Productivity and Growth: What Do We Really Know?, 108 Econ. J. 447 (1998).

[7]The notion that rights will tend to receive greater protection in wealthier societies is among the themes developed in Richard Posner, The Cost of Rights: Implications for Central and Eastern Europe -- and for the United States, 32 Tulsa L.J. 1 (1996).

[8]A normal good is defined as a good for which the demand rises as income rises.

[9]Data were drawn from CIA World Factbook 2000, available online at www.ocdi.gov/cia/publications/factbook/index.html.

[10]Charles Humana, World Human Rights Guide 3d ed. (Oxford: 1992).

The 40 criteria used in rating each country were distilled from various UN conventions and international treaties. The percentage ratings were determined by awarding a number of points for each question:

3 points if there is an unqualified respect for the freedom or right

2 points if there are occasional breaches of respect for the freedom or right

1 point if there are frequent violations of the freedom or right

0 points if there is a constant pattern of violation of the freedom or right

Questions 7-13 were weighted more heavily because they involve a greater degree of physical suffering. The rating was reached by adding the total points for nonweighted questions to the total for the

Freedom House ratings on both political rights and civil liberties from its 1999-2000 survey (lower ratings reflect better human rights conditions),[11] and the Index of

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weighted questions, multiplying by 100, and dividing by 162, the total number of points possible. The average score was 62%.

The forty criteria are:

Freedom to:

1. Travel in own country;
2. Travel outside of own country
3. Peacefully associate and assemble
4. Teach ideas and receive information
5. Monitor human rights violations
6. Publish and educate in an ethnic language

Freedom from:

7. Serfdom, slavery, forced or child labor
8. Extrajudicial killings or "disappearances"
9. Torture or coercion by the state
10. Compulsory work permits or conscription of labor
11. Capital punishment by the state
12. Court sentences of corporal punishment
13. Indefinite detention without charge
14. Compulsory membership of state organizations or parties
15. Compulsory religion or state ideology in schools
16. Deliberate state policies to control artistic works
17. Political censorship of press
18. Censorship of mail or telephone tapping

Freedom for or rights to**:**

19. Peaceful political opposition
20. Multiparty elections by secret and universal ballot
21. Political and legal equality for women
22. Social and economic equality for women
23. Social and economic equality for ethnic minorities
24. Independent newspapers
25. Independent book publishing
26. Independent radio and TV networks
27. All courts to total independence
28. Independent trade unions

Legal rights**:**

29. From deprivation of nationality
30. To be considered innocent until proven guilty
31. To free legal aid when necessary and counsel of own choice
32. From civilian trials in secret
33. To be brought promptly before a judge or court
34. From police searches of home without a warrant
35. From arbitrary seizure of personal property

Personal rights:

36. To interracial, interreligious or civil marriage
37. Equality of sexes during marriage and for divorce proceedings
38. To practice any religion
39. To use contraceptive pills and devices
40. To noninterference by state in strictly private affairs

[11]Freedom in the World: The Annual Survey of political Rights and Civil Liberties, 1999-2000, Adrian Karatnycky ed. (Freedom House: 2000).

Political rights and civil liberties were each rated by Freedom House on a scale of 1 to 7, with 1 being the most free and 7 being the least free. Countries were assigned a particular number based on responses to the checklists below and the judgments of the survey team at Freedom House. The team assigned initial ratings to countries by awarding from 0 to 4 raw points per checklist item, depending on the comparative rights or liberties present; the only exception is the additional discretionary question B in the political rights checklist, for which 1 to 4 raw points were *subtracted,* depending on the severity of the situation. After placing countries in initial categories based on the checklist points, the team made adjustments for factors like extreme violence, whose intensity might not be reflected in the checklist questions. The factors considered in each category are:

Political rights: enable people to participate freely in the political process, which is the system by which the polity chooses authoritative policy makers and attempts to make binding decisions affecting the national, regional, or local community. In a free society, this represents the right of all adults to vote and compete for public office, and for elected representatives to have a decisive vote on public policies.

Checklist for political rights:

1. Is the head of state and/or head of government or other chief authority elected through free and fair elections?
2. Are the legislative representatives elected through free and fair elections?
3. Are there fair electoral laws, equal campaigning opportunities, fair polling and honest tabulation of ballots?
4. Are the voters able to endow their elected representatives with real power?
5. Do the people have the right to organize in different political parties or other competitive political groupings of their choice, and is the system open to the rise and fall of these competing parties or groupings
6. Is there a significant opposition vote, de facto opposition power, and a possibility for the opposition to increase its support or gain power through elections?
7. Are the people free from domination by the military, foreign powers, totalitarian parties, religious hierarchies, economic oligarchies, or any other powerful group?
8. Do cultural, ethnic, religious, and other minority groups have reasonable self-determination, self-government, autonomy, or participation through informal consensus in the decision-making process?

Additional discretionary Political Rights questions**:** A. For traditional monarchies that have no parties or electoral process, does the system provide for consultation with the people, encourage discussion of policy, and allow the right to petition the ruler? B. Is the government or occupying power deliberately changing the ethnic composition of country or territory so as to destroy a culture or tip the political balance in favor of another group?

Civil liberties: freedoms to develop views, institutions and personal autonomy apart from the state.

Checklist for Civil Liberties:

1. Are there free and independent media and other forms of cultural expression? (Note: in cases where the media are state-controlled, but offer pluralistic points of view, the *Survey* gives the system credit.)
2. Are there free religious institutions and is there free private and public religious expression?
3. Is there freedom of assembly, demonstration, and open public discussion?
4. Is there freedom of political or quasi-political organization? (Notre: this includes political parties, civic organizations, ad hoc issue groups, etc.)
5. Are there free trade unions and peasant organizations or equivalents, and is there effective collective bargaining? Are there free professional and other private organizations?
6. Is there an independent judiciary?
7. Does the rule of law prevail in civil and criminal matters? Is the population treated equally under the law? Are police under direct civilian control?
9. Is there protection from political terror, unjustified imprisonment, whether by groups that support or oppose the system? Is there freedom from war and insurgencies? (Note: freedom from war and insurgencies enhances the liberties in a free society, but the absence of wars and insurgencies does not in and of itself make a not free society free.)
10. Is there freedom from extreme government indifference and corruption?
11. Is there open and free private discussion
12. Is there personal autonomy? Does the state control travel, choice of residence, or choice of employment? Is there freedom from indoctrination and excessive dependency on the state?

Economic Freedom Rating for 2000 prepared by the Wall Street Journal (lower ratings reflect better economic freedom conditions).[12] Finally, on the theory that the overall quality of human rights in a nation is likely correlated with the degree to which people want to migrate into the nation (or exit from it), I include data on net migration rates as well (migrants per 1,000 population, a positive rate indicates a net influx of migrants).[13]

Table 1 reports the simple correlation coefficients between per capita GDP and the various indicators of the quality of human rights in each nation (nations with missing values for any human rights index were discarded for that particular correlation). The column labeled "N" denotes the number of observations used for each correlation. All of the results are statistically significant.[14]

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13. Are property rights secure? Do citizens have the right to establish private businesses? Is private business activity unduly influenced by government officials, the security forces, or organized crime?
14. Are there personal social freedoms, including gender equality, choice of marriage partners and size of family?
15. Is there equality of opportunity, including freedom from exploitation by or dependency on landlords, employers, union leaders, bureaucrats, or other types of obstacles to a share of legitimate economic gains?

[12]Gerald O'Driscoll, Jr., Kim R. Holmes & Melanie Kirkpatrick, 2001 Index of Economic Freedom (Heritage Foundation and Wall Street Journal: 2001).

The *Index* includes a broad array of factors determining economic freedom:

1. Corruption: in the judiciary, customs service and government bureaucracy
2. Nontariff barriers to trade: such as import bans and quotas, as well as strict labeling and licensing requirements
3. The fiscal burden of government: encompasses income tax rates, corporate tax rates and government expenditures as a percent of output
4. The rule of law: efficiency within the judiciary, and the ability to enforce contracts
5. Regulatory burdens: burdens on business, including health, safety and environmental regulation
6. Restrictions on banks: regarding financial services, such as selling securities and insurance
7. Labor market regulations: established work weeks and mandatory separation pay
8. Black market activities: including smuggling, piracy of IP rights, the underground provision of labor and other services

[13]Data were drawn from CIA World Factbook 2000, available online at www.ocdi.gov/cia/publications/factbook/index.html.

[14]In particular, if the various human rights indices are regressed in a simple regression on per capita GDP, the resulting coefficient of per capita GDP is statistically significant at the 95% level.

Table 1

Simple (Pearson) Correlations with

Per Capita GDP

	Corr. Coefficient	N
Humana Rating	0.62	101
Freedom House Political Rights Rating	–0.44	193
Freedom House Civil Liberties Rating	–0.52	193
WSJ Index of Economic Freedom	–0.72	155
Migration Rate	0.38	190

Recalling that better human rights conditions are associated with higher values of the proxy for human rights in rows 1 and 5, and lower values of the proxy in rows 2-4, the results uniformly support the proposition that wealthier nations have better human rights conditions. The relationship holds whether the rights in question are predominantly economic, political or civil. These findings strongly suggest that policies which promote real income growth will also tend to promote human rights across a broad range of concerns.

We have already noted that open trade tends to increase real incomes, but at the risk of belaboring the point, it is perhaps instructive to look directly at the relationship between trade policy and human rights indices. The Index of Economic Freedom contains data by country on average tariff rates, which is a reasonably good measure of openness to trade at least in goods markets.[15] Not surprisingly, a strong and statistically significant negative correlation arises between average tariff rates and per capita GDP (that is, more open nations tend to have higher GDP)—the correlation coefficient is -0.48. This relationship is explicable in part by the fact that more open countries tend to have higher growth rates, as noted earlier, and in part by the fact that over the history of the GATT fewer demands were made for trade concessions from developing countries.[16]

[15]Gerald O'Driscoll, Jr., Kim R. Holmes & Melanie Kirkpatrick, 2001 Index of Economic Freedom (Heritage Foundation and Wall Street Journal: 2001). Nations with economies that are closed to imports were excluded from the sample in preference to assuming some extremely high average tariff rate.

[16]See generally John Jackson, The World Trading System 2d ed. 319-25 (MIT: 1997).

Because of the relationship between an open trading system and economic growth, we might expect that average tariff rates would also bear a clear, negative relationship to indicators of human rights (that is, lower average tariff rates tend to occur in nations with better human rights conditions). Table 2 reports the simple correlation between the average tariff rate and the various indicators of human rights employed above.

Table 2

Simple (Pearson) Correlations with

Average Tariff Rate

	Corr. Coefficient	N
Humana Rating	–0.60	94
Freedom House Political Rights Rating	0.43	151
Freedom House Civil Liberties Rating	0.44	151
WSJ Index of Economic Freedom	0.54	148
Migration Rate	–0.20	151

Again recall that better human rights conditions are associated with higher values of the proxy for human rights in rows 1 and 5, and lower values of the proxy in rows 2-4. Of course, a lower average tariff rate reflects greater openness to trade. Thus, greater openness to trade is correlated with better human rights conditions according to all of the indicators in Table 2. The results are statistically significant except for the one pertaining to the migration rate.

I do not want to make too much of these results. Simple correlations are hardly conclusive proof of a causal relationship between openness to trade and the overall quality of human rights—no doubt some of the causality runs the other way, and more sophisticated empirics are needed to sort out the true relationship. Moreover, even if openness to trade leads to improved human rights in general, exceptions may arise with respect to particular rights or countries. Nevertheless, there is certainly no basis for supposing either in theory or on the basis of available empirical information that a more open trading system does systematic damage to human rights in any broad sense. To the contrary, everything we know points to a generally favorable relationship between them, and the question then becomes how best to address the occasional tension that may arise.

II. Trade, Human Rights and Policy Instruments

I will begin with some background on the imperfections of markets and of an open trading system. Economists usually discuss such imperfections using the language of "efficiency" and "distribution."

Economic theory does not teach that the unfettered operation of open markets is always desirable. Among the conditions necessary for markets to work well is an absence of "non-pecuniary externalities," defined as effects (favorable or unfavorable) on some individuals that do not pass through the price system resulting from the transactions of others individuals. The paradigm example is pollution—the transaction between a customer and a manufacturer, say, results in productive activity by the manufacturer that causes pollution which harms some third party. In the absence of non-pecuniary externalities, open competitive markets tend to be "Pareto efficient," in the sense that no alternative allocation of resources can make someone better off without harming someone else.[17] But as a practical matter, externalities such as pollution are a commonplace, and the possibility arises that corrective government intervention can enhance efficiency.

Moreover, economic theory has essentially nothing to say about distributional equity. Even if an economy is operating "efficiently," the distribution of income may be unacceptably skewed by some criterion. Measures to redistribute income may be judged appropriate even though they often entail some efficiency loss.

It is well known in the international economics literature that open trade may create or exacerbate some problem associated with non-pecuniary externalities or with distributional equity. For example, a lowering of trade barriers may cause a nation to specialize in the production of some good with a production process that is quite "dirty," resulting in a serious local pollution problem. Likewise, the "Stolper-Samuelson" theorem holds that the owners of inputs or "factors of production" that are used intensively in the production of goods that are displaced by imports when trade becomes

[17]This proposition is sometimes known as the first theorem of welfare economics. See Hal Varian, Microeconomic Analysis 3d ed. 323-26 (Norton: 1992).

more open will tend to suffer reduced real income as a result (the owners of factors used intensively in exports will tend to enjoy increased real income).[18] If workers in an import-competing industry are at the lower end of the income distribution at the outset, for example, more open trade may make them even worse off relative to other workers and the perceived equity of the income distribution may suffer.

Economic theory thus stipulates (the empirical importance of the problem is another matter) that more open trade may cause inefficiency or inequity in some contexts. Not all such effects will infringe "human rights," but some of them may—commentators increasingly speak of "rights" to environmental quality, for example, and certainly a reduction in the real incomes of less fortunate individuals might be seen as interfering with certain "rights" to an adequate standard of living.

Might such possibilities justify interference with (or opposition to) more open trade? One answer is to be found in the preceding section—more open trade can contribute to overall improvement in human rights even if there are some more narrow tensions. Human rights advocates would be wise not to focus myopically on the negative aspects of open trade to the exclusion of its positive effects.

But there is a further response that builds on another important strand of economic literature. Consider first the case of the harmful non-pecuniary externality that is somehow exacerbated by more open trade—say, reciprocal tariff concessions have led some nation to specialize in an industry with high levels of pollution. An economist would say that manufacturers in the polluting industry do not bear the full social costs of their production if they are permitted to impose harms on others without paying for them. If those harmed by pollution have difficulty acting collectively to purchase relief,[19] theory then holds that the "first-best" device for dealing with the pollution externality is to intervene in a manner that raises the cost of the goods produced in the polluting industry to their true social cost, as by imposing a tax on the production of the good in question. After price is increased appropriately, no one will consume the good unless they are willing to bear its full social cost, including the cost of pollution, and the level of production will then be "efficient."

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[18]See, e.g., Peter Lindert, International Economics 9th ed. 73-77 (Irwin: 1991).

[19]This is the mechanism explored by Ronald Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960).

But what about dealing with the pollution problem through trade policy, as by retracting the reciprocal tariff concessions that led to the increase in pollution? Theory teaches that this response to the pollution problem is inferior. Even if it reduced pollution toward the appropriate level, it would do so at the cost of raising prices on other goods unconnected to pollution that were covered by the tariff concessions, and this would impose an additional efficiency loss on consumers. Direct intervention in the market that causes the pollution can correct the problem without causing such additional distortions.[20]

A similar line of reasoning applies to the problem of how best to correct for any harm to the income distribution caused by more open trade. When the distribution of income is unacceptable, one way to correct it is through progressive income taxes (including negative taxes [subsidies] for the poorest individuals if necessary). Such taxation has some cost to the overall level of output because it reduces work incentives. But imagine trying to achieve the same degree of redistribution through an alternative policy instrument such as trade policy (perhaps by rescinding the reciprocal trade concessions that led to reduced incomes for workers in import-competing industries). If the degree of income redistribution is the same as under the progressive tax system, then the adverse effect on work incentives should be the same. But efforts to correct the income distribution through trade policy impose a further cost by raising consumer prices and impeding efficient specialization of production in accordance with the principles of comparative advantage. Thus, progressive taxes produce fewer efficiency losses and are accordingly the "first-best" way to deal with income distribution problems. Restrictions on trade, like all other legal rules that cause further inefficiencies, are inferior.[21]

The general lesson is one about optimal policy instruments. Whatever the problem that arises, the best intervention will always deal with it at lowest cost. It is exceedingly unlikely that a problem connected to more open trade is best addressed by closing off trade and sacrificing its familiar benefits, rather than through some other policy instrument that directly addresses the problem in question. Even if a more open trading system at times collides with "human rights" in the estimation of some observers,

[20]See, e.g., Jagdish Bhagwati & T.N. Srinivasan, Lectures on International Trade 185-91 (MIT: 1983).

therefore, measures specifically and narrowly tailored to enhance the human rights at issue are more likely to be a cost effective solution than the much cruder device of interfering with open trade and the resulting allocation of productive resources.

III. The WTO and Human Rights: Response to the Critics

In this section I will briefly offer an "economic" response to arguments noted in the introduction: the claim that WTO membership strips the world community of important sanctions against human rights violators; the notion that the growth of trade causes direct harms to the environment or to social conditions generally via a "race to the bottom;" and the suggestion that globalization is harmful because of its effects on income disparities. I also touch on the question whether intellectual property rights in pharmaceuticals are a threat to "human rights" in the developing world.

A. The WTO, Trade Sanctions and Human Rights

Undeniably, the rules of the WTO system can interfere with the ability of its members to punish human rights violators by restricting trade with them. WTO members limit their capacity to exclude imports from other WTO members in accordance with "tariff bindings" in the goods area, and various "market access commitments" in the services area. Any trade restrictions in excess of these agreed limits, even in the name of human rights measures, would violate WTO law unless justified by some exception to the WTO rules, or by some superseding mutual agreement between the affected nations. As to the first possibility, although provisions such as Article XX of GATT (now part of the WTO agreements) provide some leeway for trade restrictions in the name of human rights, their scope is unclear and no doubt limited. And superseding agreements that allow trade sanctions between parties to a human rights dispute will be very rare. Thus, once a nation is admitted to the WTO, the ability of other WTO members to impose trade sanctions (legally) against that nation for human rights violations becomes more restricted.[22]

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[21]This point is made in quite general terms in Steven Shavell, A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?, 71 Am. Econ. Rev. (Paps. & Procs.) 414 (1981).

[22]Note that many of the targets of trade sanctions imposed in the past for political ends, such as Iraq, Iran and the Soviet Union, were not members of the GATT/WTO system at the time of the sanctions.

That said, it is unclear to what extent the admission to the WTO of a nation accused of human rights abuses results in an important loss of external leverage. Recall the debate in the United States over most-favored nation status for China, and the argument of the U.S. administration that open commercial engagement will tend to improve human rights conditions over time. The information presented in Section I, indicating that wealthier and more open nations tend to have better human rights records on average, lends support to this claim. Likewise, policies aimed at isolating human rights violators and cutting them off from the prosperity that accompanies open trade may well cause human rights to deteriorate.

Further, it is questionable whether trade sanctions will be effective in promoting changes in human rights policy in the short term. Academic studies regarding the efficacy of sanctions for political purposes give them mixed reviews, indicating that sanctions often fail for a variety of reasons. The studies suggest, inter alia, that sanctions are most likely to be effective when they pertain to matters of modest importance, and when the sanction has the potential to inflict large losses on the target (such as a few percent of GDP).[23] With such factors in mind, consider the problem of promoting human rights in China. Efforts to induce the government of China to dramatically alter its policies toward dissidents seek fundamental changes in the political system that probably cannot be viewed as "modest" under any plausible criterion. Likewise, it is unclear whether trade sanctions against China can succeed at imposing large losses on its economy—unless they are coordinated widely in a multilateral fashion, the nations that impose sanctions may simply see China divert its trade to other nations.

Finally, even if accession to the WTO causes an important loss of leverage over human rights matters in the view of some observers, the discussion in Section II above argues for a narrowly tailored response to the problem. The sensible response is not general opposition to the growth and expansion of the WTO, but an appropriate clarification or amendment of the rules governing exceptions to WTO obligations that would permit human rights sanctions under proper circumstances. I do not mean to advocate such changes, as I think it quite unclear whether the gains from relaxing the rules in this area would be worth the costs in the form of abuses and failed sanctions

[23]Perhaps the leading study is Gary Hufbauer, Jeffrey Schott & Kimberley Elliot, International Sanctions Reconsidered 2d ed. 91-115 (Inst. for Int'l Econ.: 1990).

programs. But if an important tension really exists here, specific changes in rules and interpretation that better integrate WTO law with international human rights law are the better course.[24]

B. Environment and "Race to the Bottom" Worries

Critics of the WTO commonly argue that open trade degrades the environment as business relocates to take advantage of lax environmental protection, and further places competitive pressures on environmental, labor, social and perhaps other standards with the result that regulators must sacrifice regulatory goals in these area in the interest of national competitiveness. Since many of these regulations touch on matters that some commentators view as "human rights," some attention to them is required here.

Economic commentators are largely critical of such claims on both theoretical and empirical grounds.[25] I begin with the theoretical objections.

The first emphasizes the essential lesson of Section I. Open trade increases real incomes on average, and nations with higher real incomes tend to spend more on the environment, on worker safety regulations, on social safety net programs, and so forth. The proposition that an open trading system will tend to reduce the <u>average</u> level of social protection in these areas is thus fundamentally at odds with the evidence that such standards are "normal goods" for the most part—interference with open trade is likely to damage human rights on average, not the reverse.

The second objection challenges the essential premise of the argument that open trade harms the environment (or other matters of social concern) when businesses relocate to take advantage of lower costs. If a business relocates, say, to a jurisdiction that permits more pollution, that phenomenon may well be desirable from an economic standpoint. The harm caused by a quantum of pollution is not the same everywhere: geographical differences across jurisdictions may make pollution less harmful in some places (air pollution is much more problematic in the Los Angeles basin, for example); differences in tastes or incomes may also make some societies more tolerant of pollution

[24]This is the general message in Petersmann, supra.

[25]The literature is vast. Much of it is collected and referenced in the papers found in Unfair Trade and Harmonization: Prerequisites for Free Trade?, Vols. I & II, Jagdish Bhagwati & Robert Hudec eds. (MIT: 1997) (hereafter Bhagwati & Hudec), and in a symposium issue of the Journal of Economic Law on regulatory competition, published in June 2000.

than others. As a consequence, the social "shadow price" of pollution varies internationally, and it is perfectly appropriate for polluting businesses to locate where the social costs of pollution are lower. The argument is not limited to pollution. As one more (no doubt controversial) example, consider child labor. Where children have few opportunities for schooling and their families live in poverty, the opportunity to work may well leave them better off than otherwise. To the degree that a more open trading system makes possible greater levels of trade in products produced with child labor, affected children may benefit. Nothing here is meant to deny the sadness of children living in poverty with no access to schooling and poor access to the basics of life, but measures that interfere with their ability to work may leave them worse off yet.

The third theoretical objection relates to the policy instruments analysis of Section II. The fear of a "race to the bottom," slightly rephrased, is a fear that governments will use lax regulatory policies as a means to attract capital to their jurisdiction.[26] But that claim raises its own puzzle—why is capital valuable (at the margin) to the jurisdiction in question? Are the returns to additional capital due to the fact that capital is taxed in a manner that transfer rents from the owners of the new capital to the citizens of the jurisdiction? If not, what is the incentive to attract more capital? If capital is valuable at the margin because of the tax system, why would governments not use the tax system to attract more capital (as through subsidies to new business)? Is that not a more likely way for jurisdictions to attract capital than through suboptimal regulatory policies that sacrifice the environment, the interests of workers, or something else of value?

One response is that the regulatory policy in question is expressly redistributive—government has chosen to tax capital for the purpose of redistributing income, and capital mobility in an open trading system makes it much harder to pursue this policy over the long run.[27] A reduction in taxes can of course mitigate capital flight in this scenario, but it comes at the expense of the redistributive program in question (or creates the need for a different kind of tax to finance it). With the addition of this insight, the more plausible

[26] See John Wilson, Capital Mobility and Environmental Standards: Is There a Theoretical Basis for the Race to the Bottom?, in Bhagwati & Hudec vol. 1, supra.

[27] This is the essence of the distinction between efficiency-enhancing and redistributive policies in David Charny, Regulatory Competition and the Global Coordination of Labor Standards, 3 J. Int'l Econ. L.

and precise "race to the bottom" claim becomes one about the long-run difficulties of redistributing income from the owners of mobile factors of production in an open economy to the owners of immobile factors.

It is not entirely clear, however, why redistribution needs to proceed in this fashion. If the goal is to aid the poor, for example, taxes on the labor or landholdings of the wealthy may suffice to raise the needed funds. Hence, the pressure that an open trading system places on established programs of redistribution may be a largely transitory problem that simply requires appropriate adjustments in tax policy.

The fourth line of criticism is closely related. Any inefficient harm to the environment from the growth of trade (putting global commons issues to one side) or any more general "race to the bottom" results from a failure of national political systems to employ proper tools to address social problems. Indeed, the essence of the race to the bottom claim is that domestic regulators will deviate from optimal regulation due to competitive pressures. But if regulators are inclined to deviate from optimal regulation under those circumstances, what reason is there to believe that they would engage in optimal regulation under any circumstances? Put differently, if the concern is that interest group politics distorts regulatory decisions, what reason is there to believe that the distortion will systematically run in the direction of under-regulation in an open trading system? Chicago school economists such as George Stigler and Sam Peltzman have made enormous contributions to the theory of regulation which suggest that much regulation is excessive and unproductive, a result of capture by regulated entities.[28] The same point is made by those on the other side of the political spectrum, and environmental regulation in particular hardly escapes condemnation.[29] Once domestic regulatory policies are seen in their true light—as the highly imperfect product of an interaction among self-interested interest groups—the fact that they may come under pressure in an open trading system need not be unfortunate. International regulatory competition may well drive out foolish and wasteful regulations rather than undermine valuable regulations.[30]

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281 (2000), as well as the point of departure for Dani Rodrik in Has Globalization Gone Too Far? (Inst. for Int'l Econ.: 1997).

[28]E.g., Sam Peltzman, An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments, 81 J. Pol. Econ. 1049 (1973).

[29]E.g., Bruce Ackerman & William Hassler, Clean Coal: Dirty Air (Yale: 1981).

[30]See generally the symposium in Journal of International Economic Law, June, 2000.

The fifth line of theoretical criticism concerns the question of whether there exists any practical, superior alternative to regulatory competition in an open trading system. Economic commentators agree that nations should differ in the degree to which they regulate in various areas due to differences in tastes, incomes, geography and other factors. Accordingly, harmonization of regulatory standards is quite undesirable in general.[31] And to the suggestion that international cooperation ought to at least place a "floor" under the level of regulation on many subjects, the response is that there is little reason to trust cooperation to produce an appropriate floor. In the area of labor and environmental standards, for example, the great fear of developing nations is that any international floor on such standards will be driven by protectionist interest groups in the developed countries seeking to raise the costs of their developing country rivals—precisely that fear is said by many to have produced the unraveling of the WTO ministerial meeting in Seattle.

The final line of attack on the race to the bottom and related claims is not theoretical, but empirical. The bulk of the investigation done in this area pertains to environmental regulations, and searches for one of two things: direct evidence that more open trade has been followed by a lowering of environmental standards, or evidence that businesses relocate to jurisdictions with lax environmental regulations following trade liberalization. In general, empirical evidence of such phenomena is scant: "The literature surveyed is almost unanimous in its conclusion that environmental regulations have not affected interjurisdictional trade or the location decisions of manufacturers. Where studies have found statistically significant effects of such regulations, the effects are always quite small."[32] None of this is meant to deny that some environmental problems may cross jurisdictional boundaries, and that international cooperation can be needed to address them. But the notion that the growth of world trade has precipitated a noticeable decline in the domestic environmental standards of trading nations is not supported by the available evidence.

No doubt more empirical work remains to be done, and perhaps the picture for policies other than environmental standards will ultimately look rather different. Indeed,

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[31] Again, see generally sources cited in note 25 supra.

[32] Arik Levinson, Environmental Regulations and Industry Location: International and Domestic Evidence, in Bhagwati & Hudec, Vol. I, supra, p. 450.

as noted above, some commentators do believe that a more open trading system has put serious pressure on certain redistributive policies that in the past have been supported by capital taxes. It is perhaps in this domain that any "race to the bottom" is likely to manifest itself, and to impinge on important "human rights" concerns. But the magnitude of the problem remains unclear, and the ability of governments to substitute alternative methods of redistribution that are not threatened by capital mobility may largely ameliorate it.

C. Income Disparities

Recent decades have brought widening income inequality in many nations.[33] Some commentators link the problem to growing trade, and view it as a basis for resisting the growth of the WTO or other "globalization" initiatives.

To be sure, some of the increased income inequality may be due to more open trade. The Stolper-Samuelson theorem, noted earlier, predicts declining real incomes for factors of production dedicated to the import-competing industries harmed by growth in trade. To the degree that the affected entities are workers already toward the lower end of the income distribution (perhaps textile workers in developed countries, as an example), deepening income inequality is surely a possibility.

It hardly follows, however, that resistance to further growth in trade is a sensible response. Much of the increase in income inequality is likely due to other factors. The returns to education have been rising generally,[34] and lower skilled workers are being left behind across the board regardless of their industry. The reason why is something of an economic puzzle, but the general view is that technological progress in modern times favors skilled workers.[35] The empirical evidence on the relationship between trade and

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[33] Some of the inequality literature is cited in Dunoff, supra. See also Burtless, C., International trade and the rise in earnings inequality, 33 J. Econ. Lit. 800 (1995).

[34] See Gordon Hanson, The Globalization of Production, NBER Reporter, March 22, 2001, p.12; Murnane, R. J., and Levy, F., Why today's high-school-educated males earn less than their fathers did: The problem and an assessment of responses. 63 Harv. Ed. Rev. 1 (1993).

[35] Galor, O., and Moav, O., Ability-biased technological transition, wage inequality, and economic growth. 115 Q.J. Econ. 469 (2000).

wages also tends to find rather little downward pressure on any category of wages from the growth of trade.[36] The primary reasons for widening inequality likely lie elsewhere.

Moreover, as noted, open trade promotes the growth of real incomes on average even if some individuals suffer. When the growth of trade harms particular groups of citizens to a degree that is troubling, policies that interfere with trade and reduce overall national income are an unnecessarily costly way of dealing with the problem. Returning to the earlier discussion of optimal policy instruments, transfer programs for the needy would be a superior corrective. And if trade-related harms are for some reason deemed worthy of special attention, transfer programs targeted at trade-related harms to groups of workers (such as the Trade Adjustment Assistance Program under U.S. law)[37] can be employed.

This last point raises a broader issue. Income inequality arises for many reasons that have nothing to do with trade, and it is hardly clear that the proper response to income inequality in any way turns on its genesis. Perhaps all that is needed is a sensible network of need-based transfer and safety net programs—once in place, they can address troubling income inequalities whatever their source. And against a backdrop of sensible transfer and safety net measures, open trade can only improve matters by increasing national income and making assistance to the needy more affordable.

D. TRIPS and the Developing World

Although trade liberalization lies at the heart of the WTO agenda and its predecessor the GATT, other matters now come within the WTO system. The most important to date is intellectual property. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires WTO members to establish effective protection for patents, trademarks, copyrights and other types of intellectual property. It includes detailed rules about the rights that must be protected as well as many of the procedures for protecting them.

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[36] Robert Lawrence and Matthew Slaughter, International trade and American wages in the 1980s: giant sucking sound or small hiccup? 1993 Brookings Papers on Economic Activity 161; Edward Leamer, In search of Stolper-Samuelson effects on US wages, NBER Working Paper, no 5427, January 1998; Kevin Murphy and Finis Welch, F., The role of international trade in wage differentials, in Workers and their wages: Changing patterns in the United States, M. H. Kosters editor, 39-76. (AEI: 1991).

[37] See 19 U.S.C. §§2271-2394.

One consequence of TRIPS has been tan effort in developing countries to create or enhance patent protection for pharmaceuticals. The consequences of this effort for the price and availability of medicines in developing countries has been the subject of considerable attention lately, particularly with respect to the AIDS epidemic in sub-Saharan Africa. Legislation alleged to be inconsistent with TRIPS was the subject of recent litigation in South Africa in a case brought by manufacturers of AIDS medications, a case that eventually was dropped.[38] Many commentators have plainly been troubled by the notion that the intellectual property laws required by TRIPS might be used to raise the price or restrict the availability of medications under the desperate circumstances that confront many sub-Saharan nations,[39] and this aspect of the WTO system has been attacked as a particular source of tension with human rights—here, basic rights to medical care.[40]

Economists have something to contribute to this set of issues, but to some degree can merely point out that the wisdom of the various policy options turns on thorny empirical issues. To be sure, economists generally believe that some degree of intellectual property protection is essential to provide innovators with proper incentives to create new ideas and to market them. But there is no consensus on the details of an optimal intellectual property system, such as optimal patent length or scope. Accordingly, we cannot be confident that the rules contained in TRIPS enhance economic welfare relative to the set of national rules that would prevail in its absence, or relative to some other hypothetical multilateral agreement.

With respect to pharmaceuticals in particular, no one can say for certain whether existing rules governing pharmaceutical patents afford inadequate protection (suboptimal incentives to innovate) or excessive protection (excessive periods of monopoly pricing relative to what is necessary to encourage innovation). Some studies suggest that the social returns to pharmaceutical innovation are exceedingly high and that more investment in R&D is needed.[41] Commentators skeptical of that view point to the high

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[38] South Africa Settles Patent Dispute with Drug Industry, 14 AIDS Litigation Reporter No. 18, p. 6 (June 18,2001).

[39] EU/WTO: Promise to Address Medicine for Poor Countries, European Report, June 27, 2001.

[40] The right to the highest attainable level of physical and mental health has long been among the rights recognized in the UN covenants.

[41] Kevin Murphy & Robert Topel, forthcoming in Journal of Law and Economics.

profitability of the industry, to the billions of dollars that can be made from a successful new drug before generic entry occurs, and to the limited supply of human capital available for productive research. In the end, one can neither prove nor refute the possibility that patent rights in pharmaceuticals create excessive rents for pharmaceutical companies, and that some reduction in patent protection might be socially productive. If so, then the relaxation of pharmaceutical patent protection in developing countries might seem a particularly attractive option given the humanitarian concerns.

In addition, it is unclear how much patent protection in developing countries affects the overall incentives of pharmaceutical companies to conduct research and development. International price discrimination is common in pharmaceuticals, with dramatically lower prices on drugs sold to many developing countries. It is possible that revenues from developing country sales for many types of drugs are quite a small portion of total revenues presently. The impact of reduced intellectual property protection in developing countries on the returns to pharmaceutical R&D might then be small as well, especially if generic medications sold in developing country markets could be kept out of major developed markets.

Further, even if a reduction in patent protection for pharmaceuticals in developing countries would come at the cost of an important, uneconomical reduction in incentives to innovate, it is possible to imagine devices that would make pharmaceuticals more affordable in developing country markets without affecting incentives to innovate. The most obvious mechanism is direct transfers from the governments of developed nations to help fund pharmaceutical purchases in the developing world—the recent G-8 commitments regarding AIDS drugs are illustrative.[42]

But this discussion requires an important caveat. The AIDS pandemic is not the only infectious disease problem in the developing world—malaria, drug-resistant tuberculosis, and sleeping sickness are among the other notable killers. And unlike AIDS, these diseases are found primarily in developing countries. Little research is being undertaken on these diseases, presumably because pharmaceutical companies do not anticipate returns that would justify the cost. The TRIPS agreement <u>might</u> have some

[42] See Launch of Global AIDS Fund at G-8 Summit Gets Mixed Reviews, Africa News, July 24, 2001.

potential to change this situation if pharmaceutical manufacturers perceived that it would create credible patent rights in the developing economies.

Yet, the political pressure has been to weaken TRIPs, and of course the DOHA ministerial meeting of the WTO produced a Declaration on the TRIPs Agreement and Public Health that opens the door wider to the use of compulsory licensing in response to national medical emergencies, and affirms the right of nations to permit parallel imports (which undercuts international price discrimination by pharmaceutical manufacturers). Although such policies can have the salutary impact of making existing drugs more affordable to those who desperately need them, their prospect may greatly diminish any hope that TRIPs might stimulate new research on tropical diseases.[43]

Conclusion

The opponents of globalization and the WTO point to a wide array of concerns, only some of which can fairly be said to implicate human rights. Economists will find little merit in most of the human rights critique (like most of the other objections to trade and globalization), and indeed the evidence suggests that the growth of the trading system generally tends to promote rather than undermine human rights. Any tensions are best resolved through tailored interventions that directly address the human rights impairment without sacrificing the wider benefits of freer trade.

[43] I address these issues at considerable length in another recent paper: TRIPs, Pharmaceuticals, Developing Countries, and the Doha “Solution”, 3 Chi. J. Int’l L. 47 (2002). Similar observations may be found in Jean O. Lanjouw, A Patent Policy for Global Diseases: U.S. and International Legal Issues, forthcoming in Harvard Journal of Law and Technology (Fall 2002). Lanjouw proposes in essence a two-tier system of patent rights that would provide strong patent protection in developing countries for medicines that address tropical diseases, but would weaken patent protection in developing countries for other medicines.

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