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Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?

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HUMAN RIGHTS PROVISIONS IN FREE TRADE AGREEMENTS: DO THE ENDS JUSTIFY THE MEANS?

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I. Introduction

Numerous Free Trade Agreements (FTAs) contain provisions imposing human rights-related obligations, particularly in the case of agreements between the European Union and a developing country (often a former colony). Such obligations often consist of hortatory "best endeavors" language rather than legally binding provisions. Even the small number of provisions that are binding are very rarely enforced. Furthermore, even if an FTA features human rights-related provisions, it may contain other terms that have negative implications for human rights. Thus, including human rights provisions in FTAs will not necessarily result in better human rights outcomes. There are additional reasons to be cautious about the potential for FTAs to improve the circumstances of developing countries. There is an inherent inequality in FTA negotiations between developed and developing countries. And trade agreements vary significantly in the degree to which they provide for financial, technical, logistical, and other forms of assis-

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tance to their developing country participants. Indeed, there has been a recent trend towards negotiating FTAs and other trade agreements amongst predominantly developed countries. These agreements tend to focus on achieving commitments to liberalize trade more deeply and broadly than that to which the World Trade Organization (WTO) membership as a whole would be likely to agree. Such "high standard" agreements do not make many, if any, provisions for particularized needs or different capabilities of developing countries. It is therefore not surprising that such agreements and negotiations have no least-developed country (LDC)[1] or poorer developing country participants. Given the unfavorable bargaining power developing countries face in FTA negotiations with developed country partners and the trend towards negotiating FTAs that are not well-aligned with poorer countries' interests, FTAs may not be a suitable forum for addressing human rights-related concerns.

Furthermore, even though the European Union's FTAs among others contain human rights clauses, such FTAs by and large do not include the countries with the worst human rights abuses. While human rights violations occur in all countries, there is a significant correlation between level of economic development and such abuses.[2] The countries that are considered to have the highest levels of corruption and human rights abuses are not, by and large, participating in FTAs or other reciprocal trade agreements, at least in part because they are not members of the WTO. While the WTO is not a panacea for developing countries, it may provide the better space – as compared to FTAs – for achieving objectives in furtherance of human rights objectives.

This article begins in Part II with a brief discussion of the historical debates over human rights and trade linkage and the practice of including human rights provisions in FTAs. Part III identifies a number of concerns regarding the inclusion of human rights obligations in FTAs, including the fact that FTAs rarely include the worst human rights offenders. Part IV then argues that it may be preferable – and more fruitful – to promote human rights by bringing the worst culprits into the WTO, and details some of the ways human rights concerns can be promoted through the WTO and membership therein. Part V then concludes.

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[1] "LDC" is the term the United Nations uses to refer to countries it has identified as being low-income and suffering from severe structural obstacles to sustainable development. The criteria used to determine LDC status includes gross national income per capita; a human asset index; and an economic vulnerability index. There are presently 48 countries classified as LDCs. *See* What are least developed countries (LDCs)?, UNITED NATIONS (last visited Jan. 17, 2015), http://www.un.org/en/development/desa/policy/cdp/ldc_info.shtml.

[2] Indeed, the denial of economic opportunity can be seen as a direct violation of human rights. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976). However, economic rights are often seen as "second generation" rights that are a lower priority than "first generation" civil and political rights. *See, e.g.*, Makau wa Mutua, *The Ideology of Human Rights*, 36 VA J. INT'L L. 589, 605 and n.42 (1996); *see also* Makau Mutua, *Human Rights and Powerlessness: Pathologies of Choice and Substance*, 56 BUFF. L. REV. 1027, 1028 (2008) ("[T]here has never been a major human rights NGO in the West that focuses on economic, social, and cultural rights. The problem is not simply one of orientation, but a fundamental philosophical commitment by movement scholars and activists to vindicate 'core' political and civil rights [over other types of rights] . . . .").

II. Trade and Human Rights – To Link or Not to Link?

There has been a lengthy debate within academia and the GATT/WTO membership regarding the linkage or lack thereof between trade and human rights, and to what degree any such linkage should be formalized within the GATT/WTO.

Ernst-Ulrich Petersmann has long argued that international trade governance in the WTO should be "constitutionalized" in conformity with Members' human rights obligations and that the right to trade should be seen as a human right.[3] While many ascribe to Petersmann's views, his position has also been subject to numerous critiques.[4]

Disagreement remains over whether human rights should be written more explicitly into the WTO Agreements. However, views have evolved such that it is now much more common to see commentators claim that human rights are implicitly consistent with the WTO and that the WTO should be read consistent with other international law obligations, including human rights treaties and principles of customary international law.[5] As will be discussed below, there have been numerous examples of WTO members finding ways to allow human rights concerns to be addressed, and for such concerns to be acknowledged by dispute settlement panels and the Appellate Body.

Nonetheless, the WTO membership as a whole is highly unlikely to provide for more explicit human rights-related obligations in any sort of agreement. Developing countries are generally opposed to such provisions and have not been willing to discuss them in the WTO context. Although developing countries can use their numbers to their advantage within the WTO, they are not able to do so when negotiating an FTA with a developed-country partner.[6] In the FTA con-

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[3] Petersmann has published extensively on this subject for over twenty years. *See, e.g.*, Ernst-Ulrich Petersmann, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19 (2000); Ernst-Ulrich Petersmann, *Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUROPEAN J. INT'L L. 621 (2002). For an extensive list of Petersmann's publications on this subject prior to 2002, see Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUROPEAN J. INT'L L. 815, n3 (2002).

[4] For a particularly harsh critique, see Alston, *supra* note 3. For other critiques, *see* Robert Howse and Kalypso Nicolaides, *Legitimacy Through "Higher Law"? Why Constitutionalizing the WTO is a Step Too Far*, in THOMAS COTTIER AND PETROS MAVROIDIS, EDS., THE ROLE OF THE JUDGE: LESSONS FOR THE WTO (2002); Steve Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in GRÁINNE DE BÚRCA AND JOANNE SCOTT, EDS., THE EU AND THE WTO (2001).

[5] *See, e.g.*, Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 755 (2002) ("Unless otherwise prescribed, WTO provisions must evolve and be interpreted consistently with international law, including human rights law . . . . [A] good faith interpretation of the relevant WTO and human rights provisions should lead to a reading of WTO law coherent with human rights law.").

[6] *Cf.* Marcia Harpaz, *When East Meets West: Approximation of Laws in the EU-Mediterranean Context*, 43 COMMON MARKET L. REV. 993, 999 (2006) (discussing the EU's expectation that its Mediterranean neighbors will unilaterally align their legislation in certain respects to that of the EU rather than the parties engaging in a "give and take" negotiation).

text, many developing countries have acceded to the demands of developed countries by agreeing to some form of human rights obligations.[7]

There have been a variety of efforts to discipline human rights through trade agreements. In some cases, provisions are included that make specific reference to "human rights." The European Union has long included such human rights clauses in its agreements.[8] Other agreements include chapters or other provisions that, while not using the term "human rights," are nonetheless linked to an objective that can be seen as human rights-related. Examples include provisions requiring the parties to abide by International Labor Organization treaties.[9] Many FTAs, including all FTAs entered into by the United States, include labor-related provisions – sometimes in the form of an entire chapter.[10] FTAs with provisions designed to protect indigenous peoples and their innovations arguably also fit into this category. Some provisions are designed to reserve the right to take measures to further the interests of indigenous peoples, even if doing so results in giving better treatment to a segment of the domestic population than is accorded to the trading partner. New Zealand includes such provisions in its FTAs, designed to preserve the policy space necessary to comply with its obligations to Mâori pursuant to the Treaty of Waitangi.[11] Other agreements include provisions relating to the protection of traditional knowledge.[12] Examples include the China – New Zealand FTA, which provides that the parties may, subject to their respective international obligations, "establish appropriate measures to protect genetic resources, traditional knowledge and folklore."[13]

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[7] *See, e.g.*, EMILIE HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS, 4 (2009).

[8] *See, e.g.*, LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS (Oxford 2005).

[9] For example, the labor chapter in the United States – Peru FTA establishes a number of obligations to comply with ILO obligations. *See* United States – Peru Trade Promotion Agreement (2006), ch. 17, particularly Arts. 17.1-17.3, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf.

[10] For a discussion of the range of labor provisions in FTAs to which the United States is a party, *see* David A. Gantz, *Labor Rights and Environmental Protection Under NAFTA and other U.S. Free Trade Agreements*, 42 U. MIAMI INTER-AM. L. REV. 297 (2011).

[11] *See, e.g.*, New Zealand – Thailand Closer Economic Partnership Agreement (entered into force Jul. 1, 2005), Art. 15.8, para. 1 ("Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfillment of its obligations under the Treaty of Waitangi."). For the full text of the agreement see New Zealand Ministry of Foreign Affairs & Trade, *New Zealand - Thailand Closer Economic Partnership Agreement*, *available at* http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php.

[12] "Traditional knowledge" refers to "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity." *See* World Intellectual Property Organization, *Traditional Knowledge*, http://www.wipo.int/tk/en/tk/.

[13] *See* New Zealand – China Free Trade Agreement, chapter 12, Art. 165 (entered into force Oct. 1, 2008), *available at* http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf. For a discussion of FTA provisions relating to traditional knowledge, see Susy Frankel, *Attempts to Protect Indigenous Culture Through Free Trade Agreements*,

The European Union (EU) has been the most prominent proponent of including human rights clauses in FTAs, having done so for well over twenty years.[14] The EU's agreements have generally contained provisions indicating that respect for human rights, as expressed in the Universal Declaration of Human Rights, constituted "an essential element" of the agreement.[15] Despite these provisions, earlier agreements contained no operational language requiring any particular implementing measures to ensure the protection of human rights, nor any enforcement mechanism should human rights be violated.[16] More recently, the EU has included implementation provisions that obligate the parties to implement measures necessary for their fulfillment of their FTA obligations, including a human rights clause.[17] Notwithstanding such provisions, the FTAs vary in the degree to which – if at all – the human rights clauses are subject to the agreements' dispute settlement provisions. Also, even when dispute settlement is a possibility, the EU has generally stopped short of exercising its full rights with respect to its trading partners' human rights violations.[18] While it is primarily the EU that includes human rights clauses in its FTAs, the United States and other countries often include provisions relating to labor rights that can be seen as a type of human rights provision.[19] While labor rights abuses can be seen as human rights abuses, it is not clear that the purposes of labor chapters in FTAs have much to do with protecting human rights. The motivation for including such clauses is instead to assuage the concerns of those – particularly Democrats in the United States Congress – who worry that the proposed free trade agreements will lead to a shift in jobs to developing countries due to lower wages and lax labor standards in those countries.[20] Thus, the impetus for including labor chapters in FTAs seems to be the desire to protect, or be seen to be protecting, workers in the developed country instead of protecting workers' rights in the developing country. Given the motivation for such provisions, we should not be sanguine that their inclusion in FTAs is a step forward for human rights.

in CHRISTOPH B. GRABER, KAROLINA KUPRECHT AND JESSICA C. LAI, INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES (2012).

[14] *See* HAFNER-BURTON, *supra* note 7, at 51-52 (describing EU protections of human rights in trade agreements dating back to the early 1990s).

[15] *See Universal Declaration of Human Rights*, UNITED NATIONS, *available at* http://www.un.org/en/documents/udhr/.

[16] Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, University of Cambridge Legal Studies Research Paper No. 24/2012 (Sept. 2012) at 4, 8.

[17] *Id.* at 4.

[18] *Id.* at 9.

[19] *See* Zolomphi Nkowani, *International Trade and Labour: A Quest for Moral Legitimacy*, 8 J. INT'L TRADE L. & POL'Y 4, 10 (2009) (arguing that "is beyond dispute . . . that labour rights are human rights . . . ."). For a discussion of labor clauses in United States FTAs, see Nkowani at 10-11.

[20] HAFNER-BURTON, *supra* note 7, at 58, 62-64.

III. Human Rights and FTAs – Missing the Target?

A. Effectiveness of Human Rights Provisions in FTAs

Although the EU uses FTAs as a mechanism for imposing human rights provisions on developing countries, and the United States has also included human rights-related provisions in its FTAs, most commonly relating to labor standards,[21] it is unclear whether such provisions go very far towards reducing the most significant human rights abuses worldwide.

There is some data to suggest the provisions used by the EU and United States have, in some cases, had positive effects on their FTA partners' compliance with human rights obligations.[22] Of course there is a real question whether it is appropriate or desirable for developed countries to be dictating conditions of behavior to developing countries. However, if one ascribes to the "the ends justify the means" school of thought, then FTAs still do not appear to be a particularly effective instrument for addressing human rights concerns.

The author of a detailed examination of the use of human rights provisions in trade agreements has concluded the EU and US's motivations in including such provisions has more to do with politics and other considerations than with any genuine concern for a positive human rights outcome:

> [T]he rise of a human rights discourse should be viewed with at least some skepticism. . ..Many policymakers may not actually be as invested in the human rights outcome, or the effects of the policy, as they could be. . ..And so they may be willing to trade off or sell down certain aspects of human rights to win a political compromise that seems indefensible to moral advocates and that could have harmful, and certainly unintended, effects.[23]

Such inconsistencies are evident in developed countries' approaches to trade agreements with developing countries. The United Nations High Commission for Human Rights has cautioned developing countries about the potential human rights implications of adopting intellectual property protections more stringent than those required under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), commonly referred to as TRIPS-plus provisions.[24] Such provisions include data exclusivity for patented pharmaceuticals, making it more difficult for less expensive generic medications to compete in the

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[21] Nkowani, *supra* note 19.

[22] *See generally* HAFNER-BURTON, *supra* note 7.

[23] HAFNER-BURTON, *supra* note 7, at 172. *See also* Stephen Joseph Powell and Patricia Camino Perez, *Global Laws, Local Lives: Impact of the New Regionalism on Human Rights Compliance*, 17 BUFF. HUM. RTS. L. REV. 117, 149 (2011) ("[M]any of the human rights provisions negotiated arguably serve the political and economic agendas of the developed countries rather than the actual concerns of the regional partners about their failure to implement human rights obligations to the betterment of their civil societies.").

[24] Ioana Cismas, The Integration of Human Rights in Bilateral and Plurilateral Free Trade Agreements: Arguments for a Coherent Relationship with Reference to the Swiss Context, 21-SUM CURRENTS: INT'L TRADE L. J. 3, 6 (2013).

marketplace. In the Dominican Republic – Central America – United States FTA (DR-CAFTA) negotiations, Guatemala in particular attempted to fight against such provisions, but was unsuccessful.[25] The United States and other developed countries simultaneously require TRIPS-plus commitments in their FTAs with developing countries while including provisions requiring various human rights protections – and sometimes declining to include provisions sought by the developing country to assist in promoting its economy. For example, while the United States and other developed countries have insisted upon TRIPS-plus provisions within FTAs, they have largely declined to provide protections for the traditional knowledge of the developing country partner.[26] Perhaps unsurprisingly, this reflects a preference by developed countries for political rights over economic and social rights.[27]

The culprits are not limited to the United States and European Union. The United Nations Committee on Economic, Social and Cultural Rights identified an example of this preference in Switzerland's FTAs. It noted that by requiring its FTA partners to accede to the International Convention for the Protection of New Varieties of Plants, Switzerland's FTAs could jeopardize its partners' right to food (on the basis that adherence to the convention may increase the cost of food production).[28] In the context of the PACER Plus trade negotiations, New Zealand and Australia have been accused of pressuring Pacific Island countries to increase market access for fatty cuts of meat, alcohol and tobacco products.[29]

Developed countries therefore often send a mixed message with respect to their interest in promoting human rights. Countries appear to push for provisions that suit their policy preferences, which reflect different priorities in different countries. The United States includes in its conditions – both in its GSP program

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[25] Powell and Perez, *supra* note 23 at 148-49. *See also* Joseph E. Stiglitz, Trade Agreements and Health in Developing Countries, 373 THE LANCET 363, 364 (2009) ("But perhaps the most adverse consequences for health arise from provisions in trade agreements that are designed to restrict access to generic medicines. These include . . . the data exclusivity provisions that have become a standard part of US and European bilateral trade agreements.").

[26] Colombia and Peru unsuccessfully sought such protections in their respective FTA negotiations with the United States. *See* Powell and Perez, *supra* note 23, at 146-47.

[27] Not all developed countries have insisted on TRIPS-plus provisions. Indeed, Norway refused to support negotiating for the inclusion of TRIPS-plus provisions in the EFTA-India FTA precisely because it did not wish to impede India's access to affordable medicines. Cismas, *supra* note 24, at 6.

[28] Cismas, *supra* note 24, at 6.

[29] The Pacific Agreement on Closer Economic Relations (PACER) is an umbrella agreement between Australia and New Zealand and the Forum Island Countries that sets out a plan for staged trade liberalization and cooperation. At present these countries are negotiating "PACER Plus", which will be a free trade agreement between the Forum Island countries and Australia and New Zealand. *See* New Zealand Ministry of Foreign Affairs and Trade: *Pacific Agreement on Closer Economic Relations (PACER,) available at* http://www.mfat.gov.ws/PACER.html. For a discussion of the potential negative health implications for the Pacific Islands countries of PACER Plus, see Adam Wolfenden, *Health Implications of PACER-Plus for Pacific Island Countries*, Pacific Network on Globalisation (Oct. 14, 2014), *available at* http://pang.org.fj/health-implications-of-pacer-plus-for-pacific-island-countries/ ("Non-communicable diseases are already a major problem for many FICs and commitments under PACER-Plus could exacerbate this as tariffs are cut. There are concerns that FICs will have their ability to ban the import of such fatty foods as mutton flaps, turkey tails, as well as food high in sugar content curtailed."); *see also* David Legge et al., TRADE AGREEMENTS AND NON-COMMUNICABLE DISEASES IN THE PACIFIC ISLANDS 10 (2013), *available at* http://www.who.int/nmh/events/2013/trade_agreement.pdf.

and its FTAs – provisions relating to the human rights of children, but does not require that recipient countries outlaw other serious human rights violations, such as torture or murder.[30] In contrast, the EU has emphasized workers' human rights in its GSP scheme, but has tended to refer to human rights without specifying labor rights in its FTAs.[31]

These contradictory approaches are not limited to GSP programs and FTAs, but are also evident in bilateral negotiations in connection with new WTO members' protocols of accession. In order to join the WTO, a non-member must attain the consensus of all existing members that it should be permitted to accede.[32] In practice this has led to significant demands from the existing membership, particularly the United States, for concessions that go beyond the terms of the WTO Agreements.[33] These "WTO-plus" requests are de facto requirements if the non-member wishes to receive the consensus it needs to become a member. These demands may do damage to the would-be member's development interests. For example, as a condition of Samoa's accession to the WTO, the United States required Samoa to lift its existing restrictions on the importation of turkey tails, a cheap and very fatty product that is treated as a waste product in Samoa, which has the world's highest percentage of obesity. Samoa had its measures in place to make this unhealthy product less accessible. However, just as Australia and New Zealand did for mutton flaps, the United States saw a market opportunity and seized upon it.[34]

Nevertheless, demands made in the context of WTO accession may be directed at rectifying deficiencies in judicial independence, affording legal protections for individuals and businesses, providing avenues for public participation in proposed rule-making, and other changes directed at improving transparency and reducing the potential for corruption in domestic regulatory and judicial processes.[35] Thus, some aspects of the WTO accession process are likely to lead to improvements in human rights.

B. Lack of Capture of Worst Offenders

Unfortunately, even if human rights provisions in existing FTAs are having positive effects, these agreements are not reaching the most significant human

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[30] HAFNER-BURTON, *supra* note 7 at 10.

[31] *Id.* at 10, 12.

[32] *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 1867 U.N.T.S. 154, Art. XII [hereinafter Marrakesh Agreement]; *see also* WTO, *Accessions*, *available at* http://www.wto.org/english/thewto_e/acc_e/acc_e.htm ("Any state or customs territory having full autonomy in the conduct of its trade policies may become a member ("accede to") the WTO, but all WTO members must agree on the terms.").

[33] *See, e.g.*, Julia Ya Qin, 'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37 JOURNAL OF WORLD TRADE 483 (2003).

[34] *See, e.g.*, *Samoa Rewarded for Turkey Tail Turnaround*, SAMOA OBSERVER (Oct. 3, 2012), *available at* http://www.samoaobserver.ws/local-news/other/business/1314-samoa-rewarded-for-turkey-tail-turnaround.

[35] *See, e.g.*, Susan Ariel Aaronson and M. Rodman Abouharb, *Unexpected Bedfellows: The GATT, the WTO and Some Democratic Rights*, 55 INT'L. STUD. Q. 1, 7-8 (2011).

rights abuses. Those abuses are not disciplined or addressed by the vast majority of free trade agreements, even those containing human rights provisions. This is because the worst human rights offenders largely do not participate in international trade agreements, including the WTO and FTAs.

Given the broad range of human rights instruments, it is not always evident what types of abuses are occurring when "human rights violations" are discussed in broad terms.[36] Nonetheless, various organizations and the press have catalogued countries in order to identify the most egregious violators of human rights. Although it is not clear what criteria were applied to create these rankings, which are not identical from list to list, there are significant overlaps. Two such lists are provided here as illustrative examples. What is striking about these lists is how few of the listed countries are members of the WTO.[37]

According to the Christian Science Monitor, in 2013, the world's worst human rights violators were:[38]

Tibet (not a WTO member)
Uzbekistan (not a WTO member)
Turkmenistan (not a WTO member)
Sudan (not a WTO member)
Somalia (not a WTO member)
North Korea (not a WTO member)
Libya (not a WTO member)
Eritrea (not a WTO member)
Equatorial Guinea (not a WTO member)
Myanmar (is a WTO member)

The worst violators in 2014, according to Human Rights Risk Atlas, are:[39]

Syria (not a WTO member)
Sudan (not a WTO member)
DR Congo (is a WTO member)
Pakistan (is a WTO member)
Somalia (not a WTO member)
Afghanistan (not a WTO member)
Iraq (not a WTO member)
Myanmar (is a WTO member)
Yemen (not a WTO member)
Nigeria (is a WTO member)

There are a few overlaps on these lists, with Myanmar, Somalia and Sudan appearing on both. However, of the seventeen different countries listed, only four

[36] It is likely that the abuses garnering the most attention are violations of civil and political rights rather than economic, social or cultural rights. *See* Mutua, *supra* note 2.

[37] The status of each country as a WTO member or not is indicated in parenthesis following the country's name.

[38] *World's Worst Human Rights Violators*, Christian Science Monitor (Nov. 7, 2013), http://www.csmonitor.com/Photo-Galleries/Lists/World-s-worst-human-rights-violators#279281.

[39] Maplecroft Global Risk Analytics, *Human Rights Risk Atlas 2014*, Maplecroft Global Risk Analytics, http://maplecroft.com/portfolio/new-analysis/2013/12/04/70-increase-countries-identified-extreme-risk-human-rights-2008-bhuman-rights-risk-atlas-2014b/.

– Nigeria, Myanmar, Pakistan, and Democratic Republic of Congo – are members of the WTO, and only one WTO member, Myanmar, appears on both lists.

There is also a correlation between corruption and the fulfillment of human rights.[40] In particular, "[t]he protection of human rights is inversely affected by the presence of corruption in a society."[41] It has even been argued that corruption can itself be a direct violation of human rights.[42]

Given the connection between corruption and human rights abuses, the most corrupt countries likely have significant human rights issues as well. Transparency International measures the perceived levels of corruption in countries worldwide, based on expert opinion. In the 2013 study, the ten countries perceived to have the highest levels of corruption (from worst to tenth-worst) were:[43]

Somalia (not a WTO member)
North Korea (not a WTO member)
Afghanistan (not a WTO member)
Sudan (not a WTO member)
South Sudan (not a WTO member)
Libya (not a WTO member)
Iraq (not a WTO member)
Uzbekistan (not a WTO member)
Turkmenistan (not a WTO member)
Syria (not a WTO member)

It is striking that not a single one of the most corrupt countries is a member of the WTO.

There is also a correlation between human rights violations and corruption on the one hand and lack of participation in FTAs on the other. There are numerous FTAs in existence between a developed country on the one hand and a developing country on the other, and many of these contain human rights-related obligations. However, such agreements tend not to be with the worst human rights abusers,[44] which suggests such agreements may be of limited value in addressing human rights issues. The vast majority of FTAs WTO members enter into are

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[40] *See* United Nations Convention against Corruption, G.A. Res. 58/4, U.N.Doc. A/RES/58/4 (Oct. 31, 2003) (taking the view that corruption is adversely related to the realization of human rights).

[41] James Thuo Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 147 (2009).

[42] Julio Bacio Terracino, *Corruption as a Violation of Human Rights*, (Int'l Council on Human Rights Policy Working Paper 2008), *available at* http://www.ichrp.org/files/papers/150/131_terracino_en_2008.pdf.

[43] *Corruption Perceptions Index 2013*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/cpi2013/results (last visited Jan. 18, 2015).

[44] There are numerous South-South FTAs; however, such agreements are often between neighboring countries with similar factor endowments and export portfolios, meaning that the gains from trade achieved by such agreements are likely to be modest. *See* JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES (2011) at 8 (noting this to be the case in the context of African FTAs).

with other WTO members.[45] The WTO rules dictate this dynamic. Under the rules, WTO members must give each other most-favored nation (MFN) status; MFN requires a WTO member to give to every other WTO member treatment that is at least as good as that given to any other country.[46] Thus, in the absence of an applicable exception, WTO members should treat all other WTO members the same without favoring any particular trading partner over the others. The MFN requirement applies, *inter alia*, to tariff rates.[47] Therefore, a WTO member's tariff rate on a given line of its tariff schedule should be the same for all WTO member-exporting countries. Furthermore, because MFN requires that WTO members give each other the best treatment given to "any other country," any preferential treatment given to a non-WTO member must be extended "immediately and unconditionally" to all WTO members.[48]

There are a number of exceptions to the MFN rule.[49] For our purposes, the most significant one is GATT Article XXIV, which provides that WTO members may enter into FTAs (and customs unions) with each other without extending the provisions of such agreements on an MFN basis to other WTO members, so long as certain criteria are satisfied.[50] In other words, the MFN obligation does not apply to Article XXIV-compliant FTAs. Thus, the parties to an FTA falling within the scope of Article XXIV do not need to extend to other WTO members the favorable treatment they grant to one another. With respect to the scope of Article XXIV, the text provides in relevant part that customs unions and FTAs are permitted "as between the territories of contracting parties" if certain elaborated conditions are satisfied.[51] Thus, it appears that FTAs between a WTO member and a non-WTO member would not fall within the Article XXIV exception to the MFN obligation. Accordingly, if a WTO member entered into such an FTA, it would be obligated to extend to its fellow WTO members any provisions in the FTA that were more favorable than the treatment being provided prior to the

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[45] The WTO maintains a Regional Trade Agreements Information System, which includes an online list of all FTAs that have been notified to the WTO. WTO, *Welcome to the Regional Trade Agreements Information System (RTA-IS)*, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last updated Jan. 15, 2015).

[46] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art. I [hereinafter GATT].

[47] GATT Art. I:1.

[48] *Id.*

[49] The exceptions to the most-favored nation principle are pervasive, so much so that MFN has been termed "least favored nation" or LFN, as countries give better than the MFN rate to so many other WTO members. *See, e.g.*, Alan O. Sykes, *The Law, Economics and Politics of Preferential Trading Arrangements: An Introduction*, 46 STAN. J. INT'L L. 171 (2010). For a discussion of this phenomenon, see *The Future of the WTO, Report by the Consultative Board to Director-General Supachai Panitchpakdi* (2005) ("the Sutherland Report") at 19-21, *available at* http://www.wto.org/english/thewto_e/10anniv_e/future_wto_c.pdf. The Sutherland Report references the particularly stark example of the European Union, which at the time of publication in 2005 gave better than MFN treatment to all WTO members except for nine (Australia, Canada, Chinese Taipei (Taiwan), Hong Kong, Japan, Korea, New Zealand, Singapore and the United States). The case of the EU has since become even more noteworthy as it has since concluded an FTA with Korea and is currently negotiating FTAs with Canada, Japan, Singapore, and the United States.

[50] GATT Art. XXIV.

[51] GATT Art. XXIV:5.

creation of the FTA. For this reason, the vast majority of FTAs are amongst WTO members.[52]

C. Not in Developing Countries' Best Interests

Bilateral FTAs between a developed country and a developing country often contain provisions that the developing country does not consider attractive, including human rights provisions, TRIPS-plus intellectual property obligations, and labor and environmental commitments.[53] While developing countries have successfully fended off these types of provisions for possible inclusion in WTO agreements, they are nonetheless willing to agree to them in a one-on-one negotiating context.[54] The bilateral negotiating context is therefore viewed as less favorable overall for developing countries than the WTO, where the developing countries are in the majority and can block the negotiation of agreements or terms that they find objectionable.[55]

In addition, negotiating FTAs takes time and resources, which are then not available to apply in the context of WTO negotiations. This has been a negative development for poorer WTO members – a trend that is likely to get worse, as discussed below.

D. Trend Towards FTAs that Exclude the Poorer WTO Members

Currently a new wrinkle is emerging with respect to FTAs that suggests even more strongly that the WTO is the better forum for developing countries. Previously, FTAs were primarily bilateral, no more ambitious than the WTO in terms of commitments, and often included developing countries. The world's economic powerhouses were not pairing with each other, but with countries with which they saw a benefit – perhaps for political or other non-economic strategic reasons – to allying. Now, however, the trend in FTAs seems to be towards multi-party agreements with high-standards objectives that by and large do not include the poorest WTO members.

Until recently, FTAs were primarily: between neighboring or closely proximate countries; between a developed and a developing country; covering similar

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[52] There are some exceptions. For example, some WTO members have entered into customs unions or free trade agreements with neighboring non-WTO member countries. In most such cases, the non-WTO member is in the process of WTO accession.

[53] *See, e.g.*, Arie Reich, Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity, 60 U. TORONTO L.J. 263, 287 (2010).

[54] *See generally* HAFNER-BURTON, *supra* note 7; Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT'L ECON L. 571, 583 (2007) ("weaker actors have a better chance to have their voices heard, and their policy choices taken into account" in the multilateral consensus-based system). Cf. Andrew T. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT'L L. 639 (1997-1998) (discussing similar phenomenon in context of BITs).

[55] *See, e.g.*, David Kinley and Hai Nguyen, Viet Nam, Human Rights and Trade: Implications of Viet Nam's Accession to the WTO 40 (Friedrich Ebert Stiftung, Working Paper No. 39 2008) (difficulties in WTO negotiations "can, and has, lead to an upsurge in the negotiation of bi-lateral trade agreements which inevitably favour the powerful over the weak and dilute the overall protective reach (albeit limited) of multi-lateral agreements such as the WTO").

topics to the WTO; and/or between a superpower and a much smaller developed country. Thus, the major economies were entering into FTAs with a variety of trading partners, but not with each other. There is currently no FTA between any two of the United States, European Union, China or Japan, nor between any two of Japan, China and South Korea. However, this dynamic is changing rapidly. At present the United States and the European Union are negotiating the Trans-Atlantic Trade and Investment Partnership (TTIP);[56] the United States and Japan are negotiating an FTA along with ten other countries in the Trans-Pacific Partnership (TPP) negotiations;[57] and Japan, China and South Korea are all engaged in the sixteen-country negotiations to form the Regional Cooperation and Economic Partnership (RCEP).[58] In tandem, China, Japan and Korea are negotiating a trilateral FTA, known as "CJK", and China and Korea have all but wrapped up bilateral FTA negotiations. Thus, much of the FTA momentum consists of the largest economies finally pairing up, rather than linkages with poorer countries.

In addition, there has been a recent move towards pursuing broader and deeper economic integration efforts within FTAs. While many previous FTAs largely tracked the subject matters of the WTO, more recently, FTAs and other trade agreement negotiations have increasingly included subjects that are outside the scope of the WTO. For example, the TPP, mentioned above, has been characterized by the parties as a "twenty-first century trade agreement".[59] While the exact meaning of this term is unclear, it seems to refer to both the breadth and depth of the agreement.[60] In terms of depth, it is understood that there will be no *a priori* exclusions of any tariff lines from the trade in goods coverage.[61] This differs from most FTAs which tend to provide carve-outs for anywhere from a relatively small to quite a large number of tariff lines associated with products seen as sensitive or otherwise of particular importance to one or more of the participating countries.[62] While it remains to be seen whether the TPP will indeed include

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[56] *See Transatlantic Trade and Investment Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *available at* http://www.ustr.gov/ttip (last visited Jan. 18, 2015).

[57] *See Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *available at* http://www.ustr.gov/tpp (last visited Jan. 18, 2015).

[58] *See* Department of Foreign Affairs and Trade (Australia), *Regional Comprehensive Economic Partnership Negotiations*, *available at* http://www.dfat.gov.au/fta/rcep/.

[59] *See Trans-Pacific Partnership Leaders Statement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 12, 2011), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-leaders-statement.

[60] Addressing this question is one of the primary objectives of a recent book. *See* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT (C.L. Lim, Deborah Elms and Patrick Low, eds.) (Cambridge 2012).

[61] *See, e.g., Outlines of the Trans-Pacific Partnership Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 2011), *available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement ("The TPP tariff schedule will cover all goods, representing some 11,000 tariff lines.") [hereinafter USTR TPP Fact Sheet].

[62] The agricultural sector in particular is often carved out in whole or in part. *See, e.g.*, Warren Maruyama, *Preferential Trade Agreements and the Erosion of the WTO's MFN Principle*, 46 STAN. J. INT'L L. 177, 190 (2010) (discussing the phenomenon of FTAs with major sectoral exclusions); Matthew Schaefer, *Ensuring That Regional Trade Agreements Complement the WTO System: U.S. Unilateralism a Supplement to WTO Initiatives?*, 10 J. INT'L ECON. L. 585, 570 (2007) (discussing the tendency to exclude agriculture from FTAs); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Con-*

commitments to remove tariffs on every single tariff line, it is unusual in even professing that such an outcome would be desirable.[63] With respect to breadth, the TPP will address several areas that generally have not been covered by FTAs. These include provisions dealing with regulatory coherence; supply chain management; state-owned enterprises; small- and medium-sized enterprises; and e-commerce.[64] In addition, the TPP will have chapters addressing environmental protection and labor standards.[65] Consistent with many United States FTAs, the provisions of these chapters may be subject to binding dispute settlement. While this is a common feature of United States FTAs, most other countries only apply hortatory or "best endeavors" language to describe any FTA text pertaining to protecting the environment or guaranteeing labor rights.

At the same time that the largest economies are negotiating FTAs with one another, larger groupings of countries are also in the process of negotiating sector-specific plurilateral agreements such as the Trade in Services Agreement (TiSA).[66] These negotiations are endeavors to incorporate broader subject matter coverage and deeper liberalization than is presently covered by the WTO Agreements, particularly in sectors involving rapidly evolving technologies. Countries that produce technology are finding the GATS increasingly anachronistic given its outdated services definitions and categories.[67] The poorest WTO members, which generally do not produce technology, have not sought to participate in these negotiations.[68] This dynamic, coupled with the lack of progress in concluding the Doha Round, has led coalitions of the willing to negotiate on their own. Because these plurilateral negotiations comprise like-minded countries interested in accelerating trade liberalization, the discussions are unlikely to involve much,

stitutional, and Political Constraints, 98 AM. J. INT'L L. 247, 268 (2004) (noting that many of the EC's FTAs exclude agriculture).

[63] It is difficult to imagine that this will be the case due to a few extreme sensitivities, the most notable of which is Japan's tariff on rice. The most likely scenario is that rice would be included, but that Japan's obligations to lower tariffs would consist of something short of reducing such tariffs to zero over a given time period. Instead, the agreement could call for Japan to lower its tariffs over time, but perhaps not remove them entirely. *See, e.g.*, *Tariff Agreement with the U.S. Stands in Way of TPP*, THE JAPAN TIMES (Feb. 2, 2014), http://www.japantimes.co.jp/news/2014/02/02/national/tariff-disagreement-with-u-s-stands-in-way-of-tpp/#.U0YG26L6r6M (noting that of five categories of farm products Japan is trying to shelter from tariff cuts, the U.S. has insisted on comprehensive tariff removal for four categories, but has "shown signs of being flexible on giving exceptional treatment to rice").

[64] *See, e.g.*, Embassies of Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore & Vietnam, *Trans Pacific Partnership: a 21st Century Agreement*, *available at* http://www.usnzcouncil.org/wp-content/uploads/2012/11/TPP-at-a-glance.pdf.

[65] *See USTR TPP Fact Sheet*, *supra* note 61.

[66] See Shin-yi Peng, *Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next Version of GATS?* 43 HONG KONG L.J. 611 (2013); Coalition of Services Industries, The Trade in Services Agreement (TISA), available at https://servicescoalition.org/negotiations/trade-in-services-agreement.

[67] Peng, *supra* note 66 at 611.

[68] The current TiSA participants are Australia; Canada; Chile; Chinese Taipei; Colombia; Costa Rica; the European Union; Hong Kong (China); Iceland; Israel; Japan; Liechtenstein; New Zealand; Norway; Mexico; Pakistan; Panama; Paraguay; Peru; South Korea; Switzerland; Turkey; and the United States. The parties have made clear that other WTO members that share the group's objectives are welcome to join the negotiations. *See* Foreign Affairs, Trade and Development Canada, *Trade in Services Agreement (TISA)*, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng.

if any, discussion of special and differential treatment for developing countries. This is a significant difference from the WTO context. Within the WTO, the principle of special and differential treatment is well-established, and is reflected in, inter alia, developing countries being subject to more lenient provisions and longer phase-in periods for a variety of commitments.[69] While the WTO process is imperfect, and much ink has been spilled over the failure of WTO members to deliver on the Doha Development Agenda, which had been promised in exchange for the Uruguay Round Agreements, developing countries nonetheless have a greater voice and have achieved far more concessions within the WTO's multilateral process than in any other trade agreement context.

Due to the size of the economies involved, these new agreements have more potential than previous FTAs to set the terms for future multilateral trade agreements. Yet developing countries, particularly poorer ones, are largely absent from this new generation of FTAs. The TPP includes a number of developing countries – most notably Vietnam – but, unlike the WTO, does not appear to be designed to include less significant commitments or other special and differential treatment provisions for these countries.[70] Sector-specific plurilateral trade agreements such as TiSA may address technologies in which poorer countries are not actively participating. As such, the less-developed countries are not needed to obtain a "critical mass".

IV. The WTO and Human Rights

A. WTO Membership Correlated with Improved Human Rights Records

The data cited above suggested that *not one* of the ten most corrupt countries is a member of the WTO. As a result, there appears to be a significant correlation between human rights abuses and corruption on the one hand, and lack of WTO membership on the other. But does WTO membership "cure" the corruption and human rights abuses? Many commentators have critiqued the WTO in particular and globalization more broadly for their role in contributing to income inequality within countries.[71] Nonetheless, even amongst those who express reservations about trade liberalization, many have conducted case studies and determined that in many instances joining the WTO has contributed to an improvement in human rights and a decrease in corruption. For example, Aaronson and Abouharb found a positive correlation between respect for democratic rights and GATT/WTO membership, with the level of respect for such rights increasing in tandem with

[69] *See* WTO, *Special and Differential Treatment Provisions*, *available at* http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm.

[70] *See, e.g.*, Deborah Kay Elms, *Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379, 396 (2013) ("RCEP explicitly allows special and differential treatment for developing economies, while the TPP does not.").

[71] *See, e.g.*, Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) (linking globalization with increased income inequality); Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 288 (2003) (concluding that globalization has increased income inequality within, and amongst, countries). For a critique of the critics, see Michael J. Trebilcock, Critiquing the Critics of Economic Globalization, 1 J. INT'L L. & INT'L REL. 213, 220-26 (2005).

the length of GATT/WTO membership.[72] They provide examples indicating that both the WTO accession process and the Trade Policy Review Mechanism have played important roles in these improvements, as these processes provide other members with the opportunity to identify problems such as lack of transparency, failure to provide the opportunity for democratic participation in various processes, and partiality in regulatory or other processes affecting businesses.[73] Kinley and Nguyen have similarly determined that Vietnam's human rights record has improved since its accession to the WTO.[74]

Accordingly, a better path towards protecting human rights may be to promote WTO membership and to facilitate developing country participation within the WTO, particularly in WTO negotiations. If this is accepted, it should be seen as a positive that many least-developed countries (LDCs) were founding members of the WTO, and several others (Cambodia, Cape Verde, Laos, Nepal and Yemen) have joined since the WTO's inception.[75] Nonetheless, the WTO accession process can be extremely lengthy and challenging, with some countries abandoning the process before achieving membership.[76]

B. Developing Countries Get More of a Say

Developing countries are better able to negotiate for redistributive or other welfare-enhancing measures in the context of the WTO than in a bilateral agreement. Although developing countries have sometimes been disappointed with the WTO as a forum for progressing their interests, the WTO is nonetheless a preferable avenue for developing countries than bilateral FTAs. First, within the WTO, developing countries have the ability to use their numbers to their advantage in promoting certain agendas and putting a halt to others. A significant majority of the WTO's 160 members[77] comprises developing and least developed countries.[78] As a result of the developing countries' demands, the WTO agreements contain many different provisions that reflect the principle of "special and differential treatment" for developing countries.[79]

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[72] *See* Aaronson and Abouharb, *supra* note 35.

[73] *Id.*

[74] Kinley and Nguyen, *supra* note 55.

[75] *See* WTO, *Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (detailing a complete list of WTO members, including dates of accession).

[76] *See* UNCTAD, *The Least Developed Countries Report: Linking International Trade with Poverty Reduction*, (2004) chapter 3 (discussing LDC accession to the WTO) *available at* http://unctad.org/en/docs/ldc2004_en.pdf.

[77] There were 160 members as of Jul. 20, 2014. Yemen is the newest WTO member, having ratified its Protocol of Accession earlier this year. *See* WTO, *Yemen to Become 160th WTO Member* (May 27, 2014), http://www.wto.org/english/news_e/news14_e/acc_yem_27may14_e.htm.

[78] The WTO website indicates that over two-thirds of Members are developing countries. WTO, *Trade and Development*, http://www.wto.org/english/tratop_e/devel_e/devel_e.htm.

[79] The WTO Secretariat has periodically prepared compilations of the various special and differential treatment provisions. For the most recent version see WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77 (Oct. 25, 2000), *available at* http://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm.

The 2013 Bali Ministerial Conference outcomes reflect the impact of developing countries banding together within the WTO. The Bali package includes several notable decisions of interest to developing countries, including an Agreement on Trade Facilitation;[80] an interim agreement relating to the stockpiling of food for food security purposes;[81] and a pledge to improve the level of duty-free and quota-free market access provided to least developing countries.[82]

C. The WTO as a Space to Address Some Human Rights Concerns

1. Power in Numbers

While developing countries can band together in the WTO context, negotiating a bilateral FTA presents a very different dynamic. When a relatively poor country negotiates an FTA with a wealthy one, the inequality in bargaining power unsurprisingly results in the developed country largely dictating terms to the developing country. This can result in developing countries individually agreeing to terms – such as intellectual property provisions that go beyond those required by the WTO's TRIPS Agreement – that they have collectively resisted within the WTO context.[83] Indeed, within the WTO, the least developed countries have been able to postpone their implementation of TRIPS since the inception of the organization. At present, LDCs will not have to implement TRIPS until 2021 at the earliest.[84]

A further benefit for developing countries is the WTO's practice of decision-making by consensus. The strong preference for consensus means that even small countries can, in theory, block certain actions. While in practice a poor country standing alone is unlikely to stand in the way of measures to which all other members either agree or are acquiescent, developing countries have successfully influenced the WTO negotiating agenda. For example, in 1996, the Singapore Ministerial Conference included a number of items on a proposed negotiating agenda that were widely viewed as of interest to developed countries, but not to developing ones.[85] Due to the opposition of developing countries, the so-called

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[80] Ministerial Decision of 7 December 2013, Agreement on Trade Facilitation, WT/MIN(13)/36, WT/L/911 (11 December 2013).

[81] Ministerial Decision of 7 December 2013, Public Stockholding for Food Security Purposes, WT/MIN(13)/38, WT/L/913 (11 December 2013).

[82] Ministerial Decision of 7 December 2013, Duty-Free and Quota-Free Market Access for Least-Developed Countries, WT/MIN(13)/44, WT/L/919 (Dec. 11, 2013).

[83] *See, e.g.*, Richard Baldwin, Simon Evenett and Patrick Low, *Beyond Tariffs: Multilateralizing Non-Tariff RTA Commitments*, in RICHARD BALDWIN AND PATRICK LOW, EDS., MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 89 (2009) ("[I]t is striking that many WTO members [have] accepted RTAs that include disciplines whose discussion they firmly rejected at the multilateral level.").

[84] Pursuant to TRIPS Art. 66.1, LDCs were given a ten-year transition period from the entry into force of the WTO before they would need to implement the bulk of TRIPS' obligations. This transition period was extended by the WTO membership in November 2005 to July 2013, and again in July 2013 until July 2021. *See Decision of the Council for TRIPS of 29 November 2005*, IP/C/40 and *Decision of the Council for TRIPS of 11 June 2013*, IP/C/64.

[85] The Marrakesh Agreement provides that the WTO membership shall meet as the Ministerial Conference at least once every two years. Marrakesh Agreement Art. IV:1. The Ministerial Conference is the

"Singapore issues" - competition policy, investment, transparency in government procurement and trade facilitation – were not included in the negotiating agenda.[86]

Thus, the WTO presents a better opportunity than do FTAs for developing countries to weigh in on topics that have human rights impacts.

2. *GSP*

An additional avenue under the WTO framework for human rights concerns to be addressed is to grant and withhold preferential tariff treatment through Generalized System of Preferences (GSP) schemes. The WTO rules provide for an exception to the MFN principle for preferential treatment given to developing countries pursuant to GSP programs. In 1979, the GATT contracting parties adopted the Enabling Clause,[87] which permits GATT (and now WTO) signatories to grant preferential treatment to developing countries under GSP schemes without extending that treatment on an MFN basis to all WTO members.[88] Such programs must be generalized, meaning that there should be some form of universal or neutral criteria to determine which countries are eligible, with like preferences being applied to similarly situated countries.[89] Thus, it is not acceptable to give lower tariffs solely to one's former colonies, but it would be permissible, for example, to give preferences to all countries below a certain income threshold.[90] Although the Enabling Clause is silent as to whether developed countries may condition their GSP programs on actions to be taken or abstained from on the part of the would-be recipients, it has been a widespread practice of GSP-

highest decision-making body of the WTO. *See* WTO, *Ministerial Conferences*, *available at* http://www.wto.org/english/thewto_e/minist_e/minist_e.htm. There have been nine Ministerial Conferences since the WTO's inception; Singapore was the first. *Id.* Prior to the Singapore Ministerial, many of the WTO's developed-country members pushed for the Ministerial to launch negotiations on a number of topics. Due to the objections of developing country members, new negotiations were not initiated. Instead, the Ministerial established working groups to consider the so-called Singapore issues. See *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (Dec. 18, 1996), paras. 20-22.

[86] The resistance of developing countries led to a compromise whereby Ministers only agreed to establish working groups to study the issues surrounding these four topics. *See Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (Dec. 18, 1996), [20]-[22].

[87] Differential and more favorable treatment reciprocity and fuller participation of developing countries, Decision of 28 November 1979, GATT Doc. L/4903.

[88] GSP originated from the United Nations Conference on Trade and Development (UNCTAD) in 1968. See Gerhard Erasmus, *Accommodating Developing Countries in the WTO: From Mega-Debates to Economic Partnership Agreements*, in DEBRA P. STEGER, ED., REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY (2010).

[89] *See* Appellate Body Report, *European Communities – Conditions for Granting Tariff Preferences to Developing Countries*, WT/DS246/AB/R para. 173 (Apr. 7, 2004) ("[The Enabling Clause] does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'nondiscriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond.").

[90] *Id.* Such schemes sometimes include preferential treatment for non-WTO members, particularly LDCs. For the list of the recipients to the European Union's "Everything but Arms" program, *see, e.g.*, http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150164.pdf.

granting countries to impose such conditions.[91] Conditions are imposed in two contexts. First, the GSP program as a whole may only be available to countries satisfying certain criteria, such as complying with human rights or other international obligations.[92] Second, some GSP-grantors have a base-level GSP program available to all developing countries (often subject to a GDP ceiling), but then provide additional so-called "GSP-plus" preferences to countries meeting specified criteria.[93] Under both contexts, developed countries have used the threat of removing GSP or GSP-plus treatment as a stick to encourage developing countries to, *inter alia*, comply with human rights obligations.[94] At the same time, the ability to obtain the basic and/or heightened preferences is held out as a carrot to developing countries. Recently, the United States suspended its grant of GSP to Bangladesh as a result of the highly-publicized tragedies resulting in the deaths of over a thousand Bangladeshi garment factory workers. President Obama announced the suspension, stating Bangladesh "is not taking steps to afford internationally recognized worker rights."[95]

Developing countries have discounted the value of the favorable treatment they receive from GSP programs due to developed countries erecting new trade barriers (such as voluntary export restraints) and excluding key products from their GSP schemes.[96] One of the problems with GSP schemes is that the grantor country often grants preferences on primary products while excluding further manufactured products that use the primary product as an input. For example, unprocessed cocoa beans may be subject to preferential tariff rates, while chocolate products such as chocolate bars will not be.[97] This creates unfortunate incentives for poor countries. It would be better from a development standpoint to shift from heavy emphasis on farming and exporting primary products to a trade portfolio that included further manufacturing of those primary products. Further manufacturing is where the product is transformed from a commodity into a far more valuable (in terms of the price it will command) product. Yet when GSP programs give preferential tariff treatment to raw materials and commodities, but not to value-added products, it is understandable that GSP recipients continue to pro-

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[91] *See, e.g.*, Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS. & DEV. L.J. 1, 53 (2002).

[92] *See* Susan Aronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD T.R. 413, 428-29 (2007).

[93] *Id.* at 429.

[94] The United States links GSP status to the provision of workers' rights. The EU links certain incentives to compliance with a subset of the ILO Conventions. See HAFNER-BURTON, supra note 7 at 9, n.11.

[95] U.S. Suspends Trade Preferences Program for Bangladesh, GLOBALPOST (Jun. 28, 2013), http://www.globalpost.com/dispatch/news/kyodo-news-international/130628/us-suspends-trade-preferences-program-bangladesh. *See also* U.S. Trade Representative Michael Froman Comments on President's Decision to Suspend GSP Benefits for Bangladesh, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jun. 2013), http://www.ustr.gov/about-us/press-office/press-releases/2013/june/michael-froman-gsp-bangladesh.

[96] ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 78 (1987).

[97] *See, e.g.*, Matthew G. Snyder, Note, *GSP and Development: Increasing the Effectiveness of Nonreciprocal Preferences*, 33 MICH. J. INT'L L. 821, n. 166 (2012).

duce primary products and that such products form the bulk of their exports to developed countries.[98]

While developing countries may be dissatisfied to some degree with the conditionality of GSP programs, they do appear to provide a mechanism for developed countries to discipline human rights abuses.

3. GATT Exceptions

i. Article XX

WTO members may also be able to influence adherence to human rights obligations through the use of the GATT Article XX exceptions, in particular XX(a) allowing measures "necessary to protect public morals."[99] Article XX(a) has not been invoked frequently, and it is unclear how broadly its terms can be stretched. However, the recent *EC – Seal Products* case may signal a willingness on the part of the WTO Appellate Body to interpret "public morals" broadly. In the *Seal Products* dispute, the dispute settlement Panel and the Appellate Body both accepted the EU's contention that its ban on imported seal products was "necessary to protect public morals" under Article XX(a).[100] While *Seal Products* related to animal welfare rather than human rights, this decision seems to open the door to import restrictions based on human rights violations. In particular, it is arguably incongruous to allow import restrictions based on a moral objection to inhumane slaughter methods of seals, but to prohibit such restrictions based on a moral objection to violations of fundamental human rights (such as child labor).[101]

ii. Article XXI

An additional possibility is the use of the GATT Article XXI Security exceptions. Article XXI allows a WTO Member to refrain from complying with WTO obligations through a self-judging provision that a Member State can invoke whenever "it considers" a measure to be "necessary for the protection of its essential security interests."[102] This language is then limited by requirements that

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[98] *See* JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES 9-10 (2011) (noting that African countries primarily export unprocessed raw materials).

[99] GATT Art. XX(a).

[100] *See* Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, adopted June 18, 2014, para. 5.201 ("Accordingly, we find that the Panel did not err in concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT 1994."); *see also* Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, para. 7.639. While the Appellate Body (and Panel, albeit via logic rejected by the Appellate Body) found that the EU's measure did not satisfy the Art. XX chapeau and thus would need to be modified in some way (paras. 5.338-5.339), its finding under XX(a) is of potentially major significance.

[101] *See* Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, Rights and Democracy* (Jan. 11 2000), *available at* http://www.iatp.org/files/Protecting_Human_Rights_in_a_Global_Economy_Ch.htm (arguing that Art. XX should be interpreted consistent with international human rights law norms).

[102] GATT Art. XXI(b).

the security interests relate to fissionable materials; arms and other munitions trafficking; or times of war or other emergencies.[103]

The use of Article XXI has been limited to date.[104] However, during the GATT era, it was the basis – in tandem with United Nations Security Council authorization – for signatories to impose sanctions on South Africa.[105] Because Article XXI reads as a self-executing provision – meaning that the member makes the determination as to whether the exception applies, not a dispute settlement panel – there may be further policy space available here to respond to human rights violations committed by another WTO member.

4. *Waivers*

A further flexibility within the WTO is the ability for members to provide a waiver to excuse one or more members from abiding by some aspect of their WTO commitments.[106] The waiver process was used in the context of a shared view that WTO members should comply with the Kimberley Process Certification Scheme, which was designed to prevent any trade in diamonds that have not been certified as conflict-free. Implementing the Kimberley Process requires members to prohibit importation of certain diamonds. In theory, such import restrictions could have been justified under either Article XX or XXI of GATT.[107] However, because members did not wish to rely upon the potential application of an exception, they instead decided to draft a waiver to excuse members from complying with WTO obligations to the extent such noncompliance was necessary to comply with the Kimberley process. While the waiver may not have been necessary (because Article XX or XXI could perhaps have been relied upon as defenses, had a country trading in conflict diamonds challenged a ban on importation of such diamonds), the relevant point here is that waivers are another tool WTO members can use to limit trade in order to further human rights objectives.

V. Conclusion

Human rights provisions in FTAs may have a positive effect on human rights adherence in some cases. However, such advances are likely to be around the margins, as the most serious human rights offending countries and the most corrupt nations are largely not participating in FTAs. In addition, FTAs present some concerns due to the inequality of bargaining power that exists in agree-

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[103] *Id.*

[104] *See, e.g.*, Roger Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 707.

[105] Olufemi Amao, *Trade Sanctions, Human Rights and Multinational Corporations: the EU-ACP Context*, 32 HASTINGS INT'L & COMP. L. REV. 379, 389 (2009) ("[S]anctions were successfully imposed based on Article XXI and United Nations Security Council authorisation, for gross violations of human rights in the territory."). *See* S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977); S.C. Res. 569, U.N. Doc. S/RES/569 (Jul. 26, 1985).

[106] *See* Marrakesh Agreement, Art. IX:3-5. Waivers require the approval of at least three fourths of the WTO membership. Marrakesh Agreement, Art. IX:3.

[107] *See, e.g.*, Joost Pauwelyn, *WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for 'Conflict Diamonds'*, 24 MICH. J. INT'L L. 1177 (2003).

ments featuring a developed and a developing country; the inclusion alongside human rights obligations of certain provisions, such as TRIPS-plus intellectual property provisions that may conflict with human rights objectives; and the trend towards FTAs that will largely exclude developing countries and their interests. The data is more convincing with respect to a linkage between WTO membership and an improvement in human rights. In addition, the WTO provides a more conducive forum than FTAs for developing countries to have a voice in the policies that affect them. There is policy space within the WTO for developed countries to adopt policies to encourage developing countries to adhere to human rights obligations, but at the same time, allow the developing countries to express their own views on these issues. As such, those interested in promoting human rights in developing countries should focus less on pushing human rights obligations in FTAs and more on bringing countries into the WTO and working therein to effect agreements that will help the economies – and in conjunction the human rights records – of developing countries.