BACKGROUND PAPER FOR HDR 2000

Separate and Unequal:
Trade and Human Rights Regimes

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INTRODUCTION

The thesis of this paper is that there currently exist two separate and unequal frameworks for international trade on the one hand and international human rights on the other. These separate frameworks have different and often contradictory foundations in philosophy and values, laws and standards, and procedural and enforcement mechanisms. Most importantly, they have different and often contradictory substantive impacts on the lives of human beings. In particular, the trade framework has superceded and marginalized the human rights framework to the point where major violations of human rights are carried out under the legal imprimatur of international trade, negatively impacting the well being of countless millions of people around the world.

The paper will discuss and then compare the separate and unequal foundations of international trade and human rights at several broad levels: philosophy and values, laws and standards, and procedures, and enforcement mechanisms. The paper will then examine how these contradictions have resulted in widespread violations of human rights, focusing on economic, social, and cultural rights. The paper will conclude with concrete recommendations for harmonizing the two frameworks to ensure the recognition, respect, protection, and fulfillment of human rights values in the growing arena of international trade.

I. INTERNATIONAL HUMAN RIGHTS

This chapter provides an overview of the international human rights regime. It consists of three sections: the philosophy and values of human rights, the development of human rights laws and standards, and the procedures and mechanisms for enforcing human rights.

The chapter highlights a fundamental divide between human rights theory and practice. On the one hand, the philosophical basis of human rights is grounded in universal values and absolute priorities, with all states having undertaken solemn legal commitments to recognize, respect, protect, and fulfill these rights. On the other hand, the international community has steadfastly refused to grant the human rights regime any priority in actual

practice, leaving enforcement mechanisms largely reliant on the voluntary compliance and good will of duty-holders except in rare instances when powerful political interests derive advantage from human rights enforcement. This divide looms even larger when compared to the effective enforcement mechanisms to deter and remedy violations of international trade law (discussed in the next chapter).

A. Human Rights Values and Resource Constraints

This section discusses the philosophical basis of human rights in theory and principle. The "absolute" nature of human rights values is examined in the context of a world with limited resources for implementing human rights and all other policies. The section critiques the conventional rationale for dividing human rights into categories based on resource requirements and constraints. It concludes with a framework for maintaining the relative priority of universal human rights principles even in a world of limited resources.

A.1 Questioning Deontological Rights

The philosophical basis of human rights values is deontological. In other words, human rights are ends in themselves. They do not derive their value from a utilitarian calculus of maximizing benefits or achieving efficiency. As one commentator explains, "What is central about human beings is not their tendency to rationally maximize their self-interest, but their intrinsic human dignity and worth."[1] This is reflected in human rights law through the use of words like "inalienable" and "inherent." Following the philosophy of Locke and Kant, human rights derive directly from unchanging and immutable sources of truth: God, Nature, Justice, or Reason. As the drafters of the US Constitution proclaimed, "We hold these truths to be self-evident…"

According to this view, human rights are by their very nature absolute; they cannot be subject to political bargaining or economic trade-offs without losing the essential quality that makes them human rights. The core principle of human rights is that they are not

[1] Garcia, "The Universal Declaration at 50 and the challenge of the Global Markets: Trading Away the Human Rights Principle," 25 Brooklyn J. Int'l. Law 51, at 71.

dependent upon, nor should they be subject to, democratic processes such as the majority vote or utilitarian considerations such as achieving the greatest good for the greatest number. It is contrary to the very essence of human rights that a majority should be allowed to enslave a minority for any reason whatsoever, including the overall benefit of society as a whole. The logical corollary of this view is that human rights should take priority over all other moral, political, or economic claims.

It is tempting to ridicule and dismiss the deontological basis of human rights claims, especially from an economics perspective. In a world of finite resources, how can any claim be considered absolute? If all human rights are absolute, how can we prioritize among competing rights? Should we place those human rights incapable of immediate realization in an inferior category of rights? Should we disregard these claims to absolute priority and subject human rights to the normal trade-offs of cost-benefit analysis?

In seeking answers to these important challenges, it is important to reject two common but flawed responses. The first draws a distinction between human rights that are positive or concrete, and therefore capable of realization and priority, and those that are negative or abstract, and therefore de-prioritized within existing resource constraints. The second takes the existing distribution of resources as a given and allocates the remainder among human rights and other claims, often stripping human rights of any priority whatsoever.

A.2 Dividing Human Rights

Human rights are often divided into two categories. Negative/concrete rights do not require resources for their realization; it is sufficient for duty holders to refrain from violating them. Civil and political rights are generally considered in this category. States do not need to give us free speech, they merely need to stop preventing us from speaking freely. A more nuanced view holds that some, albeit limited, resources are required to protect negative rights from violation by others. Positive/abstract rights, on the other hand, require resources for their fulfillment. Since resources are always limited, these rights cannot be realized immediately but only progressively through policies and practices. Economic and social rights are generally considered in this category. States

need to actually provide services like immunizations and facilities like health clinics in order to guarantee the right to health. Positive rights cannot therefore make absolute claims on resources but only relative claims as rights to agreed-upon policies.

The distinction between positive and negative rights has been given legitimacy and legal sanction through the provision in the Covenant on Economic, Social and Cultural Rights phrase that its rights are subject to "progressive realization" to the maximum of "available resources." However, this distinction was based not on legal or empirical rationality but rather on Cold War politics. The US and the West insisted on separating civil and political rights from economic and social rights, and downgrading the latter. But a more accurate way to understand the relationship between rights and resources is that all human rights have both positive elements that require resources and negative elements that do not.

This understanding is based on Asbjorn Eide's typology of human rights duties to respect, protect and fulfill rights, which correspond to Sen's typology to respect negative freedom, protect negative freedom, and fulfill positive freedom (see HDR 2000 paper by S.R. Osmani). It is important to add one additional duty to these typologies – the duty to recognize. This not only imposes an obligation on states to ratify human rights treaties, but also on non-state actors to accept human rights responsibilities. This concept becomes especially important in the context of international trade law's refusal to accord any priority to so-called non-trade values, including human rights.

Although Eide's typology has gained widespread acceptance in the human rights movement and beyond, its full implications are not always understood. The main purpose of dividing human rights duties into the categories of recognize, respect, protect and fulfill is to demonstrate the fallacy of viewing civil and political rights as capable of immediate realization without resources, while ESCR as positive rights requiring state expenditures and therefore being subject to progressive realization.

Instead Eide argued that all human rights have a negative component requiring little to no resources (the duty to respect as well as the proposed duty to recognize), a regulatory

component requiring some resources (the duty to protect), and a positive component requiring significant resources (the duty to fulfill).

The similarities between all human rights can be seen in the following examples. The negative component of the right to political participation means that one should not be prevented from voting through violence or even economic like a high poll tax. The regulatory component requires that outside parties should not interfere with the right to vote, which might require police protection of voting stations and other measures. The positive component requires the establishment of institutions and procedures to ensure a free and fair voting process. The negative component of the right to food means that one should not be deprived of the means of feeding oneself, for example through land confiscation. The regulatory component means that others should not interfere with the right to vote, which could be paramilitary forces or even development project that deprives people of tradition food sources. The positive component requires the establishment of institutions and procedures to ensure that hunger is eliminated.

It is also worth noting that one of the major methods of protecting negative rights against infringement by either the state or third parties is through a justice system capable of providing effective recourse for victims of rights violations. In many developing countries, the costs of building an effective judicial system far outweigh the costs of fulfilling even those rights whose positive enjoyment is considered resource-intensive, such as rights to health and education. Thus to be capable of realization in the real world rather than on paper, even the negative elements of human rights are not capable of immediate realization unless sufficient resources are allocated. Does this mean that there is no such thing as real human rights, because no right is capable of immediate realization without resources and policies? Or do only wealthy citizens from wealthy countries have human rights?

A.3 Human Rights and Resource Constraints

The core principle of human rights holds that every child is born with equal freedom and dignity. Yet this is patently untrue, unless we can separate the abstract notion of birth from the concrete social, economic, and political conditions into which every child is

born. The lottery of life dictates that some children will die very young from hunger and preventable disease. Moreover, this lottery is not random; very poor children will have the least "enjoyment" of the right to life.

It has long been understood in development circles that the major reason that millions of children die every year from preventable causes involved the distribution of resources rather than the availability of resources. The challenge is applying this truism to our analysis of human rights and resource constraints. Do we take the existing unjust distribution of power and resources as a given? If so, then those rights that are most violated, and therefore farthest from concrete realization, would be placed in an inferior category of rights based not on principles of justice, but rather on surrender to the enduring reality of structural injustice. In the US the right to free speech has been accorded a much high priority than the right to health, not only in the formal legal system but also in the distribution of resources. As a result, the right to free speech enjoys widespread recognition and enforcement, whereas 45 million Americans have no health care coverage and child mortality in Harlem equals that in Bangladesh.

A corollary challenge lies in the contradiction between espousing a human rights program that challenges anti-human rights distribution of resources in the present but not the past. For example, many countries have pursued a policy of wage suppression through repression of labor rights, with the result that the poorest workers have been unjustly deprived of significant income. But for this missing income, their enjoyment of human rights to food, health and housing would be much better realized. Similarly, corrupt governments, encouraged by irresponsible lenders, have squandered billions of dollars in development aid and contributed to an unsustainable debt that consumes an enormous share of national resources, leaving little for the fulfillment of people's fundamental rights.

In a world of finite resources and unjust distribution of resources, we will inevitably be forced to make choices even among supposedly absolute human rights priorities. The deontological claim of human rights should not be construed as an all-or-nothing demand that ignores fundamental economic realities. But while no rights are absolutely absolute, we should also be careful not to lose the priority value of human rights altogether.

Constitutional rights do not have absolute value in a domestic legal system, but they do have the highest priority, and therefore any limits on their enjoyment must be carefully and narrowly drawn. Similarly, human rights should sit on top of the hierarchy of international values and reflect the highest priority for a claim on scarce resources, not to be lightly overridden based on standard cost-benefits analysis.

It also makes a difference if past violations are accounted for in the present policy calculus. For one, it means seeking to redress these effects rather than taking them for granted, which might lead to different policies on issues like wages and debt. Second, it might broaden the concept of priorities and resource constraints, opening space for bolder thinking on some of the underlying issues. And third, it might lead to different policies and priorities regarding those whose rights are routinely violated.

Rather than downgrade the principle of rights for the most deprived and oppressed into the category of abstract rights to be realized progressively, we might increase our practical efforts to ensure that their deprivation ends. In other words, taking the principle of "all human rights for all people" seriously might require prioritizing certain human rights-enhancing policies aimed at those who least enjoy them. In essence, this constitutes a program of human rights affirmative action, or, to borrow a term from liberation theology, a preferential option for the rights-poor. This affirmative action program might be a useful framework for addressing the need for priorities among human rights given resource constraints.

B. Human Rights Law

This section provides a brief survey of the development of human rights laws and standards over the past 50 years. The major areas of legal development include the Universal Declaration of Human Rights, subsequent international and regional human rights treaties and declarations, labor rights and the ILO system, and UN declarations on human rights, including the World Conferences in the 1990s. The purpose of this section is not to evaluate these developments or discuss their efficacy, but merely to summarize the range of human rights laws as they currently exist. Attached to this paper is a supplementary annex that describes in more detail the legal framework of ESCR,

including a discussion of content, duties, and violations. For more information on the development of human rights law in general, readers are referred to Cees Flinterman's paper for HDR 2000, and for more on human rights procedures and enforcement mechanisms, to Philip Alston's paper for HDR 1999.

B.1 The Universal Declaration of Human Rights

The Universal Declaration in 1948 is generally taken as the starting point and foundation of the international human rights regime, although certain categories of rights predated the Universal Declaration, including labor rights through the International Labor Organization (ILO), minority rights through the League of Nations, and rights of civilians in war through Hague laws. The Universal Declaration was unanimously adopted by the UN General Assembly (then consisting of 48 states) with great publicity and fanfare. It represented a breakthrough in that individuals were recognized as the subjects of rights for the first time in international law. Previously states had been the exclusive subjects and actors of international law. The Universal Declaration recognized a full range of civil, political, economic, social and cultural rights, and moreover declared all these rights to be "interdependent and indivisible." It was thus established that indivisible human rights were the appropriate international vehicle for achieving the goal of human dignity, and that human dignity required freedom of expression and participation on the one hand and freedom from poverty and want on the other.

The Universal Declaration did not limit human rights obligations to states, asserting that all organizations and individuals shared duties to promote the realization of human rights. This can be seen in Article 28: "the right to a just social and international order." While this article has been ignored in practice, it nonetheless established the principle of extending human rights duties to non-state actors at the very outset of the human rights regime. Moreover, human rights were given priority over other social, economic, and political goals and policies. The Preamble stated that human rights were "inalienable" and inherently derived from the equal dignity and freedom of all human beings. The importance of this deontological basis for human rights was discussed in the preceding section.

B.2 International and Regional Treaties

The adoption of the Universal Declaration set in motion a process of standard-setting through which the full range of human rights were elaborated in various treaties and covenants at both the international and regional levels. The first and arguably most important of these treaties were the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Together with the Universal Declaration they constitute the International Bill of Rights. In addition, international treaties were adopted prohibiting genocide, torture, racial discrimination, discrimination against women, and abuse of children. These treaties, which have been ratified by the vast majority of states, contain a comprehensive listing of rights pertaining to their respective mandates. The most recent international treaty, the Convention on the Rights of the Child, protects the full range of civil, political, economic, social and cultural rights of children and enjoys near-universal ratification (only the US and Somalia have thus far failed to ratify it).

Each of the six core international human rights treaties has a treaty body comprised of independent experts and responsible for monitoring and promoting compliance by states parties. These are the Committee on the Elimination of Racial Discrimination (first meeting in 1970), the Human Rights Committee (1976), the Committee on the Elimination of Discrimination Against Women (1982), the Committee on Economic, Social and Cultural Rights (1987), the Committee against Torture (1988), and the Committee on the Rights of the Child (1991). The treaty bodies develop human rights standards and jurisprudence both through specific observations on state parties' compliance with their legal obligations and through general comments that interpret broader aspects of human rights norms. For example, the Committee on ESCR has issued general comments interpreting and expanding on the rights to housing and food, the rights of elderly and the disabled, and the impacts of economic sanctions on the enjoyment of ESCR.

In addition to the international treaties, human rights have also been enshrined in the treaties of regional systems such as the Organization for Security and Cooperation in Europe, the European Council, the Organization of American States, and the

Organization of African Unity. These systems each have human rights treaties, treaty bodies, and other mechanisms for monitoring and enforcement. The text of the treaties generally follows the language found in the international treaties, with some variations (please refer to HDR 2000 on regional human rights systems).

B.3 The UN Charter and UN Organs

The UN Charter lists among its Fundamental Purposes and Principles in Article 1(3) the "promotion of human rights and fundamental freedoms." In effect, all UN organs and agencies are charged with human rights responsibility, including standard-setting. (Their role in human rights implementation and enforcement is discussed in the next section). However, the practical involvement of most UN bodies in the development of human rights laws has been extremely under-developed.

Of the major UN bodies, the Security Council has studiously avoided any role in the development of human rights norms. ECOSOC has also played a limited and unexceptional role, besides the creation of the Committee on Economic, Social and Cultural Rights as the treaty body for that covenant. The General Assembly is the only principal organ of the UN to take a central role in promoting human rights law, for example through passing critical human rights resolutions such as the Universal Declaration of Human Rights and the Declaration on the Right to Development.

The main responsibility for human rights standard-setting within the UN Charter-based bodies has fallen on the Commission on Human Rights, primarily through the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Commission is comprised of diplomats and political appointees rather than independent experts, and the previously expert-based Sub-Commission is being increasingly politicized as states seek more leverage over UN human rights policy. The Sub-Commission has passed numerous resolutions elaborating standards and interpretation of human rights law, and also has commissioned thematic and country-specific reports. For example, reports by the Special Rapporteurs for the right to food (A. Eide) and for economic, social and cultural rights (D. Turk) have made significant contributions to developing jurisprudence on these rights. Reports currently being prepared on the right

to development and on extreme poverty hold special interest for the area of human development.

The UN specialized agencies historically have shown only limited interest in human rights law, viewing their mandates as more technical and advisory. This is beginning to change, however, as evidenced by the widespread, although perhaps still shallow, support for mainstreaming human rights throughout the UN system. Leading the way in this regard is UNICEF, which has made human rights a central element of its mandate since establishing and promoting the Convention on the Rights of the Child. Similarly, the WHO, the FAO, and UNDP have recently become much more active in promoting the human rights to health, food security, and development respectively. However, apart from UNICEF none of the specialized agencies has played a major role in developing or interpreting rights standards.

B.4 International Declarations

The Universal Declaration is not a treaty, but a resolution passed by the General Assembly. Resolutions and declarations are generally considered "softer" law than treaties because they are not specifically ratified by states and therefore do not impose binding legal obligations. The exception is when a resolution is so universally accepted in word and practice that it becomes part of customary international law, for example, the Universal Declaration itself. However, the difference between hard and soft human rights law is somewhat academic in light of the fact that even legally-binding treaty-based law lacks even minimally effective enforcement mechanisms, as discussed below.

In 1986 the General Assembly passed the Declaration on the Right to Development as the culmination of efforts to establish this right in international law. The Declaration is lengthy and confusing, but can be summarized as recognizing that all human rights, and particularly economic, social and cultural rights, must be protected during development processes. The Declaration recognizes the right of people and communities to participate in development processes, but not the right of states to certain levels of development and aid, as has been claimed by some developing countries. In this respect, it does not so much create a "new" right as simply affirm the fundamental importance of all human

rights in the process of sustainable human development. The Declaration might therefore be viewed as an early step in what is now called mainstreaming human rights and human development in the UN system.

The world conferences convened during the 1990s provide another source of "soft" declaratory human rights law and standards. These conferences were convened on various issues including environment and development (Rio in 1992), human rights (Vienna 1993), women's rights (Beijing 1995), social development (Copenhagen 1996), population (Cairo 1997), housing (Istanbul 1997), and food security (Rome 1998). The conferences issued declarations with strong emphasis on human rights, as well as programs of actions with specific benchmarks and targets. The World Conference in Vienna was particularly forceful in affirming the interdependence and indivisibility of all human rights, and in emphasizing the need to give greater consideration to enforcing ESCR. The human rights principles asserted in these declarations presently stand as the latest chapter in a 50-year process of standard setting.

B.5 Criticism of ESCR Standards

As the foregoing survey demonstrates, there is no shortage of human rights laws on the books today. But while the era of human rights standard setting may be coming to a close, there remains a tendency to question the validity of ESCR standards based on their supposed vagueness and lack of judicial and practical enforceability. Given the centrality of ESCR to the concept of human development, this critique will be addressed briefly before turning to the issue of human rights enforcement.

Traditional human rights lawyers unfamiliar with the field of development often dismiss ESCR for being too vague and difficult to measure. While it is true that indicators for civil and political rights are better developed through years of practical application, there are methodologies for assessing and comparing socio-economic conditions – the UNDP's human development index, UNICEF's rate of progress measurements, and the World Bank's report on World Development Indicators, for example – that could easily be applied to assessing ESCR violations. There are volumes of research on socio-economic conditions (concerning health, education, and other ESCR issues) compiled by academics

and development agencies. The problem therefore is not the lack of data but the lack of concrete collaboration between the fields of human rights law and development economics.

A related argument – that ESCR are not judicially enforceable in the same manner as civil and political rights – is factually inaccurate. Many countries have enshrined ESCR in their constitutions and domestic laws, and as a result, there are numerous examples of courts adjudicating and enforcing ESCR around the world. Even in the US, whose legal system is generally hostile to ESCR, state constitutions generally protect health and education, for example. It is certainly not more difficult for a judge to assess violations of the right to education than to decide anti-trust cases with complex economic data and evidence.

The fact that ESCR are subject to the "progressive realization" clause has also been used to argue against their practical enforceability. But the Committee on ESCR and two meetings of independent experts (in Limburg in 1986 and Maastricht in 1997) have provided guidelines for assessing violations of ESCR within the framework of progressive realization. In particular, there are three types of ESCR violations that are not limited by progressive realization. First are violations based on any form of discrimination in access to education, health, or other services. Second are violations based on the failure to provide a minimum core content of the right, for example free primary education or basic maternal-child health care. Third are policies that cause actual regression in the enjoyment of ESCR. Given that all three types of violations are regrettably common in almost all states today, we can see that the presumed difficulty of assessing violations of ESCR has been greatly exaggerated. For more on these issues, please refer to the supplementary annex.

The main obstacle to realizing ESCR, and all human rights, has always been and remains a lack of political will by those holding power in governments, international institutions, and transnational corporations.

C. Human Rights Enforcement Mechanisms

This section is by necessity brief. In contrast to the wealth of human rights norms and standards, there is precious little practical enforcement. The entire human rights system relies on voluntary compliance by states, with the occasional public condemnation from a UN body without any means to enforce compliance with recommendations. This section examines the enforcement role of the treaty-based human rights bodies and the UN Charter-based bodies. It concludes with a discussion of the human rights paradox in which absolute deontological values in theory have no practical institutional mechanisms for enforcement, and therefore in practice the realization of rights has an extremely low priority in international relations. This situation is the exact opposite of that prevailing in international trade law, in which relative utilitarian values enjoy powerful enforcement mechanisms and near-absolute priority in international relations.

C.1 Treaty-Based Human Rights Bodies and Voluntary Compliance

Under international treaties states are required to report only periodically, generally every five years, on their progress with compliance. These reports, when prepared, tend to be recitations of socio-economic data without any real effort to assess the human rights impacts of policy. An expert (though often politicized) treaty monitoring committee reviews these reports and issues weak recommendations that have no binding effect. Decisions are arrived at by general consensus, and the relationship to state parties is usually one of dialogue rather than confrontation. The treaty bodies issue non-binding observations with no enforcement mechanism to compel or even encourage fulfillment of recommendations. In effect, state parties are expected to engage in voluntary self-policing of their human rights treaty obligations. Treaty bodies also develop jurisprudence interpreting human rights through general comments and declarations. Again, the purpose of these interpretations is to guide state practice and elaborate the normative concept and content of rights rather than establish enforceable legal precedents.

Three of the six treaty bodies – the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee against Torture – have an optional protocol for reviewing individual and inter-state petitions concerning violations of rights. This mechanism allows groups to petition the Committee regarding a specific

human rights violation that requires urgent attention, although the Committee still can only issue non-binding and non-enforceable recommendations. The protocol must be ratified by state parties in addition to ratification of the underlying treaty in order to be effective; few states have availed themselves of this opportunity to face human rights condemnation.

Reliance on voluntary compliance has produced unimpressive results. This can be seen broadly in the persistence of widespread human rights violations committed by almost all states despite their undertaking solemn international commitments through ratifying various treaties. Fifty years after the Universal Declaration, violations of ESCR are committed with near-total impunity, as states have barely faced rhetorical condemnation for such violations, let alone enforcement measures. Even more telling, states have not even devoted sufficient resources to keeping up with their administrative duties regarding the international human rights treaties. For example, the vast majority of state parties to the Covenant on Economic, Social and Cultural Rights do not even bother to produce the required reports every five years, leading the Committee at times to call a delinquent state party to a session on the strength of NGO reports.

C.2 UN Charter-Based Bodies

The UN's political organs are mandated to promote human rights awareness at the broadest level as well as respond to concrete violations of human rights. In practice, there are very few mechanisms in the UN system for concrete action on human rights. The one exception to this rule is also the most controversial. The Security Council, led by the US, has recently proclaimed that the right of humanitarian intervention allows it to intervene politically, economically or militarily in a country in response to a crisis, including human rights violations. The controversy arises not only in the fact that this is a new right with very questionable foundation in international law, but also that it is applied by the Security Council in a very unbalanced manner. The selective use of human rights to intervene in certain crises but not others depending on the target country's relationship to the permanent members of the Council undermines the central human rights principle of universality and deeply politicizes the field.

Among other UN bodies, the Commission on Human Rights was established in 1946, but it did not begin to monitor major types of human rights violations until the 1980s with the development of thematic mechanisms and rapporteurs on issues such as disappearances, summary execution, and torture. The UN system as a whole did not address human rights issues until the 1970s, when various UN bodies took up the issues of apartheid in South Africa and self-determination on the Occupied Palestinian Territories. The UN Secretariat did not appoint a senior official to head the Centre for Human Rights and coordinate UN human rights activities until 1994 with the establishment of the Office of the High Commissioner for Human Rights. In addition to the failure to seriously address human rights issues, the UN system has also been hampered by the ad hoc creation of various bodies and sub-bodies with overlapping human rights mandates and little or no rational coordination.

Philip Alston has provided a succinct critique of the UN's human rights system: "the bottom line is that the UN human rights system consists of disparate, and often only formally related, bodies with overlapping mandates and different, perhaps sometimes even inconsistent, approaches. There has been no grand design, there is built-in resistance to institutional and procedural reform, and there is reluctance to professionalize combined with a preference for relying upon diplomats or part-time 'experts.'"

C.3 Regional Systems and National Institutions

The primary reason that international human rights enforcement is so weak is that the system lacks concrete judicial mechanisms such as adjudicative bodies that can issue definitive rulings on human rights violations. However, at the regional and national levels there are more judicial mechanisms with greater potential for development than at the international level. This paper will only touch on these mechanisms, as several excellent papers on regional systems and national institutions have already been submitted to HDR 2000.

Within regional mechanisms, the African system has no formal court procedures, but both the Latin American and European systems have courts that can hear complaints against member states and issue binding judgements. The OAS human rights system

entails a cumbersome process – only after domestic remedies have been exhausted can a case be taken up by the Inter-American Commission on Human Rights, and after investigation possibly referred to the Inter-American Court on Human Rights. Moreover, judgements still rely on voluntary compliance for implementation given the lack of regional political will to enforce Court decisions. The European Court is the most advanced both in its jurisprudence in interpreting the European Social Charter and also in the respect that its decisions are accorded within the European system. Although the Court lacks specific enforcement capacity such as sanctions, states will generally implement an adverse decision rather than risk political isolation in the region. An example is the Court's recent decision that the British ban on gay soldiers serving in the military violates human rights and must be changed.

Perhaps the most effective method of enforcing human rights is through national institutions linked to fully applicable domestic laws and procedures. While these institutions are a relatively new development, they appear to offer promise for incorporating international human rights norms through domestic judicial systems. From the global perspective of universal applicability, the major flaw in national institutions is precisely that they are subject to national political will. Since human rights must often be enforced against recalcitrant state parties, it is unlikely that major violators will voluntarily establish and then respect domestic human rights institutions.

C.4 The Human Rights Paradox

Over the past 50 years, a wide range of human rights norms and principles have been established and even celebrated. These principles are meant to represent the highest values in the international system, the end goals of all policy-making, the very raison d'être of interstate and intrastate relations. States sign human rights treaties in full public view with great pomp and circumstance, thereby incurring obligations to recognize, respect, protect and fulfill human rights. In the areas of standard-setting, human rights education, technical and advisory services, and other cooperative efforts, the field of human rights has made significant strides relations with states, as well as developing human rights institutions within states. But in the critical area of implementation, the international community has proven entirely unwilling to hold itself accountable to

human standards through effective enforcement mechanisms that assess violations and punish violators. In other words, tremendous effort and resources have been allocated to developing human rights standards and discourse, but almost none to making these rights meaningful in the daily lives of human beings. In this way, the rhetoric and reality of human rights are almost completely delinked.

The impetus for all progress in monitoring and protecting human rights over the past decades has come from "below" through people's movements fighting for social justice and civil society groups seeking to raise public awareness of rights violations and compel governments to fulfill their legal commitments. While public activism and pressure is a positive and necessary component of human rights enforcement, the current exclusive reliance on such means merely indicates the weakness of institutional enforcement in the international system. To effectively promote human rights accountability and implementation, civil society participation should be channeled through established international human rights judicial procedures and enforcement mechanisms.

The fundamental paradox is that human rights make universal and absolute deontological claims on global and national policies, with strong public support, but without any institutional means for implementation. In practice, the absolute claim of human rights is entirely vitiated by the relative and voluntary nature of institutional enforcement. Human rights therefore make little difference in the lives of human beings. A cynic might argue that the pomp and ceremony around human rights only serve to mask and legitimize the real practice of human rights violations that occur in every corner of the world. The human rights paradox is even more telling when compared to international trade law, which makes relative claims on international policies and resources, excludes public participation and enjoys minimal civil society support, yet enjoys extremely powerful enforcement mechanisms that ensure the near-absolute implementation of trade norms and principles.

II. INTERNATIONAL TRADE

This chapter provides an overview of the international trade regime. It consists of three sections: trade values and philosophy, the development of trade law and institutions, and the enforcement of trade rules through the WTO.

This chapter illustrates the ways in which international trade law contradicts the neoclassical economic rationale upon which it purports to be based and contends that the current trade regime has successfully delinked the means of trade from the welfare maximizing ethical purposes of trade, substituting different end goals such as maximizing short-term corporate profits. That liberalization in the WTO model does not lead to welfare maximization is amply illustrated by enormous and growing global disparities in wealth, income, health standards and access to technology

This chapter also documents the evolution of the rules and institutions governing the international trading system, focusing mainly on the formation of the WTO. It emphasizes the uneven access which various actors in the international arena are afforded to decision-making processes in the trade regime and examines the marginalization of human rights, labor rights and environmental concerns in international trade.

A. Trade Values and Philosophy

This section explores modern trade law in theory and practice, including the neoclassical economic theory upon which the trade regime is purportedly based. This section also examines theoretical and practical difficulties in trade law which include contradictions between neoliberal economic assumptions and real world conditions as well as discrepancies between international trade law and the neoliberal model. Finally, this section reveals the pivotal influence of major TNCs in creating the current free market extremism and the disastrous human consequences of trade liberalization.

A.1 Maximizing Welfare

The neoliberal model of economics, supposedly the foundation of international trade law, is based on classical utilitarian theory. Utilitarianism can be summarized as a model that seeks the greatest good for the greatest number of people without valuing any other end goals as such (i.e. human rights, freedom, development). The means are inseparable from the ends, and moreover constantly shift according to the calculus of the day. In this respect utilitarianism is diametrically opposed to deontological theories like human rights, in which the ends are universal and absolute. For example, utilitarian theory does not automatically condemn enslaving a minority of the population to serve the needs of the majority if aggregate welfare is thereby maximized.

The current neoliberal economic version of utilitarianism – the axiom that a rising tide lifts all boats – seeks in theory to achieve the most welfare for the most people by maximizing the aggregate of individual utilities expressed through consumer preference in a free and open market where firms compete in a level playing field according to universal rules. Essential assumptions underlying this theory are that individuals seek to maximize their profits or utilities, that they have access to full information, and that the invisible hand of the market works to level the playing field and provide perfect competition. Proponents of this free trade model argue that it maximizes such utilities as consumer choice, lower prices, increased employment, enhanced economies of scale, specialization, increased competition, the accelerated diffusion of the fruits of innovation, and, most importantly, the aggregate welfare of humanity.

The clearest example of neoliberal utilitarian economics -- at least in theory -- is the recent emergence of international trade law. Trade law has focused almost exclusively in terms of a normative framework on achieving efficiency through removing barriers to the free flow of capital and goods. This means that values other than efficient commercial exchanges are viewed as outside the scope of, and even hostile to, the purposes and vision of trade law. There is no allowance for deontological ends such as human dignity or the preservation of the environment, no value placed on safe and healthy working conditions or a pollution-free environment. According to this view, human rights and environmental concerns are at best irrelevant and at worst disguised protectionism that actually threaten the goal of efficiency. Goods produced by destroying workers' lives or depleting nonrenewable resources are still counted as growth and value creation within

the framework of maximizing utilities. Externalities are excluded from the economic calculus and therefore also from policy formation supposedly aimed at maximizing aggregate welfare.

Defenders of free trade insist that welfare goals such as human rights and human development will be achieved as automatic and inevitable results of trade liberalization and free markets. But crucially, these welfare goals find no formal recognition in the legal and regulatory framework of international trade. The means and ends of free trade are thereby inextricably linked in theory but delinked in practice. They are not inscribed into binding laws with corresponding commitments and practical obligations. The legal framework recognizes only the means of free trade – liberalization, lowering of trade barriers, opening access for capital and investment – not the normative values of welfare maximization that are supposed to flow inevitably from such means. The ideological coherence and practical viability of international trade is therefore predicated on ensuring a perfect fit, or at least a close correlation, between trade law's legally-binding means of trade liberalization and the "inevitable" welfare maximizing end goals of human development.

A.2 Theoretical and Practical Difficulties in Trade Law

There are two significant flaws in the current international trade model. First is that the neoliberal economic theory on which trade law is supposedly based does not conform to real world conditions and therefore its conclusions about which economic policies produce welfare maximization are not valid. But more importantly, trade law in its current form is not even faithful to this neoliberal model but includes numerous distortions based on delinking the means of trade from the welfare maximizing ethical purposes of trade, and substituting different set of end goals, primarily related to maximizing short-term corporate profits.

The more extreme forms of neoclassical economic theory have been largely discredited within the field of economics for relying on assumptions that do not correspond to present realities. Adam Smith and David Ricardo, considered the founding fathers of this theory, assumed that goods could cross borders but not capital or labor, as was the case in

their day. Smith based his theory of the invisible hand on a conviction that large markets and labor division and specialization were key to growth, and that these required free and open markets. Ricardo amended this by basing the international division of labor on comparative not absolute advantage, leading each country to specialize in producing certain products more cheaply and efficiently than others. But their theories simply do not apply under current circumstances given the fact that capital has become the most mobile factor in international trade. Indeed, Ricardo emphasized that if capital were also mobile then trade between countries would be governed not by the law of comparative advantage but by the labor theory of value (absolute advantage in terms of labor costs). It follows that true free trade would require ending restrictive immigration policies that confine labor within national borders while capital and goods are free to move.

It is also worth noting that both Smith and Ricardo were moral philosophers as well as economists. Maximizing human welfare was the essential purpose of their economic theories, not merely an afterthought. Today, the dominant discourse in international trade emphasizes the values of free trade and open markets as ends in themselves, without corresponding emphasis on the underlying welfare values. This narrow-minded focus was criticized in a prescient UN study produced almost 40 years ago: "One of the greatest dangers in development policy lies in the tendency to give to the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten in preoccupation with the means. Human rights may be submerged and human beings seen only as instruments of production rather than free entities for whose welfare and cultural advance the increased production is intended… Even where there is recognition of the fact that the end of all economic development is … the growth and well-being of the individual and larger freedom, methods of development may be used which are a denial of basic human rights."[2]

It is ironic that a warning applicable to centralized statist methods of trade and production, which emphasizes materials over human considerations, should now be leveled at the global capitalist trade system. This is the result of delinking what are called trade values such as liberalization and open markets from non-trade values such as human rights and human development. Such delinking is difficult to reconcile with the

[2] Five Year Perspective 1960-64, U.N. Doc. E/3347/Rev. 1, para. 90 (1960).

empirical fact that trade law and practice has enormous and perhaps decisive impacts on supposedly non-trade issues such as labor standards, health, education, standard of living, and protection of the environment.

It is also difficult to reconcile with recent trends in the fields of human rights and development. The UN system has moved towards economic concepts and practices that place human beings at the center of development. The interlinked norms of sustainable development, human development, human rights, and the right to development have gained increasing currency in the theory and even the practice of UN bodies and agencies. Economists such as Amartya Sen have returned to moral philosophy and ethics as the root of economic theory and practice. The human rights movement increasingly recognizes the fallacy of dividing civil and political rights from economic, social and cultural rights, and the damage to human welfare of neglecting the latter rights entirely. Poverty is now understood as "a violation of basic human rights standards" according to the UNDP.[3] It has become almost a truism that all forms of economic activity -- whether trade, aid, investment, or development -- should be aimed at enabling human beings to reach their full potential.

But this only makes the international trade regime's exclusive reliance on an extreme and discredited form of neoliberal economic theory all the more surprising. In an age of increasing connections between trade, human rights, development, how is it that trade law and practice have come to be delinked from mainstream views in the field of economics and in the broader UN system? What accounts for the narrow ideological view prevailing in such a crucial policy-making arena? What are the concrete outcomes and impacts of delinking trade and human rights?

A.3 Influence of Major TNCs

The most powerful force pushing the current free market extremism is the influence of major TNCs in the development of the global trade rules. It is generally understood that "comparative advantage, international competitiveness, and the international division of

[3] Cite UNDP pamphlet on human rights (1999).

labor result in large measure from corporate trade strategies and national policies."[4] Yet this factor is largely overlooked in academic and professional writing about international trade and its impacts, perhaps because it seems like a case of restating the obvious. Without an explicit acknowledgement of the role of TNCs, it is difficult to analyze why the trade law regime goes beyond even the most conservative schools of neoliberal economics despite the absence in the global economy of key theoretical pre-conditions regarding choice, competition, information, level playing field, etc.

It is an open secret that global trade institutions are heavily penetrated and influenced by the world's largest corporations. These powerful actors, with revenues larger than many state budgets, have established permanent and constant lobbying at the WTO, IMF, World Bank, and OECD, not to mention the trade missions of Northern governments. Most cases before WTO are brought by governments in response to pressure from major corporations. More significantly, corporate lobbyists have played a key role in drafting the actual texts of various global trade agreements. James Robinson, Chairman of American Express, was President Reagan's chief advisor in the early stages of the Uruguay Round, which happened to include an agreement deregulating banking services. Daniel Amstutz, Vice President of Cargill (one of the world's largest agribusiness firms), drafted the initial version of the Agreement on Agriculture in the Uruguay Round. Lobbyists for major pharmaceutical company played a central role in drafting TRIPS, which mandates US-style patent rights globally.

The role and interests of international business can also be seen in the example of the International Chamber of Commerce. The most powerful international business lobby, the ICC is composed of major TNCs including GM, Novartis, Nestle, and McDonalds. The ICC recently embarked on a major campaign to establish "an effective regulatory framework for globalization," with impressive results. A 1998 meeting between the ICC and senior UN officials, including Kofi Annan, issued a joint declaration calling on the UN and the private sector to "forge a close global partnership to secure greater business input into the world's economic decision-making." ICC Secretary General Maria Livanos Cattaui subsequently wrote that "the way the United Nations regards

[4] Robert W. Benson, "Free Trade as an Extremist Ideology," 17 Puget Sound L. Rev. 555, 556 (1998).

international business has changed fundamentally. The shift towards a stance more favorable to business is being nurtured from the very top."[5] Helmut Maucher, ICC President, is now seeking formal status within the WTO. "We want to be neither to be the secret girlfriend of the WTO nor have to use the servants' entrance." He added that "governments have to understand that business is not just another pressure group but a resource that will help them set the right rules."[6]

This focus on TNCs and the WTO is not meant to obscure the role of other important factors and actors in global trade, such as national policy-making in developed countries and the international trade institutions themselves. While all these forces represent in varying degrees the interests of the powerful and wealthiest sectors of international society, TNCs directly express these interests without countervailing pressure, such as democratic opinion and public pressure (in the case of many governments). And the WTO is the preeminent enforcement mechanism in international trade, indeed in all of international law. Nevertheless, TNCs and the WTO is simply integral components of a larger international economic system in which developed countries have been literally compelled to adopt structural adjustment programs that slash public sector spending, re-orient industry and agriculture towards export to service debt, and tighten credit and the money supply, and eliminate barriers to foreign investment and trade.

There is, however, one crucial difference between TNCs and the WTO. TNCs represent only their own interest in profit maximization, whereas the WTO is meant to represent the interests of all member nations, and their populations, in gaining the supposed welfare of trade liberalization. It stands to reason that TNCs should seek global rules of trade that heighten their competitive advantage, increase their market share, and maximize their profits. After all, corporations are supposed to maximize profits as part of the fiduciary duty owed to shareholders. It is their job, their bottom line, their raison d'être. And international trade law, administered by global trade institutions like the WTO, is the best way to accomplish this basic objective.

[5] International Herald Tribune 2/25/98
[6] Cite from Third World Network article.

But it does not stand to reason that corporate interests should exercise predominant influence in a global organization charged with enforcing universal rules of free trade in the interests of all humanity. Traditional neoliberal economics theory posits that free and open trade provides the greatest benefit to the greatest number of people. The WTO model of corporate-managed free trade raises an important practical variant of this issue: is what is best for Cargill and Monsanto best for all of us?

A.4 Impacts of Trade Ideology

If across-the-board trade liberalization really does maximize the general welfare, then criticism of international trade law from a normative human rights perspective would have to be significantly tempered. Before examining this empirical assumption, it is worth recalling that current trade law does not in fact mandate strict liberalization, but rather retains protections favored by developed countries. For example, developed countries do not adopt as domestic policy the austerity medicine prescribed for developing countries and the international system as a whole. Instead public sector spending on unemployment assistance, social security, health care, education, and other basic social services is still provided, not to mention direct subsidies and other trade protections for important and strategic sectors like agriculture and textiles.

Assessing free trade's concrete impacts on human welfare is an enormously complex empirical undertaking that is beyond the scope of this paper. However, even a brief survey of this issue is sufficient to underscore the point that trade liberalization is not always the best policy from the perspective of welfare maximization or human rights.

It must first be understood that the trade law regime is making a very strong claim, namely that liberalization in the WTO model always leads to welfare maximization, and is the best policy for all countries regardless of their specific contexts. The irony is that free markets and liberalization are treated as absolute values in the WTO trade system, notwithstanding the general skepticism of economists for absolute values in a world of limited resources and multiple policy contexts. If free markets only maximized welfare in certain situations or certain countries, then it would not be acceptable to have blanket universal rules promoting free markets as the highest legal and political value in the

regime. Rather, a different set of goals -- universal human rights, for example -- should then be substituted as the highest values in the system, with free trade being one possible (non-exclusive) means of achieving these goals depending on the situation.

The strong claim of international trade law is impossible to sustain. Rather than review the wealth of data on the impacts of globalization, the reader is referred to UNDP Human Development reports over the past ten years. These detail the enormous and growing disparities in wealth, income, health standards, access to technology, and other issues, with the richest sectors of all societies capturing the lion's share of the enormous wealth generated since the end of the Cold War, even if the bottom quintile has shown marginal aggregate improvement. In particular, the reader is referred to papers prepared for the 1999 HDR (Tokel & Klein, Whalley, Khor). These papers demonstrate that trade liberalization has been a mixed blessing in Latin America and other regions, with some successes and some failures, with increasing poverty and unemployment in certain countries, and with the persistence of absolute poverty throughout the world. Numerous UN and independent reports have demonstrated the free trade and structural adjustment programs have winners, usually concentrated in the wealthy sectors of developing countries, and many more losers. For example, UNCTAD's 1997 Trade and Development Report found that almost all countries that have undertaken rapid trade liberalization have seen unemployment grow and wages drop for unskilled workers.

It is extremely difficult to reconcile the brutal facts of poverty – millions of children die of hunger and preventable disease every year while the wealth of the richest corporations and individuals rises exponentially – with a global trade system that truly maximizes welfare for the greatest number of people. And it is impossible to reconcile these conditions with respect for human rights and human development. Even if one argued that economic shock now will lead to welfare maximization down the road, human rights does not permit the sacrifice of this generation of children for the next (not to mention Keynes's comment about the long run).

The empirical conclusion that international trade and free market globalization have not achieved welfare maximization and respect for human rights, and in some cases have harmed these values, leads to a theoretical conclusion that delinking the means of free

trade from the ends of human development has failed to achieve its stated goals and expected outcomes. The priority must therefore be on finding practical alternatives to reconcile economic efficiency and other free trade principles with respect for human rights and human development as the goal of all economic activities, including trade.

B. Development of Trade Law and Institutions

This section reviews the evolution of modern trade law and institutions, primarily the ITO and the GATT system, whose Uruguay Round culminated in the formation of the WTO. The section examines the decision-making processes of the GATT, the various trade issues which the eight GATT Rounds legislated and the creation of the GATT dispute resolution mechanism. This section analyzes the Uruguay Round, key provisions of the WTO and the limited capacity of developing countries to influence decisions of the WTO. As was evidenced at the recent Ministerial meeting in Seattle, these countries are now expressing strong opposition to the lack of balance and fairness in the WTO system.

B.1 Overview

The transformation of the global economy has proceeded very rapidly in the decade since the end of the Cold War. The term globalization has become common parlance throughout the world to describe the changes in international relations and economy. At the risk of simplification, globalization can be understood as the process of integrating local and national economies into a global system with relatively unimpeded capital and trade flows spurred by new communications technologies and a universal legal framework promoting free and open market access.

While there is little question that globalization has changed the face of international affairs, it is important to distinguish between the different impacts of two types of globalization -- transactional and regulatory. Transactional globalization refers to the increasing volume of trade involving capital, goods, and services crossing national boundaries. While there has always been international trade, the amount and integration of trade flows today dwarfs trade of the past. Yet many commentators, including US

Treasury Secretary Lawrence Summers, argue that these changes are more incremental than revolutionary.

It is harder to take issue with the revolutionary nature of changes taking place in regulatory globalization. In the past ten years, and especially the last five, an entirely new legal framework has come to govern the field of international trade, complete with a host of new agreements and powerful new institutions like the WTO to monitor and enforce these rules. The field of international law has never seen such rapid changes in so short a time. According to a prominent international jurist, "It is plausible to suggest that ninety percent of international law work is in reality international economic law in some form or another."[7]

Moreover, international economic law, and specifically trade law, have come to overshadow and supercede a host of international law fields related to labor, human rights, development, and the environment. As discussed below, the reach of trade law extends into all these fields without any acknowledgement of the legal principles that have governed and regulated these fields since even before World War II. In addition, trade law is enforced through increasingly powerful disciplinary mechanisms that constrain the policy options of states. The profound impacts of limiting popular advocacy and national policy in areas of human rights, development and the environment have been felt in all corners of the globe. Unlike the quantitative changes of transactional globalization, many commentators argue that regulatory globalization can aptly be described as revolutionary:

"From its imperfect beginning in the GATT 1947 to its current apotheosis in the WTO, the revolution in IEL means that more aspects of the international economy are regulated through treaty-based rules than at any previous time, rules with less room for state discretion and unilateral action than at any prior time, and under the adjudicative supervision of stronger institutions than at any other time."[8]

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[7] John H. Jackson, "International Economic Law: Reflections on the 'Boilerroom' of International Relations," 10 Am. U. J. Int'l L. & Pol'y 595, 596 (1995).

B.2 The ITO and the GATT

The International Trade Organization (ITO) was expected to be the lynchpin of the Bretton Woods system, administering a comprehensive code to govern the conduct of world trade. The ITO was to be the executive organ of the system, coordinating international economic policy with the IMF and the World Bank. Its purview extended beyond trade in goods to cover services, investment rules, commodity agreements, and encouraging full employment practices. In this sense the ITO had a broader mandate and philosophical underpinning than its successor, the WTO, with its narrow focus on economic liberalization.

However, US refusal to ratify the Havana Charter despite playing an active role in negotiations doomed the ITO. As an alternative, 23 of the 50 countries involved in the failed ITO negotiations agreed to establish the GATT as a multilateral trade agreement to reduce and bind tariffs. While the GATT initially began as a set of global rules with weak enforcement and minimal oversight bureaucracy, its legal and institutional framework expanded gradually through eight successive "Rounds" of multilateral negotiations between members.

GATT historically has operated under a system of consensus decision-making. Under the consensus system, a single vote against a decision was sufficient to negate its effect. The area most affected by the consensus system was the dispute resolution mechanism, since the losing party in a dispute could always block implementation of the dispute panel's decision. This greatly hampered the development of an effective enforcement mechanism for resolving disputes. However, the consensus system did not constrain the general rules-making authority of the GATT since most major decisions were taken by the powerful industrial countries and then presented to the membership for ex post facto ratification. The United States, Europe, Canada and Japan, referred to as the Quad countries, exercised decisive influence over GATT rule making.

[8] Frank J. Garcia, "Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle," 25 Brooklyn J. Int'l L. 51, 60 (1999)

There was no progress on dispute resolution mechanisms until the Tokyo Round in 1979, when rules were formalized in the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance. However, parties still lacked the right to resort to panel proceedings or to have panel reports adopted. Any GATT member could still block any decision. In 1991 Arthur Dunkel, Director-General of the WTO, proposed a draft agreement on dispute resolution with the right to a panel and to adoption of the panel report, the right to appeal to an Appellate Body, and the right to take enforcement measures against non-compliance. This draft became the basis for the WTO's dispute mechanisms adopted under the Uruguay Round in 1994.

Until the Uruguay Round GATT rules covered only tariffs on merchandise goods. The developed countries, which exercised dominant influence in GATT despite the formal requirement of consensus, were very careful to create exceptions under GATT to the overall trend of tariff reduction in order to protect sectors vulnerable to competition from developing countries. This was most evident in the protective barriers and trade distorting measures like subsidies that the US and Europe maintained for agriculture, especially products like sugar and tobacco where production in developing countries was cheaper. Another example was the 1961 agreement by developed countries to impose discriminatory restrictions on low cost imports in clothing and textiles. This protectionist framework was expanded and institutionalized in the Multi-Fiber Arrangement of 1974. Another component of developed country protections was the accepted use of so-called voluntary export restraints and orderly marketing arrangements to safeguard against import surges, almost always from developing countries. Developed countries, especially the US, still use anti-dumping measures permitted by the WTO to limit competition from developing countries.

The history of developed country protectionism is important to keep in mind when examining free trade issues under the WTO. Manipulation of GATT rules by developed countries is one of the primary reasons that developing countries insist on reforms and "special" treatment in order to level the playing field, and also why they resist the introduction into the WTO of additional measures that might be abused by developed countries as disguised protectionism, such as labor and environmental standards (discussed below).

B.3 Uruguay Round

The most far-reaching changes in the GATT, especially in terms of laws and regulations, came with the Uruguay Round from 1986-94. The UR was the longest and most comprehensive round of negotiations ever undertaken through the GATT. Agreement was delayed for years due to disagreements between the US and the EU, mostly on agriculture. These disagreements were finally hammered out at the Blair House Accord in 1992, after which the Quad countries quickly reached agreement on major issues such as establishing the WTO, binding tariffs, opening market access, eliminating non-tariff barriers to trade, and drafting new multilateral agreements covering additional good and services in the GATT system. The speed with which major decisions and policies were taken after the US and EU resolved their differences demonstrates how the powerful industrial countries actually dominate the supposedly consensus-based decision-making process of the GATT. The UR concluded with the Marrakesh Agreement in 1994, signed by 123 countries.

The UR established the WTO and its Charter as the institutional framework missing from the international trade regime since the ITO was rejected in 1948. The UR also separated the trade law regime of GATT from the role of monitoring and enforcing trade rules through the WTO. The UR extended the application of GATT rules from tariffs on merchandise goods to non-tariff barriers on a whole range of goods and services through the adoption of new multilateral agreements under the WTO umbrella. The UR also reversed the decision-making process on disputes to an anti-consensus system, meaning that WTO decisions, including dispute resolution panel findings, would be automatically adopted unless opposed by all members, even the winning party to the dispute. Finally, the UR adopted the principle of a Single Undertaking, whereby all WTO members agreed to abide by all agreements instead of being free to ratify selected agreements as before. These changes have had a dramatic impact on the GATT system, transforming it into a powerful institutional mechanism for enforcing a growing body of global trade laws.

The main new multilateral agreements negotiated in the UR in addition to the GATT are the Trade-Related Intellectual Property Agreement (TRIPS), the Agreement on Sanitary

and Phytosanitary Standards (SPS), and the General Agreement in Trade and Services (GATS).

TRIPS sets enforceable global rules on patents, copyrights and trademarks through US-style intellectual property laws granting monopoly sales rights to patent holders for an extended period. The pharmaceutical industry was very influential with Quad countries during the drafting of the agreement. Many developing countries objected to TRIPS entering the WTO system yet lacked the resources, expertise, and political will to withstand the pressure from developed countries. They argue that TRIPS is a protectionist device that maintains and increases the monopoly power exercised by Northern TNCs and hinders technology transfer to and development in the South. In addition, many civil society groups have objected to TRIPS Article 27.3b that allows the patenting of life forms and encourages the appropriation of traditional knowledge through manipulation of the patent process, damaging the environment and threatening the livelihood of traditional farming communities. The impact of TRIPS has already been felt in many developing countries, such as India, Argentina and Brazil, which have had to annul laws protecting local pharmaceutical companies or ensuring the affordability of lifesaving drugs.

SPS regulates government policies relating to food and health safety standards to ensure that they do not pose non-tariff barriers to free trade. The WTO has appointed the Codex Alimentarius, a standards-setting agency of the UN Food and Agriculture Organization, as the arbiter for global food standards under the SPS. The Codex is heavily influenced by corporate interests -- Nestles has more personnel representing different countries' governments that has any one government. Developing countries fear that their food and safety standards will be judged lacking under SPS, whereas Northern NGOs are concerned that national standards in their countries will be eroded. In the Beef Hormone case (1998), a WTO dispute panel interpreted SPS to support an American challenge against the EU's ban on the sale of beef with artificial growth hormones. Finding the ban an unfair restriction on trade in the absence of clear scientific evidence of the danger, the panel required the EU to open its markets to hormone-treated beef or face countervailing duties amounting to over $500 million. This ruling directly contradicts the Precautionary Principle, a key environmental norm that permits restrictions on potentially harmful

products unless there is clear scientific evidence that they do not pose a danger. Based on the same reasoning, the labeling of GMOs may no longer be allowed under the SPS.

GATS covers trade in goods and services so that almost all international transactions are now included in the WTO umbrella. Previously the service sector was considered a local and national industry, but with the advent of global communications, large TNCs have come to dominate areas such as banking, insurance, telecommunications, and data management. Financial services are not completely within GATS, and developed countries have contemplated further deregulation. But many developing countries and civil society groups have objected to what they view as a back door means of inserting provisions from the rejected Multilateral Agreement on Investments (MAI).

In addition, an agreement on government procurement was negotiated in the UR prohibiting governments from using "non-economic" considerations in procurement, such as affirmative action and environmental concerns. Unlike the other multilateral agreements, the procurement agreement is subject to voluntary ratification and currently covers 26 countries.

The UR introduced fundamental changes into the GATT system with virtually no public consultation or understanding of the implications of the WTO and its covered agreements. Even developing countries that signed the Marrakesh Agreement had little awareness of the constraints that the UR would place on national decision-making in critical areas of economic policy and social development. As these impacts have become more clear over the past few years, that has been a strong backlash among developing countries against what they perceive to be the unbalanced playing field created by the Uruguay Round agreements. This explains the widespread support for the call by Guyana, as Chair of the Group of 77, that the Seattle meeting of the WTO focus on "review, repair and reform" of past agreements and implementation procedures.[9]

B.4 The WTO

[9] Statement of Guyana FM Clement Rohee in September 1999, as quoted in Progressive Response (11/24/99).

Created in 1995 under the UR, the WTO separated the institutional framework of trade from the substantive rules embodied in GATT and other multilateral trade agreements such as GATS, TRIPS, and SPS. The WTO currently has 134 members (over 90 of whom are developing and least developed countries) and 33 observer nations, with 30 more applying for accession, including China. To be accepted, countries must make specific commitments to liberalize and open their economies and to abide by trade agreements administered by the WTO. The Quad countries, and especially the US, exercise decisive influence in deciding what countries get admitted and under what terms, as demonstrated in the case of China.

The WTO describes itself as a member-driven consensus-based in organization. While in principle the WTO is one country one vote, the tradition of consensus from GATT remains, to the benefit of the powerful Northern countries. In the text, a two-thirds majority is required to amend agreements and admit new members, and a three-quarters majority is required to adopt major interpretations of agreements. In reality, however, the rules of the global economy are written in closed-door meetings of the Quad countries, often with the input and participation of major corporate interests. Decisions are then presented for acceptance to the rest of the members, who are pressured or induced through concessions in the form of special and differential treatment (S&D) into accepting. As discussed below, developing countries anyway lack the resources and technical expertise to participate fully in the negotiating process, although the Seattle meeting witnesses a newly-assertive stance on the part of developing countries as they effectively resisted Northern attempts to inject new issues like labor standards into the WTO framework.

The official operating principles of the WTO are:

- Non-discrimination among trading nations (MFN) or between national and foreign goods and services (national treatment).
- International trade should become progressively freer through agreements that obligate countries to eliminate barriers to foreign goods, services, and investment.

- Global rules will make international trade predictable and improve conditions for fair economic competition by lowering barriers and prohibiting practices like subsidies and dumping.
- Rules should be more favorable for developing countries, giving them transition periods to adjust to new rules and special privileges.

GATT, GATS, TRIPS and SPS incorporate the principles of MFN and national treatment. The principle of MFN in Article I mandates that some WTO members cannot be treated better or worse than others with respect to "like products." Identical preferential treatment must be extended to all WTO members. In the Belgian Family Allowances Case (1953), one of the first decided in GATT dispute settlement, a panel considered a Belgian measure that imposed additional tax on products from countries that did not have a system of family allowances. Norway and Denmark challenged the tax as a violation of MFN and won. Article III's national treatment standard allows countries to impose regulatory requirements on imported products only as long as they are treated no less favorably than like domestic products. Although this would seem to allow a country with high labor or environmental standards to insist that imported like products be produced under similar conditions, WTO panels (in the Tuna-Dolphin cases) have ruled that the production process by which a product is made is irrelevant in the determination of like products. Of course, this narrow interpretation of trade rules would reject any trade-based restrictions motivated by the human, labor or environmental rights implications of the production process.

B.5 Developing Countries in the WTO

It is widely recognized that developing countries, which comprise the vast majority of WTO members, lack the resources and expertise to participate in the WTO's complex rule-making and dispute resolution procedures. The WTO's response has been to provide certain benefits to developing countries, such as providing transition periods to implement trade liberalization, enacting rules to improve market access for these countries through the Generalized System of Preferences (nonreciprocal, and nondiscriminatory preferences for developing country exports), and requiring countries to

consider the negative impacts of safeguards and anti-dumping measures (largely enacted by the US and EU).

However, most developing countries argue that they have derived little benefit from the WTO system thus far and have not been provided with the resources and technical assistance to participate adequately. Rather than help level the playing field, they complain that the supposedly rules-based WTO actually maintains Northern privilege and power while failing to address the structural obstacles to Southern development. They have called for broad reforms of the WTO system based on the principle of "free trade plus aid." Proposed reforms include:

- Support developing countries with resources and technical assistance to participate in negotiations and dispute settlements.
- Include all WTO members in negotiations and drafting rather than rely on exclusive groups like the Quad countries.
- Provide trade adjustment assistance to help developing countries cope with the social dislocation of implementing trade rules.
- Provide Most Favored Pricing to ensure that TNCs do not take advantage of monopolies (often through TRIPS) to charge higher prices in developing countries that can least afford them.
- Protect food security though exemptions on trade liberalization relating to domestic production of foodstuffs.

One of the main trade reforms demanded by developing countries is technology transfer and technical assistance focused on three critical areas in which capacity is lacking: negotiations, implementation, and infrastructure.

Developing countries have limited capacity to negotiate because their trade missions are understaffed and lack resources and expertise. Many countries have a single official in Geneva representing interests at the WTO, WHO, ILO, and other UN agencies. Almost half of the 42 African members do not even have a single representative in Geneva. In contrast, developed countries have large staffs with infrastructure of technical support often supplied by corporations. There is a need for a technical assistance fund and/or an

office in Geneva to provide resources for technical and legal advice to developing countries on negotiations, drafting agreements, dispute settlements, and other WTO issues.

In terms of implementation, the World Bank has estimated that the LDCs would have to have to allocate an entire year's development budget in order to implement reforms to make the UR trade rules functional. These include reforms in sanitary standards intellectual property practices, customs valuation and import licensing, and other issues. These rules were based on the existing laws in place in most developed countries and therefore impose no additional burdens on these countries. Related to implementation is the lack of infrastructure capacity of developing countries. Economic infrastructure (transportation, communications, border controls) and social infrastructure (education, technology, skills training) have always been linked to public sector investment, which has plummeted in developing countries as a result of the debt burden, structural adjustment programs, and decline in foreign aid.

In addition to transfer of knowledge and capacity, developing countries have requested aid for trade adjustment assistance to workers displaced by changing trade patterns. These include unemployment benefits, job training and education, and other benefits commonly provided in developed countries. The WTO makes no provision for providing trade adjustment assistance for developing countries, nor does it consider such programs in developed countries as subsidies or non-tariff barriers. As a result, the countries with the highest unemployment, the greatest negative impacts on workers from trade reforms, and the least capacity to develop competitive and job-creating industries are the ones without trade adjustment assistance to aid displaced workers.

Another specific reform that has been suggested is the concept of Most Favored Pricing. Similar to MFN, this policy would require TNCs to extend similar pricing to all WTO members. MFP targets the common practice by TNCs, especially drug companies, of charging more in developing countries than in developed countries despite equal costs of production, because in the latter they face greater competition as well as pressure from the public and national health systems. With TRIPS and the consolidation of large TNCs in food production and pharmaceuticals, this practice has become more common.

Mandating MFP would simply require TNCs to grant the same benefits to consumers as they themselves gain from the WTO's free trade rules.

Finally, developing countries have requested special protection for domestic food security. Their position is that food produced for domestic consumption and small farms should be exempt from liberalization to safeguard the fragile food security of these countries and protect the livelihoods of the rural population. This could be created as a stand-alone item or by amending the Agreement on Agriculture. The food security safeguard is seen not only as a basic human rights issue for impoverished rural communities, but also as a counterbalance to years of developed country protectionism in agriculture that have placed developing countries at a competitive disadvantage,

Developing countries have begun to express strong opposition the lack of balance and fairness in the WTO system, as illustrated by their positions at the recent Ministerial meeting in Seattle. They argue the developed countries have written the global rules of trade without their input, and that the benefits have largely flowed to Northern countries and companies. The concept of free trade plus aid is intended to level the playing field while still remaining within the basic free trade framework of the WTO. While some may argue that concepts such as technology transfer and funds for trade adjustment are merely redistributive devices that unfairly burden developed countries, the entire basis of neoliberal trade theory presupposes a level of fairness in international competition that is lacking given the advantages that developed countries have gained from past protectionism.

C. WTO Enforcement

C.1 WTO Enforcement Procedures

The WTO has very strong enforcement procedures through the Dispute Settlement Understanding (DSU), which covers all WTO agreements. These procedures include the right to complain against violations, a speedy mediation and adjudication process, and severe penalties to ensure compliance on the part of the losing party. The dispute

settlement procedure of the WTO has the following stages: consultation, panel investigation and report, appellate review, adoption of decision, and implementation.

When a complaint is brought against a WTO member, the parties first enter a consultation and mediation process. This process plays an important filtering role in terms of pressuring parties to settle and avoid a panel. If the dispute cannot be resolved, a panel of three or five trade experts reviews the case in closed-door hearings open only to the disputants. All documents, briefs, and hearings are confidential. The panel issues a ruling, which can be appealed to the Appellate Body, consisting of seven appointed judges. The findings of the panel or Appellate Body, as the case may be, must be adopted without amendment unless rejected by consensus of WTO members. Losing parties have three choices: change the offending law to conform to trade rules, pay permanent compensation to the winner, or face approved and non-negotiated countervailing trade sanctions. Most countries, including the US, have official policies of changing their laws to conform to WTO decisions.

In its first five years of existence, 170 cases have been brought into the WTO dispute settlement procedures, generally by the US or the EU. Developing countries face a marked disadvantage in participating in the WTO dispute system because they lack the technical skills and resources to present complaints and also may be reluctant to challenge powerful countries that control access to global finance and lending through the IMF and World Bank. Moreover, civil society groups are denied access to WTO proceedings even if they were instrumental in establishing the challenged law or regulation. In fact, even states at the sub-federal level are denied participation in WTO proceedings. The absurdity of this can be seen in the fact that the state of Massachusetts was not present at a WTO panel challenging its law not to give public contracts to companies that do business with Burma, modeled on anti-apartheid laws. Massachusetts was represented by the US government, which opposed the law in the first place. Needless to say, the law was ruled to violate GATT principles. It should also be clear that human rights and environmental laws, like the Clean Air Act, are not. These citizen-led democratic efforts to promote values other than trade and economic efficiency have been consistently struck down by secret WTO panels whose procedures are closed to everyone except disputing state party representatives.

Thus far every single environmental or labor regulation that has been challenged in the WTO has been found to violate the rules of free trade, despite the fact that most of these laws are clearly not forms of disguised protectionism since they were drafted and promoted by citizens groups over the objections of industry and the government. The WTO's remarkable record shows the bias against human rights and other "non-trade" norms inherent in the WTO system.

This bias has several sources. First, as discussed above, trade law does not recognize human rights principles but instead considers them to be non-tariff barriers to free trade. This constitutes an impassable theoretical and practical obstacle, for if human rights principles have no value in the free trade regime, then their implementation and enforcement cannot be achieved through the trade framework. Second, the few exceptions that do exist in WTO jurisprudence are extremely narrow and tend to be interpreted very strictly by trade bureaucrats sitting on adjudicative panels. Third, panelists have no expertise in non-trade issues such as human rights and have tended to view them as either irrelevant or dangerous to free trade principles. And fourth, the proceedings of WTO panels are secret and anti-democratic, depriving civil society groups and the public from any participation in decisions with enormous impacts on their welfare. These latter points are examined in more depth below.

C.2 Human Rights as a Barrier to Trade

The Havana Charter, the blueprint for the failed International Trade Organization, allowed for members to take measures against "unfair labor conditions." GATT contains no similar blanket provision. Any restriction on trade based on human rights considerations constitutes a prima facie violation of free trade principles embodied in GATT Articles I (MFN) and III (national treatment). The very first case decided by a WTO panel made clear that health, environmental, or other non-trade values had no place in the WTO system.

In early 1996 Venezuela brought a case against the US Clean Air Act after the Venezuelan oil industry had failed in a similar challenge in US court. Venezuela argued

that the emissions requirements in the Clean Air Act put Venezuelan domestic refineries at an unfair disadvantage because their gas was not as clean as that produced in US domestic refineries. The WTO upheld this challenge, ruling that the Clean Air Act violated the national treatment standard requiring similar treatment of like domestic and foreign products. The fact that the US law reflected a democratic consensus to prioritize health and environmental concerns over cheaper gas was not relevant to the WTO panel. Rather than face $150 million in trade sanctions, the US changed its law to allow dirtier gas into the country. This result appears to contradict the consumer choice element of neoliberal economic theory.

Another case with negative human rights implications was the Caribbean Banana case. Lobbied by TNCs like Chiquita, the US challenged the EU's policy of granting trade preferences to bananas grown by former colonies to enable local companies to compete internationally. The WTO ruled that the preferences violated MFN and authorized the US to impose $200 million in countervailing duties. The EU dropped its policy, resulting in loss of livelihood and unemployment for thousands of Caribbean workers dependent on preferential trade with the EU.

These and similar cases overturn key principles of multilateral environmental agreements that protect the environment through trade discrimination, such as the Montreal Protocol on Substance that Deplete the Ozone Layer (1987) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989). As discussed earlier, the Beef Hormone case eviscerated the Precautionary Principle, a linchpin of numerous environmental laws including the Rio Declaration. It therefore appears that no trade-related attempts to protect human rights or the environment can withstand challenge in WTO dispute mechanism. This has grave consequences for global governance given the enormous and increasing impact of trade on human rights and environmental concerns.

C.3 Human Rights Exceptions to Free Trade?

The only barriers to trade permitted within the WTO framework are measures that fall within the limited exceptions specifically provided for in Article XX. These are

exceptions for public morals in Article XX (a), for human, animal, and plant life in XX (b), for prison labor in XX (e), and for conservation of exhaustible resources in XX (g).

However, any attempt to rely on Article XX exceptions to free trade encounters three significant obstacles. First, WTO panels have in the past adopted a very narrow interpretation of these exceptions. Second, even if a trade-restrictive measure falls within one of the exceptions, it must still pass a narrowly defined "necessity" test. And third, WTO panels have adopted a distinction between products themselves and the processes used to produce the product (PPMs) in holding that trade restrictions based on PPMs violate MFN and national treatment of like products.

The prison labor exception is narrowly tailored to address a specific practice, and cannot therefore be used to cover broader labor rights violations. It is conceivable that trade-restrictive measures against states that violate labor rights could fall within the public morals exception of Article XX (a). This argument has been strengthened by the adoption of the 1998 ILO Declaration of Fundamental Principles and Rights at Work, which requires compliance with certain core labor standards as a condition of membership for all 130 members.[10] Likewise, human rights violations could be considered to offend public morals and trigger an exception to WTO rules given universal recognition of human rights law by countries around the world. Moreover, exceptions based on human rights and labor rights should not run afoul of the WTO's prohibition on measures that constitute disguised protectionism and attacks on comparative advantage. It hardly makes sense that a country should be allowed to adopt a national policy of compelling children to work in order to gain comparative advantage and the protection of the WTO.

However, there is no WTO jurisprudence interpreting Article XX (a) to cover labor and human rights violations. At its 1996 Singapore Ministerial Conference, the WTO rejected taking an active position on labor standards by referring such issues to the ILO. Since the ILO has no jurisdiction WTO trade rules with labor impacts, that avenue seems closed. Moreover, on the strength of developing country concerns over disguised protectionism, the Ministerial meeting at Seattle soundly rejected US attempts to

[10] List ILO Declaration.

introduce the issue of labor rights into the WTO agenda. It is extremely unlikely that a WTO dispute panel would disregard the express political will of the members and allow labor and human rights measures through the back door of legal interpretation, especially when past panels have demonstrated clear hostility to such concerns.

Even if a human rights measure somehow fit within an Article XX exception, it would still have to pass the "necessity" test, a finding that the measure is not only necessary for its human rights purpose but also the least trade-restrictive alternative possible. This test balances human rights and free trade, a utilitarian act hostile to the very purpose of human rights. Not only does test fail to recognize the high priority which rights must hold in any policy determination, but in fact turns this on its head, and privileges trade values. In other words, WTO panelists with a built-in bias favoring trade values can substitute a less effective human rights measure in place of a more effective, democratically selected human rights measure, on the basis of the measure's effect on trade. Clearly this defeats the measure's purpose of protecting human rights in the first place, and also renders the Article XX exception meaningless.

The Tuna-Dolphin case in 1989, decided under the GATT dispute system, was the first to introduce the products-PPMs distinction. The US government was forced against its will to sanction Mexico after a US court agreed with environmental groups that allowing the sale of Mexican tuna violated the Marine Mammal Protection Act. Mexico then challenged the US policy as a violation of GATT. In one of the most important decisions on the environment, the GATT panel ruled that, although the US embargo fit within the protection of animal life exception in article XX, it still violated GATT because Mexican tuna could not be discriminated against on the basis of the manner in which it was caught, or the process of production (PPM). The panel's decision essentially closed the door on using Article XX to protect the environment or uphold labor standards, since by definition violations occur during the production process. Otherwise how can clothing made by slave labor be distinguished from other clothing?

A similar case, the Sea Turtles Case, involved a challenge by India, Malaysia, Pakistan and Thailand to US law that all shrimp sold in the US must be caught with inexpensive turtle excluder devices. A panel of three trade bureaucrats with no environmental

expertise ruled that the law violated GATT MFN and national treatment principles by treating like products differently and discriminating against shrimp caught without turtle excluder devices.

Nothing in the text or negotiating history of GATT justifies the products/PPM distinction. In fact, several GATT panels upheld trade-restrictive measures relating to intellectual property rights violations, which are a form of PPM since the end products look the same. The bottom line is that WTO trade rules, as interpreted by the dispute panels, recognize the protection of intellectual property as an important value that justifies restrictions on free trade but not human rights or environmental protection.