

TRADE LAW AS A FORM OF HUMAN RIGHTS PROTECTION?

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Many argue that there are linkages between trade and human rights regimes. The author takes the argument one step further and enquires whether trade regime itself can be termed a form of human right protection. In addition to examining individual WTO Agreements and provisions like Article XX of GATT, the author also argues how the broad principles underpinning the trade regime, like non-discrimination, right of market access and right of participation go on to further human rights. She also addresses some concerns as to how trade and human rights cross roads at times, like the case of liberalisation of essential services.¹

I. INTRODUCTION

The trade framework seeks to ‘expand the production of and trade in goods and services’.² This paper argues that while this imperative continues, the trade framework is not (or at least is no longer) ignorant of the political and social factors that undoubtedly pervade the broader framework of international law and that such factors now equally permeate trade regulation.

The above claim is not controversial. However, this paper takes the argument one step further to explore whether it is not just the line between trade and politics that has blurred but whether the distinction between trade and the human rights protection regime has likewise diminished as a result of promoting equal participation. In particular, it is argued that the ideology of contemporary trade law is not premised unconditionally on the promotion of free trade. To make this argument, this paper refers to the various measures taken to protect access to and participation in the framework of international trade, and discusses whether these measures can be viewed as a form of human rights protection.

A definitional contrast is made at this point between trade restrictions, which regulate the trade framework, on the one hand and the ideology of free trade, which aims to liberate participants in the trade framework from any constraints whatsoever on the other. Having made this distinction, this paper can determine whether the contemporary framework of international trade law is underpinned by the free trade philosophy, or is perhaps influenced by multiple objectives (certainly there is nothing to preclude a finding that trade regulation seeks to promote free trade and principles of non-discrimination and equality).

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¹ Abstract supplied by the Editors.

² P. Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 14 EUR. JOUR. OF INT’L L. 121 (2002).

Ultimately, the question posed here is the extent to which the contemporary trade framework is only preoccupied with free trade between States, rather than focusing on protecting equal access and participation of States and non-State actors, including individuals.

Trade restrictions, which may favour individuals, place express legal obligations on States. The specificity with which such restrictions are expressed is in stark contrast to the indeterminate nature of human rights obligations, under international law. To the extent that trade restrictions are viewed as protecting the rights of individuals in promoting equal access and participation, it can be argued that trade law is a more developed (in terms of legal clarity as to the nature and scope of the right) subset of human rights protection.

This paper is divided into four parts. First, there will be brief reference to the coincidence between the ideology of international trade and human rights law. Second, there will be an overview of the restrictions under current trade law that can arguably be interpreted as protecting human rights. Third, the paper will consider whether it is accurate to claim that trade law defers to human rights principles and finally, some conclusions will be drawn as to the extent that international trade law can be described as a form of human rights protection.

II. A COINCIDENCE BETWEEN THE IDEOLOGY OF INTERNATIONAL TRADE AND HUMAN RIGHTS?

Traditionally, the ideology of trade was directed toward the management of trade security and ‘the allocation of resources’.³ Throughout the twentieth century there was also the emergence of a parallel framework to manage human security and the allocation, and protection, of human rights. In the period after the Second World War the paths of the trade and human rights frameworks collided because the impact of insular ‘beggar thy neighbour’ economic policies was seen to exacerbate the large scale breaches of human security that had occurred.⁴ Therefore, the measures taken to guard against future human rights breaches inevitably would require reconsideration of the trade framework. On that basis, it can be said that the ideology underlying both contemporary human rights and trade regimes date from this period⁵ and that the ideology of both frameworks is to maximise the enjoyment and potential fulfilment of participant rights, by requiring compliance with certain fundamental, even non-derogable, obligations owed between the participants.

³ Fiona Macmillan, *Looking Back to Look Forward: Is There a Future for Human Rights in the WTO*, 6 INTERNATIONAL TRADE LAW & REGULATION 163 (2005).

⁴ A. Warman, *Rights and Democracy* in HOWSE & MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION 5 (2000) (HOWSE & MUTUA).

⁵ *Id.*, 5.

Another way to view the coincidence between trade and human right is from the perspective of Nobel laureate economist and philosopher Amartya Sen, who noted that while the implementation of free trade principles has led to “unprecedented increases in overall opulence . . . the contemporary world denies elementary freedoms to vast numbers - perhaps the majority - of people”.⁶ Sen argued that if the framework of international trade was to continue it could not be in ignorance of this fact because “elementary freedoms are not only the primary ends of development, they are also among its principal means”,⁷ suggesting there is a relationship of co-dependence between free trade principles on the one hand and elementary freedoms, or human rights, on the other. In order to protect that relationship, and thereby the trade framework, restrictions have been adopted that seek to protect the interests of participants. Trade restrictions operate in accordance with Sen’s philosophy that “economic facilities can help generate personal abundance as well as public resources for social facilities”⁸ and that “freedoms of different kinds can strengthen one another”.⁹

III. TRADE RESTRICTIONS AS HUMAN RIGHTS PROTECTION

A. PUBLIC MORALS EXCEPTION

The trade framework is primarily based upon legal obligations, although this does not discount the influence of morals in the determination and expression of legal constructs, as seen in the prohibition on child labour in International Labour Organization (ILO) Convention 182.¹⁰ The history of trade law, both before and after the Second World War, is fecund with instances where non-economic influences have shaped the development of the trade framework. The prohibition of the slave trade is notable as is the banning of the opium trade and the requirement for compensation and the regulation of expropriation.

An early attempt at legal recognition of some form of moral responsibility, within the trade context, was attempted with the 1922 Genoa Conference Draft Agreement on Import and Export Prohibitions, where a public morals exception was suggested. The Agreement was never adopted, but subsequently the International Trade Organization (ITO) and Havana Charter also used rights-based rhetoric requiring Members to ‘take fully into account the rights of workers’.¹¹ A cynical

⁶ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) 3-4.

⁷ *Id.*, 3-4.

⁸ *Id.*, 10-11.

⁹ *Id.*

¹⁰ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1997, UN Doc. C182.

¹¹ Article 7, Havana Charter for an International Trade Organization, March 24, 1948, available online at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (last visited on June 21, 2010).

interpretation would be that the references to individual rights are economically motivated, because a greater number of participants arguably maximises the economic output, but there is nothing to preclude protection of both the economic advantages of wider participation and the rights of participants.

The General Agreement on Tariffs and Trade (GATT),¹² which arose from the ashes of the ITO, clearly established that the trade framework being created was governed by more than just economic incentives. Article XX provided by way of general exception that nothing in the GATT was to be 'construed to prevent the adoption or enforcement by any contracting party of measures (a) necessary to protect public morals; or (b) necessary to protect human, animal or plant life or health'.¹³ Primacy was therefore being afforded to States adopting legislative measures that protected public morals, over the assurance of free trade.

Article XX required that Members satisfy one of the listed exceptions, of which (a) and (b) are the most relevant here, and that measure in question be in accordance with the chapeau direction that the measures not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

¹² General Agreement on Tariffs and Trade, 1994 available online at http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm (last visited on June 21, 2010).

¹³ The full provision states: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labour; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved; (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination; (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The contracting parties shall review the need for this sub-paragraph not later than 30 June 1960."

between countries where the same conditions prevail, or a disguised restriction on international trade'.¹⁴ This meant the risk arose that the chapeau could defeat the substance of Article XX, as arguably occurred in notable pre-World Trade Organisation (WTO) disputes such as the so-called '*Thai Cigarette*'¹⁵ and '*Tuna Dolphin*'¹⁶ disputes that "construed Article XX so restrictively as to almost read it out of the GATT, or to marginalize it".¹⁷

Despite a restrictive interpretation being given to Article XX under the GATT arrangement, there was still perceived to be the need for a public morals exception when the framework shifted and the WTO was established, for example as found in Article XIV(a) of the General Agreement on Trade in Services (GATS).¹⁸ On that basis, the restrictive interpretation given to Article XX should not be viewed as undermining it as a form of rights protection. Indeed, the cautious approach in applying Article XX may strengthen its credibility – given that the *chapeau* was still prioritising non-discrimination (which thus relates to protecting the right to participation) and that overuse of the exception may otherwise imply that Article XX is easily abused and thus not a true indicator of where public morals are prioritised before free trade.

Certainly, the dispute settlement mechanism (DSM) of the WTO has sought to pre-empt abuse of Article XX. In the *European Community - Asbestos*¹⁹ decision the DSM²⁰ required that before Article XX could be invoked, there needed to be a sufficient nexus between the measure taken by the respective Member and the policy in question. Given the indeterminate nature of human rights, which would make it difficult to identify a clear link between the particular policy and the human right that was allegedly being breached, Article XX may in fact establish too high a threshold to be useful in terms of protecting human rights. Alternatively, the need for greater specificity in expressing those human rights potentially affected by trade policy so that Article XX may be applied could prove an incentive for more careful consideration of exactly how trade and human rights inter-relate. Thus, Article XX may in the future be a powerful tool with which to promote and manage that relationship, and in particular define with specificity those human rights affected by trade.

¹⁴ Article XX, GATT, *supra* note 12.

¹⁵ Panel Report, *Thailand - Restrictions on Importation of And Internal Taxes on Cigarettes* (United States), DS10/R - 37S/200 (November 7, 1990).

¹⁶ Panel Report, *United States — Restrictions on Imports of Tuna* (Mexico), DS21/R (September 3, 1991) (US – Tuna).

¹⁷ Warman, A. 'Rights and Democracy' in HOWSE & MUTUA *supra* note 4, 11.

¹⁸ *I d.*, 3.

¹⁹ Panel Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* (Canada), WT/DS/135 (September 18, 2000); Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, (Canada), WT/DS/135 (March 12, 2001) (EC – Asbestos).

²⁰ *Ed*: The author uses the phrase DSM to denote the entirety of the mechanism (including Panels and the Appellate Body) envisaged under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Commentators such as Howse link the origins of Article XX to ‘the idea of *ordre publique* in private international law’ and relate Article XX “to the fundamental public policies of a society, and not merely order in the sense of civil peace and public security”.²¹ Supporting that approach is the determination of the Appellate Body in *EC - Asbestos*²² that it was ‘vital or important common interests or values’ that would justify invoking Article XX. Yet, and despite the fact that Article XX is linked with common values, there continues to be debate as to the scope and nature of the public morals exception and in particular the extent to which, as McCrudden²³ argues, the term has to be interpreted to include human rights.

Decisions under the DSM can be used both in support of and to dispute the extension of Article XX as a tool for protecting human rights. In *EC - GSP*²⁴ the EC had sought to invoke Article XX in order to defend a measure that offered tariff incentives in return for cooperation with its drug combating program. The fact that the EC was unsuccessful *prima facie* suggested that free trade was being prioritized over the rights of those individuals that could have benefitted from implementation of the drug trafficking prevention programme. An alternative view highlights that the decision promoted and protected equal participation (and thus non-discrimination), which is likewise a right of individuals that must be protected. When a more nuanced view is taken of the broader context in decisions by the DSM to apply Article XX (or not) what may appear to be a judgment in favor of free trade can instead (or at the same time) be a judgment in favor of human rights. A hypothetical example given by Eres cites the potential that imposing import bans due to unregulated child labor practices within the exporting State may place those children at greater risk given that such a ban can further isolate the children in question from international protection – and that there is the potential for the increased use of child labor to compensate for the loss of income resulting from the ban.²⁵

B. PARTICIPATION PROTECTION STRATEGIES

The Article XX exception theoretically provides a basis on which States can ensure the regulatory aspects of the trade framework do not undermine public morals, which is arguably a mechanism for the protection of human rights. A second

²¹ R. Howse, & M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Montreal: International Center for Human Rights and Democratic Development, Policy Paper, 2000) (Howse & Mutua, 2000).

²² *EC - Asbestos*, *supra* note 19.

²³ C. McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of ‘Selective Purchasing’ Laws under the WTO Government Procurement Agreement*, 3 J. INT’L. ECONOMIC L. (1999) 8.

²⁴ Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries* (India), WT/DS/246 (April 7, 2004).

²⁵ Tatjana Eres, *The Limits of GATT Article XX: A Back Door For Human Rights?* 35 GEORGETOWN INT’L L. J. 18 (2004).

restriction within the trade framework that can be interpreted as protecting human rights is the adoption of strategies that seek to promote widespread participation.

1. Poverty Reduction Strategy Papers

Poverty Reduction Strategy Papers (PRS Papers) provide the basis on which the International Monetary Fund (IMF) and World Bank lending is granted. By 2008, seventy States had lodged papers with the IMF, demonstrating wide acceptance of the concept.²⁶ PRS Papers are drawn up in consultation with civil society and other stakeholders to determine strategies for reducing poverty while simultaneously promoting sustainable economic growth that, in turn, is necessary for widespread participation in trade. The strategies adopted in the Papers are not solely for the benefit of the individual State and have wider economic impact. To ensure that the interests of all potentially affected parties are protected, the IMF and World Bank exercise significant supervision at the stages of negotiation of the PRS papers as well as during their implementation. It is often argued that owing to this stringent supervision “States are likely to find themselves with little bargaining power *vis-à-vis* the ... IMF and World Bank”.²⁷

The justification in allowing supervision by the IMF and World Bank, with the effect of superseding the State’s discretion in determining its economic policy, is based on the argument that there is a link between the rights of individuals and stakeholders on the one hand and a country’s economic growth on the other. Among others, the Office of the High Commissioner for Human Rights (OHCHR) recognises that stakeholder participation in the PRS Paper process is due to the link between State economic policy and broader human rights concerns.²⁸ The input of multiple stakeholders, in determining the relevant strategy, is viewed as a pre-condition to “the macroeconomic stability that is understood to be necessary for the full enjoyment of economic, social and cultural rights”.²⁹

2. Free Trade Restrictions

The imposition of trade restrictions, which inhibit free trade in its purest sense, has led scholars such as Petersmann to argue that there is a linkage between human rights and trade law.³⁰ Rather than adopting a similar position here in order to argue that a nexus exists between trade and specific human rights in accordance with linkage theory, this paper seeks to show that the relationship between the trade framework and the broader concept of human rights is one of overlap. In

²⁶ J. Tooze, *Aligning States’ Economic Policies with Human Rights Obligations* 2(2) HUMAN RIGHTS LAW REVIEW 230 (2002).

²⁷ *Id.*, 242.

²⁸ *Id.*, 243.

²⁹ *Id.*, 245.

³⁰ E. Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: A Rejoinder to Alston*, 19 EUROPEAN J. INT’L L., 2 (2002) (Petersmann).

doing so, the analysis seeks to assist in articulating the relevant human rights. For example, many of the so-called social, cultural and economic rights are often given little practical implementation. Where trade restrictions are imposed that aim to protect the right to food or the right to healthcare, there is evidence that such a human rights exist at more than just a theoretical level. Reference to several of the restrictions imposed in the WTO context will bear this point out, in addition to illustrating the measures taken to promote equal participation, which it is argued here is itself evidence of an overlap with human rights protection.

a). Agreement on Agriculture

The Agreement on Agriculture came into effect with the establishment of the WTO and imposed regulations in three primary areas relating to agricultural trade: domestic support, market access and export subsidies.

The first area was domestic support whereby States provide fixed payments to local producers, which has the effect of undercutting foreign producers. Prior to the regulations, States retained and exercised their discretion in extending domestic support often to the detriment of other participants in the trade framework. The second area relates to market access, and refers to the reduction of tariff barriers to trade. Tariff income is a significant source of income for ‘least-developed countries’, which were thus granted exclusion from the reduction in the 1995 Agreement.³¹ The final area of regulation related to export subsidies which required developed countries to reduce export subsidies by at least 35% in the period between 1995 and 2000. This restriction was criticized for permitting developed countries to continue to subsidize farmers in a manner that developing countries were unable to sustain.

Article 12 requires States to give “due consideration to the effects of [any] prohibition or restriction on importing Members’ food security”. Despite this, there has been criticism that in effect, the Agreement on Agriculture allowed States to disguise isolationist measures in the rhetoric of protecting individual participants. This risk is potentially mitigated by the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries,³² which was also adopted during the Uruguay Round, whereby Least-Developed Countries and Net Food-Importing Developing Countries were to be compensated if negatively impacted upon due to higher food prices including those arising as a result of the 1995 Agriculture Agreement.

³¹ Instead tariffication was adopted for least-developed countries, whereby a ceiling was instituted on tariffs that could not be raised in the future.

³² WTO, Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries *available at* http://www.wto.org/english/docs_e/legal_e/35-dag_e.htm (last visited on June 22, 2010).

b). General Agreement on Trade and Services

The General Agreement on Trade and Services (GATS) has been one of the most widely criticised aspects of the WTO framework from the perspective of the potential negative impact on human rights. Liberalisation of services such as health and education has come under particularly severe criticism. Prior to GATS, given the nature of cross border supply of services, governments were able to avoid responsibility in ensuring that there was equal access to the market in essential services both on the demand side and the supply side. On the other hand, the danger involved in liberalising essential services is notoriously illustrated by the Cochabamba experience where the Bolivian government ceded control of water services in the town of Cochabamba to a private company that rapidly raised prices.³³

At one level, relinquishing control of what are otherwise considered to be the State's obligations in pursuit of financial gain suggests that the GATS promotes a framework in which participants fulfil self-serving interests to the detriment of any party without the power to protect themselves. At another level placing responsibilities typically exercised by the State into the trade domain, and effectively subject to tender, shows the extent to which trade framework integrates with other aspects of society. Within this scenario, social responsibility is shared by States and non-State actors. While lessons such as the Bolivian experience highlight the potential for abuse in the exercise of this form of substituted governance, it would be simplistic to assume that all private service providers would act to the detriment of their target consumers.

c). Trade Related Aspects of Intellectual Property Rights

The agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)³⁴ creates an anomaly in the context of discussing trade inhibitions and human rights protection. On the one hand the TRIPS is the sole instrument within the trade framework that expressly seeks to protect individual rights. On the other hand, it is intellectual property that is protected, which by its very nature may inhibit rights of access, the most serious concern being restrictions on access to pharmaceutical products, which in turn may undermine the right, if it exists, to healthcare. Intellectual property arguably instils financial barriers, prevents low-cost generic manufacturing and limits parallel imports.

TRIPS seeks to address this anomaly by attempting a balance between encouraging participation, in recognising the individual party's intellectual

³³ The company in question, Bechtel, brought a claim against the Bolivian Government for loss of profits after the Government acquiesced to public protest and resuming control over water services. The company and the Government eventually arrived at a mutual settlement given the mounting international pressure in the matter.

³⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (last visited on June 22, 2010).

property, while confirming that the protection given is not to be to the prejudice of the “transfer and dissemination of technical knowledge [...] in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.³⁵ Article 8 states that Members may “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided such measures are consistent with the Agreement”, while Article 27 excludes patents for inventions required to protect human, animal or plant health and necessary to avoid serious environmental damage. By implementing a minimum in regulation, the TRIPS does not prioritise the rights of one individual over another. Instead, the TRIPS acknowledges that the rights of both must be contemplated.

TRIPS establishes a positive obligation on States to implement the provisions therein, without any restriction on the adoption of more restrictive standards. When the TRIPS was negotiated there was some fear that more powerful States or beneficiaries or holders of intellectual property may institute overly restrictive protections.³⁶ The concern relates to the implementation of the TRIPS, and the extent to which the individual rights to intellectual property may be allowed to trump social concerns.³⁷ TRIPS affords recognition of innovation and arguably fosters a collaborative environment for science and technological advances, as well as international cooperation and knowledge transfer for the benefit of the community globally.

Thus, it can be said that the TRIPS encourages greater participation in protecting the interests of participants while promoting knowledge transfer. However, there is the counter-argument that although TRIPS protects the intellectual property of individuals, it “dismisses the knowledge system and innovations of indigenous peoples and farmers because they innovate communally over long periods of time”.³⁸ When a cumulative process to knowledge creation and ownership is ignored there is the risk that the TRIPS framework fails to recognise grass-roots contributions and frustrates low-level community participation and access to protection. Therefore, the benefits of protection of intellectual property under TRIPS,³⁹ come with certain caveats. First, the framework only protects the intellectual property in creation and invention that arises from a

³⁵ Article 7.

³⁶ It has been used primarily against developing States. For example the proposed boycott threatened by the US against South Africa who sought to introduce laws that would permit parallel imports to increase drug access: Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies* 24 HUMAN RIGHTS QUARTERLY 1 (2002) (Dommen).

³⁷ Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, (EC) WT/DS114/R (March 17, 2000).

³⁸ Dommen, *supra* note 36.

³⁹ WTO, *Understanding the WTO: The Agreements: Intellectual property: protection and enforcement*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited on June 22, 2010).

fixed methodology. Secondly, TRIPS presumes that the intellectual property in a creation or invention is the property of just one party.

In relation to the ownership of particular knowledge, Dommen argues that TRIPS does not displace traditional approaches and that Article 27 in fact leads to ‘effective sui generis’ recognition that certain inventions and creations cannot be the property of one party.⁴⁰ He argues that the TRIPS can encourage greater cooperation, knowledge sharing and participation because Article 27 exempts certain inventions from patentability with a view to securing interests of wider humanity, which in turn has the effect of establishing communal ownership of the invention in favour of the wider international community. Certainly, there is recognition that certain types of technology cannot be viewed under a traditional lens of ownership and possession. For example the International Union for the Protection of New Varieties of Plants encourages stricter measures and stronger monopolization policies while retaining deference to the Article 27 principle in its policies.

d). Agreement on the Application of Sanitary and Phytosanitary Measures

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) imposes minimum health standards to ensure the protection of plants, humans and animals but seeks to pre-empt the use of manipulated health and safety requirements as a non-tariff trade barrier. It permits States to adopt trade restrictions pursuant to the precautionary principle⁴¹ to ensure food safety, animal and plant health. However, Article 5 of the SPS places a burden on Members to prove, on a scientific basis, that a safety risk exists, requiring regulation in order to sustain the measure.⁴²

In *European Community – Measures Concerning Meat and Meat Products*⁴³ the WTO DSM found in favour of the USA and Canada, who sought prohibition on the import of beef from Europe that had been injected with certain hormones it claimed was carcinogenic. The DSM found that in the circumstances there was an insufficient scientific basis to justify the measure, but the determination was condemned by environmental, human rights, health and food lobbyists as failing to accommodate alternative non trade-focused views. In that case the DSM failed to consult with public interest groups as to the scope of application of the precautionary principle in the trade context, appearing to afford the free trade principle primacy.

⁴⁰ Dommen, *supra* note 36.

⁴¹ The precautionary principle provides that protective action can be taken before there is complete scientific proof of a risk.

⁴² Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (USA), WT/DS26/AB/R (January 16, 1998), ¶¶ 123-125.

⁴³ *Id.*

However, subsequent disputes have taken the alternative route and promoted the need for safety and health standards, have sought assistance from *amicus curiae*, referred to the safety standards in the particular State and more heavily relied on scientific findings to establish the ‘appropriate level of protection’⁴⁴ in each case. As with the trade restrictions above, the SPS shows that ‘legitimate public interests’ are being protected within the trade framework.⁴⁵

The four examples above, of restrictions on an uninhibited policy of free trade, illustrate instances where trade regulation seeks to protect equal participation, while also ensuring that the fulfilment of economic rights is not to the detriment of satisfying what are, by implication, therefore recognised as fundamental rights such as food, water and healthcare. It can be said that trade regulation thus strengthens the case that certain human rights are recognised as fundamental and that there is an obligation on the broader international community, and not just States, as to maintenance. To that extent trade law can be seen as a form of human rights protection.

3. Labour Protections

In theory, labour protections would be a substantial concession to individuals in the trade framework as they regulate the conditions of labour that may be permitted in a State. Labour protections are often considered the domain of the International Labour Organisation (ILO), as was declared for example at the 1996 Singapore Ministerial Declaration,⁴⁶ but in practice the power of States and companies on the one hand and the ILO on the other has undermined the scope of protection afforded. Howse and Mutua note that, amongst other issues, the ILO has no dispute settlement or enforcement mechanism to assist it, its attention is often distracted by the myriad of activities within its mandate that detract from rights protection and the ILO has a bilateral structure that is unsuitable for seeking the necessary multilateral cooperation from Members.⁴⁷

There are, in fact, few restrictions relating to labour in the WTO framework. This is unsurprising given that the ability to price goods and services competitively as a consequence of the lack of restriction on labour practices imposed by the WTO is in accordance with free trade principles. Such competitive products are inevitably likely to be favoured by consumers in comparison to

⁴⁴ Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, (Canada), WT/DS18/AB/R (October 20, 1998) ¶ 199. Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, (Canada), WT/DS135/AB/R (March 12, 2001) ¶ 113–14 (confirming the right of WTO Members to protect human health and safety at the level of protection they deem appropriate).

⁴⁵ Dommen, *supra* note 36.

⁴⁶ Singapore Ministerial Declaration, WT/MIN(96)/DEC (December 13, 1996) available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (Last visited on June 22, 2010).

⁴⁷ HOWSE & MUTUA, *supra* note 17.

domestic goods and services that are priced to reflect internal labour regulations of a more rigorous standard.⁴⁸ Furthermore, trade principles, such as Most Favoured Nation and Production and Processing Methods, are not considered to be subject to restrictions relating to labour standards, so for example in *United States - Restrictions on Imports of Tuna* the DSM found that like products must be afforded equal treatment, regardless of the production method used.⁴⁹

Labour protections that are recognised as human rights in, for example, the International Covenant on Economic, Social and Cultural Rights⁵⁰ are left vulnerable given that States cannot impose trade restrictions on the basis of unsuitable labour regulation and practice in another State. Of course, the fact that the WTO does not provide for any form of labour control is due to the will of Member States, as with the Agreement on Government Procurement⁵¹ that prohibits signatories withholding the award of government contracts on the basis that the tendering party is in breach of internationally recognised labour standards.

States can – and do – respond when there is the perception that human rights relating to labour are being breached. In *EU and Japan – Myanmar Sanctions*⁵² the US State of Massachusetts passed a law barring companies doing business with Myanmar from bidding for major public contracts after the military Government was recognized by human-rights groups and the US State Department as violating human rights. This was challenged by Japan and the EU as breaching the Agreement on Government Procurement but the dispute lapsed after the US Courts struck down the Massachusetts law as unconstitutional. It illustrates, however, that the lack of express regulation does not mean that States will act in their trade relations in a manner inconsistent with human rights protections and such examples, albeit isolated, show the increasing influence of human rights concerns. Thus, it can even be envisaged that the violation of labour rights may be recognised as coming within the Article XX ‘public morals’ exception, especially given the argument that the prohibition on slavery and arguably even child labour are recognised by States as peremptory, and thus non-derogable, norms of public international law.⁵³

⁴⁸ *Ibid*, 17.

⁴⁹ *US – Tuna*, *supra* note 16.

⁵⁰ International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/6316 (1966), Articles 6, 7 and 8.

⁵¹ The plurilateral Agreement on Government Procurement, available online at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (Last visited on June 22, 2010).

⁵² Request for Consultation, *United States of America – Measure Affecting Government Procurement* (EC) WT/DS88 (June 20, 1997); Request for Consultation, *United States of America – Measure Affecting Government Procurement* (Japan) WT/DS95 (June 20, 1997).

⁵³ HOWSE & MUTUA, 2000, *supra* note 21.

IV. DOES THE TRADE FRAMEWORK DEFER TO HUMAN RIGHTS PRINCIPLES?

Both advocates and opponents of a linkage between WTO law and human rights concede that throughout the trade framework there are examples that, if not extending ‘priority to non-economic human rights values’⁵⁴ certainly make reference to those values: including Article XX GATT, Article XIV GATS and Articles 7 and 8 of the TRIPS Agreement. The continuing recognition of non-trade related factors in the WTO framework suggests that their earlier inclusion under GATT, in the post World War Two context that was concerned with limiting the erroneous exercise of State discretion, was not temporally isolated.

GATT was one of several instruments that sought to construct the post World War Two international framework, including the Universal Declaration of Human Rights,⁵⁵ the 1951 Refugee Convention⁵⁶ and the 1948 Genocide Convention,⁵⁷ which all afforded protection to the rights of individuals. In all cases the approach taken initially appears to construct a protective buffer between State policy and its potential effects on individuals so that States were required ‘to stand back from intervening in the areas of human rights or of trade’.⁵⁸ The above analysis suggests that States are now required to be proactive in promoting participation and to take active steps to ensure a balance between free trade and respect for human rights. Thus, in both the post World War Two and contemporary international framework, trade and human rights are not disparate and the protection of individuals is a shared responsibility.

The relationship between the human rights and trade regimes was the basis for Petersmann to note, ‘both human rights and WTO rules are based on non-discrimination; the rule of law; access to courts and adjudication of disputes; promotion of social welfare through peaceful cooperation among free citizens; and parliamentary approval of national and international rules’⁵⁹ to thus argue that a linkage exists. To the extent that a link is thought to exist between trade and human rights, when the rights of individuals are relegated below trade concerns there is criticism and ‘a call to the WTO to recognize the primacy of human rights over international trade law’.⁶⁰

Certainly, intrusion of WTO into areas which were sole domains of States, like intellectual property and health, can be justified only on account of

⁵⁴ Petersmann, *supra* note 30.

⁵⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810.

⁵⁶ Convention relating to the Status of Refugees, 189 U.N.T.S. 150.

⁵⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

⁵⁸ Dommen, *supra* note 36.

⁵⁹ *Id.*, 5.

⁶⁰ *Id.*, 2.

linkages these areas share with trade. Furthermore, given that realistically the support of States is necessary for the success of the WTO framework, it can be seen that States have acquiesced to the WTO exercising a broader mandate – although it is possible to interpret the support given by States with cynicism.

One interpretation is that regulations that promote human rights also allow States to pursue protectionist goals. However, this approach fails to explain regional trade arrangements that adopt rights-focused regulations but that are vehemently opposed to protectionism, such as the African Economic Community, Economic Community of West African States and Common Market for Eastern and Southern Africa.⁶¹ Therefore, the fact that trade regulation may both protect human rights and promote protectionist goals does not undermine the conclusion that there is an overlap between trade regulation and human rights. The more cautious finding that is made here does not go to the extreme of claiming a linkage between trade and human rights, and is instead satisfied with arguing that there is evidence that trade law is influenced by rights protections and not solely driven by the principle of free trade.

Arguing a substantive overlap rather than a linkage, is based on the reasoning that the relevant provisions in trade law do not seek to protect human rights *per se* – and which the OHCHR considers are ‘neutral’⁶² in relation to free trade. Instead, the relevant provisions in trade law address the impact of trade on the exercise of human rights. For example, Petersmann argues that there is a linkage on the basis that the principle of non-discrimination in trade is also found in both the ICCPR and the ICESCR, the Universal Declaration on Human Rights and a majority of international, regional and domestic human rights instruments.⁶³ It is argued here that the principle of non-discrimination as it applies in trade does not affect the provision of benefits found in those instruments, rather it guarantees the opportunity to access those benefits. Indeed, ‘free’ or equal access can lead to one party losing a benefit, which could in turn have repercussions on the human rights of another individual. There is a substantive overlap in that trade does not inhibit access to rights but there is no link in the trade framework with the provision of those rights.

To the extent that the rights of participants in the trade framework are affected by various trade policies, it is submitted that, the response has been in the development and implementation of trade regulation, including the Article XX public morals exception. ‘As citizens become richer they increasingly demand more democracy and civil rights to protect their wealth from the arbitrary actions of governments’⁶⁴ but the above point is borne out because trade law not only

⁶¹ Sisule Fredrick Musungu, *Economic Integration and Human Rights in Africa: A Comment on Conceptual Linkages*, 1 AFRICAN HUMAN RIGHTS LAW JOURNAL 88, 92-96 (2003).

⁶² OHCHR, HUMAN RIGHTS AND TRADE (2003).

⁶³ Petersmann, *supra* note 30.

⁶⁴ John O. McGinnis and Mark L. Movsesian, *The World Trade Constitution*, 114(2) HARVARD LAW REVIEW (2000) 511.

protects the rich, it also seeks to protect the poor from those same ‘arbitrary actions’. If the traditional objective of trade regulation was the management of intra-State relations, an aim of the current trade framework is arguably the minimisation of the negative impact of intra-State relations on non-State actors.

The WTO is neither a legislator nor an enforcer of human rights. As the face of the contemporary trade framework, the WTO is only one aspect of human rights protection within the broader context of public international law. This realisation rationalises the apparent inconsistency where on the one hand the WTO Agreement Preamble seeks to ensure that developing States have the opportunity to ‘secure a share in the growth of international trade that is commensurate with their economic development needs’,⁶⁵ thus prioritising equal access, while on the other hand the WTO framework fails to regulate on matters such as labour protection or gender discrimination, which impact upon access. Instead, it is the ongoing development and implementation of trade law that aims to promote participation and minimise the impact of trade on human rights that shows overlap between – rather than the deference for – trade and human rights.⁶⁶

V. CONCLUSION: TO WHAT EXTENT CAN INTERNATIONAL TRADE LAW BE DESCRIBED AS A FORM OF HUMAN RIGHTS PROTECTION?

This paper has argued that the relationship between trade law and human rights is not one of linkage or even deference – but of overlap. The final section of the discussion considers whether the extent to which there is compatibility means that trade law can be described as a form of human rights protection.

The regulation of so-called ‘free’ trade prevents States from engaging in a ‘race to the bottom’ to implement policies that attract investment at a cost to individuals.⁶⁷ A cynic might argue that States only participate in this framework because any perceived costs in adhering to the regulatory trade framework are offset by the benefits in access to wider markets. However, such a view employs rather a narrow lens of analysis, which fails to acknowledge the much broader framework of international human rights protection whereby States permit the regulation of their domestic policies. Thus, it is not such a remarkable suggestion that States would concede their sovereign discretion in order to promote human rights.

⁶⁵ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (WTO Agreement).

⁶⁶ Warman, A. President ‘Rights and Democracy’ Introduction to Howse, R. and Mutua, M. Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization’ (2000) 2 (McGinnis & Movsesian).

⁶⁷ SANFORD F. SCHRAM, *AFTER WELFARE: THE CULTURE OF POST-INDUSTRIAL SOCIAL POLICY* (2000).

Such a simplistic treatment also glosses over the reality in the WTO as a centralized regulatory body that seeks to compromise between the interests of individuals and States while being subject to the power of influence groups and seemingly irreconcilable, but equally important, considerations such as wage regulation on the one hand and environmental protection on the other.⁶⁸ Despite the difficulties in balancing competing interests in the trade framework there is evidence that the rights of individuals will not be relegated, as in *EC – Asbestos*,⁶⁹ where France’s ban on products from Canada that contained asbestos was deemed necessary to protect human life, pursuant to Article XX GATT, by the DSM.⁷⁰

A second example that illustrates that the rights of individuals are not overlooked by the WTO – and the trade framework generally – seeks to balance the interests of the multiplicity of participants, relates to the DSM. The Marrakesh Agreement and Dispute Settlement Understanding Agreement (DSU) confers jurisdiction on the DSM but without providing for any enforcement mechanism so that regardless of human rights concerns being prioritized by the DSM, States can still elect whether or not to adopt the findings.⁷¹

A lack of enforcement mechanism is unsurprising given that generally the international courts, such as the International Court of Justice, do not have this capacity. Instead, the cumulative provisions of the DSU provide for a ‘multilateral surveillance mechanism to guarantee effective implementation, thus non-repetition, and to ensure that effective satisfaction will result’.⁷² In determining what would be an appropriate response, the DSM will have regard to the specific context and, pursuant to Article 21(8), ‘if the case is one brought by a developing country Member... the DSM shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members’.⁷³ Measures are to be remedial and encourage compliance by, rather than punishment of, the breaching party. For example, arbitration is used to determine the level of sanctions and ‘the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of restrictions or other obligations’⁷⁴ must be paid heed to.

⁶⁸ McGinnis & Movsesian, *supra* note 64.

⁶⁹ *EC – Asbestos*, *supra* note 19.

⁷⁰ *Id.*

⁷¹ It is noted here that the DSB’s jurisdiction is confined within the ambit of WTO law, pursuant to Articles 3(2) and 19(1) of the DSU, which provide that ‘recommendations and rulings of the DSM cannot add to or diminish the rights and obligations provided in the covered agreements’. Arguably, this encourages State compliance given that there is no scope for the DSB to encroach into policy determinations outside its jurisdiction.

⁷² Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) *EUROPEAN J. INT’L L.* 753, 781 (2002).

⁷³ Article 21.8, DSU, *supra* note 20.

⁷⁴ Article 22 *id.*

Therefore, even though there is no express enforcement mechanism attached to the DSM which would confirm its capacity to promote human rights, it is clear that the resolution of trade disputes is considered to be a broader task than just determining State responsibility and the impact of the breach on individuals is relevant.⁷⁵

A comparison between the GATT trade framework and the subsequent WTO framework is also useful in order to show the extent to which trade law can increasingly be described as a form of human rights protection. Howse argues that the call by States for increased liberalization of trade that led to the establishment of the WTO was feared to imply a loss of ground gained in terms of human rights recognition that characterised the period after World War Two and influenced the development of the GATT.⁷⁶ It is therefore ironic that this paper has highlighted that the period after the establishment of the WTO can in fact be seen as one of increasing human rights protection.

One example is the more narrow interpretation of Article XX by the GATT DSM when it deferred to the *chapeau* element of non-discrimination over the promotion of public morals, in *US - Restrictions on Imports of Tuna*.⁷⁷ The principle of non-discrimination promotes equal participation in trade; however there are exceptional circumstances where the interest of the public are not served by allowing unregulated participation, so that it would be inappropriate for the DSM to prioritise non-discrimination without greater regard to the particular circumstances. In contrast, and in *US - Import Prohibition of Certain Shrimp and Shrimp Products*, the WTO DSM considered that Article XX must be interpreted contextually rather than applying 'the notion of trade liberalization'⁷⁸ without question. Thus, the WTO DSM considered there to be a multiplicity of relevant factors, including the impact on human rights, rather than just assuming that ensuring non-discrimination would satisfy the substance of Article XX.

The Preamble to the WTO Agreement requires trade relations to 'be conducted with a view to raising standards of living ... and expanding the production of and trade in goods and services'.⁷⁹ As a self-contained legal regime,⁸⁰ the WTO framework fosters trade while recognising the impact on individuals. The overlap in objectives requires the development and implementation of trade regulation with regard to international human rights, although only to the extent

⁷⁵ T.J. Dillon, *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICHIGAN J. INT'L L. 349, 376 (1995).

⁷⁶ Robert Howse, *From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading Regime*, 96(1) AM. J. INT'L. L. 94, 103 (2002).

⁷⁷ *US - Tuna supra* note 16.

⁷⁸ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (India, Malaysia, Pakistan, Thailand) WT/DS58/AB/R (October 12, 1998).

⁷⁹ TRIPS, *supra* note 34; WTO Agreement, *supra* note 65.

⁸⁰ *Report of the CDI*, ILC Document A/CN.4/504 (2000) 15.

necessary within the discrete scope of the trade framework – suggesting a limited role by trade law in terms of a form of protection for human rights.

The final submission made here is that there is one final way in which trade law can be viewed as a form of human rights protection. This is because the debate as to which human rights are relevant in the context of trade law can assist in providing clarity to the broader, and indeterminate, concept of human rights. It is argued that because human rights are debated within the context of trade law there is the potential for greater clarity in identifying those human rights that are affected by trade, which in turn requires that there is greater clarity in how to define the specific, affected human right. On that basis trade law can also be seen as a form of human rights protection – albeit at the level of identifying and defining human rights.

