

***HUMAN RIGHTS AND THE WTO:
INCORPORATION OR COOPERATION?
IS THERE A NEED FOR AN AGREEMENT ON TRADE-RELATED ASPECTS
OF HUMAN RIGHTS?***

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TITLE

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BACKGROUND

The WTO was established to essentially provide for an international body responsible for overseeing and facilitating international trade and trade related issues. One of the factors behind establishing a body specifically charged with international trade is the realisation that international trade, properly administered, can augment economic development and growth. To that extent, the WTO through adopting and entrenching various principles, aimed at creating and facilitating free trade, hopes to eradicate poverty and maximise employment in contracting members' states.

The undertaking of promoting, protecting and enforcing human rights on the other hand is essentially geared towards ensuring, among others, the protection of the human person and human development; be it economic, social, or political. At the core of the protection and enforcement of human rights is the belief that all human beings possess human dignity, which must be guarded by all at all costs. Inherent in the protection and enforcement of human rights is the principle of the rule of law through which, citizen participation is ensured by means of adopting democratic principles. Democratic principles and the rule of law are in turn; indispensable components of economic growth and development as they, among others, ensure stability, predictability, transparency, accountability and further guarantee to the people the freely expressed will to determine their own political, economic and social cultural systems.

Therefore, whilst international trade augments and ensures economic development and growth, the protection and enforcement of human rights ensures that human beings participate fully in the acquisition and enjoyment of the resultant economic wealth. Indeed, economic development and economic growth are inextricably linked to human development; hence the protection and enforcement of socio-economic rights, the right to development and core labour rights among others, is of cardinal

importance to the economic, social, political and cultural advancement of the vulnerable members of our societies.

This unique relationship between trade - as a catalyst for economic growth and development - and human rights is further elucidated by the recent United Nations Millennium Declaration of 2000, which entrenches and strengthens the connection between development and human rights, and between development and economic and social rights. The Millennium Declaration sets forth a number of key developmental goals; all of which needs to be realised by signatories over a given period. Of principal importance in this context however, is the fact that the Millennium Declaration ushers in new standards of human rights, essentially redefining some of the fundamental values contained in the United Nations Human Rights Declaration, thus bringing them within the realm of modern day developmental needs.

The main objective of this mini-thesis is to explore and evaluate the viability of incorporating the promotion, enforcement and protection of human rights within the WTO agenda, mandate and framework. It further aims to investigate the viability of accelerating multilateral cooperation amongst international major role players, thus assessing and evaluating the kind of cooperation necessary for the adequate protection and enforcement of human rights by the WTO and major role players involved. These two main objectives will be undertaken with the overall objective of providing a theoretical and jurisprudential basis against which the need to adopt an agreement on trade-related aspects of human rights will be based.

Given that the subject matter of human rights and indeed the protection and enforcement of human rights is broad and wide, the paper will focus largely on the protection and enforcement of those aspects of human rights as contained in the UN treaties and those having a direct bearing on the WTO as an organisation seeking economic development and growth through trade and trade related measures. To that extent economic development and growth will be discussed in the context of the specific mandate of the WTO, the Doha Development Agenda of the WTO and the UN treaties and declarations seeking to foster economic development and growth. Furthermore, the undertaking of protecting and enforcing human rights will largely be looked at with particular focus on the protection and enforcement of economic and social rights; internationally accepted core labour rights and standards; human rights aspects of intellectual property rights as affected by the agreement on trade-related

aspects of intellectual property (TRIPS); human rights aspects of services liberalization measures as affected by the general agreement on trade and services (GATS).

The paper is divided into the following four chapters: Chapter 1 introduces the nature and content of human rights; followed by a discussion on the WTO's mandate and basic principles. From there on it discusses in an in-depth manner the relationship between trade, economic development and human rights, thereby alluding also to trade-related aspects of human rights. Chapter 2 discusses the possibility of incorporating human rights within the WTO framework, among others, it discuss the need for an agreement on trade-related aspects of human rights, universally recognised minimum standards and also trade and economic sanctions. Chapter 3 introduces and discusses the need for an accelerated multilateral cooperation by the WTO. It further discusses the current manner in which the WTO cooperates with external parties and also discusses cooperation with major role players. Chapter 4, the last chapter, makes conclusions and recommendations.



DECLARATION

I declare that, **Human Rights and the WTO: Incorporation or Cooperation? Is there a need for an agreement on trade-related aspects of Human Rights?**” Is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Joseph M Senona.

Signed:.....

May 2005



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ACRONYMS

AoA	Agreement on agriculture
DDA	Doha Development agenda
GA	General Assembly
GATT	General Agreement on tariffs and trade
GATS	General agreement on trade in services
FDI	Foreign direct investment
INGO	International Non governmental organisation
ILO	International Labour Organisation
ICESCR	International convention on economic, social and cultural rights
ICCPR	International convention on civil and political rights
IP	Intellectual Property
LDCs	Least developing countries
MFN	Most-favoured Nation
MDGs	Millennium developmental Goals
MNC	Multinational Corporation
NT	National Treatment
OHCHR	Office of the high commissioner for human rights
TRIMS	Trade related investment measures
TRIPS	Trade related aspects of intellectual property
UN	Unites Nations
UDHR	Universal Declaration of Human Rights
WTO	World Trade Organisation
VCLT	Vienna convention on the law of treaties

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CHAPTER 1: HUMAN RIGHTS AND THE WTO

1.1 INTRODUCTION

The process of globalisation has resulted in a complex web of interdependent and interrelated international disciplines. It is no longer possible, for instance, to talk about global economics without mentioning global peace and security or talk about global politics without talking about social and economic justice. The two disciplines, which form the central theme of this paper, that is, international trade as administered by the WTO and the protection and enforcement of human rights have also been catapulted by the process of globalisation. They, like many other global disciplines, are gradually becoming inextricably interdependent and interrelated with each other. This chapter seeks to proffer an overview of the two disciplines. Firstly, it will highlight the nature and general aspects of human rights in order to provide a proper context against which the relationship between international trade and the protection of human rights will be reconciled. Secondly, it will discuss the WTO as an international institution responsible for the administration of international trade, thus highlighting its background and some of its basic principles. Thirdly, this chapter will seek to bring the two global disciplines together thereby discussing how their relationship comes about. Lastly, the chapter will give a general overview of trade-related human rights.

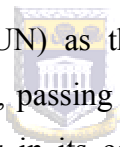
1.2 HUMAN RIGHTS: PROMOTION, PROTECTION AND ENFORCEMENT

In a world characterised by globalisation and its, sometimes undesirable, ramifications, the importance of maintaining human rights standards cannot be over emphasised. The acceleration of economic activities and political activities due to rapid globalisation¹ has resulted in many global institutions, including governments,

¹Through out this work, reference is constantly made to ‘globalisation’; following here is a brief description of this phenomenon: There are many and varied definitions of ‘globalisation’, for the purpose of this work however, it is not necessary to adopt a particular definition. Example of such definitions, however include submissions by Joerges C, Sand I and Teubner G (2004), “Transnational Governance and Constitutionalism.” Hart Publishing, USA p 13 that: ‘globalisation is a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitute autonomous global sectors for themselves.’ Mishra R C (2003), “Governance of Human rights: Challenges in the Age of Globalisation.” Authors press publishers Delhi: India, p 18 on the

vigorously pursuing policies with the aim of optimally benefiting from globalisation. In pursuing these benefits, these global players sometimes find themselves perpetuating systematic and gross violations of human rights.² These in turn often results in a situation wherein the right to life, the right to dignity and the right to personal or the individual or population as a whole, among others, being continually infringed or threatened.³ The promotion, protection and enforcement of human rights, therefore, essentially seek to remedy this undesirable situation by putting the interests of the human person at the hub of these activities.

Human rights or fundamental values are internationally agreed values, standards or rules regulating the conduct of States towards their own citizens and non-citizens alike.⁴ They dictate to the States their obligations and duties, and further restrict the freedom of States to act towards their entire population. Human rights are moreover universal moral entitlements deriving from respect of the moral autonomy, rationalists and dignity of human beings.⁵ They are recognised as inalienable birthrights of every individual and do not require State authority to confer them.⁶

Nowadays, there is a plethora of international instruments serving as sources of human rights standards; all of which geared towards protecting and promoting these esteemed rights.⁷ The United Nations (UN)  as the forerunner in promoting and protecting human rights, by among others, passing critical human rights resolutions, has long since incorporated human rights in its constitutive document; the United Nations Charter.⁸ Recognition of human rights in this document led to the formal

other hand provides that: “globalisation can be used to describe the changes in international relation...the process of integrating local and national economies into global system with relatively unimpeded capital and trade flows spurred by the new communications technologies and a universal legal framework promoting free and open market access.” See also Held D (1995) ‘Democracy and the Global Order: From the Modern State to Cosmopolitan Governance.’ Polity Press, Cambridge p 62 submitting that: ‘Globalisation is a multi-dimensional phenomenon involving diverse domains of activity and interaction, including the economic, political, technological, military, legal, cultural, and environmental domains. Each of these spheres involves patters of relations and activity.’

² Baehr P R (1999). “Human rights: Universality in practice.” Macmillan Press LTD, at p 20.

³ Ibid.

⁴ Baehr P. R (1999) p 1.

⁵ Kennedy D. M. L and Southwick J. D (2001). “The Political Economy of International Trade: Essay in Honour of Robert Hudeck.” Cambridge University Press, at p 38.

⁶ Ibid.

⁷ According to Baehr P. R (1999). p 2 the most important historic human rights documents are of are of Western origin. The Virginia Bill of rights 1776 and the French Declaration of the right of man and citizens 1789, both documents contained a list of human rights in the sense of individual rights and have served as a model for later documents.

⁸ The preamble of the Charter of the United Nations explicitly mentions fundamental human rights. Article 1: 3 states one of the purposes of the UN as seeking to promote ‘international cooperation in solving international problems of an economic, social cultural, or humanitarian character, and in

adoption of Universal Declaration of Human Rights (UDHR) by the General Assembly in 1948.⁹ The Universal Declaration of Human Rights is considered a basic source of human rights standards as it embodies a list of the most important human rights including: The right to life, liberty and security of the person; the prohibition of slavery; the prohibition of torture; the right to fair trial; the right to freedom of movement; the right to property; the right to participate in the government of one's country; the right to freedom of opinion and expression; the right to freedom of assembly and association; the right to freedom of thought, conscience and religion.¹⁰ Among the rights embodied in the UDHR are some of the important social and economic rights; such as the right to work; the right to an adequate standard of living, including the right food, clothing, housing and medical care.¹¹ These particular breed of rights are distinguishable from the so called civil and political rights; which include the classic human rights such as the right to life, liberty, and security of the person; the right to freedom of association and assembly; the right to participate in the government of one's country; the right to property; the right to freedom of thought, conscience and religion.

The distinction between fundamental rights led to human rights scholars making a differentiation between 'generations of rights'.¹² The 'first generation' refers to civil and political rights. The 'second generation' refers to social and economic rights. The 'third generation' refers to collective rights, which include, the right to development; the right to peace; the right to clean and natural environment; the right to one's own natural resources; and the right to one's own cultural heritage.¹³

Both the first and second generation of human rights, have now been elaborated in two legally binding international treaties adopted by the General Assembly in 1966: The United Nations Convention on Civil and Political Rights (ICCPR)¹⁴ and the

promoting and encouraging human rights and for fundamental for all without distinction as to race, sex, language or religion.' See Baehr (1999) p 2.

⁹ Adopted on 10 December 1948, G.A. Res 217A (III), U.N. Doc. A/810.at 71 (1948). Baehr (1999) p4 submits that: "The Universal Declaration was adopted as a resolution by the general assembly. Accordingly, such resolutions are not legally binding. Nevertheless, it is by now commonly accepted that the so called core rights in the Declarations have acquired the status of binding international law."

¹⁰ Ibid.

¹¹ Ibid, Articles 23, 25, and 26 of the UDHR.

¹² Baehr (1999) p 6.

¹³ See generally Baehr (1999), p 6 for a full discussion on the classification of rights in 'generations'.

¹⁴ Adopted 16 December 1966, GA. Res. 2200 (XXI). 21 U.N. GAOR, 21st Sess. Supp. No 16 at 52, U.N. Doc A/6316 (1966). Entered into force 23 March 1976.

United Nations Convention on Economic, Social and Cultural Rights (ICESCR).¹⁵ However, despite the distinction between generations of rights, the final Declaration of the second world conference on human rights held in Vienna 1993, the Vienna Declaration and Programme of Action, maintained in Article 5 that:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”¹⁶

An elaboration of this fundamental values is however incomplete without an effective protection mechanism. The challenge that remains is finding an effective international protection mechanism; particularly when regard is had to the fact that human rights are still being grossly violated all over the world¹⁷ and that the institutions of protection, nationally and internationally are still very weak or in some instances non-existent.¹⁸ The concept of the protection of human rights is however not a simple one, as it does not lend itself to a predetermined methodical approach.¹⁹ Nevertheless, the international protection of human rights may be said to be direct and indirect,²⁰ with three main categories of international protection, that is, anticipatory or preventive protection; curative or mitigatory protection and remedial or compensatory

¹⁵ Adopted 16 December 1966, GA. Res. 2200 (XXI), U.N. GAOR, 21st Supp. No 16, at 49, U.N. Doc. A/6316 (1966). Entered into force on 23 March 1976.

¹⁶ Vienna Declaration and Programme of Action, G.A. Res. UN Doc A/CONF.157/23 12 July 1993. Prior to this provision, Article 6:2 of the UN Declaration on the Right to Development, resolution 41/128 of 4 December 1986 provided and continues to provide that: ‘All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.’

¹⁷ Ramcharan B. G (2002). “The United Nations High Commission for Human Rights: The Challenges of International Protection.” International Studies in Human rights vol 71, Martinus Nijhoff publishers, at p 7.

¹⁸ Ibid.

¹⁹ Ramcharan B. G (1989). “The Concept and Present Status of the International Protection of Human Rights: Forty years after the Universal declaration.” Martinus Nijhoff publishers, at p 9.

²⁰ Ibid p 17, accordingly, by direct international protection it is meant the intercession of an international entity either at the behest of the victim or victims concerned or by person on their behalf or on the volition of an international protecting agency itself to halt the violation of human rights. On the other hand, by indirect it is meant the efforts geared to standard setting, reporting, educating, teaching, and training research, the dissemination of information and advisory service.

protection.²¹ Noteworthy from this is that, these categories of international protection extend mainly to civil and political human rights to the exclusion of social and economic rights.²² The latter group of rights is generally protected through indirect means, therefore requiring even greater efforts geared towards protecting them.²³

There are many contemporary agencies, all of which are dealing with international promotion and protection of human rights. However, it is apparent that many of these institutions are fairly weak.²⁴ Hence, more is still needed from all major role players in order to fully realise the international obligation of promoting and protecting human rights standards. The World Trade Organisation (WTO) as an international institution is one such role player.

1.3 THE WTO: OBJECTIVES AND MANDATE

International economic activity cannot fully take place without international trade. In very simple terms, trade constitutes of the flow of goods and services across national frontiers.²⁵ The WTO is an umbrella organisation charged with the task of administering and facilitating the entire international trading system. It was brought into existence by the signing of the Uruguay Round of agreements in Marrakesh, Morocco on 15 April 1994, but came formally into being on 1 January 1995 after 76 countries had ratified the Uruguay agreements.²⁶

The origins of the WTO can be traced back to the 1940's. The idea then was to create and establish an International Trade Organisation (ITO) as a third institution in addition to the IMF and the World Bank (the Bretton Woods institutions).²⁷ The ITO never materialised, instead the General Agreement on Tariffs and Trade, 1947 (GATT 1947), which was set up as transitory arrangement to be subsumed under the ITO, continued to exist for 47 years until the emergence of the WTO, upon which it was amended and attached as an annexure to the Uruguay Round agreements.²⁸ Nowadays however, it is accepted that the WTO stands alongside the Bretton Woods

²¹ See Ramcharan B. G (1989) p 18 for a full discussion on these three categories.

²² Ibid 18-20.

²³ Ibid.

²⁴ See Ramcharan B. G (2002) p 7. Some of the major institution will be discussed in chapter three, below.

²⁵ Qureshi A. H (1999). "International Economic law." Sweet & Maxwell publishers, p 239.

²⁶ Jackson J (1997). "The World Trading System: Law and Policy of International Economic Relations." Cambridge 2nd Ed at p 1-2. See also Rugman A. M and Boyd G (2001). "The World Trade Organisation in the new global economy." Edward Elgar publishers, p 3.

²⁷ Jackson J (1997) p 32-44 and also Rugman A. M and Boyd G (2001) p 3.

²⁸ Jackson J (1997) p 36-38 and also Rugman A. M and Boyd G (2001) p 3.

institutions as a third institution handling international economic cooperation within the area of international trade.²⁹

The Uruguay Round, which was launched as the eighth trade-negotiating round at a ministerial meeting in Punta *del Este*, Uruguay September 1986, resulted in a list of other important and far-reaching agreements; all of which propelled and took the international trading system to new heights. The most important achievements of the Uruguay Rounds can be summarised as including: The adoption of the General Agreement on Trade in Services (GATS); the adoption of an agreement on Trade-related aspects of Intellectual Property Rights (TRIPS); the consolidated trade-rules disciplines over agriculture; further integration of developing countries; a revised dispute settlement procedure; and the new Institutional Charter (WTO Charter)³⁰ for the organisation, in the form of the Marrakesh agreement establishing the WTO.³¹

The Marrakesh Agreement establishing the WTO sets out the purpose and objectives of the WTO, which can accordingly be discerned from the preamble to the Charter.³² According to Qureshi, the primary purpose of the WTO is two-fold: ‘to ensure the reduction of tariffs and other barriers to trade, and the elimination of discriminatory treatment in international trade relations.’³³ The WTO is charged with ensuring this primary purpose in order to facilitate higher living, full employment, growing volumes of real income and effective demand, and expansion of production and trade in goods and services in all contracting parties’ states.³⁴ The quintessence of the WTO is therefore to foster economic growth and development through trade liberalization. In order to carry out this mandate, the WTO provides a substantive and procedural code of conduct through the Charter and WTO agreements; all of which aimed at

²⁹ Ibid.

³⁰ Jackson J (1997) p 4 maintains that: “One of the interesting achievement of the Uruguay Round is the development of a new institutional charter for the organization that will help facilitate international cooperation concerning trade and economic relations, and fundamentally change GATT system to accommodate the vast new terrain of trade competence that this latest round of negotiations thrust on the trading system.”

³¹ See Jackson J (1997) p 2-4, for a full discussion on the Uruguay Round and its impact on trade. See also Rugman and Boyd (2001), maintaining at p 23 that ‘these agreements have the potential to strengthen substantively the rule based nature of the trade regime.’

³² Qureshi A.H (1999) p 237-239.

³³ Ibid.

³⁴ Qureshi A. H (1999) p 238. See also Jackson J (1997) p 12-13.

trade liberalization through the elimination of trade barriers and reduction of tariffs and the elimination of discrimination in international trade relations.³⁵

This brief outline of the WTO background clearly evinces the lack of a direct human rights approach by the institution. The objectives of the WTO, while encapsulating some of the ideals of social justice, such as, higher living standards, increased employment, nevertheless still lacks a more direct human rights approach to can effectively protect and enforce specific rights, such as the right to health, the right to food and other basic human rights.³⁶

1.3.1 BASIC PRINCIPLES OF THE WTO

At the core of the WTO and GATT is the principle of non-discrimination; according to which any barrier to trade should be applied equally to all contracting members.³⁷ The principle of non-discrimination is entrenched by the most favoured nation (MFN) and the national treatment (NT) principles, which by far and large inform the many agreements of the WTO, in particular WTO rules on goods, services and intellectual property (IP). However, the precise scope and nature these principles differs across these three areas.³⁸ The former, (MFN) principle calls for the treatment of others equally. Accordingly, countries cannot normally discriminate between their trading partners, in that any liberalisation measure granted to one favoured member should be immediately granted to all other members.³⁹ This principle is a priority in GATT (article 1), GATS (article 2), and TRIPS agreement (article 4). The latter principle, NT, calls for the treatment of foreigners and locals equally. Accordingly, imported and locally produced goods should be treated equally after foreign goods have entered the local market. This principle also applies to foreign and domestic services and to foreign and local trademarks, copyrights and patents.⁴⁰ Like the MFN principle, the NT principle is a priority in GATT (article 3), GATS (article 17), and TRIPS agreement (article 13).

³⁵ Qureshi A.H (1999) p 239.

³⁶ See below paragraph 1.4.1 for a synopsis of trade related human rights.

³⁷ Rugman A.M and Boyd G (2001) p 4.

³⁸ This is especially true for the NT principle which is a specific, not a general commitment when it comes to services. See “The WTO: Functions and Basic Principles” available at http://publications.worldbank.org/catalog/content-download?revision_id1526126 accessed 03-04 2005

³⁹ Understanding the WTO 3rd edition, WTO publication, September 2003, p 10-13.

⁴⁰ Ibid.

There are, however four important exceptions to the key principles of non-discrimination. They are:

- Developed countries can give tariff preferences to developing countries.
- Countries entering into regional free trade agreements do not need to extend the preferences negotiated in this context of an MFN basis.
- A country can invoke temporary 'safeguards' protection to one of its industries suffering serious injury due to the surge of imports.
- Temporary quantitative restrictions can be invoked by a country with serious balance of payment problems.⁴¹

In addition to the principle of Non-discrimination, the WTO maintains the fundamental principles of 'single undertaking', 'freer trade', 'and predictability', 'promotion of fair competition' and 'encouraging development and economic reform'.⁴² In terms of the single undertaking principles, WTO members must accept all the obligations of GATT, GATS, TRIPS agreement and any other corollary agreement. This in turn ends the free ride of some developing countries, which under the old GATT could receive benefits of some trade concessions without having to join and undertake their full obligations.⁴³

The WTO seeks to achieve the principle of 'freer trade' through gradual negotiations. These negotiations will be aimed at lowering trade barriers, including tariffs, import bans and quotas that restrict quantities selectively. It further aims to ensure 'predictability' through binding and transparency. Binding ensures that the country cannot change its tariffs arbitrary without negotiating with other members and providing compensation where necessary. In addition transparency ensures that countries trade rules are clear and public.⁴⁴

The WTO also remains committed to the principle of providing 'fair competition.' This is to be done by discouraging unfair practices such as export subsidies, and dumping products at below low costs to gain market access.⁴⁵ The last principle-envisaged by the WTO is development and economic reform. Accordingly,

⁴¹ Rugman and Boyd (2001) p 4, accordingly, the last two measures are temporary exceptions to the member's commitment to the GATT and a public investigation has to be undertaken to allow for a limited relief from the obligations.

⁴² Understanding the WTO 3rd edition, September 2003 p 11-13.

⁴³ Rugman and Boyd (2001) p 4-5.

⁴⁴ Understanding the WTO (2003) p 10-13.

⁴⁵ Ibid.

developing countries are given a more beneficial position within the WTO system; *inter alia* by giving them time to adjust, greater flexibility and special privileges.⁴⁶

All these basic principles are without a doubt geared towards the liberalisation of trade and the facilitation of international trade. They are, however in no way directly associated with protecting human rights.⁴⁷ Indeed this rings true when one has regard to the fact that GATT 1947 was negotiated as an agreement about rights and obligations of states and of the customs territories way back in the 1940's; a time in which human rights and their concomitant protection was not prevalent.⁴⁸ Today, however, human rights have become recognised by virtually all countries. The WTO and GATT can therefore not escape this human rights revolution.⁴⁹ International treaty interpretation, in particular, article 31 of the 1969 Vienna Convention on the law of treaties, therefore, requires interpretation of the 1994 agreements establishing the WTO with due regard to 'any relevant rules of international law applicable between parties, including universally recognised human rights'.⁵⁰

The IMF and the World Bank have already conceded their role as human rights protectors, at least as far as developmental issues are concerned.⁵¹ The WTO as an institution that envisages economic growth and development should therefore shoulder some responsibility pertaining to the protection of human rights; in particular, those fundamental values whose promotion and enforcement could be undermined by adherence to the obligations imposed by trade rules.

⁴⁶ *ibid.*

⁴⁷ The closest that the WTO comes to restricting trade because a member maintains undesirable environmental policies and breaches of non-trade values, is through Article XX of GATT. In that regard, the only barriers to trade permitted within the WTO are measures that fall within the limited exceptions provided in article XX. These exceptions include exceptions for public morals, for human, animal and plant life, for prison labour and for conservation of exhaustible resources. Despite this exceptions though, it remains utterly impossible to meaningfully protect human right since this provision is interpreted narrowly to exclude any reference to the broad scheme of furthering any non trade issues, such as human rights. See Mishra (2003) p 20 for a full discussion.

⁴⁸ Kennedy and Southwick (2001) p 32.

⁴⁹ *Ibid.*

⁵⁰ Article 31:3(c) of the 1969 Vienna Convention on the Law of Treaties.

⁵¹ Olonka-Onyango J (1995). "Beyond the Rhetoric: Reinvigorating the struggle for economic and social rights in Africa." 26 California Western international law journal at p 8. Accordingly, at first the World Bank and the IMF were reluctant to join the debate the issue of human rights, however through external pressure, human rights issues have come to feature on the agenda of the two institutions. Both are willing and prepared to promote economic and social rights. The question of civil political rights is accordingly a different matter and would require an amendment to the Bank's founding charter in order to be accommodated.

1.4 ECONOMIC DEVELOPMENT, SOCIAL JUSTICE, MULTILATERAL TRADE AND HUMAN RIGHTS

International human rights regime emphasizes the indivisibility of civil, political, economic and social and cultural rights. The objectives and imperatives of individual self-determination and self-development not only requires the protection and enforcement of negative freedoms, but also the protection and enforcement of positive economic and social rights, which essentially enables the citizens to acquire the economic resources and social security necessary for human development.⁵² This in essence, is the realisation of social justice. For many developing countries, international trade is seen as the beacon of hope to realising social justice given the profound effect it has on their economies. According to Jackson:⁵³ “It is generally recognised that the influence of trade on national economies has been growing for decades and can be much more profound than the percentages might indicate, both because trade is often a much higher percentage of the goods-producing sector of the economies, and because a multiplier on ripple effects amplifies the consequences of such sectors expanding or contracting.” By adhering to the principles of international trade, such as those aimed at trade liberalisation, developing countries in particular can augment their economic growth and development. International trade is indeed an important engine for growth and faster development, in that, it has been demonstrably linked to greater market access opportunities, more foreign exchange, more foreign direct investment, transfer of technology and the boosting of domestic productivity;⁵⁴ all these factors being essential to positive development.

The Seattle debacle of December 1999⁵⁵ caused the WTO to accelerate its efforts pertaining to developmental issues. The main purpose behind the efforts was to ensure that international trade as administered by the WTO did in fact augment economic development in least developed countries (LDC's) and developing countries, which incidentally dominate the WTO.⁵⁶ The fourth WTO ministerial conference held in Doha, Qatar 9-14 November 2001 therefore saw the ministers

⁵² Kennedy and Southwick (2001) p 39.

⁵³ Jackson J (1997) p 6.

⁵⁴ Mosoti V (2004). “The New Partnership for Africa’s Development: Institutional and Legal Challenges of Investment Promotions.” 5 San Diego Int’l journals 145 at p 147.

⁵⁵ See “the WTO Debacle in Seattle” available at <http://www.isgnweb.org/pub/02-003.htm> accessed 11-05-2005.

⁵⁶ Rugman and Boyd (2001) p 216.

adopt a ministerial declaration setting out a broad work programme called the Doha Development Agenda (the DDA). Progress under the DDA is essentially aimed at achieving a global commitment to reinvigorating the slowing world economy,⁵⁷ through trade and trade related measures, which are considered as the surest way in which to support developing countries efforts to grow their way out of poverty.⁵⁸ In addition to this main aim, the DDA also aspires towards fostering a stronger and more open multilateral trading system, since such a system can make a broader contribution to international peace and security.⁵⁹

The DDA is clearly a robust mechanism by the WTO to eradicate poverty and bring about economic development and stability. It is this aspect of economic development that begs the question of whether the DDA will ever succeed without the concomitant undertaking of protecting and enforcing those aspects of human rights necessary to realise social justice, that is, socio-economic rights, core labour rights and some of the civil and political rights. Indeed, the WTO Charter and agreements envisages and espouse the objectives of higher standards of living, steady growth of real income, full employment, and economic growth compatible with sustainable development.⁶⁰ By integrating human rights in its economic policymaking and its agenda, the WTO will thus be ensuring that markets are not only open and efficient but also fair and just.⁶¹ The pursuit of equitable development and fair trade are therefore legitimate human rights concerns.⁶²

The preceding paragraph brings into question the extent to which economic development and human rights are related, and if indeed related, the extent to which they can be reconciled.⁶³ Given the challenges brought about by globalisation and developmental challenges we face today, economics and finance cannot be practiced

⁵⁷ The WTO annual report 2003, WTO publication, p 3.

⁵⁸ Ibid. Paragraph 51 of the Ministerial Declaration is in this regard pertinent, it accordingly provides that ‘the committee on trade and development and the committee on trade and environment, shall within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of negotiations, in order to achieve the objective of having sustainable development appropriately reflected. See Ministerial Declaration adopted 14 November 2001, WT/MIN (01)/ DEC/ 1 20 November 2001.

⁵⁹ Ibid.

⁶⁰ Jackson J (1997) p 12 –13.

⁶¹ Sampson G. P (2001), “The role of the World Trade Organization in Global Governance.” United Nations University Press, p 210-211.

⁶² Ibid.

⁶³ Genugten W, Hunt P and Mathews S (2003), “The World Bank, IMF and Human Rights.” Wolf Legal publishers, p 1.

in social, cultural, ethical or moral vacuum.⁶⁴ Evidently, the two disciplines, that is, human rights and economics, are inextricably interdependent and interrelated. Human rights accordingly, provide the common moral and legal underpinning for the global economy; they are as relevant to the field of international trade, finance and investment as they are to any other area of human activity.⁶⁵ The relationship between economic development and human rights, and between economic development and social and economic rights in particular, is further discernable from the plethora of human rights instruments calling for the protection of social and economic rights of individuals and groups. Chief among these is the internationally binding ICESCR⁶⁶ and the UN Declaration on the Right to Development,⁶⁷ which essentially captures this link thus: ‘The right to development is an inalienable human right by virtue of which every human person and all people are entitled to participation in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.’⁶⁸

However, the most recent international document that has entrenched and further elucidated the relationship between human rights, economic development and the achievement of social justice through protection of socio-economic rights is the UN Millennium Declaration of 2000 and its developmental goals (MDGs).⁶⁹ Although not binding, the Millennium Declaration is nevertheless important in that it uses certain fundamental values as aspirations to economic growth and development, essentially redefining them to meet the modern day developmental need. For instance, according to the Millennium Declaration, the right to equality is taken to mean that: “No individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured.”⁷⁰ The right to freedom on the other hand is taken to mean that: “Men and Women have the right

⁶⁴ Ibid p 1-2.

⁶⁵ Ibid. See also Sampson G. P (2001) p 210.

⁶⁶ UN Doc A/6316 16 December 1966. The ICESCR is also important in this regard because it is binding in nature, thus different from other Declarations such as the 2000 Millennium Declaration, the 1986 Declaration on the Right to Development. However, these other declarations, although passed as resolutions are also important in that they provide and evince the evolving status of human rights and moreover, they do in certain instances acquire the status of binding customary law. For instance, the UDHR was passed as a resolution, but it is now commonly accepted that core rights in this declaration have the status of binding international law. See Baehr (1999) p4.

⁶⁷ UN Declaration on the Right to Development adopted by the General Assembly of the United Nations, resolution 41/128 of 4 December 1986.

⁶⁸ Ibid article 1:1.

⁶⁹ United Nations Millennium Declaration, UN Doc A/Res/55/2 18 September 2000.

⁷⁰ Article 6 of the 2000 Millennium Declaration.

to live and raise their children in dignity, free from hunger and from fear of violence, oppression or injustice. Democratic and participatory governance based on the will of people best assures this.”⁷¹

It is evident that these two fundamental values are no longer viewed and defined in the traditional sense of the UN Universal Declaration of Human Rights. They have undergone a metamorphosis, which aptly recognise modern day developmental needs. Moreover, these fresh views of fundamental values seem to suggest that we are moving towards a situation wherein compliance with human rights and fundamental values is used as a yardstick to measure the successes of these major institutions (the UN, the WTO, MNCs and any other institution seeking economic growth and development) in bringing about economic growth and development for all.⁷² Evidently, most of these institutions share a destiny; that is bringing about economic development. Consequently, the shared common vision between human rights and economic development through WTO trade regime is also undeniable. The UN Secretary General, Koffi Annan succinctly described the link thus: “The goal and principles of the WTO Agreements and those of human rights do therefore share much in common. Goals of economic growth, increasing living standards, full employment and the optimal use of the world’s resources are conducive to the promotion of human rights, in particular the right to development. Parallels can also be drawn between the principles of fair competition and non-discrimination under trade law and equality and non-discrimination under human rights.”⁷³

For the UN, it would seem that economic development and the realization of MDGs will indeed achieve social justice, since its efforts are backed by the promotion and protection of positive social and economic rights. The WTO on the other hand is a fairly new institution, and its success pertaining to social justice, will by far and large depend on how it protects and promote human rights, in particular trade related aspects of human rights.

The challenge is to arrive at a situation wherein human rights have a practical and feasible impact on the manner in which the WTO administers international trade rules

⁷¹ Ibid.

⁷² Genugten W, Hunt P and Mathews S (2003) at (vii).

⁷³ UN document A/55/342, “Globalisation and its impact on the full enjoyment of all human rights: Preliminary report of the secretary-general fifty fifth session of the general assembly.” Also cited in, Jones (2004) “Who’s Afraid of the WTO” p 131.

and also a situation whereby trade rules will have a practical and feasible impact on the protection and enforcement of human rights.

1.4.1 SYNOPSIS OF TRADE-RELATED HUMAN RIGHTS

The desire to reconcile trade and human rights is more importantly premised on the submission that the protection of human rights, aptly requires that complying with trade rules must not undermine human rights obligations and that free trade must also be fair trade.⁷⁴ The issue however, is not only about the general matter having to do with the relationship between the two disciplines and how they can be reconciled with each other. On the contrary, the issue also has to do with the precise definition of where and how this reconciliation should take place.⁷⁵ There are clearly discernable universally applicable fundamental values that have a bearing on international trade, and are affected by it, either directly or indirectly.

The promotion and protection of social and economic rights has, and is still being advanced by two binding international treaties, the UDHR and ICESCR; with the express purpose of achieving social-economic justice, thereby realizing the right of people to live in dignity.⁷⁶ The relationship between some of the WTO agreements with this breed of fundamental rights is apparent. GATS, which seeks to liberalise the service sector, has a direct bearing on the realisation of socio-economic rights, in particular having potential negative impact⁷⁷ on the delivery of basic services such as education, health and water.⁷⁸ The right to health and healthy living of both children and adults can also be affected by the requirements and obligations under GATS.⁷⁹

⁷⁴ See “TRIPS, Trade in Services and the fulfilment of children’s right in Botswana” available at <www.3dthree.org> [accessed November 2004].

⁷⁵ Genugten W, Hunt P and Mathews S (2003) p 5.

⁷⁶ It is generally accepted that poverty is a violation of human rights standard, in particular robbing the human person of the right to dignity. See Mishra (2003) p 15.

⁷⁷ Despite this potential negative impact, however, it must be emphasised that service liberalisation have the potential to contribute to meeting human rights obligations by promoting and increasing the efficiency and effectiveness of the service sector, thus providing better quality in services and generally promoting growth and development. See “The WTO and Service Liberalisation and Human Rights” available at www.worldgrowth.org/pages/trade/wg-hrights.php accessed 03-05-2005.

⁷⁸ The UNHCHR recognised the fundamental importance of basic services, particularly in the area of health and education, as a means of promoting the realisation of human rights, hence it called upon ‘government and international economic policy forums to actively ensure that the formulation, interpretation and implementation of policies in relation to the liberalisation of trade in services does not negatively impact on the enjoyment of human rights by all persons.’ See resolution by sub-commission on human rights ‘Liberalisation of Trade in services and human rights’ resolution 2001/4.

⁷⁹ See “TRIPS, Trade in Services and the fulfilment of children’s right in Botswana” available at <<http://www.3dthree.org>> [accessed November 2004].

Health related services could be affected by all four modes of supply if such service liberalisation measures are taken without regard to socio-economic rights, particularly the right to access to medical health care.⁸⁰ A negative impact on the right to health invariably affects the right to life and the right to healthy living, hence due care must be taken when carrying out obligations under trade rules.⁸¹ Other socio-economic rights that could be affected by careless and unscrupulous service liberalisation policy measures include the right to work, the right to education, and the right to land.⁸²

Human rights instruments recognise Intellectual Property (IP) and the right to everyone to benefit from IP as a human right.⁸³ This accordingly necessitates the WTO interpretation of intellectual property rights in line with this mandate.⁸⁴ Indeed obligations under TRIPS agreement can in certain instances negatively affect certain basic human rights, in particular the right to health and the right to life. In developing countries where HIV/AIDS and related deceases have reached pandemic proportions and are wrecking havoc, fulfilling the right to have access to medical health care, and ultimately healthy living and the right to life is of cardinal importance. The WTO's administration of this agreement therefore has to have regard to these rights.⁸⁵ The WTO, did recognise the need to interpret TRIPS agreement with due regard to the right to health and the right to life. It did so when it adopted the declaration on TRIPS and Public Health at Doha, 14 November 2001.⁸⁶ This is seen as the first step to

⁸⁰ Ibid "TRIPS, Trade in Services and the fulfilment of children's right in Botswana," submitting further that 'increasing FDI in health-related services such as hospitals or health insurance could lead to a two-tiered health system that discriminates against the poor and the most vulnerable groups, such as children living with HIV/AIDS.

⁸¹ Ibid.

⁸² Article 25 of the UDHR captures this point by providing that: "Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care necessary and necessary social service and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control."

⁸³ The UDHR recognises this right at article 27 and the ICESCR at article 15. In addition, the UNHCHR sub committee on Human rights "Intellectual Property and Human Rights" resolution 2000/7, affirms in article 1 that "the right to protection of the moral and material interest resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27(2) of the UDHR and article 15(1) (c) of the ICESCR, a human right, subject to limitation in the public interest." Article 8 goes further to request the "WTO in general and the council on TRIPS during the ongoing review of the TRIPS, in particular to take fully into account existing state obligations under international human rights instruments."

⁸⁴ Kennedy and Southwick (2001) p 32.

⁸⁵ See "Assessing Doha: what does the Qatar meeting at the WTO mean for human rights" available at <http://www.ichrdd.ca/frame2.iphtml> [accessed 9-11-2004].

⁸⁶ Ibid. See also Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, WT/MIN (01)/DEC/2, 20 November 2001. Paragraph 4 reads thus: "We agree that the TRIPS Agreement does

protecting human rights aspect affected by TRIPS agreement; however more work still has to be done to protect many other rights issues raised by TRIPS agreement, such as traditional knowledge and bio-piracy, both of great importance to indigenous people.⁸⁷

The WTO has just accelerated efforts to further liberalise the agricultural sector through the DDA.⁸⁸ Developing countries have been fighting for fair trade in this sector by lobbying for the removal of trade distorting domestic support and export subsidies. The removal of these subsidies is very important to developing countries, since such will create and expand markets for developing countries, thus leading to greater revenue from export. These, is the case since most developing countries have a comparative advantage in agricultural products. The rise in export revenue will in turn help countries realise the right to development held by their citizens, but more importantly will propel economic growth and development in countries thus creating conducive environment for the realization of many other fundamental values.⁸⁹ Furthermore, in the WTO context, the agricultural sector is important since it affects aspects such as food security, in particular the realisation of the right to food⁹⁰ for net food importing countries.⁹¹ This right has a potential of being negatively affected by WTO trade rules, and it affects both developing and developed countries alike.

not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of the WTO Members' right to public health and in particular, to promote access to medicines for all.”

⁸⁷ Ibid. Paragraph 19 of the Ministerial Declaration of the WTO's 4th Ministerial Conference at Doha in 2001 instructs the Council for TRIPS to examine the relationship between the TRIPS Agreement and the *Convention on Biological Diversity* and the protection of traditional knowledge and folklore. Accordingly, such efforts must also be geared to protecting traditional knowledge as a human right in line with 15(1)(c) of the ICESCR which seeks the effective protection of all forms of intellectual property – including the moral and material interests of indigenous authors – with the aim of promoting the enjoyment of all human rights.

⁸⁸ Some authors have expressed concern over this general plan to liberalise the agricultural sector, in particular arguing that the liberalisation process is detrimental to the development of small scaled rural farming. Accordingly, the Agreement on Agriculture is labelled as not adopting a people centered approach to agricultural trade policies. The argument continues that many internationally recognised rights are affected by the agricultural trade policy, including the right to life, to food, to health, to work and to be free from discrimination See “Planting the right seed: A human rights approach to agriculture trade and the WTO” available at <http://www.tradeobservatory.org/library.cfm?refid=69823> accessed 03-05-2005.

⁸⁹ Ibid.

⁹⁰ Entrenched in Article 25 of the UDHR and Article 6, 11, and 12 of the ICESCR.

⁹¹ The WTO's agreement on agriculture does recognise net food importing countries, hence providing an opening for this provision to be interpreted and implemented in a way that ensure people's

Labour rights and standards have already been the subject of contention within the WTO ranks. The question of linkage between trade and labour resulted from a standoff between developing and developed countries.⁹² The developing countries perceived attempts to link further liberalisation to adherence to certain core labour standards as a protectionist or neo colonial in motivation.⁹³ The standoff resulted in the WTO deciding on distancing itself from enforcing and protecting labour rights. The matter was settled at a meeting held in Singapore, December 1996. The meeting decide that all member countries should uphold core labour rights; however, the WTO was not a proper place to deal with them.⁹⁴ Accordingly, the International Labour Organization (ILO) should proceed with the role of enforcing core labour rights.⁹⁵

Notwithstanding the Singapore decision, it remains possible to suspend GATT and WTO privileges in order to protect workers rights.⁹⁶ This much is accordingly evident from the Singapore ministerial declaration, in particular the wording in paragraph 4 that: "...we reject the use of labour standards for protectionist purposes and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."⁹⁷ Indeed, the issue of labour rights was not adequately settled, because a member can still derogate from WTO/GATT principles where the other members are responsible for the violation of human rights.⁹⁸ This becomes more relevant when the product subjected to international trade are manufactured by the use of iniquitous working conditions including, the exploitation of individual employed in the production of such goods.⁹⁹ For instance, where the

livelihood and human right. See "planting the right seed: a human right perspective on agriculture trade and the WTO."

⁹² Francioni F (2001). "Environment, human rights and International trade." Hart publishing, p 182.

⁹³ Ibid.

⁹⁴ Ibid, see also WTO Ministerial conference, Singapore 9-13 December 1996, Doc WT/MIN (96)/Dec of 18 December 1996.

⁹⁵ Ibid.

⁹⁶ Francioni F (2001) p 288.

⁹⁷ Ibid 288-289. See also WTO Ministerial Conference, Singapore 9-13 December 1996, Doc WT/MIN (96)/Dec of 18 December 1996.

⁹⁸ Francioni F (2001) p 289.

⁹⁹ See Francioni (2001) p 207 and also Jones (2004) p 137 discussing child labour and sweatshops. Jones submits that "some exports goods such as apparel, footwear, toys and sporting apparel, particularly from certain developing countries, have been made using child labour or under sweatshops conditions." Accordingly, sweatshops are defined as "work environments with one or more of the following features: Long hours, with meagre wages, crowded conditions, unsafe or unsanitary facilities, poor lighting and ventilation, and harsh treatment."

breach of labour rights amounts to serious breach of human rights like the case of inhumane child labour.¹⁰⁰

The issue of labour rights is very topical to international trade, especially if it is seen in the context of the protection of human rights. The Singapore decision was premised on the fact that, protecting such rights would give leeway for some countries to use labour standards for protectionist purposes. It is clear however that, there are instances where such rights have to be protected and enforced for legitimate purposes such as in cases of trade goods and services resulting from gross violation of human rights. Leary submits that: "...the importance of social justice to a stable and peaceful world and social justice implies rights for the great majority of the world's population-the workers. Today, we use the terminology of human rights rather than social justice, but human rights cannot exist without social justice. The rights of workers must be seen as essential to issues of social justice, human rights, and democracy and must be promoted as such."¹⁰¹ It remains a challenge; therefore for the WTO to find a meaningful manner in which to protect core labour right, at the same time guarding against the requirement of adhering to core labour rights being used for protectionist purposes.



In addition to the above specific rights, there are other fundamental values, which are inextricably linked with the protection of human rights and ensuring human development. They affect the WTO as an institution of trade, and as an institution in which political decisions are taken, with one of the aims being international peace and stability. The ideal of democratic self-government, presupposes a democratic state. Human rights treaties recognise that human rights and popular sovereignty include the citizens' rights to participate in the election of governments and in the exercise of government powers, which must be based on the will of the people.¹⁰² Participatory democracy in turn ensures transparency, accountability, stability and further guarantee to the people the freely expressed will to determine their own political,

¹⁰⁰ Ibid.

¹⁰¹ Compa LA and Diamond SF (1996). "Human rights, labour rights, and international trade." University of Pennsylvania press: Philadelphia p 26-9.

¹⁰² Kennedy and Southwick (2001) p 37. Article 8 of the 1993 Vienna Declaration reads thus: "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives...The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world".

economic and social cultural system.¹⁰³ Without democracy, transparent policymaking, respect for human rights, national and international policymaking lacks democratic legitimacy.¹⁰⁴ Moreover, general economic development and ultimately human development suffers a set back when the political environment is not conducive.¹⁰⁵ Clearly the WTO's principle of achieving transparency and predictability as regard trade rules and trade policy making will be affected by whether or not a country embraces democratic principles.

Directly connected to democracy is the right to self-determination. The Vienna Declaration, 1993 reaffirms this right in article 2 holding that: "All people have the right to self-determination. By virtue of that right they determine their political status and freely pursue their economic, social and cultural development." Central to this re affirmation is the entrenchment and re-enforcement of collective development by the human family. This right supplement the right to development.¹⁰⁶

The Rule of law is another principle, which if appropriately protected and enforced would ensure good governance, that is, a government free from corruption, misadministration, bureaucracy and arbitrary policy making. Human morality, rationality and dignity calls for a rule orientated rather than power orientated behaviour.¹⁰⁷ In that regard, trading with countries, which foster the Rule of law, can further ensure the success of the WTO as an institution responsible for the international trading system with the aims of fostering economic growth and development.

1.5 SUMMARY

The nature of human rights is straightforward. They are inalienable birth rights guaranteeing an individual's right to be treated with equally with dignity. At the centre of protecting human rights is the desire to foster human development. Human rights and economic development are symmetrical disciplines, each depending on the other for success.

¹⁰³ Ibid article 8 of the 1993 Vienna Declaration.

¹⁰⁴ Ibid and also Kennedy and Southwick (2001) p 36.

¹⁰⁵ See the UN Millennium Declaration, 2000.

¹⁰⁶ See Article 2 of the 1993 Vienna Declaration, and also Baehr (1999) Chapter 5, pages 42-56 for a full discussion on the right to self-determination.

¹⁰⁷ Kennedy and Southwick (2001) p 36.

The WTO's primary concern, that is, trade liberalization and trade related measures, is rapidly making inroads in the human rights regime due to the profound impact it has on social, political and economic issues. This rapid movement, steered by the process of globalisation results in an interdependent, interrelated and interdisciplinary nature of global affairs. It is from this nature of affairs that the relationship between trade and human rights is born. In that regard, the advancement of international trade and success thereof is closely linked with the advancement of human rights, in particular those that are trade related. Therefore trade and human rights are mutually reinforcing as opposed to being mutually exclusive.



CHAPTER 2: HUMAN RIGHTS AND THE WTO:

INCORPORATION:¹⁰⁸

2.1 INTRODUCTION

The preceding chapter demonstrated the causal link between international trade, as administered by the WTO, and human rights. The perpetual process linking the two disciplines is inevitable; precisely because at the centre of the two disciplines is the well-being of the human person. Indeed this process calls for the reorientation of many international disciplines to be carried out hand in hand and in some instances hand in glove with each other. Regarding the two central disciplines of this paper, we have learned from the previous chapter that the challenge is to ascertain how, where, and which human rights aspects should be integrated within the WTO's international trade regime; and conversely which aspects of trade should be integrated within the protection and enforcement of human rights, so that ultimately we arrive at a situation where both disciplines are meaningfully integrated with one another, thus fostering a cohesive and credible unit that protects human rights and at the same time facilitates international trade with the objective of achieving economic growth and development.

In this chapter we traverse the idea that trade-related human rights can be meaningfully protected through the adoption of an agreement on trade-related aspects of human rights. Firstly, the chapter discusses the need for a human rights approach to international trade by the WTO. Secondly, the chapter highlights the importance of an agreement on trade-related aspects of human rights, thereby picking up on some of the significant problems that might be remedied by the adoption of such an agreement. Thirdly this chapter looks at the issue of the proposed minimum standards to form the substratum of the proposed agreement, thus identifying sources of such

¹⁰⁸ The question of incorporating the protection and enforcement of human rights, in the context of this paper, postulates a situation wherein the WTO would include at the least trade related aspects of human rights within its trade agenda and ultimately its framework, thus putting in place a practical and responsive mechanism in which such rights will be promoted, protected and enforced by the WTO in case of breach.

standards. Lastly, this chapter will analyse trade sanctions as mechanism for enforcement, thereby commenting on the present role of the WTO in using trade sanctions to enforce human rights compliance.

2.2 INCORPORATING HUMAN RIGHTS WITHIN THE WTO: TOWARDS A TRADE-RELATED HUMAN RIGHTS AGREEMENT¹⁰⁹

The conflict and debate emanating from the question whether or not to include human right with in the WTO is not at all new. History tells us that during the Uruguay Rounds of trade negotiations, certain developing countries refused to discuss any linkage between social justice, human rights, labour rights and trade relations.¹¹⁰ The relationship was suggested by some of the developed countries and was essentially that these issues should form part and parcel of the WTO agenda. Linkage was accordingly thwarted at the 1996 Singapore ministerial conference.¹¹¹ Some of the strategic and practical arguments that came up against such linkages were that, such linkages ‘may create a sharp divide between countries with different economies and social system and widely different underlying value system, moreover the WTO is not equipped to deal with social issues.’¹¹² However, the 1999 Seattle fiasco brought fresh attention to the relationship between the WTO trade issues and other social concerns.¹¹³ As things stand, the saga continues, indeed other commentators argue that, until such time these issues are adequately addressed, the civil society protest like the 1999 Seattle are likely to increase rather than go away.¹¹⁴

Clearly this overt polarisation cannot be allowed to continue because of its negative impact on the realization of developmental goals. Human rights and other social issues are here to stay. This human rights revolution seemingly suggests a nuanced approach to international relations and international disciplines, such a trade,

¹⁰⁹ An agreement on trade-related aspects of human rights is the sort of agreement that will essentially provide a legally binding international response mechanism to trade related human rights violations. Such trade related human rights violations extend to fundamental values, including socio-economic rights, certain civil political rights and the right to development. See Taylor A and Thomas C (1999), “Global Trade and Global Social Issues.” p 35 and 42-8.

¹¹⁰ Francioni F (2001) p 202.

¹¹¹ Ibid.

¹¹² Pitou van Dijk and Faber G (1996), “Challenges of the New World Trade Organization: Legal Aspects of the International Organization.” Vol 28 Kluwer law International, The Hague: Netherlands p 15.

¹¹³ Ibid.

¹¹⁴ Southwick and Kennedy (2001) p 34.

international law, international politics etc. An approach that recognises that the human person and his concomitant rights are at the centre of all international relations and economic activities aimed at development.¹¹⁵ Indeed, many of the international organisations' approach to human rights, leaves much to be desired.

Taylor and Thomas correctly point out that: "Under conditions of globalisation, the decisions of governments, transnational corporations and international organisations such as the WTO, shape the lives of people quite distant from them. Decision-making becomes decoupled from the reality of people's lives. It is no longer concerned with human values, the quality of life, human dignity and human rights, but with technical issues to do with maintaining an order that supports the free-market principles. The debate over intellectual property, for example, often seems more concerned with the rights of ownership, capital and the co-modification of the environment than with social issues concerning moral consequence of biotechnology and the privatisation of life form or the ownership of the means of subsistence."¹¹⁶

A human rights approach therefore presupposes the type of approach that challenges and calls into question the legitimacy of 'state-centred' approaches to international law and international disciplines; a 'state centred' approach that persistently fails to protect human rights and democratic peace in international relations.¹¹⁷

Seen from this perspective, Southwick and Kennedy submit that: "The necessary human rights approach to international law must go beyond power politics, interest groups politics, and legal positivism so as to protect human rights through progressive "contitutionalization" of national and international legal system on the basis of mutually coherent principles of constitutional democracy. Overcoming the contradiction between power-oriented international law and rule-oriented national law requires "interdisciplinary" approaches beyond the ivory towers of traditional international law doctrine. The future acceptability and legal effectiveness of international law depend increasingly on the consistency of the values underlying

¹¹⁵ Article 2:1 of the UN declaration on the right to development provides that 'the human person is the central subject of development and should be the active participant and beneficiary of the right to development.'

¹¹⁶ Taylor A and Thomas C (1999), "Global Trade and Global Social Issues." Routledge publishers, New Fetter Lane: London, p 34.

¹¹⁷ Southwick and Kennedy (2001) p 34. It can be argued in the same vain that a human rights approach is the sort of approach that seek to challenge the free-market orientated principle to international economic activities.

international law with those of constitutional democracies [including fundamental values]”¹¹⁸

The WTO is an international organisation possessing legal personality.¹¹⁹ Moreover, its agreements contain rules, which amount to international law and are thus liable to be interpreted in accordance with such.¹²⁰ Adopting an agreement on trade-related aspects of human rights will give the WTO legal effectiveness and will moreover facilitate the interdisciplinary approach to international law as highlighted in the excerpt by Southwick and Kennedy.¹²¹ Trade-related aspects of human rights agreement will move the WTO beyond the ivory towers of traditional international law doctrines, thus giving it the legitimacy and effectiveness relating to global rule making in the area of trade and trade related issues.¹²²

Apart from the jurisprudential need for an agreement on trade-related aspects of human rights; much can be gained from such an agreement when regard is had to the specific legal, technical and practical problems relating to mainstreaming human rights within the WTO. The question being how, where and which human rights should the WTO incorporate and protect. The complexity of these questions can therefore only be tackled through a responsive multilateral agreement that has regard to both trade liberalisation and social justice, especially since both are in the public interest.¹²³ Without a doubt, the inclusion of a ‘social clause’ will go a long way in ‘conditioning the enjoyment of trade advantages by the respect of the minimum standards of labour rights [and human rights]’.¹²⁴ Francioni submits further that: “The

¹¹⁸ Ibid.

¹¹⁹ The WTO is an international legal subject by virtue of being established in accordance with the procedures of International law, in particular the 1995 Marrakesh Agreement establishing the WTO. As an institution possessing international legal personality, the WTO has rights and obligations as determined by the procedural and material norms of international law. See Genugten W, Hunt P and Mathews (2003) p 46. See also Skogly S I (2001), “The human rights of obligations of the World Bank and the International Monetary Fund,” in particular Chapter 4 for a full discussion on the nature of legal personality relating to international organisation.

¹²⁰ Genugten W, Hunt P and Mathews S (2003) p 46 making reference to *World Health Organization (WHO) vs. Egypt* case at p 47 where the International Court of Justice held that: “international organisations are subjects of international law and, as such, are bound by any obligations, incumbent upon them under general rules of international law, under their constitution or under international agreements to which they are parties.” Reports of judgments, advisory opinion and orders, 1980 p 89-90.

¹²¹ Southwick and Kennedy (2001) p 34.

¹²² Ibid.

¹²³ Francioni (2001) p 188.

¹²⁴ Ibid p 287.

non-inclusion of a social clause in the instruments of interstate trade raises a delicate problem of conditionality between different norms of international law, that is, the need to verify what degree of protection may be assured in terms of human rights within the area of trade relations between states. In other words, it is necessary to verify if, and within what limits, the basic criteria provided for by trade law (namely the most favoured nation principle, the principle of national treatment of products imported from state parties, and the prohibition of quantitative restrictions on imports from such countries) can be derogated where members are responsible for the violation of human rights.”¹²⁵

There is a clear justification for a move towards adopting a trade-related human rights agreement.¹²⁶ Indeed such an agreement will ally some of the obstacles that exist in incorporating the protection of human rights within the WTO. Arguments against a move towards incorporation are accordingly that: Measures used to enforce human rights standards by the WTO would be contradictory. Accordingly many of the principles and goals of the WTO play a significant role in advancing human rights; hence there is no need to include human rights within the WTO.¹²⁷ Furthermore, so the argument continues the origins of GATT/WTO system is aimed at a broader role for trade liberalization, which in the long run will lead to the realisation of universal human rights.¹²⁸ In that regard ‘the contribution of the WTO to peaceful trade relations and the peaceful settlement of trade disputes has reduced the significant cause for political conflict and war situations in which human rights are most likely to be abused’.¹²⁹ Moreover, using the WTO as an enforcement mechanism is problematic, because the organization was never intended to address these issues and has no institutional framework or resources to deal with such issues; nor does it have the institutional capacity to investigate human rights violations.¹³⁰ Also, the WTO’s authorised sanctions are not the most appropriate response to human rights abuses, since such sanctions end up hurting consumers and workers in the violating

¹²⁵ Ibid p 289.

¹²⁶ Such an agreement will be in line with Article 10 of the Declaration on the Right to Development, which provides that: ‘Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation policy, legislative and other measures at the national and international levels.’

¹²⁷ Jones K (2004), “Who’s afraid of the WTO?” Oxford University Press: New York, at p 131

¹²⁸ Jones K (2004) p 131.

¹²⁹ Ibid.

¹³⁰ Ibid p 132.

country.¹³¹ In additions to these submissions, there is also the argument that the inclusion of human rights within the WTO would lead to ‘protectionism’ by other countries.¹³²

These submissions, while valid in their own right, are nevertheless surmountable. A move towards adopting an agreement on trade-related aspects of human rights would accordingly be aimed at carving out a precise agreement that addresses these issues, while at the same time making sure that the WTO is not stained and bedevilled by incorporating non-trade issues such as human rights and labour rights, within its framework and agenda.¹³³ More importantly however, such a move will be aimed at establishing a strong multilateral, rule based international trade regime that does not act in isolation from human rights, despite the obvious and pressing need to take into consideration such rights and a melange of non trade issues that belong to the international agenda, and are directly affected by trade itself and the rules that govern it.¹³⁴

2.3 UNIVERSALLY RECOGNISED MINIMUM STANDARD

The preceding paragraph has laid a foundation for the need to adopt a trade related-human rights agreement in order to establish a strong multilateral system and to remedy some of the problems posed by the proposed incorporation of human rights within the WTO framework. Chapter 1 has introduced a scope of trade-related human rights and further enunciated the relationship between these rights and the WTO.¹³⁵ There is a plethora of sources of human rights; however, some are more basic and binding than the rest. In that regard, a minimum standard of human rights should be derived from credible internationally recognised and accepted sources.

As an international institution having international legal personality, the WTO is bound by sources of international law. In particular the treaties to which it has acceded to,¹³⁶ customary international law, and the general principles of international

¹³¹ Ibid.

¹³² The developing countries in particular argued that attempts to link further liberalisation to adherence to certain core labour standards was a protectionist and neo colonial in motivation. See Francioni (2001) p 182 for a discussion on the attempt to link labour with trade by developed countries.

¹³³ Sampson G P (2001), “The Role of the World Trade Organization in Global Governance,” p 15.

¹³⁴ Ibid.

¹³⁵ See paragraph 1.4 and 1.4.1 above.

¹³⁶ Genugten W, Hunt P and Mathews S (2003) p 50.

law.¹³⁷ A trade-related human rights agreement would therefore be predicated on those values found in these universally accepted sources. Treaty law as the primary and important source of human rights contain minimum standard, which have to be interpreted and analysed in the context of WTO law. Accordingly, the implementation and interpretations of rights as codified in international human rights treaties are significant contributions to the development of understanding of human rights.¹³⁸ The Vienna Convention on the Law of Treaties (VCLT) provides the general and supplementary rule by which to interpret treaties. Accordingly, article 31 of the VCLT provides that a ‘treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.¹³⁹

Customary International law and the General principles of international law are perhaps the most important direct source of international law, and human rights standards in particular, because all subjects of international law are not exempt from them.¹⁴⁰ According to Skogly “Customary international law is norms that have developed from States practices without being codified in treaties, or they may once have been laid down in treaties, but as a result of constant pattern of compliance from all or most States, have gained status as international customary law applicable to all States, also to those who have not ratified them.”¹⁴¹ These sources provide minimum standard in particular for values relating to socio-economic rights, labour rights and those rights generally related to development.

2.3.1 SOCIAL AND ECONOMIC RIGHTS

The nature of the link between these breeds of rights and the WTO has already been traversed.¹⁴² The 1948 Universal Declaration of Human Rights is the first basic source.¹⁴³ The preamble to the UDHR provides that the Declaration is ‘a common

¹³⁷ Ibid.

¹³⁸ Ibid. See also Skogly SI (2001) p 84-84.

¹³⁹ Article 31 (2) provides the definition of the context referred in article 31. See Jager N (2002), “Corporate Human Rights Obligations: In Search for Accountability.” p 48-50.

¹⁴⁰ Genugten W, Hunt P and Mathews S (2003) p 51.

¹⁴¹ Skogly SI (2001) p 84-5.

¹⁴² See paragraph 1.4, chapter 1.

¹⁴³ Skogly SI (2001) Chapter 6 p 111-143 entitled ‘sources of international human rights obligations’ and also Jager N (2002) chapter 3, p 45-74 entitled ‘Applicable Norms’.

standard of achievement for all people and all nations.’ This reinforces the idea that everyone must pursue its values. Following on the Universal Declaration is a number of UN Conventions. The most important, source of socio-economic rights however, is the International Convention on Economic, Social, and Cultural rights.¹⁴⁴ This Convention sets out fundamental social and economic rights, which must be promoted and protected. Such rights, which are of particular importance to the WTO in light of being affected by obligations under trade rules, include the right to the highest attainable standard of physical and mental health;¹⁴⁵ the right to education;¹⁴⁶ the right to an adequate standard of living (food, housing, clothing);¹⁴⁷ the right to work, conditions of work and the right to rest and leisure;¹⁴⁸ and the right to life.¹⁴⁹ The WTO, in order meaningfully promote and protect these human rights should in addition to protecting also respect and fulfil the rights included in the Convention.¹⁵⁰ Rights contained in this Convention are further supported by other rights specific conventions, which also function as sources.¹⁵¹ These include conventions addressing the prohibitions of racial discrimination¹⁵², conventions supporting the rights of women¹⁵³ and children.¹⁵⁴

2.3.2 LABOUR RIGHTS



In this instance, while the heading refers to labour rights, there are other names used to designate this breed of rights such ‘minimum core labour standards’, and ‘workers

¹⁴⁴ Adopted 16 November 1966.

¹⁴⁵ Article 12 ICESCR.

¹⁴⁶ Contained in Article 26 of the UDHR and Article 13, 14 of ICESCR.

¹⁴⁷ Article 26 of the UDHR and Article 11 of the ICESCR.

¹⁴⁸ Article 23, 24 UDHR and Articles 6 and 7 ICESCR.

¹⁴⁹ Article 3 UDHR and Article 6[1-6] ICCPR.

¹⁵⁰ According Genugten W, Hunt P and Mathews S (2003) p 53-6, “...the obligation to respect requires the state and other international legal persons to abstain from doing anything that violates the integrity of the individual or infringes on or her or his freedom to use the material resources available to that individual in the way he or she finds best to satisfy his/her needs. The obligation to respect requires from the state and other international legal bodies measures necessary to prevent other individual or groups from violating the integrity, freedom of action of the other human rights of the individual, including the prevention of the infringements of his her material resources. The obligation to fulfil requires the state and other international legal bodies to take measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs recognised in the human rights instruments, which cannot be secured by personal efforts.”

¹⁵¹ Francioni (2001) p 204.

¹⁵² International Convention on the elimination of all forms of Racial Discrimination, 7 March 1966 660 UNTS 195, 1966 (entered into force 4 January 1969).

¹⁵³ International Convention on the Elimination of all forms of Discriminations against Women 18 December 1979, 1249 UNTS 13, 1980 (entered into force 3 September 1981).

¹⁵⁴ International Convention on the Rights of Children, adopted 20 November 1989, 1577 UNTS 3, 1989 28 IML 1448 (entered into force 2 September 1990).

rights'.¹⁵⁵ The pertinent question therefore is what is the difference between human rights and labour rights? Some scholars submit that core labour rights are a subset of human rights. McMahon holds that: "Beyond the ILO support in international law for labour rights can be found within the wider human rights regime that is now a recognised part of a global regime. For many who are in efforts to strengthen the international human rights regime, the long and widely recognised experience of the ILO is considered a model to emulate and a base upon which to construct deeper regime. At an intellectual level, it is widely understood that labour rights must be constituent part of a society that recognises human rights...Thus, no human rights regime is imaginable that does not include basic labour rights. A society that forces its workers to leave their human rights at the door of the employer is not a just and free society. And in turn there is no democratic labour movement that believes that it can fairly represent its members' interest without reliance on basic human rights. Thus it is no surprise that the major document of international human rights, such as the UDHR, include reference to specific labour rights."¹⁵⁶ Seen from this perspective, workers rights are human rights due to the fact that they guard against workers working under deplorable and unsatisfactory conditions, which undermine their right to dignity.¹⁵⁷ While it is true that workers rights are human rights, it is submitted that it is inappropriate to consider all of them as minimum international labour standards.¹⁵⁸

As things stand, the WTO has already maintained that minimum core labour standards should be maintained and observed.¹⁵⁹ Accordingly, the International Labour Organisation (ILO)¹⁶⁰ provides direction as to which labour rights are fundamental rights. It has clarified and elaborated workers rights in its conventions and has also recognised in its declarations certain rights as fundamental human rights

¹⁵⁵ Jones (2004), p 134-6.

¹⁵⁶ McMahon J A (2001). "Trade and Agriculture: Negotiating a New Agreement." Cameron May LTD; Bondway, London p 281-2. See also Jones (2004) p 135 submitting that: "As a conceptual issue, workers rights are in many ways a subset of human rights, in the sense that work is an essential element of human existence."

¹⁵⁷ See also Compa LA and Diamond F S (1996). "Human rights, Labour rights and International trade" p 22.

¹⁵⁸ Compa LA and Diamond FS (1996) p 28.

¹⁵⁹ See also WTO Ministerial Conference, Singapore 9-13 December 1996, Doc WT/MIN (96)/Dec of 18 December 1996.

¹⁶⁰ The International Labour Organisation is an institution designed specifically with the purpose of promoting and protecting worker's rights and welfare globally. It was founded in 1919 and became a specialised UN agency in 1946. Its membership includes not only governments but also union organizations and employer associations. See Jones (2004) p 141, and also Compa LA and Diamond FS (1996) p 28-30.

forming the core labour standards.¹⁶¹ These include: the right to freedom of association and to form and join trade unions, and the prohibition against discrimination in employment,¹⁶² exploitative child labour, forced labour, slavery, servitude¹⁶³ and child labour.¹⁶⁴ In addition, the 1998 ILO Declaration on Fundamental Principles and Rights at Work maintains that: ‘all members, even if have not ratified the convention in question have an obligation arising from the very fact of membership of the organisation, to respect, to promote and realise these fundamental values.’¹⁶⁵

These core labour rights are also recognised in other foundational sources of human rights such as the Universal Declaration of Human Rights, the ICCPR and the ICESCR.¹⁶⁶ These sources are clear enough to can enable the WTO to protect, respect and fulfil core labour rights as they are universal in their character, and are further more free from the taint of protectionism.¹⁶⁷

2.3.3 OTHER TRADE-RELATED HUMAN RIGHTS VALUES

In addition to social and economic right together with labour rights, it was highlighted in chapter 1 that trade is inextricably linked with other aspects of human rights such as democracy,¹⁶⁸ the rule of law¹⁶⁹ and the right to self determination¹⁷⁰ and development.¹⁷¹ These are universally recognised principles entrenched in most UN

¹⁶¹ Compa LA and Diamond FS (1996) p 28.

¹⁶² The right to equality and the prohibition discrimination is also protected in the UDHR, ICESCR and ICCPR.

¹⁶³ These rights are also protected by the UDHR and ICCPR.

¹⁶⁴ See Francioni (2001) p 207 and also Jones (2004) p 137.

¹⁶⁵ Ibid

¹⁶⁶ Ibid. See also Compa LA and Diamond FS (1996) p 28, accordingly, the rights delineated in these conventions and form labour rights include, the right to work, the right to just and favourable conditions of work, including air wages and safe and healthy working conditions; the right to protection against unemployment; the right to equal pay for equal work; the right to form trade unions; the right to rest and leisure and reasonable limitation of working hours; and the right not to be subjected to forced labour.

¹⁶⁷ Francioni (2001) p 186.

¹⁶⁸ See in this regard Article 8 of the 1993 Vienna Declaration providing that ‘democracy development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing...’

¹⁶⁹ See Article 24 of the 2000 UN Millennium Declaration, which reads “we will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognised human rights, fundamental freedoms, including the right to development.” Indeed development thrives in stable, secure and peaceful conditions.

¹⁷⁰ See Article 2 of the 1993 Vienna Declaration recognising that every one has the right to self determination.

¹⁷¹ See Article 10 of the 1993 Vienna Declaration recognising the right to development as a universal and inalienable right and an integral part of fundamental human rights.

treaties and declarations, including the Universal Declaration of Human Rights, the 1993 UN Vienna Declaration and recently the UN Millennium Declaration 2000. The right to development is moreover recognised in the UN Declaration on the Right to Development.¹⁷² In addition the ICCPR provides a credible source for many other human rights standards, which although not directly related to trade, are nevertheless important to it. These include the right to life;¹⁷³ the prohibition of torture, cruel, inhuman and degrading treatment;¹⁷⁴ the right to privacy;¹⁷⁵ and the right to freedom of movement.¹⁷⁶

While the sources of these minimum standards are apparent, the conflict of incorporating them with in the WTO continues. Crudden and Davies commenting on the issue of labour evince the conflict thus: “Incorporating labour rights into the WTO would increase the number and difficulty of trade disputes; the WTO must be protected as an institution. If it is not, the global trading system might be undermined. Finally, it would be in appropriates for a body with primary expertise in trade to have to interpret labour rights standards. Trade law, in short, should not be used as a sword to enforce labour rights.”¹⁷⁷



Unfortunately, the continual avoidance of these non-trade issues will at the end weaken the credibility of the WTO as far as global rule making in the area of trade is concerned,¹⁷⁸ and in the process risking repetition of events similar to Seattle debacle. Indeed such is the process of globalisation that international relations are continually being integrated with one another. To that extent, constant reformation is needed in order to adequately deal with these difficult challenges. A trade-related human rights agreement would therefore see the WTO bridge the gap between itself and human rights, and will moreover see the WTO regulating and facilitating the relationship between the two disciplines thereby setting out clearly its own programme of action relating to the protection of human rights.

¹⁷² Adopted by the General Assembly of the United Nations, resolution 41/128 of 4 December 1986.

¹⁷³ Article 6 [1-6] of the ICCPR.

¹⁷⁴ Article 5 UDHR and article 7 ICCPR.

¹⁷⁵ Article 12 UDHR and Article 17 ICCPR.

¹⁷⁶ Article 13 UDHR and Article 12 ICCPR.

¹⁷⁷ Francioni (2001) p 196.

¹⁷⁸ Southwick and Kennedy (2001) p 34.

2.4 INCORPORATING HUMAN RIGHTS WITHIN THE WTO: TRADE AND ECONOMIC SANCTIONS

The matter of sanctions has been the subject of many scholars.¹⁷⁹ Cleveland submits that: ‘states have long used trade sanctions to promote a range of foreign policy goals, for at least the past 100 years, including the employment of trade restrictions to promote human rights abroad.’¹⁸⁰ Accordingly, the imposition of sanctions is partly because of the absence of ‘effective international remedy for human rights atrocities’.¹⁸¹

There are essentially three ways in which countries can attempt to alter the foreign policy of the targeted country through the use of sanctions: by limiting exports, by restricting imports, and by the impending finance including the reduction of aid.¹⁸² The first two forms of sanctions are trade sanctions and engender costs to the targeted country in terms of lost exports market, denial of critical imports, lower prices received for embargoed exports, and higher prices paid for substitute imports.¹⁸³ The third manner, financial sanctions are levelled at the interruption of the targeted country’s commercial and official development financial assistance. Accordingly, the interruption of the commercial finance will usually require the targeted country to pay higher interest to alternative creditors; or in the case of official development assistance, the denial of grants may be use.¹⁸⁴

The use of trade sanctions to promote compliance with international rights is however threatened by recent development in trade liberalization policy.¹⁸⁵ As we have seen, the WTO is a rule based system and adheres to certain basic principles forming the substratum of the organization. Seen in this light, many of the trade sanctions aimed

¹⁷⁹Hufbauer GC, Schott JJ and Elliott KA (1990). “Economic Sanctions Reconsidered: History and Current Policy” Institute for international Economics: Washington, DC provide at p 4 that: “economic sanctions entered the diplomatic armoury long before world war 1. Indeed the technique was used in ancient Greece. The most celebrated occasion was the Pericles’s Megarian decree, enacted in 432 BC in response to the kidnapping of three Aspasian women...”

¹⁸⁰ Francioni (2001) p 200.

¹⁸¹ Ibid.

¹⁸² See Hufbauer, Schott and Elliott (1990) p 36-8 and 65-6. Francioni (2001) p 200 also maintains that trade sanctions may also take the form of import or exports bans, quotas, licensing requirements, tariffs, financing assistance, or conditioning government procurement.

¹⁸³ Ibid, Hufbauer, Schott and Elliott (1990) p 36.

¹⁸⁴ Ibid p 37.

¹⁸⁵ Francioni (2001) p 200, submitting that the coming into being of the WTO and the adoption of the WTO charter, the consolidation of trade rules and adoption of new agreements together with a comprehensive dispute settlement mechanism, all affect the use of unilateral trade sanctions.

at promoting human rights compliance would be in breach of this system of basic principles by deviating from the basic norms.¹⁸⁶ Notwithstanding this fact, however, it is apparent that certain targeted restrictions on trade are necessary if the WTO is to protect and fulfil the realization of certain trade-related human rights such as the right to health and the prohibition of exploitative child labour. Moreover, such restrictions are necessary if the WTO is to gain credibility as a cohesive international organization facilitating trade and protecting human rights.

The difficulty, of course lies in the fact that the present WTO/GATT system does not expressly accommodate human rights and labour rights¹⁸⁷ to impose trade sanctions in a credible and orderly manner.¹⁸⁸ Nevertheless, the WTO dispute settlement mechanism can be considered to be highly effective because of the possibility of applying trade sanction if a decision is not followed.¹⁸⁹ This system does not however impose human rights obligation and has thus far not taken into consideration human rights, apparently because of the difficulty they pose and the fact that human rights do not fall within the current trade agenda.¹⁹⁰ In fact, article 23 of the WTO dispute settlement understanding (DSU) provides that ‘if a dispute involves an allegation of a violation of WTO law; recourse to the WTO dispute mechanism is compulsory and exclusive’.¹⁹¹ Accordingly, this provision excludes recourse to the WTO dispute settlement mechanism if human rights are violated as a result of WTO rules.¹⁹²

The lack of proper authority for the WTO to impose trade sanctions, in order to enforce compliance with human rights, has also contributed to countries imposing unilateral trade sanctions.¹⁹³ Unilateral trade sanctions are authorised by the customary international law,¹⁹⁴ and have been imposed by countries to promote both

¹⁸⁶ Ibid 201.

¹⁸⁷ Ibid. See also Jagers N (2002) p 236 maintaining further that the non discriminatory principle of the WTO, which are enforced by the by the WTO dispute settlement system, can undermine the ability of states to fulfil their human rights obligation.

¹⁸⁸ See Francioni (2001) p 200-4 and Jones (2004), 133-5.

¹⁸⁹ Jagers N (2002) p 236.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid p 236-7. Despite this provision however, Jagers (2002) submits that: “some scholars have argued that human rights law has primacy over WTO law, as under UNDHR, is generally considered to be customary law international law, while some of the human rights norms are also *jus cogens* principles. Hence, the provisions of the WTO should be interpreted in a way to which is consistent with human rights norms in the UDHR.”

¹⁹³ A distinction is made between unilateral trade sanctions and multilateral sanctions. Unilateral refers to action by individual States, which is not taken in pursuance to the mandate of the regional or global organisation. Multilateral sanction on the other hand refers to sanctions that are authorised by a collective body such as the UN. See Francioni (2001) p 201.

¹⁹⁴ Francioni (2001) p 210.

trade values and non-trade values such as the prohibition of genocide or torture, to dismantle apartheid regime and to promote the restoration of democracy and the rule of law.¹⁹⁵ The imposition of such sanctions is sometimes problematic in that countries impose them in a prejudicial and undisciplined manner that might perpetuate protectionism.¹⁹⁶ Also, such sanctions often lack the necessary effectiveness due to the absence of cooperation from other countries.¹⁹⁷ Moreover, the fact that the WTO framework does not directly support the use of trade sanctions could also lead to the irresponsible use of such sanctions, for instance where they are not appropriate and have a potential of causing adverse effects to the economy. Some scholars observe that: ‘trade sanctions, even if effective in inflicting pain on the targeted country are not necessarily the most appropriate response to human rights. Trade is a blunt instrument and can often inflict damage on the unintended targets.’¹⁹⁸

Clearly, such sanctions need to be properly authorised through a multilateral agreement, which will ensure an orderly and responsible fashion that will lead to sanctions actually being effective. Jones maintains that: “In general, trade sanctions may be able to influence a targeted country’s behaviour regarding human rights, worker’s right, the environment, or other type of government policies. Trade in other words may be effective as part of an enforcement mechanism to achieve non-trade goals. Yet the unilateral use of sanctions, undisciplined by international agreement, is damaging not only in terms of the direct economic cost of restricted trade but also in the systematic cost of undermining accepted WTO trade rules.”¹⁹⁹ Without a doubt, the irresponsible use of trade sanctions would in the long run defeat one of the purposes of the WTO, that is, economic growth and development. It is foreseeable that such sanctions could cripple the economies of vulnerable countries or lead to economic stagnation, thereby placing the human person in undesirable conditions.

Unless, a proper international agreement is adopted, the query as to the appropriateness and effectiveness of trade restrictions used to combat human rights violations will always be pertinent. Indeed it will always be difficult to make

¹⁹⁵ Ibid p 200.

¹⁹⁶ Jones (2004) p 134.

¹⁹⁷ Hufbauer, Schott and Elliott (1990) p 44.

¹⁹⁸ Jones (2004) p 132.

¹⁹⁹ Jones (2004) p 134.

sanctions work.²⁰⁰ In particular because, human rights are in most cases not directly connected to trade, hence the gap between the two poses a major problem for using trade to enforce human rights.²⁰¹ The same questions can be asked if we opt to incorporate only workers rights. Clearly, there is a lack of connection between trade and more serious violations of workers rights, or if there is such a connection, it is often indirect.²⁰² In that regard, would trade sanctions be effective, or appropriate? Accordingly such sanctions would reduce employment opportunities in the targeted country for many workers.²⁰³ Taken together, these questions seem to suggest an urgent need to organise the manner in which trade sanctions are taken, so as to secure a safe and responsible mechanism.

2.5 SOME CONCLUDING REMARKS

This chapter has provided a clear justification for the adoption of a trade-related human rights agreement. Such an agreement will go a long way towards incorporating human rights within the WTO thus dealing with the many problems posed by the lack of an international agreement in this area, including problems related to the unscrupulous use of trade sanctions. Furthermore, such an agreement will strengthen the WTO as an international institution without necessarily straining it.



It would however be an ‘illusion to believe that by including these checks [and adopting an agreement of this nature], all problems would be solved. To include human rights in any development strategy is difficult and there will be failure and success. The important point is to develop a conscious approach to human rights to honour the obligations and to learn from the mistakes.’²⁰⁴

Jones maintains further that: “In developing multilateral or even global mechanism of human rights enforcement, the principle that applies, as it does everywhere else, is that the political will supporting a solution of the underlying problem must be strong enough to support international institutions dedicated to the issue. This development

²⁰⁰ Ibid p 133.

²⁰¹ Ibid p 134.

²⁰² Jones (2004) p140.

²⁰³ Ibid. Jones submits that ‘such trade sanctions would miss the target, while inflicting damage on export industries that typically offer the best prospects for economic growth, and indirectly, social progress.’

²⁰⁴ Genugten, Hunt and Mathews (2003) p 78.

needs to precede the linkage with trade. In this case, an international mandate for protecting human rights is necessary, with international agreement on definitions, standards, procedure, responses, and remedies. A remedy that includes trade measures, applied systematically according to the clearly defined rules, would at least theoretically be compatible with the WTO system subject to international law.”²⁰⁵

Indeed it is prosaic that incorporation of the protection of human rights within the WTO is necessary given the linkage that exists between trade and human rights, either directly or indirectly. An agreement on trade-related aspects of human rights would therefore proffer a useful and pragmatic basis on which the WTO is to conduct its affairs *vis-a-vis* other international disciplines in the area of human rights, including cooperation with other international organisation dealing with the protection and enforcement of human rights. Such an agreement will moreover provide a basis on which trade sanctions, be it unilateral or multilateral will be taken in a more responsible manner that takes into account the human rights implications and also detrimental impacts of such sanctions on small and vulnerable economies.



²⁰⁵ Jones (2004) p 135.

CHAPTER 3: HUMAN RIGHTS AND THE WTO: COOPERATION?²⁰⁶

3.1 INTRODUCTION

Globalisation and the rapid interdependence and interdisciplinary nature of global relations calls for an accelerated cooperation from all global players in order to adequately and effectively tackle the challenges brought upon by the ever changing world. The subject matter of including social justice, in particular human rights, within the WTO agenda is in fact inescapable; hence the WTO would sooner or later find itself hard-pressed not to address the issue. The fact that it is currently constrained by its institutional frame work to act on the issue of human rights, denotes that it has to look for other avenues, which would enable it to play a meaningful role in protecting human rights. One such avenue is engaging in an accelerated multilateral cooperation with other international major role players in the area of human rights and world economics. Currently, the WTO Charter provides for cooperation with other global organisations, but the scope of such cooperation has thus far proven to be inadequate to meaningfully enable the WTO to contribute to the protection of human rights, particularly those that are trade related.

This chapter will firstly discuss the current manner in which the WTO relates to other international bodies, thereby highlighting some of the significant shortcomings inherent in this mechanism in relation to protection of human rights. Secondly, the chapter introduces and discusses the ideal concept of an accelerated multilateral cooperation by the WTO in the area of human rights, thus speculating on the viability of such cooperation. Thirdly, the chapter will look at multilateral cooperation with the view of identifying major role players involved in the protection of human rights and world economics, thereby discussing in particular, the UN and its agencies; International Nongovernmental Organization; Multinational Corporations and National governments (States).

²⁰⁶ The question of an accelerated multilateral cooperation geared towards the protection and enforcement of human rights by the WTO in the context of this paper, postulates a situation wherein the WTO would expand its cooperation abilities to include cooperation with other major bodies within the area of trade related human rights, without necessarily incorporating such rights within its framework with a view to enforce them, thus mainly reorienting the WTO towards a greater human rights approach in its activities.

3.2 COOPERATING WITH THE WTO: LINKS AND EXTERNAL RELATIONS

The impact of trade on human rights is by now commonplace phenomena.²⁰⁷ It is this profound impact, among other things, that necessitates a cooperative stance by the WTO and other international institutions. Although the WTO can justifiably be regarded as the pillar of international economic order, there are other international organizations that have an important role to play in fostering a multilateral cooperation in the area of trade.²⁰⁸ The WTO Charter recognises the daunting task of maintaining external cooperative relations with other external institutions. Jackson captures this thus: “For any international organization today, but particularly one like the WTO, which has such profound effects on the economic well-being and activity of billions of citizens, there are a number of complex and sometimes troublesome issues about how the organization relates to other international (governmental, to non-governmental (NGO)), and indeed business, firms and individual citizens. The story begins with the United Nations and then continues with other relationships.”²⁰⁹

Despite the difficulty in reconciling the WTO and other global institutions, it is clear that the significance of maintaining such external relations cannot be overemphasised. The WTO Charter, however, contains only a few clauses relating to these external relationships. Article III entitled ‘functions of the WTO’ provides at article III: 5 that: “With a view to achieve greater coherence in global economic policy making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.” Article V entitled ‘relations with other organizations’ reads, at article V: 1 that: “The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organisations that have responsibilities related to the WTO.” Article V: 2 on the other hand provide that: “The General Council shall make appropriate arrangements for the consultation and cooperation

²⁰⁷ See paragraph 1.4.1 and also 2.2 above.

²⁰⁸ Hoekman B M and Kostecki M M (2001). “The Political Economy of the World Trading System.” Oxford University Press, 2nd Ed: Oxford New York p 68.

²⁰⁹ Jackson JH (1998). “The World Trade Organization: Constitution and Jurisprudence” Royal Institute of International Affairs: Great Britain, p 51.

with non-governmental organisations concerned with matters related to those of the WTO.”²¹⁰

Reading article III: 5 in its pristine form, one can hardly argue that the envisaged ‘cooperation’ therein extends to cooperation for the effective protection of human rights. Clearly, the provision, hence the scope of article III: 5 are limited to ‘coherent global economic policymaking’, in particular between the WTO, the IMF and the World Bank.²¹¹ However, as we have witnessed in chapter 1, a cohesive global economic policy postulates an economic policy that leads to sustainable economic development and growth predicated on principles of human rights.²¹² It is arguable therefore that in cooperating with each other pursuant to article III: 5, the WTO, the IMF and the World Bank are mandated to have regard to human rights implications born by their areas of specialization.²¹³ Such an interpretation would certainly be consonant with the requirements of the Vienna Convention on the Law of treaties. However, the prolix manner in which such an interpretation is made is undesirable, moreover it seems to interpret article III: 5 well beyond its scope.

The provisions of article V are more direct. Article V: 1 authorises the WTO through the general council to engage with other intergovernmental organizations (IGOs) having responsibilities related to the WTO. Accordingly, where such IGOs have been identified, an agreement is entered into for the purpose of cooperation.²¹⁴ Article V: 1 also calls for appropriate arrangements for the purpose of effective cooperation. Most questions and arrangements about the relationship however, concern observer status given to other IGOs,²¹⁵ and as such does not extend to cooperation on human rights issues. Such observer status usually brings access to document, including restricted documents pertinent to the work of the WTO, but does not however provide status to

²¹⁰ Article V of the WTO Charter.

²¹¹ Formal agreements were accordingly negotiated between the WTO, the IMF and the World Bank. The aim of which is to strengthen inter agency relations through the promotion of cooperation and collaboration. See Hoekman and Kostecki (2001) p 68.

²¹² See above paragraph 1.4 of chapter 1.

²¹³ Indeed the IMF and World Bank Structural adjustment Programmes have received attention for their impact on enjoyment of human rights, in particular socio-economic rights, see Genugten W, Hunt P and Mathews S (2003) “World Bank, IMF and Human Rights” and also Skogly SI (2001) “The human rights obligations of the World Bank And the International Monetary Fund.”

²¹⁴ Hoekman B M and Kostecki M M (2001). “The Political Economy of the World Trading System.” Oxford University Press, 2nd Ed: Oxford New York p 67-8.

²¹⁵ Jackson (1998) p 53.

IGOs to participate or speak at meetings that are observed.²¹⁶ Some of the major IGOs that have been identified as having related responsibilities with the WTO, include: The United Nations, World Intellectual Property Organisation (WIPO), IMF, World Bank, Office international des Epizootics, and International Telecommunications Union; UNDP; UN Economic Commission; FAO; ILO; International Organisation for Standardization (ISO); World Customs Organizations (WCO) and UNCTAD.²¹⁷ So far, no cooperative links have been made with UN agencies promoting human rights. Even among those UN agencies charged with the obligation of promoting human rights, such as the UN FAO and WIPO,²¹⁸ cooperation is limited to the area of specialization, for instance, the WTO cooperates with WIPO on matters mainly related to technical aspects of the TRIPS agreement only, and cooperates with UNFAO on technical aspects of Agreement on Agriculture only, effectively excluding human rights implications of such agreements.²¹⁹

Article V: 2 provides for the making of appropriate arrangements to consult with and cooperate with NGOs concerned with ‘matters related to those of the WTO.’ According to Jackson, there seem to be no general explicit rules regarding the role for NGOs in various WTO activities.²²⁰ From the wording of article V: 2 NGOs whose work is related to human rights are unlikely to secure arrangements with the WTO precisely because, theirs is an unrelated activity. The WTO has nevertheless made provision by enacting some guidelines in which it seeks to reach out to NGOs in general.²²¹

Taken together, the provisions providing authority for creating external links and relations with other external bodies by the WTO appear to be inadequate to forge the kind of multilateral cooperation necessary for the effective and meaningful

²¹⁶ Ibid Jackson, maintaining that: ‘there is an inherent difficulty in determining the appropriateness of the relationship in terms of the charter’. So far the charter recognised a special role ‘as appropriate’ for both the IMF and the World Bank through a delicately negotiated text agreement between the WTO and these institutions, thus recognising a need on the part of the financial organizations to have special access and the opportunity to comment.’

²¹⁷ Hoekman B M and Kostecki M M (2001). “The Political Economy of the World Trading System.” Oxford University Press, 2nd Ed: Oxford New York p 68-9.

²¹⁸ A number of UN agencies have thus far been charged with promoting human rights, regardless of the fact that they are specialised. See below paragraph 3.4.1

²¹⁹ See, Hoekman and Kostecki (2001), p 68-0

²²⁰ Jackson (1998) p 53. Full discussion on the role of NGO in the WTO is undertaken below.

²²¹ See below, paragraph 3.4.2.

participation by the WTO in protecting trade-related human rights. The scope of these provisions is largely limited to making ‘appropriate arrangements with IGOs and NGOs having related responsibilities with the WTO.’ The specific reference to ‘related matters’ effectively excludes protection of human rights, as at this point in time, this is not a specialised area of the WTO; hence an ‘unrelated matter’. In addition, the scopes of these provisions are inadequate in that they do not extend to other important global players, specifically Multinational Corporations, who play a major role on world trade.²²² An accelerated and cohesive multilateral cooperation aimed at enhancing the protection of human rights by the WTO, must therefore be characterised by participation of all global players, each contributing their resources and skills in order to help the WTO meet its international obligation of protecting human rights.

3.3 HUMAN RIGHTS AND THE WTO: TOWARDS AN ACCELERATED MULTILATERAL COOPERATION

The ideal of an accelerated multilateral cooperation presupposes a situation wherein global institutions²²³ and international regimes²²⁴ work together in order to achieve a particular goal, irrespective of their area of expertise.²²⁵ Undoubtedly, the major problems facing the world today, including those ramifying from globalisation require global solutions from global institutions acting together in a concerted effort. According to Diehl, for instance: “Neoliberals argue that international institutions do more than merely reflect the distribution of power and serve as an alternative means

²²² See paragraph 3.4.3 below.

²²³ IGOs, NGOs, Multinational Corporations (MNCs), International financial institutions, National Governments etc.

²²⁴ According to Diehl P F (1997). “The politics of Global Governance: International Organizations in an Interdependent World.” Lynne Rienner Publishers, Colorado: USA at p 25 “...an international regime is composed of sets of explicit or implicit principles, norms, rules, and decision making procedures around which actors expectations converge in a given area of international relation and which also help coordinate their behaviour, for instance, the international trade regime based on GATT.”

²²⁵ The UN Declaration on the Right to Development recognises the importance of cooperation in meeting the challenges of development. Article 3:2 provides that ‘the realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States...’ Article 3:3 provides further that ‘States have a duty cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realisation of human rights.’ These provisions, while mandating States to engage in cooperation, should apply equally to all international major role players in the area of protecting human rights in order to foster human development.

for States to pursue power politics. From a neoliberal perspective IGOs help coordinate State behaviour, shape judgments about interests and commitments of others, and influence State preferences”²²⁶ These multilateral institutions, especially IGOs not only indicate and facilitate cooperation, they also help States by setting out international and local agendas, monitoring and ensuring compliance and carrying out a host of other functions.²²⁷

Increasing interdependence leads States to cooperate with each other to solve common problems, thus benefiting from the greater efficiency resulting from such cooperation.²²⁸ Such cooperation normally takes place, firstly at relatively non-controversial areas such as technical cooperation but later on expand and spill over into new and more controversial issues.²²⁹ It is the expansion into these new and controversial areas that requires a well defined, articulated and elaborated system that will ensure a smooth multilateral cooperation.

The WTO is certainly not an exception; it too is required to cooperate with other international institution and international regimes particularly, in areas that are considered to be non-traditional to its mandate such as environment, labour standards and human rights. The acceleration of cooperation in these areas will ensure that the role played by the WTO in the global governance of the global trading system takes into account these topical social issues. The importance of such a cooperative approach is important. Firstly, it is clear that the inherent framework of the WTO is trade orientated, thus incapable of meaningfully protecting human rights, including and in particular trade-related values.²³⁰ Secondly, a multilateral cooperation approach is important because, properly synchronised, it has the potential of yielding more results than if the WTO or indeed any of the institution worked alone towards achieving adequate protection of human rights.

In chapter 1, the unique relationship between trade and human rights was evinced by showing the ultimate desire of these disciplines, which is, ensuring human development through greater and sustainable economic development and growth.²³¹

²²⁶ Diehl (1997) p 1.

²²⁷ Ibid p 8 and 10. In specific terms, IGOs influence States through the use of oversight, majority rule, weighted voting, monitoring, support for allies, and support for specific international services.

²²⁸ Diehl (1997) p 26.

²²⁹ Ibid.

²³⁰ Jones (2004) p 131.

²³¹ See paragraph 1.4 of chapter 1 above, and also Jones (2004) p 131 providing that ‘a multilateral trade agreement tends to create stability in international relations and to increase economic welfare for all participants and conditions that play an important role in supporting human rights.’

Effective multilateral cooperation is therefore essential mostly in areas of human rights that would advance and ensure sustainable economic growth and development. Seen from this perspective, a multilateral cooperation between the WTO and the UN for instance, can accelerate the speedy realization of the UN Millennium Declaration 2000 goals (MDGs) and the goals of WTO Doha Development Agenda.

First, however, the WTO has to include and accommodate human rights within its trade agenda and mandate, thus defining for itself a role in protecting human rights and outlining where, how and which rights are to be protected. An approach of this nature will eliminate some of the obstacle, such as overlapping of obligations, which in most cases prohibit effective cooperation. This approach will moreover lead to a cohesive, comprehensive, credible and concerted cooperative system capable of protecting and enforcing human rights through; among others, the imposition of trade sanctions in a responsible manner, thus minimising the adverse effects of such. Jones provides that: “the challenge for governments, [IGOs], [MNCs] and advocates of trade and non trade issues therefore lies in developing a comprehensive system of international governance that is open, representative and responsive.”²³² Such a system of international governance can be achieved through a full participation by international major role players.



3.4 MULTILATERAL COOPERATION: PARTICIPATION BY MAJOR ROLE PLAYERS

The international governance of the global trading system is continually drawing attention from many quarters. This is as a result of the profound impact trade is having on many aspects of life. According to Jones “the major actors in governance issues are workers, consumers, business especially those engaged in importing, exporting or competing with traded goods and national governments which must play a pivotal role in bridging the gap between institutions and the demand for transnational representation.”²³³ All these role players or actors have a stake in international trade policy, some more than the others. However, there are some major role players, in particular, whose cooperation with the WTO is essential for the

²³² Jones (2004) p 168.

²³³ Ibid.

successful protection of human rights by the WTO.²³⁴ They include new participants in trade policy discussions (NGOs representing environmental groups, labour groups, advocates of human rights) who accordingly ‘perceive a link between their respective issues and trade; either through trade’s direct impact on the issues or possibly through the use of trade sanctions as mechanism to promote their goals’.²³⁵ Clearly, a multilateral cooperation requires cooperation with both new and old participants. In that regard the WTO should cooperate with the UN and agencies, International Non-governmental Organisations, Multinational Corporations and National Governments (States).

3.4.1 THE WTO AND THE UN AND ITS AGENCIES

In considering accelerated multilateral cooperation in the area of human rights, it seems fitting to start by considering the role of the UN and its agencies. This particular intergovernmental organization has over the years evolved, covering and addressing new challenges brought by globalisation. Of particular importance for the purpose of this study is the relationship this body has or could have with the WTO, in relation to protection of human rights. Indeed the general purpose of the UN is relevant to the WTO. Article 1 states the purpose as:²³⁶

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threat to peace, and the suppression of acts of aggression or other breach of the peace, and to bring about peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

²³⁴ Cooperation with these selected ‘major role players’, in particular, is in addition to being strategic also convenient as they include within their ambit many other groups and are therefore representative, for instance NGO represents civil society and its many dimensions, the UN represents many other agencies and all affiliated governments of the world, MNCs represents the business sector hence business interest, and finally national governments represent domestic policy and national interest.

²³⁵ Jones (2004) p167 makes a distinction between new participants, and traditional participants such as Multinational Corporation, exporter or importer associations unions, consumer advocacy groups and national government.

²³⁶ For a full discussion of the purpose and principle of the UN see White NG (2002) “The United Nations Systems: Towards International Justice.” Lynne Rienner Publishers Colorado: USA, p 12-14.

3. To achieve international co-operation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for the fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonising the actions of the nations in the attainment of these common ends.

The last two points are directly relevant to the discussion. These provisions have been backed by specialised agencies, which are IGOs in their own right possessing separate council, assemblies, secretariats and independent budgets.²³⁷ In addition to these specialised IGOs, there are other IGOs; that although not recognised as specialised UN agencies, are nevertheless recognised due to the relationship they maintain for instance with, the UN General Assembly.²³⁸ Apart from these, there are additional entities, playing a subsidiary role to the UN, established by main political organs such as the General Assembly, under article 22 of the UN Charter.²³⁹ Although, subsidiary, these organs retain a large degree of autonomy in their activities.²⁴⁰

It becomes apparent from this conspectus of the UN and its agencies that, a cohesive and meaningful cooperation in the area of human rights between the WTO and the UN is viable. The UN ECOSOC is an important organ in that it oversees the functions of the Human Rights Commission established under ECOSOC in 1946.²⁴¹ The Human Rights Commission has its own agenda, which contributes to the overall protection, promotion and enforcement of human rights by the UN.²⁴² Many other UN

²³⁷ White (2002) p 1-2, some of the main IGOs include: International Labour Organization (ILO); Food and Agriculture Organization of the UN (FAO); UN Educational, Scientific, and Cultural Organization (UNESCO); the World Health Organization (WHO); International Maritime Organization (IMO); International Telecommunications Union (ITU); International Monetary Fund (IMF); the World Intellectual Property Organization (WIPO); International Fund for Agricultural Development; and the UN Industrial Development Organization.

²³⁸ For instance the UN Economic and Social Council (ECOSOC), see White (2002) p4-5.

²³⁹ The main subsidiary organs include: the United Nations Development Programme (UNDP); the UN Children's Fund (UNICEF); the UN High Commissioner for Refugees (UNHCR); the UN conference on Trade and Development (UNCTAD); the UN World Food Programme (WFP); the UN Environment Programme (UNEP); and the UN High commissioner for Human Rights.

²⁴⁰ Ibid.

²⁴¹ The Human Rights Commission was responsible for the production of the Universal Declaration of Human rights adopted by the General Assembly in 1948.

²⁴² For example, the Commission considers gross violations of human rights with the aim of revealing and condemning the most serious violators. See White (2002) p 223-4 and also p 5-6.

specialised agencies, including ILO;²⁴³ FAO; WHO; and UNESCO were charged with the duty of promoting and protecting human rights.²⁴⁴ The High Commissioner for Human Rights created in 1993 following the Vienna world conference on human rights is also very important role player. Its mandate is to promote and protect human rights through out the world and to also undertake tasks assigned by competent bodies within the UN system.²⁴⁵

Should the WTO include human rights within its trade agenda and mandate, and proceed to protect these rights through an accelerated multilateral cooperation with the UN and relevant agencies, its task would be a relatively easy one, given the exactitude of the UN in human rights. Indeed, the UN chain of authority for human rights is decisive and well established. It runs from the General Assembly to, ECOSOC, to the UN Commission on Human Rights, and to the sub commission on promotion and protection of human right.²⁴⁶ This system is well coordinated and capable of forging cogent cooperative ties with other international organizations such as the WTO. Indeed given the vast resources and intellectual resources available within the UN chain of human rights, the UN can effectively cooperate with the WTO, by among others providing it with technical, practical and theoretical assistance in order to ensure that trade rule do not undermine human rights obligations of the States.

3.4.2 THE WTO AND INTERNATIONAL NON GOVERNMENTAL ORGANIZATIONS

Being an intergovernmental organisation, the WTO accommodates only governments. The private sector and NGOs do not have direct access to WTO.²⁴⁷ To that extent, if such groups would like to have certain issues addressed at WTO level, their best

²⁴³ The importance of ILO in setting human rights standard, in particular with labour is distinguishable. The ILO is accordingly concerned with economic and social rights within the work environment. It also covers to a certain extent, civil and political right. See full discussion White (2002) p 235.

²⁴⁴ White (2002) p 58.

²⁴⁵ Ibid p 222, this particular body is distinguishable from the Human rights Commission established in 1946 under the auspices of ECOSOC.

²⁴⁶ White (2002) p 222.

²⁴⁷ Hoekman and Kostecki (2001) P 69.

chance often lies in convincing their governments to take up the issue on their behalf.²⁴⁸

In July 1996 the WTO General Council established guidelines for arrangements on relations with NGOs. These guidelines mention the need to make documents more readily available and further require the WTO secretariat to engage actively with the NGOs, and recommend the development of new mechanism for fruitful engagement, including symposia on WTO related issues.²⁴⁹ The guidelines were enacted pursuant to article V: 2 of the WTO charter as a result of the pressure put on the WTO by NGOs.²⁵⁰

Nowadays, there are more pressing and urgent needs calling for the adjustment of the manner in which the WTO conducts its business.²⁵¹ The role of NGOs in protecting human rights and generally engaging in issues of ‘social justice’ on the other hand is also accelerating; hence Sampson notes that: “The NGO community at the beginning of the twenty first century looks very different form that of 1947. In recent times-roughly coincident with the birth of the WTO-the NGO community has grown in numbers, in its political influence, and its capacity to make intellectual contribution to the problems it addresses.”²⁵² Jones provides further that: “NGOs play a significant role representing civil society, providing organised channels of political influence, civic participation, and education.”²⁵³



Literature review informs us that the 1947 ITO charter included a role for NGOs in the structure of the organization.²⁵⁴ Accordingly ‘the ITO framers envisaged that the commercial and public interest NGOs would maintain regular contact with the ITO secretariat, receive unrestricted documents, propose agenda items, and participate as

²⁴⁸ Ibid.

²⁴⁹ Sampson G P (2001), “The Role of WTO in Global Governance” p 122. See also Jones (2004) p 170.

²⁵⁰ Sampson (2001) p118.

²⁵¹ Ibid, p 114, accordingly such pressing needs include “ the increased interdependence of the world economy and rapid globalisation; the rise in membership numbers and increased sophistication and political activism of NGO community; the dramatic increase in speed and ease of communication (which, among other consequences, has multiplied the influence on NGO); the exponential increase in our understanding of the environmental impact of goods traded internationally, specifically considering patterns and methods of production.”

²⁵² Jones (2004) p 169 maintains for example that more than 700 NGOs officially registered as nongovernmental participants in the WTO meeting in Seattle. See also Sampson (2001) p 117 maintaining that: “In 1996, at the first WTO Ministerial Conference in Singapore, some 159 NGOs registered, of which 108 were present while in Seattle more than 700 engaged in ministerial proceedings, while 1,478 NGOs submitted position paper.”

²⁵³ Jones (2004) p 169.

²⁵⁴ See Sampson (2001) p 116 for full discussion.

observers and occasional speakers at conferences.²⁵⁵ This particular approach was however not adopted in the 1994 WTO charter resulting in inadequate links with the public as represented by interest groups.²⁵⁶

Participation by NGOs in the WTO has however been bedevilled by a variety of factors. Indeed NGOs have also had a share of their problem in the form of criticisms and objections levelled at them, in particular regarding their participation in the WTO. Some proponents of the WTO argue that ‘these organizations are not necessarily democratic, accountable or even broadly representative and are really nothing more than self-appointed representatives of themselves.’²⁵⁷ Notwithstanding these objections however, the role of NGOs within the WTO is increasing and necessary, precisely because the NGOs give global civil society²⁵⁸ a voice, and are vehicles through which individuals get to participate in global trade policy making.

There are many NGOs doing work as well in the area of human rights and general social issues. They include big NGOs such as OXFAM, Friends of the Earth, Third World Trade Network, Amnesty International, and Public Citizen’s Trade Watch.²⁵⁹

Most human rights NGOs however were created with specific mandates and have thus adopted and developed a somewhat traditional approach to human rights.²⁶⁰ It is interesting to note though that, some NGOs, for example Amnesty International and Human Rights Watch, also cooperate with the UN in the areas of human rights, playing in particular humanitarian roles.²⁶¹ This multi-tasked approach is certainly

²⁵⁵ Ibid.

²⁵⁶ Sampson (2001) 116.

²⁵⁷ See Sampson (2001) p 118 for a full discussion.

²⁵⁸ According to Jones (2004) p 169 “civil society traditionally refers to any and all groups and organizations that exist separately from the state and the market, including political parties, interest groups, ethnic associations, and religious, cultural and community organisations...Global civil society implies a set of groups connected internationally by common interest, such as environment quality, working conditions, human rights, or (less visibly) economic benefits tied to expanding trade, whether or not they are organized internationally or as a political interest group.”

²⁵⁹ Jones (2004) p 170.

²⁶⁰ According to Oloka-Onyango J (1995). “Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa” 26 Cal. W. Int’l p 35 “this has both its benefits and its down side. It is beneficial in so far as it can produce significant effects with respect to the single issue under scrutiny” Crucial in this regard is the fact that ‘there are handfuls of NGOs that consider the specific issues of economic and social rights in a sustained and critical fashion. Among them are groups such as the Development Group for Alternative Policies (Development GAP), The International Centre for Law and Development (ICLD), Centre for Economic and Social Rights (CERS)’. Clearly such a specific approach could enable these NGOs to proffer specialised expertise in the event of an accelerated multilateral cooperation.’ Hoekman and Kostecky (2001) p 71 submit that: “In principle, encouraging greater participation of single issue NGOs, the business community and consumer protection groups in debates on the future WTO agenda would be useful to ensure new inflow of ideas and the maintenance of the communications channels with various pressure groups.”

²⁶¹ See Diehl (1997) p 253.

useful in that it has the potential of enhancing the networking capabilities of IGOs-NGOs, thus further helping in redressing, to some extent, the traditional imbalances relative to IGO-NGOs capabilities, thereby ameliorating the envisaged multilateral cooperation.²⁶²

In vying for a multilateral cooperation between the WTO and NGOs in the area of human rights, it is useful however to distinguish between ‘advocacy’ and ‘technical’ functions of the NGOs.²⁶³ Accordingly, ‘pure advocacy’ NGOs are designed to lobby on behalf of issues, mobilise public opinion in favour of it, and achieve political influence.²⁶⁴ Technical NGOs on the other hand primarily provide expertise or other specialised knowledge of an issue.²⁶⁵ Such NGOs in particular technical NGOs dealing with specific human rights issues can cooperate with the WTO by providing useful information regarding impact assessment carried out in relation to trade rules and specific human rights values, thereby ensuring that WTO trade rules do not compromise human rights obligations.

3.4.3 THE WTO AND MULTINATIONAL CORPORATIONS²⁶⁶

It is doubtless that the role-played by Multinational Corporation (MNCs) in global economic relations and in particular global trade is major. MNCs are the business sector counterparts to NGOs. They are the companies that essentially extended the scope of their operations beyond the confines of home market to foreign direct investment (FDI).²⁶⁷ MNCs are important in the context of this study because their area of work directly affects the social conditions of the host country.²⁶⁸ Moreover their impact on global trade is enormous, precisely because FDI and trade are often tightly interrelated.²⁶⁹

²⁶² Ibid 262.

²⁶³ Jones (2004) p 170.

²⁶⁴ Ibid.

²⁶⁵ Ibid, Some NGOs, however combine the tasks.

²⁶⁶ Many different terms are used to refer to this entity. They include: transnational corporation, transnational enterprise, multinational corporations and multinational enterprise. See Jager N (2002) p 11 “Corporate Human Rights Obligations: In search for Accountability.”

²⁶⁷ Jones (2004) p 171, see also Jagers (2002) p 11 holding that ‘MNC refers to a legal person that owns or control production, distribution or services facilities outside the country it is based.’

²⁶⁸ They often bring new technologies; know how, best management and operational practices to the host country.

²⁶⁹ Jones (2004) p 171.

Despite the benefits attributable to the presence of MNCs in host countries, some critics regard them as ‘great villains of the world economy: secretive, manipulative and ruthless in pursuit of global profits.’²⁷⁰ The criticisms also extend to the host country as if to suggest that where there is a corruptor there is a corruptee. The pursuit of global profit, in this regard is two sided in that, the MNCs benefit by settling in the host countries and harnessing market benefits, while governments benefit generally from the FDI brought by this companies. This mutually symbiotic relationship has resulted in governments becoming involved in the so-called ‘Dutch auction’, where countries bid against each other to offer the lowest levels of environmental, labour and human rights regulation in hope of attracting the much coveted FDI.²⁷¹

These sort of unprincipled activities resulted in the role of MNCs being scrutinised, with particular interest on the impact of large corporations on the enjoyment of human rights being central to the enquiry. Continuing efforts are being made to link MNCs and protection of human rights.²⁷² The main purpose behind efforts to link MNCs and human rights is to ultimately enforce compliance with human rights standards and in some instances hold these large corporations accountable for gross violations of human rights where they are perpetrators. In that regard, the fact that both trade and investment are the driving force of globalization, it is fitting that the two institutions should cooperate with each other, in particular within the area of human rights. Such cooperation can be with regard to including express objectives among WTO investment rules, to promote human rights. An increased dialogue between the two institutions would therefore be necessary for the effective participation of both institutions.

²⁷⁰ Ibid p 172, see also Jager (2002) p 11 who maintains that ‘MNCs can operate with a considerable degree of autonomy and can shift their operations from one state to another. Moreover, the impact of large corporations on the effective enjoyment of human rights will, given their influence generally be greater than the case of smaller business entities.’

²⁷¹ Taylor and Thomas (1999) p 40-2. Accordingly, the phenomena of ‘Dutch auction’ is also said to lead to violation of human rights in that ‘it leads to the destruction of cultural life, degrades the environment, leaves people without the means for their own subsistence, creates physical and mental health problems and tears communities and families apart.’

²⁷² See Rice E (1998) “Doe v. UNOCAL Corporation: Corporate Liability for International Human Rights” 33 U. S. F. L. Rev. 153 holds that: “Because money from the first world nations has a major impact on developing countries, foreign investment and corporate conduct have been targeted as a means of preventing future human rights abuses.”

Indeed given the size and capacity for political influence, the possibility of abuse is certain, especially where this companies deal with corruptible governments.²⁷³The UN has thus far sought to instil a measure of social responsibility²⁷⁴ within these companies through a various measures. The UN Global Compact 1999 is one such measure. It is a project undertaken under the auspices on the UN Secretary General.²⁷⁵Accordingly, ‘signatories agree to follow a code of conduct that supports social justice and human rights in all areas where they do business.’²⁷⁶ Apart from these sorts of measures, ‘MNCs have also begun imposing self-created codes of conduct for overseas dealing, largely in response to public concern for human rights and environmental issues in developing countries. Such codes often address forced labour, child labour, labour organizing and bargaining, non-discrimination, worker health and safety, and in some cases minimum wage and maximum hour guidelines.’²⁷⁷ Such corporate governance initiatives, while commendable, lack however the necessary enforcement mechanism. Nevertheless, they suggest that ‘moral persuasion may be a more powerful force in international business than is commonly recognised’.²⁷⁸

Cooperation between the WTO and MNCs is therefore crucial for both institutions; in particular as they seek to define for themselves a role they should play in protecting human rights. In that regard, cooperation between the WTO and MNCs can be in the form of holding seminars, symposiums, consultations with MNCs with the purpose of assessing the impact of trade and investment on human rights and how that can be remedied and mapping a way forward how trade rules and WTO investment rules can promote human rights. For the WTO, this sort of cooperation would go a long way; in that it would further strengthen the Trade Related Investment Measures agreement (TRIMS), in particular, by reorienting it towards promoting social justice as well.

²⁷³ Jones (2004) p 173.

²⁷⁴ The main idea behind corporate social responsibility lies in the contention that as traders and investors benefit from freer trade, it is important to ensure that free trade is also fair and that business enterprises respect human rights, labour standards and environmental standards when trading and investing. See “Human rights and trade” available at <http://www.unhchr.ch/html/hchr/cancunfinal.doc> [accessed on 9-11-04] p 5.

²⁷⁵ For more information visit the UN global compact website available at <http://www.unglobalcompact.org/Portal/Default.asp?>

²⁷⁶ See Jones (2004) 173 and also Global Compact “ten principles” available at <http://www.unglobalcompact.org/Portal/Default.asp?>

²⁷⁷ Rice (1998) p 162.

²⁷⁸ Jones (2004) p 173.

It should be remembered however that, apart from the UN measures and the self imposed corporate governance measures mentioned above, MNCs also have human rights obligations under international law.²⁷⁹ They too have obligations under international law to respect, protect and fulfil human rights including civil and political rights together with social and economic rights such as the right to health, right to food, prohibition of slavery and forced labour.²⁸⁰ Observation of these international obligations by the MNCs will therefore be strengthened by a multilateral cooperation with the WTO.

National governments however would be far more effective and ideal in monitoring MNCs in that they are in a position to enact laws to hold these large corporations accountable in case of non-compliance with universally recognised human rights standards. Some countries, for instance, help to ensure respect for international worker rights through legislation by restricting foreign investments in, or the importation of products from certain countries that engage in repressive human rights practices.²⁸¹ Cooperation between the WTO, MNCs and National Governments is therefore crucial in establishing a credible and well-synchronised multilateral cooperation aimed at protecting human rights.



3.4.4 THE WTO AND NATIONAL GOVERNMENTS

The WTO is made up of National Governments coming together to form an intergovernmental organization overseeing international trade policy. National Governments however, retain a measure of sovereignty in terms of how they formulate their policy in various matters. Trade policy is first and foremost set up domestically by governments before being translated into global policy. Jones provides that: “Governments formulate trade policies and negotiating positions according to the political calculus they face. One would normally expect a compelling national interest with implications for trade policy to come to the fore in a representative government trade policy or negotiating position.”²⁸²

²⁷⁹ See Jager (2002) p 19.

²⁸⁰ See Jager (2002) p 75-94, for a full discussion on the human rights obligations of MNCs.

²⁸¹ Rice (1998) p 162.

²⁸² Jones (2004) p 178.

Governments therefore influence the manner in which trade policy is formulated, including whether or not such policy takes into account human rights. Sensitivity towards human rights by government officials is essential if the WTO agenda is to be expanded to include social justice issues. According to Jones, ‘access to influence on trade and environmental, labour and human rights policies is politically contestable and subject to the available policy channels for deliberation. The final international negotiating positions of governments on trade and other issues depend on their judgment of national interest and available venues for pursuing their goals.’²⁸³ Protection of human rights is in the interest of all governments and the WTO provides a suitable venue for the negotiation of trade policies and adopting trade rules that do not undermine human rights.

Sole reliance on governments taking up policy stance orientated towards protection of human rights, is however not enough.²⁸⁴ Clearly, with governments being political institutions, it is foreseeable that certain issues or interest of transnational nature might not receive the necessary political backing domestically hence they might not make it to the WTO, thereby leading to the WTO falling short of representing global civil society.²⁸⁵ In that regard, advocates of non-trade goals such as human rights must push for a new regional and international agreements, conventions and organizations that would give them direct voice in these matters.

While it would be ideal to develop a proper framework in which the WTO can protect human rights through an accelerated multilateral cooperation with national governments, it should be remembered that: “International procedure can never be considered as a substitute for national mechanism and national measures with the aim to give effect to human rights standards. Human rights have to be implemented first and foremost at national and local levels. The primary responsibility of States to realise ²⁸⁶ human rights is *vis-a vis* the people who live under the jurisdiction of these States.” Therefore, National Governments have to lead the way.

3.5 SOME CONCLUDING REMARKS

The concept of an accelerated multilateral cooperation does not only apply to trade and human rights. There is greater need to organise and harmonise the activities of

²⁸³ Ibid.

²⁸⁴ See also Jones (2004) p 178-9.

²⁸⁵ Jones (2004) p 178-9.

²⁸⁶ Oloka-Onyango (1995) p 59.

global institutions so as to arrive at a well-structured system of multilateral cooperation capable to meet global challenges. The state of world governance and cohesion, including global trade governance has fallen short of accommodating other interest of global civil society.

An accelerated multilateral cooperation between the WTO, UN and its agencies, MNCs and INGOs in the protection of human rights is bound to result in greater protection and respect for human rights. However, for the WTO to successfully protect trade related human rights and to successfully enter into an accelerated multilateral cooperation with these major role players, it first has to redefine its role, relationship and link with human rights. In essence, it has to start by putting in place an agreement which will act as guideline, among others outlining where, how and which fundamental rights are trade related hence falling within the scope of its agenda. Once such a declaration is in place, it can then proceed to enter into specific and formal agreements with each one of these major role players and indeed other role players thereby fully benefiting from the expertise of these major role players.



CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

4.1 CONCLUSIONS

The prevalence of human rights has over the years gained momentum, with particular attention being paid to the promotion, protection and enforcement of this fundamental values. Human rights values have found their way into many of the international relations and activities, if not all. This point is attributable to the fact that human rights are inalienable in nature; hence any relationship purporting to serve the interest of the human person invariably affects these rights. The process of globalisation also led to the occupation of centre stage by human rights and the need to protect them. This, in essence came about as questions were being asked about the impact of globalisation on the enjoyment and fulfilment of human rights.

The WTO has a specific mandate, which is trade liberalisation; with the aim of fostering, in essence, economic growth and development. However, despite this specific mandate, which is supported by a specialized framework of basic principles and rules, the relationship between trade and human rights, in particular social justice remains apparent and in need of urgent attention. Indeed there is a causal link between trade and economic development and between trade and the realisation of social and economic rights, hence the achievement of social justice. In principle there is a causal link between trade and human rights. This particular relationship

necessitates a human rights approach by the WTO, an approach that accommodates social justice issues and human rights issues within the WTO agenda and framework.

Trade-related human rights values are varied in their nature, however assessing the current trade regime and its work progress, some of the more directly implicated rights include, the right to access to health and healthy living, the right to food, the right to development, the right to education the right to life and core labour right or standards. The possible negative impact on these rights by trade rules or obligations under trade rules necessitates intervention by the WTO as it is the supreme administrator of trade rules.

The protection and enforcement of trade-related aspects human rights is therefore of cardinal importance, hence the questions whether or not to incorporate human rights within the WTO framework, and whether or not the WTO should accelerate a multilateral cooperation geared towards the protection and enforcement of human rights, calls for an immediate attention and response.

The incorporation of human rights within the WTO, that is including human rights within the trade agenda, mandate and ultimately framework with a view of having the WTO as an enforcement mechanism, is a viable option; which is nevertheless characterized by a measure of complexities, including the questions of where, how and which rights should the WTO promote, protect and enforce without staining and frustrating its specific mandate. Notwithstanding these complexities however, such an event can be greatly facilitated if the WTO adopts an agreement on trade-related aspects of human rights. Such an agreement should be specifically aimed at defining in exact terms the current role and envisaged role of the WTO *vis a vis* human rights, in particular trade-related human right and the protection of such rights. To that extent identifying trade-related human rights values and in addition addressing in specific terms any other issue that might present itself as an impediment to the WTO carrying out its specific mandate by the adoption of such an agreement. In essence such an agreement will provide an express linkage on human rights and the WTO agreements thus clearly linking States obligations under international trade law to human rights.

The acceleration of multilateral cooperation geared towards the protection of human rights is also a viable option. However, for such an accelerated multilateral

cooperation to yield optimum result, it has to be predicated on a trade-related human rights agreement, which will act as a guideline thereby setting the tone for the WTO to effectively cooperate with other international role players. Moreover, such an agreement will in turn ensure the success of a cooperative stance by the WTO as it will clearly define and mandate the WTO to deal with human rights issues. It will furthermore facilitate cooperation with other IGOs, NGOs, MNCs and National governments.


Seen from this light, there is a clear cut need to adopt a trade-related human rights agreement, irrespective of the fact that it is for the purposes of incorporation or embarking on an accelerated multilateral cooperation. This agreement will firstly, give the WTO a human rights approach to international trade, thus giving it credibility as far as showing sensitivity towards human rights and as far as global trade rule making and policy making is concerned. Secondly, such an agreement will provide a necessary practical and pragmatic tool that will ensure that the protection of trade-related human rights and human rights in general play a practical and meaningful role in global trade policy making and that trade policy play a practical and meaningful role in human rights issues. Thirdly it will ensure that trade sanctions taken to enforce human rights compliance are taken in a responsible, uniform and orderly manner. Fourthly, such an agreement will ensure that the linking of human rights and trade is not used by protectionists to perpetuate protectionist attitudes. Lastly, such an agreement will provide an express linkage on human rights and the WTO agreements thus clearly linking States obligations under international trade law to human rights.

It certainly remains possible for the WTO to protect and enforce trade-related aspects of human rights. However such a task can only succeed if it is backed by the necessary political will to support firstly the WTO's effort to include this issue within its scope of activity, and secondly to support the human rights regime and those who seek to protect human rights.

4.2 RECOMMENDATIONS

Given the preceding conclusions and the general finding of the paper, recommendations will firstly be made in relation to the possibility of mainstreaming human rights within the WTO agenda, mandate and framework and secondly in

relation to undertaking an accelerated multilateral cooperation geared towards the protection of human rights by the WTO and major role players. Firstly, however, it is generally recommended that the WTO set in motion proceedings that will see this institution adopt a human rights approach to international trade, thus expanding trade agenda and mandate to include the protection of trade-related human rights, in particular social justice issues as outlined in the paper. Secondly, it is generally recommended that preparations be undertaken to launch a new trade negotiation round aimed at concluding a comprehensive agreement on trade-related aspects of human rights with the express purpose of mainstreaming human rights within the WTO agenda or undertaking an accelerated multilateral cooperation geared towards promoting, protecting and enforcing, in particular, trade-related aspects of human rights.

Recognising that it is only through a cohesive and well synchronised multilateral agreement that trade-related aspects of human rights can be effectively incorporated within the WTO agenda, mandate and framework, it is recommended that action orientated political and legally measures with clear time frames should be undertaken. To that extent, it is recommended that the  WTO establish a special committee on trade and human rights. The principal task of the committee will be to investigate further links between trade and human rights with the express purpose of ascertaining the best political and legal avenue that will lead to the successful mainstreaming of trade related aspects of human rights within the WTO agenda and framework without staining the WTO's specific mandate. The work of the envisaged committee on trade and human rights should therefore also be used as a foundation and background against which negotiations towards a trade related human rights agreement should be premised.

In order to facilitate the work of the envisaged trade and human rights committee, it is further recommended that the functions of all existing council, e.g. council on TRIPS, council on GATS, council on agriculture be extended by establishing sub committees within these councils, which will ascertain and report on the impact of their specific area of specialty on human rights to the envisaged committee on trade and human rights. Special relations should be established in particular between the WTO's committee on trade and development with the envisaged trade and human rights committee; and such relations should accordingly be geared towards

expanding the current ambit of ‘development’ to include ‘human development’, and ‘development through the protection and enforcement of human rights.’

Recognising that the task of mainstreaming human rights within the WTO is a complex task, it is recommended that the envisaged committee on trade and human rights put in place measures to consult stakeholders, primarily those dealing with human rights, with the view of benefiting from their technical skills and intellectual expertise. In that regard it is recommended that the envisaged committee on trade and human rights work closely with selected UN agencies with the view of benefiting technically and practically from these institutions, by among engaging in dialogue through seminars, trade and human right impact assessment projects, think tank seminars, and workshops on human rights and trade. In light of this, it is recommended that the envisaged committee on trade and human rights work in particular with the UN Sub committee on the promotion and protection of human rights from the office of the UN High Commissioner for Human Rights, the Committee on Economic, Social and Cultural Rights and the International Labour Organization secretariat, thus specifically concentrating on successfully mainstreaming socio-economic rights and core labour rights within the WTO agenda and framework.

The envisaged committees on trade and human rights should also work closely with civil society through NGOs, in particular, technical NGOs specialising in specific human rights issues related to trade. To that extent, there should be free movement of information regarding impact assessment project related to trade and human rights carried out by these NGOs. These NGOs should also be invited to submit reports on matters related to trade and human rights. Moreover, it is recommended that there be active participation and dialogue between NGOs and the envisaged trade and human rights committee; through engaging in seminars and workshops relating to specific human rights issues on trade.

Consultations between the envisaged committee on trade and human rights should be made with MNCs groupings, through holding seminars and workshop levelled at discussing the impact of trade and investment rules on human rights. Moreover, the envisaged trade and human rights committee should engage with the secretariat of the UN Global Compact, thus establishing dialogue which will facilitate information sharing and exchange of expertise regarding human rights obligations of MNCs.

It is further recommended that for the purpose of satisfying the political action, National governments, in particular developing countries and LDCs governments, should be invited to lodge submissions regarding their views on trade and human rights, thereby producing a broadly representative background preparatory work which will lead to the successful incorporation of trade related human rights within the WTO agenda and framework.

Once a comprehensive background and preparatory work has been made, it is recommended that their findings regarding trade and human rights be submitted to the ministerial council and subsequently be incorporated in the ministerial conference agenda for the purpose of final discussion at ministerial conference. Upon doing that it is recommended that a ministerial declaration be made, which will mandate negotiations on trade and human rights with the view of concluding a trade-related human rights agreement guided by the background and preparatory work of the envisaged trade and human rights committee.

Recognising that it is also through action orientated political and legal measures that an accelerated multilateral cooperation geared towards protecting trade-related human rights can be successful, it is recommended that legal measures be undertaken to amend Article V of the WTO Charter to include cooperation with major roles players in the specialising in human rights. Furthermore, it is recommended that political and legal action be undertaken in preparation for the negotiations and ultimately adoption of a trade-related human rights agreement that will facilitate and function as a comprehensive guideline for an accelerated multilateral cooperation with other major role players dealing with human rights. To that extent, it is recommended that the background and preparatory work for incorporating trade related human rights within the WTO agenda and framework by the envisaged trade and human rights committee, also be used a foundation for the negotiating such an agreement.

In order for an accelerated multilateral cooperation to be practical and feasible, it is further recommended that action orientated legal and political steps be undertaken, which action will lead to the WTO entering into formal agreements, such as the one between the WTO and Bretton Woods institutions, with the UN agencies specialising in human rights, in particular the office of the UN High Commissioner for human rights, UN ECOSOC Human Rights Commission, UNCTAD and Committee on

economic, social and cultural rights. The envisaged formal agreements between the WTO and UN agencies, should allow specialised UN agencies in human rights to have direct influence on trade rules and trade policy, that is, by engaging the WTO through regular participation in meeting with a view to proffer comments, review of trade rules from the WTO with the view of assessing their compliance with universally recognised human rights standards, conducting impact assessments on the effects of specific trade agreements on human rights, conducting workshops on the relationship between specific human rights and trade agreement, eg TRIPS agreement on the right to health, cooperating and sharing seminars where trade and human rights will be discussed, and providing technical and analytical skills in matters related to trade and human rights.

Legal and political action should also be undertaken to ensure that the WTO provides comprehensive and concrete guidelines on how best to cooperate with NGOs specialising in human rights. Such guidelines should give such human rights NGOs unrestricted observer status in the WTO arena; allow them to make regular submissions on topical issues relating to human rights with the view of incorporating such submissions in the final trade rules and trade policy, allow them to work directly with different specialised councils in the WTO. Furthermore, such guidelines should also allow for the WTO to cooperate with such NGOs by engaging in projects aimed at raising awareness on the impact of trade on human rights, engaging in technical, intellectual, and analytical information sharing through regular workshops, human rights symposiums, and seminars pertaining to the impact of specific WTO agreements on specific fundamental values. In order for this to adequately work, it is recommended that the envisaged trade and human rights committee establish a subcommittee to specifically facilitate cooperation between human rights NGOs and the WTO, thereby facilitating the inflow of intellectual expertise and information from such human rights NGOs.

Regarding Cooperation with MNCs, it is recommended that, the WTO take formal and reasonable steps to participate in the already existing UN Global Compact, thus working with MNCs which are party to the Global Compact. To that extent, it is recommended that those MNCs which are not party to the Global Compact also participate in the UN Global Compact. Formal and comprehensive guidelines should

be adopted by the WTO secretariat to enable the envisaged committee on trade and human rights to cooperate regularly with MNCs on issues of trade, investment and human rights. Such guidelines should be established with the view of providing a platform for greater dialogue between the two institutions and providing a platform for the sharing of seminars and workshops to be carried out with the view of including among the objectives of investment, the promotion and protection of human rights. In that regard, it is also recommended that the WTO through the TRIMS council work closely with the envisaged trade and human rights committee in order to specifically align the work progress under the TRIMS agreement with human rights imperatives, in particular social justice requirements thus making the rules under TRIMS agreement more human rights orientated. To facilitate cooperation between the UN Global Compact, the WTO and MNCs, it is recommended that the envisaged trade and human rights committee establish a subcommittee to specifically monitor and evaluate on a regularly basis the relationship in order to derive optimum results.

Regarding cooperation with National Governments, it is recommended firstly that WTO member countries which have not ratified all human rights instruments should take necessary political and legal measure to do so. The WTO should cooperate with National Governments through its trade policy review mechanism, essentially encouraging economic policy at national level and international level to be consistent with human rights, in particular trade-related human rights. To that extent, it is recommended that National Governments evaluate their trade policies and undertake necessary steps to realign such policies with human rights imperatives where they fall foul. Moreover, it is recommended that National Governments seek technical and analytical assistance from specialised UN agencies, such as the UN subcommittee on the promotion and protection of human rights from the OHCHR, and Committee on economic, social and cultural rights. Such technical assistance and analysis should be geared at conducting impact assessments in relation to the impact of trade obligations on the enjoyment of human rights and also be geared at helping governments in formulating trade policy that does not undermine human rights. In order for this to adequately work, the UN subcommittee on human rights and the Committee on economic, social and cultural rights, must be in cooperation with the WTO in order to provide technical and analytical assistance consonant with their cooperation with the WTO.

After taking such measures, which it is hoped will facilitate the mainstreaming of human rights within the WTO and facilitate an accelerated multilateral cooperation; it is recommended that in addition to the envisaged trade and human rights committee, a permanent human rights and trade council be established. The council will work much like the existing councils, thus monitoring, evaluating and periodically reviewing the envisaged trade-related human rights agreement with the view of ensuring that the WTO is in line with prevailing human rights standards.

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