Protection v. Protectionism

The Use of Human Rights Arguments in the Debate for and against the Liberalisation of Trade

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ABBREVIATIONS AND ACRONYMS

AMS	Aggregate measurement of support
AoA	Uruguay Round Agreement on Agriculture
CAP	Common Agricultural Policy
DSB	World Trade Organization Dispute Settlement Body
EBA	Everything But Arms
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade 1994
GSP	General System of Preferences
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
LDCs	Least-developed countries
MFN	Most-favoured-nation clause
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
PPM	Process and production methods
SCM	Uruguay Round Agreement on Subsidies and Countervailing Measures
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
WB	World Bank
WTO	World Trade Organization

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1 INTRODUCTION

Recognition that liberalisation – meaning the lowering of trade barriers, such as custom duties and quotas to enhance the free flow of goods – as well as international regulation of trade have substantive impacts on other areas has spawned new debates. "Trade and …" has become a popular discussion topic among economists, environmentalists and human rights scholars. The debate revolves around whether or not the trade community and the World Trade Organization (WTO) as its main institution should take non-trade considerations into account when deciding trade-related issues such as negotiation and adoption of trade rules, the acceptance of exceptions to trade rules and dispute settlement procedure.

One of the latest trade areas to be liberalised was agriculture. Trade in agricultural products has been a controversial and much-debated issue for quite some time. Agriculture was long treated as the general exception to international trade rules. The continuous efforts of the WTO to bring agriculture under its realm came to fruition in the Agreement on Agriculture (AoA),[1] which was concluded in the framework of the 1986-1994 Uruguay Round negotiations.[2] The trade liberalisation obligations that the AoA prescribes, in conjunction with the variety of protectionist measures of developed states, have sparked criticism from free trade opponents, who have started including human rights in their arguments against trade liberalisation. Non-

[1] Uruguay Round Agreement on Agriculture, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410, adopted on 15 April 1994, entry into force 1 January 1995.

[2] The Uruguay Round of negotiations was the eighth and most extensive in a series of trade talks. It was launched at Punta del Este, Uruguay, in September 1986 and came to a conclusion at Marrakesh, Morocco, in April 1994. It led to the establishment of the World Trade Organization, as well as numerous multilateral agreements, such as GATT 1994 and the Agreement on Agriculture, covering trade in almost all areas. For more information see World Trade Organization, *Understanding the WTO*, Geneva, WTO Publications, Summer 2003, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited 5 July 2004).

governmental organisations (NGOs) like Oxfam and FIAN (FoodFirst Information Action Network) claim that opening markets works to the detriment of economies of developing countries, and that the rules governing trade in agricultural products result in violations of the right to food and the right to development. In response, proponents of liberalising trade support their economic arguments with alleged human rights benefits that result from augmented prosperity. Hence, human rights are used to support opposing trade liberalisation views, which is even more surprising considering that human rights law and trade law have in the past been seen as two unrelated disciplines[3] that developed more or less independently from each other.[4] The WTO, for instance, has since its foundation declined to contemplate how WTO rules might affect human rights.[5]

In the "trade and human rights" discussion a vast array of issues is brought forward, including the following:

- Imposition of trade sanctions for human rights abuses,
- Inclusion of human rights conditionality in trade agreements,
- Integration of human rights principles and obligations in negotiations in the WTO[6] and the dispute settlement system ("mainstreaming human rights", "human rights approach"),
- The democratic nature of the WTO (participation of people/civil society in decision-making),
- Interpreting article XX or the General Agreement on Tariffs and Trade[7] (GATT) as to include human rights concerns, and
- The effects of trade on the enjoyment of human rights.

[3] See Resolution 2002/11 of 14 August 2002 of the Sub-Commission on the Promotion and Protection of Human Rights, preambular paragraph 4: *Concerned* that international economic law and human rights law have developed as two parallel and separate regimes, with the risk that human rights principles, instruments and mechanisms will be marginalized as highlighted by the actual or potential human rights implications of World Trade Organization agreements, including the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Agreement on Agriculture.

[4] Robinson, 2001, 210.

[5] Abbott, 2002, 121.

[6] See Resolution 1999/30 of 26 August 1999 of the Sub-Commission on the Promotion and Protection of Human Rights.

[7] General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, adopted on 15 April 1994, entry into force 1 January 1995. GATT 1994 incorporates the rules of GATT 1947.

This inquiry does not attempt to come to a conclusion with regard to the topics above. Rather, the aim of the inquiry is to find out how it is possible that human rights figure in the speech of both opponents and supporters of liberalised trade. The issues of the "trade and human rights" debate will only be touched upon in so far as they are raised by one of the parties: those who speak out against the liberalisation of trade in order to preserve human rights ("the human rights community"[8]) and those who defend free trade because it leads to overall human rights benefits ("the trade community").

Which human rights arguments are invoked to make the case for or against liberalised trade (chapter 2), on which philosophies are the positions of the opponents and supporters of free trade based (chapter 3), and how does understanding these philosophies help pointing out the flaws in the usage of the human rights arguments? Answering those questions will set the ground for the analysis of the arguments made by each of the two parties from a human rights point of view. How do supporters and opponents bend the concept of human rights to further their cause? That question is at the heart of this inquiry (chapter 4).

Many texts on the liberalisation of trade tend to show a one-sided picture, in particular where it concerns alleged human rights benefits or violations resulting from free trade. To avoid any bias, the methodology of the inquiry is based on a conceptual analysis of human rights arguments. Only very few examples are used in order to maintain a high level of abstraction and examine the use of human rights arguments from a theoretical point of view. Although human rights arguments are used in the discussion on the liberalisation of trade in all products, trade in agricultural products receives most attention in the inquiry to reflect the importance of agriculture in the economies of developing countries.

Sources used include legal texts, academic writings and statements from NGOs. Where the authors cite human rights in their argumentation, it is ex-

[8] The author acknowledges that not all NGOs and scholars that consider themselves part of the human rights movement have gotten involved in the "trade and human rights" debate. The focus of this inquiry, however, is on those who have and oppose free trade to defend human rights. Similarly, the trade community is internally divided, some being more cautious about the effects of trade liberalisation on human rights, others refusing to contemplate human rights altogether.

amined whether these arguments flow from a true understanding of human rights philosophy, or whether they represent a more economic approach to human rights. To achieve this, the foundation of human rights theory is compared to the roots of international trade theory. The findings of that comparison are then applied to scrutinise the validity of human rights arguments cited by both sides of the debate. Finally, conclusions drawn from studying the nature of human rights arguments are used to illustrate the consequences that improper understanding of human rights theory has on the true values of human rights and to suggest alternative ways of approaching the trade liberalisation debate and integrating human rights into trade policies.

2 HUMAN RIGHTS ARGUMENTS IN THE TRADE LIBERALISATION DEBATE

2.1 Theory 1: Liberalised trade resulting in human rights violations

2.1.1 Background: The Agreement on Agriculture

Of all the trade rules having an impact on developing countries, the ones originating in the Agreement on Agriculture are among those receiving most criticism. The reason is simple: agriculture is the main source of income for the majority of the inhabitants of developing countries, so the rules that regulate the trade in agricultural products in fact have a direct impact on the livelihoods of those individuals. Moreover, many farmers in developing countries suffer from hunger, so any rule pertaining to agriculture has an impact on their livelihoods. It is therefore necessary to have a closer look at the trade regime installed by the AoA.

Since the WTO Agreement on Agriculture came into force in 1994, agricultural products have been subject to international trade rules, including those that concern liberalisation, national treatment and the most-favoured-nation clause (MFN).[9] Previously, under the rules of the General Agreement on Tariffs and Trade, agricultural products were mostly exempt from international regulation. The AoA has as its purpose the removal of trade barriers by enhancing market access and reducing domestic support and export subsidies. This is reflected by the three pillars on which the AoA is based: (1) the reduction of border protection to increase *market access* for agricultural

[9] See Article 21 (1) of the Agreement on Agriculture, as well as Articles I and III of GATT 1947, 55 U.N.T.S. 194, adopted on 30 October 1947, entry into force 1 January 1948 (incorporated into GATT 1994). In short, the most-favoured-nation principle requires importing states not to discriminate between similar products from different countries, whereas the national treatment clause forbids discrimination between imported and domestically produced goods.

products, (2) the reduction of *domestic support*, and (3) the reduction of *export subsidies*.[10]

As concerns the first pillar, *market access*, all existing non-tariff barriers, such as quantitative import restrictions, minimum import prices, etc.,[11] had to undergo a "tariffication"[12] process, meaning they had to be converted into custom duties providing an equal level of protection and they had to be bound.[13] In other words, the non-tariff barriers a product faces when entering a market needed to be expressed in one single tariff to make barriers to trade more transparent and predictable. This tariff, parties agreed, would then be reduced by 36 percent over a time period of six years. For developing countries, which enjoy some degree of preferential treatment, the corresponding figures are 24 percent over a ten-year period. Least-developed countries are totally exempt from tariff reduction commitments.[14]

As for the second pillar, *domestic support*, the regime for subsidies is governed by two agreements. The WTO Agreement on Subsidies and Countervailing Measures (SCM)[15] lays down general rules on subsidies for most products, but delegates the majority of regulation for agricultural subsidies to the Agreement on Agriculture. Under the SCM, all subsidies are categorised into "boxes," which have the colours of a traffic light. In this logic, a "green" subsidy is permitted, "amber" subsidies must be reduced, and "red" stands for forbidden subsidies.[16] A slightly different categorisation was installed for agricultural products governed by the AoA. Most importantly, the

[10] Export subsidies are subsidies contingent upon export performance (see Article 1 (e) of the Agreement on Agriculture).

[11] Other measures include variable import levies, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties (see footnote 1 to Article 4 (2) of the Agreement on Agriculture).

[12] See Article 4 (2) of the Agreement on Agriculture. However, primary agricultural products that are the predominant staple in the traditional diet of developing countries are exempted from the tariffication obligation (for the conditions, see Annex 5B of the Agreement).

[13] Binding tariffs establishes a maximum amount of duties countries will levy on imports. These commitments are laid down in so-called Schedules of Concessions and are different for each contracting party.

[14] Article 15 (2) of the Agreement on Agriculture.

[15] Uruguay Round Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 3, adopted on 15 April 1994, entry into force 1 January 1995.

[16] See Agriculture Negotiations: Backgrounders, *Domestic Support: Amber, Blue and Green Boxes*, at http://wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm (last visited 5 July 2004).

"red" box does not exist, which means that agricultural subsidies remain allowed. During the negotiation of the Agreement on Agriculture, it became clear that states were not willing to forbid any agricultural subsidies altogether, but could only agree to reducing existing support measures. Under the AoA, there is instead a "blue" box, which identifies subsidies that neither are required to be reduced nor are completely harmless with regard to distorting trade. To summarise, the different boxes under the AoA are "green," "blue" and "amber."

Only one type of measure is immune from challenge:[17] the "green" box subsidies, which are supposed to only have minimal trade distorting effects.[18] They are "decoupled" from production levels or prices, meaning that they are granted regardless of the amount or value of production. Examples of "green" box subsidies are retirement payments, regional development and environmental protection programmes. "Blue" box subsidies, which cover direct support measures tied up with production-limiting conditions,[19] are designed to decrease production, thereby reducing potential surplus. The difference between the two categories is that the "blue" box subsidies are acknowledged to be trade-distorting, but are exempt from reduction commitments because they require farmers to limit production, *e.g.* by setting aside land or by imposing production quotas.

Under the AoA, the third type of domestic support are subsidies in the "amber" box, which contains subsidies that neither qualify for the "blue" or "green" box, nor fall under the so-called *de minimis* exemption.[20] They are "coupled" payments, meaning they are directly linked to either quantities or prices, such as input subsidies and market price support. Under the AoA, domestic subsidies falling in this category, the "amber" box, are the only domestic support measures that have to be reduced. The sum of the "amber" box subsidies is defined as the Aggregate Measurement of Support (AMS), which the AoA describes as "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of agricultural producers in general."[21] Developed countries undertook to lower the AMS by

[17] See Article 13 (a) of the Agreement on Agriculture.
[18] See Annex 2 of the Agreement on Agriculture.
[19] See Article 6 (5) of the Agreement on Agriculture.
[20] Under the *de minimis* exemption, subsidies of under 5% of the total value of production of a basic agricultural product are exempt from reduction requirement. For developing countries the figure is 10% (see Article 6 (4) of the AoA).
[21] Article 1(a) of the Agreement on Agriculture.

20 per cent over a period of six years. The figures for developing countries were adjusted to 13,3 per cent over a period of 10 years, whereas least developed countries (LDCs) were exempt from reduction commitments.[22]

As for the third pillar, *export subsidies*, those subsidies subject to reduction commitments are listed in Article 9(1) of the Agreement on Agriculture. In addition to prohibiting new subsidies, the AoA introduces two forms of reduction commitments, budgetary and quantitative. Developed countries were to reduce the *value* of listed export subsidies by 36 per cent over six years, and the *quantity* of subsidised exports by 21 per cent over the same period. For developing countries the reduction commitment was set at 24 per cent over a ten-year period. LDCs were exempt from reduction commitments.[23]

Article 20 of the AoA is entitled "Continuation of the Reform Process" and provides that negotiations were to be taken up to further discuss the reduction of market protection and subsidies. These reform talks have been taken up and included in the wider agenda set at the Doha Ministerial Conference. However, the ongoing negotiations have not borne any fruit, as illustrated by the failure of the 5th WTO Ministerial Conference in Cancún, Mexico in September 2003. One of the reasons for the failure was disagreement between developing countries on the one side and the United States of America (USA) and the European Union (EU) on the other over domestic support: the former pleading for the reduction of the immense amounts of domestic subsidies that flow to EU and USA producers, the latter unwilling to give them up. The failure to bring the two views together closed the door for any changes to the current rules, so the AoA regime is still the legal base for the trade in agricultural products, and subsidies continue to be allowed.

The effects of liberalising agricultural trade have sparked criticism from opponents of free trade as well as some scholars. Both of these groups have adopted human rights language to express disagreement with the current re-

[22] See Articles 6, 15 (2), Annex 3 and Annex 4 of the Agreement on Agriculture; as well as the Member's Schedules. According to the Ministerial Decision issued at the Uruguay Round, the reason for the exemptions are the weaker economies of LDCs, which could experience negative effects from trade liberalisation (see Uruguay Round Ministerial Decisions and Declarations, Decisions adopted by the Trade Negotiations Committee on 15 December 1993 and 14 April 1994, *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, at http://www.wto.org/english/docs_e/legal_e/35_dag.doc (last visited 5 July 2004)).On the other hand, only few states can actually afford subsidies.

[23] Desta, 2002, 247-248.

gime on market access and subsidies, as well as opposition to the imbalance between producer and consumer interests that allegedly flows from the Agreement.[24] NGOs create a link between the rules of free trade and human rights by pointing to the negative effects of free trade on the enjoyment of human rights of inhabitants of developing countries, notably the right to food. As is explained below, the thrust of the argument is targeted at subsidies and market access obligations. The human rights critique is often extended to the institution from which the trade rules emanate, the World Trade Organization. NGOs criticise the institution for not taking human rights into consideration in the negotiation, adoption and oversight of trade rules. Finally, as is further detailed below, the priority that trade rules allegedly enjoy over human rights is condemned by the human rights community.

2.1.2 Liberalising trade as negatively affecting human rights

Domestic and export subsidies have caused the most controversy among advocates of human rights. In its arguments against liberalising agricultural trade, the non-governmental organisation FIAN claims the current rules on trade in agricultural products cause a violation of the right to food because of the impact of the AoA on farmers in developing countries.[25] According to the NGO, the free trade regime advocated by developed countries results in the rise of cheap imports, made possible through market access obligations of the AoA, at the expense of local producers who cannot compete with subsidised products[26] to the extent that vulnerable individuals do not have access to a functioning system of food provision anymore.[27] At the same time, it is argued, export products from developing countries still face high tariffs on the markets of developed states, where they have to compete with subsidised food. FIAN uses human rights language to claim that "violations of the right to food are perpetrated in places where local agricultural production contracts so much that vulnerable individuals or groups do not have access to a functioning system of food provision anymore," and, "violations are committed where people's sources of income are destroyed as consequence

[24] Garcia, 2002, 132.
[25] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).
[26] Verwer, 2001, 157.
[27] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).

of the existing trade regime, be it their access to productive resources such as land, water and seeds or be it their jobs."[28]

Part of the blame is directed at the Agreement on Agriculture, as it continues to allow subsidies, which in practice only developed countries can afford. Even if developing countries had the financial means to support their domestic farming industries, they are barred from doing so, because the AoA forbids the introduction of new subsidies. Only few countries could afford subsidies when the Uruguay Round was concluded in 1994, almost all of them are developed countries.[29] Moreover, developed countries' obligation to reduce subsidies elapsed in 2000. Since parties failed to reach agreement over the reform of the AoA, developed states are currently exempt from further reducing subsidies to support their farmers.

Yet it does not stop there. NGOs point out that the AoA hits less developed countries from two directions. While developed states can protect their markets in two ways, first granting their farmers a competitive advantage by lowering production costs through domestic support measures and second, encouraging surpluses by paying export subsidies, developing countries have to facilitate access to their markets. They cannot afford to provide domestic support, and are barred from protecting their fragile farming sectors from cheap foreign imports through tariffs. The AoA only allows them to have one tariff, which they are barred from raising. Moreover, human rights activists claim that developing countries are pressured to open up their markets to meet loan conditions set by the World Bank (WB) and the International Monetary Fund (IMF),[30] while developed countries keep the access to their own markets limited by introducing non-tariff barriers that are difficult for developing countries to meet, such as the demands that products comply with packaging and health-related standards. Developing countries are often in no position to fulfil the high standards of developed countries. As a consequence, FIAN maintains that farmers in developing countries not only lose

[28] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).

[29] Currently, only 25 WTO members can subsidise exports, and only 34 can have domestic support measures (counting the EU as one member). For a list of the countries, see Agriculture Negotiations: Backgrounders, *Export Subsidies and Competition*, at http://wto.org/english/tratop_e/agric_e/negs_bkgrnd08_export_e.htm (last visited 5 July 2004), and Agriculture Negotiations: Backgrounders, *Domestic Support: Amber, Blue and Green Boxes*, at http://wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm (last visited 5 July 2004).

[30] Dillon, 2002, 150.

access to their own food, but also their income and jobs, as in the long run local production will be entirely replaced by imported food; farmers will be unemployed, whole sectors may disappear, and the country becomes heavily dependent on imported food.[31] Oxfam, another NGO fighting for the abolishment of subsidies, goes as far as considering export subsidies a fundamental abuse of human rights: "They have destroyed subsistence agriculture and livelihoods by the million and continue to do so."[32] By becoming dependent on imported food, the argument is, a developing country loses its influence over the price of agricultural products. Instead, the price will be largely determined by the amount of export subsidies granted to Western producers. Once the imported foods have a monopoly on the markets of developing countries, human rights advocates doubt whether the heavily criticised export subsidies will stay. Their removal, however, would lead to higher prices for the products on which importing countries have become dependent. Some have gone as far as dubbing the resulting situation one of economic slavery.[33]

There is no lack of criticism of the implementation of the Agreement on Agriculture. Free trade opponents use figures to show that industrial countries have actually increased the amount of subsidies for their agricultures and remodelled them in such a way as to shift the subsidies out of the restrictive "amber" box, and into the "blue" box.[34] In other words, the legal form of the payments is changed, so that the subsidies are classified into the category that does not require reductions. Also, direct payments to farmers in the United States that belonged into the controversial "blue" box have been restructured by the USA so that they now fall under the heading of the "green" box,[35] which covers the support measures that are immune from challenge. The reason behind the immunity is that a "green" subsidy is not linked to the

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[31] Office of the High Commissioner for Human Rights, *Human Rights and Trade*, 5th WTO Ministerial Conference, Cancún, Mexico, 10-14 September 2003, page 11, at http://www.unhchr.ch/html/menu2/trade/cancunfinal.doc (last visited 5 July 2004).

[32] Oxfam, *Human Rights for Social Change*, 19 January 2004, World Social Forum, Mumbai, India, page 3, at http://www.oxfam.org/eng/pdfs/doc040119_wsf_human_rights_jeremy_speech.pdf (last visited 5 July 2004), (referring to remarks made by the former Prime Minister of Portugal, Antonio Guterres).

[33] Marceau, 2003, lecture.

[34] Centre for Alternative Agricultural Media, Towards Cancún WTO Ministerial, *Abandoning Agriculture*, by Devinder Sharma, at http://www.farmedia.org/spectrum/Devinder/wto cancun.html (last visited 5 July 2004).

[35] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).

quantity produced. Although not in those terms, the website of the Agriculture Directorate General of the Commission of the European Union is announcing that it will follow the same example for the reform of the Common Agricultural Policy (CAP),[36] which critics regard as an evasion of reduction commitments, while still supporting local produce to the detriment of imported goods. Furthermore, the reduction of tariffs, intended to reduce protectionism by developed states, has had virtually no effect because during the Uruguay Rounds the industrialised nations fixed the duties that served as the reference point at very high levels allowing them to maintain high tariffs even after the reductions.[37] Apart from that, NGOs defending developing countries maintain that other barriers stand in the way of market access, such as the rise of duties on products such as coffee imports according to the degree of processing.[38] This system of progressive tariffs, whereby the higher the degree of processing, the higher the custom duty levied, effectively bars producers in developing countries from moving further up on the value chain,[39] because the tariffs make processed goods from developing countries too expensive to be competitive.

However, while some activists suggest that the abolishment of free trade principles would help developing countries out of their misery, others in the human rights movement have recognised that the abolishment of subsidies does not solve all developing country agricultural trade problems. According to them, many small peasants and their families would still not be able to profit from complete liberalisation because those farmers would then have to compete internationally without any kind of state support.[40] In other words, some free trade sceptics argue that developing countries should be allowed

[36] Europa, European Commission, Agriculture, CAP Reform; *CAP reform – a long-term perspective for sustainable agriculture*, at http://europa.eu.int/comm/agriculture/capreform/ index_en.htm (last visited 5 July 2004).
[37] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).
[38] *Eliminating World Poverty: Making Globalisation Work for the Poor*, White Paper on International Development, Presented to Parliament by the Secretary of State for International Development by Command of Her Majesty December 2000, available at http://www.dfid.gov.uk/Pubs/files/whitepaper2000.pdf (last visited 5 July 2004), at page 68.
[39] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).
[40] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).

to subsidise their products and protect their markets from foreign interference. They are against the unfair use of export subsidies that artificially lower the world price of products to the detriment of food producers, but support measures designed to assist farmers struggling to survive.

2.1.3 The lack of human rights concerns at the WTO

The critique of the AoA is closely connected to the WTO, the forum where trade rules are formulated. Free trade opponents accuse the Organization of taking away popular participation in the development of trade rules and policies by monopolising the negotiations over issues that have great impact on the domestic plane.[41] As a result, countries experience a loss of democratic control over their national government's economic and social policies.[42] Connected to this criticism is the demand of developing countries for a greater voice in the WTO. Although decisions are taken by consensus, developing countries complain about not being able to defend their interests, as an important part of the decision-making is done between a selected group of (developed) countries outside the formal meetings in the hallways and "green rooms" of the WTO.[43]

In addition, NGOs attack the WTO for its lack of human rights concerns in its rule-making and conflict resolution exercises. Although composed of states whose representatives also sit in United Nations (UN) bodies that promote human rights, the WTO is said to be largely responsive to the interests of producers. Economists and government representatives in the WTO dictate the content of its policies without assessing their impact on human rights. In fact, the WTO explicitly proclaims its intention not to get involved in human rights. As an alternative policy, NGOs claim that instead of pretending that trade has nothing to do with human rights, human rights considerations should play a formal role in the negotiation, adoption and implementation of trade rules. This is the reason why some go as far as demanding a trade bill of rights to be included in WTO agreements.[44]

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[41] Abbott, 2002, 123.
[42] Jenkins, 1999, 228.
[43] Fleshman, Michael, *WTO Impasse in Seattle Spotlights Inequities in Global Trading System*, at http://www.un.org/ecosocdev/geninfo/afrec/subjindx/134trade.htm (last visited 5 July 2004).The term "green rooms" refers to private rooms in which a select group tries to come to an agreement on difficult issues.
[44] Abbott, 2002, 122.

Finally, in the oversight and enforcement of trade rules, sceptics criticise the dispute settlement system[45] of the WTO for its reluctance to allow the invocation of human rights norms to surpass trade rules.[46] As a consequence, situations may occur in which the Dispute Settlement Body (DSB) declares legal under WTO law actions that would be illegal from a human rights perspective. Therefore, human rights activists demand that human rights should be allowed as an exception to the stringent trade obligations of the Agreement on Agriculture and GATT, for example by amending article XX GATT.[47]

2.1.4 Prioritising trade over human rights

On a more general plane, human rights advocates object to government priorities when trade considerations guide governments at the expense of human rights.[48] Instead of focusing on improving individual rights, governments of both developed and developing countries are said to prioritise their trade obligations over their human rights obligations. Human rights defendants critique this priority on the grounds that trade is not an end in itself, but should be used only as means when and insofar as it promotes the improvement of living conditions. They argue that human rights obligations should be the primary concern of governments.[49]

Human rights activists point out that not only have member states of the WTO signed and ratified treaties that oblige them to respect, protect and fulfil human rights, but that these obligations are the first responsibilities of states. Other regulations should be aimed at achieving the goal of protecting human dignity. The human rights community argues that rules governing

[45] The WTO dispute settlement system consists of the Dispute Settlement Body (composed of all WTO Members), panels, and the Appellate Body. Panels issue reports, which the DSB formally adopts. The Appellate Body issues reports on appeals, which are also formally adopted by the DSB. The DSB can authorise sanctions. Where in the remainder of the text the acronym DSB is used, the panels and Appellate Body are also implied.

[46] Until now, the dispute settlement system of the WTO has not been confronted with questions concerning the compatibility of exceptions based on human rights with WTO law. However, Article XX does not explicitly list human rights as a possible exception to trade rules. For more on human rights and the WTO dispute settlement system, see Marceau, 2002.

[47] Garcia, 2002, 133.

[48] Jenkins, 1999, 228.

[49] UN Document E/CN.4/2002/54, 15 January 2002, 5.

trade should achieve greater human rights promotion and protection and not violate human rights.[50]

2.1.5 The proposed alternative: Food sovereignty

Unhappy with the existing regime on trade in agricultural products, a group of developing countries proposed to include a "Food Security Box" into the Agreement on Agriculture (also known as the "Development Box"). Under the proposal, countries whose populations heavily depend on agriculture would be allowed exceptions from obligations to provide open access to their markets, and allowed to give subsidies in situations where the food security of their populations is threatened.[51] This proposition had been under discussion since the time of the WTO ministerial conferences in Seattle in 1999, but due to the collapse of talks at Cancún it has since been shelved for an indefinite period.

A new concept that has emerged in opposition to the priority given to export-oriented production and in opposition to dumping (supporting surplus production which is then exported at less than cost) is that of "food sovereignty." Introduced by the movement of peasant and family farmers Via Campesina at the 2002 World Food Summit in Rome, it reclaims the national and individual sovereignty over food security policy. The proposal embraces the concept that countries should have the right to protect and regulate domestic agricultural production and trade.[52] Human rights language is abundant in the presentation of this concept:

> "Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self reliant; to restrict the dumping of products in their markets, and; to provide local fisher-

[50] Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy, Challenges for the World Trade Organization*, at http://www.ichrdd.ca/english/commdoc/publications/ globalization/wtoRightsGlob.html (last visited 5 July 2004).
[51] World Commission on the Social Dimension of Globalization, Ideas Bank, *Food Security Box in the WTO*, at http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=51 (last visited 5 July 2004).
[52] Via Campesina et al., *Our World Is Not for Sale, Priority to People's Food Sovereignty, WTO out of Food and Agriculture*, at http://www.focusweb.org/publications/2001/WTO-out-of-Food-and-Agriculture.html (last visited 5 July 2004).

ies-based communities the priority in managing the use of and the rights to aquatic resources."[53]

Food sovereignty goes a step further than the concept of "food security," which refers to the guarantee that everyone must have enough food, but does not consider how the food was produced or where it came from. In essence, food sovereignty seeks to protect domestic production, thus the small farmers. In line with that logic, food sovereignty neither prohibits subsidies to support local markets, nor protective tariffs by importing countries,[54] as the purpose is to shield vulnerable farming industries from foreign interference.

As a consequence of the deadlock between developed and developing countries at Cancún, a coalition of NGOs has taken the concept of food sovereignty a step further and demands the complete removal of agriculture from the trade regime imposed by the WTO.[55] As trade does provide income, the concept of food sovereignty does not negate trade altogether. The NGOs recommend launching a new trade system based on serving "the rights of peoples to safe, healthy and ecologically sustainable production."[56]

2.2 Theory 2: Trade liberalisation as a means of enhancing the human condition

2.2.1 The efficiency model

The Agreement on Agriculture is another step towards the liberalisation of trade in all goods. It is therefore with the general "free trade" arguments the AoA is justified. The line of reasoning of supporters of free trade is based on

[53] People's Food Sovereignty – the Agricultural Network, *Our World Is not for Sale, Priority to People's Food Sovereignty, WTO out of Food and Agriculture*, at http://www.peoplesfoodsovereignty.org/statements/new%20statement/statement_01.htm (last visited 5 July 2004).
[54] UN Document E/CN.4/2004/10, 9 February 2004, 12.
[55] People's Food Sovereignty – the Agricultural Network, *Our World Is not for Sale, Priority to People's Food Sovereignty, WTO out of Food and Agriculture*, at http://www.peoplesfoodsovereignty.org/statements/new%20statement/statement_01.htm (last visited 5 July 2004).
[56] People's Food Sovereignty – the Agricultural Network, *Our World Is not for Sale, Priority to People's Food Sovereignty, WTO out of Food and Agriculture*, at http://www.peoplesfoodsovereignty.org/statements/new%20statement/statement_01.htm (last visited 5 July 2004).

what Dunoff[57] has termed the efficiency model: without government interference (*i.e.* subsidies and tariffs), countries specialise in what they are best at, resulting in efficient trade that is beneficial to all. Adam Smith was such a theorist. He saw trade law mainly in economic terms as a matter of augmenting efficiency and the general welfare, for which the unrestricted free market is the best guarantor.[58] Specialisation, the theory holds, brings comparative advantage,[59] resulting in lower prices and more availability.[60] In response to human rights challenges, to support their argument and to convince others of the benefits of liberalising trade, free trade proponents maintain that human rights will be improved as a side effect of augmented prosperity. As part of a broader reform process, the argument goes, better market access abroad and better trade-related policies at home can help to raise agricultural productivity and thereby income and employment.[61] With regard to the right to food, trade scholars assert that

> "the dismantling of trade barriers helps to boost food production in countries and regions where it can be produced at lowest cost, including the many developing countries whose agricultural development is currently adversely affected by trade-distorting measures, including subsidy practices abroad."[62]

According to free trade advocates, from a broader perspective, the multilateral trading system secures access to food supply by promoting a more efficient use of global resources and spreading the risks globally: droughts in one region can be mitigated by production surpluses elsewhere.[63] The decrease in price volatility, economists point out, benefits all. Also, the trade community justifies liberalisation by stating that the opening and stabilisation of market access opportunities through successive rounds of multilateral trade negotiations has directly or indirectly increased the purchasing power

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[57] Dunoff, 1998 349.
[58] Garcia, 1998b, 424.
[59] According to David Ricardo, "Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole." Ricardo, David, *On the Principles of Political Economy and Taxation*, London, John Murray, 1821, at http://www.econlib.org/library/Ricardo/ricP2a.html (last visited 5 July 2004).
[60] Dunoff, 1998, 350.
[61] Wolter, 2000, 123.
[62] Wolter, 2000, 123. The quote illustrates that some of the "trade community" acknowledge that subsidies may have negative effects on developing countries.
[63] Wolter, 2000, 124.

of households by inducing economic growth and job creation.[64] In a nutshell, economists assert that "trade enhances growth, and that growth reduces poverty."[65]

Some go further and say that subsidies and dumping are not detrimental to the interests of developing countries, because by opening up markets, they gain access to more food and cheap products from abroad, while the developing countries can sell their own farming products in developed countries.[66] Trade lobbyists state that therefore, trade opens up economic possibilities: the augmented wealth eliminates poverty, increases individual liberty and enhances human rights,[67] such as the right to property[68] and the right to trade.[69]

2.2.2 Trade is about human rights

The underlying principle of the GATT and the WTO is that voluntary trade is a mutually beneficial phenomenon.[70] In that line of thinking, unrestricted trade is to be supported, because future general welfare increases resulting from free trade are the best road to achieving and safeguarding human rights.[71] The human rights that are meant in this context emanate from the liberal theory of human rights, which encompasses the principles of liberty, fairness, equality of opportunity, non-discrimination, and the rule of law. Even adherents to the efficiency model, in which trade is strictly a matter of economic efficiency and welfare, assert that human rights concerns are essential to the analysis of international trade law, because the concepts of rule of law and elimination of trade barriers can be interpreted from the point of traditional economic theory as simply part of what trade is "about."[72] Free trade supporters point out that these values are embodied in the free trade

[64] Wolter, 2000, 121.
[65] Bhagwati, 2004, 53.
[66] Norberg, 2001, 119.
[67] Addo, 2002, 152.
[68] The right to property will be closer examined below.
[69] The free trade camp often refers to the right to trade as a human right, although from a human rights perspective, this is highly contestable, as will be shown below.
[70] Alvarez and Bhagwati, 2002, 127.
[71] Green, 1994, 612; arguing that supporting economic development in China through MFN and other policies is the best way to promote human rights in China.
[72] Garcia, 1998b, 413.

principles of the most-favoured-nation and national treatment rules[73] so they can plead that economic integration leads to increases in general welfare, non-discrimination, and the implementation of treaty-based regulatory schemes.[74] In a nutshell, the argument states that free trade is fair because of the principles it is based on (voluntary cooperation and exchange),[75] and because of the beneficial results that free trade has on human rights.

2.2.3 Economic freedom leads to human rights improvements

Supporters of free trade are eager to point out that markets reduce cases for war[76] through economic integration, the goal of the WTO system. This line of reasoning is based on the assumption that if trade restrictions and discrimination are replaced by multilateral trade arrangements, they contribute to a strategy of peace,[77] because trade partners will be reluctant to go to war with each other. In that sense, "international peace is very much linked to, if not dependent upon, international economic problems."[78] It is suggested that economic and political freedom are connected:[79]

> "There is a strong correlation between states that protect human rights and states with markets more open to trade, suggesting a prima facie case that open markets enhance economic development, that economic development is important to protecting human rights, and that rules limiting access to markets (even in the name of reducing imbalances in development) could in fact reduce the promotion and protection of human rights."[80]

Trade lobbyists see the role of the World Trade Organization in this setting as a contribution to and assistance in creating the climate that is necessary for the flourishing of human rights.[81] Moreover, free trade supporters argue that the GATT/WTO system provides a framework for peaceful negotiation

[73] Addo, 2002, 154.
[74] Garcia, 1998b, 428.
[75] Norberg, 2001, 108.
[76] Norberg, 2001, 38.
[77] Desta, 2002, 3.
[78] Desta, 2002, 4.
[79] Norberg, 2001, 252; referring to examples in South East Asia and Latin America.
[80] Abbott, 2002, 126.
[81] Qureshi, 1998, 160.

and conflict resolution to ensure that the rule of law rather than the rule of power governs international trade relations.[82]

In taking this train of thought even further, some argue that trade rules might be the gateway to promoting human rights. Damrosch speculates whether within China, which has not yet embraced important human rights treaties,[83] the most potent techniques for advancing human rights may be found in the law-based disciplines of GATT rules and WTO institutions.[84] How difficult the argument is to defend, however, is acknowledged by Damrosch herself when she refers to the numerous WTO members with abysmal human rights performance.[85] Nevertheless, it is suggested that WTO membership can create pressure for more rule of law and transparency. An analogy is made with the transformation of candidates for European Union membership, where human rights protection is one of the political requirements for membership.[86]

2.2.4 Human rights concerns at the WTO

As seen above, human rights do figure in the line of arguments of free trade supporters. However, trade lobbyists often ward off any attempts to incorporate human rights considerations into the negotiations of the WTO. Through trade-coloured lenses, human rights protection both at home and abroad have the potential to be detrimental to the economic prosperity of developing countries. Domestic human rights are seen as translating into Western protectionism, while high foreign human rights standards may remove the comparative advantage that low human rights standards seem to guarantee for developing countries. The logic behind it is that trade functions best when it is based on clear rules.[87] Leaving human rights considerations open as a possible exception to trade provisions, some claim, is to the detriment of legal certainty in trade.[88]

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[82] Wolter, 2000, 120.
[83] Apart from the International Covenant on Economic, Social and Cultural Rights, which it ratified on 27 March 2001.
[84] Damrosch, 2002, 129.
[85] Damrosch, 2002, 129.
[86] One of the Copenhagen criteria is stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.
[87] O'Neal, 1998, 652.
[88] Garcia, 1999, 72.

Others take a different road. Instead of debating whether or not to human rights should find their way into the WTO, they propose that the Organization already plays a part in the enhancement of human rights. After all, the argument goes, the preamble of the WTO states that trade should be conducted with a view to raising standards of living.[89] Consequently, the end is not trade in and of itself, but the contribution trade makes towards alleviating poverty. In practice, these free trade advocates conclude, this means that the Marrakesh Agreement Establishing the World Trade Organization[90] promotes human rights, such as the right to food, through the impact of the multilateral trading system on food security.[91]

2.2.5 Markets and human rights go hand in hand

In addition to basing the link between trade and human rights on a cause and effect relationship, some have pointed out that human rights and free trade are mutually dependent: Markets do not function without the guarantees of non-discrimination, the right to fair trial, etc.[92] One of the scholars having laid the link between human rights and trade, Petersmann, points out that human rights legitimise the free trade agenda and ensure the proper functioning of the market, while also contributing to the healthy competition by assignment of individual freedoms, property rights and liability rules to all economic actors.[93] Petersmann further asserts that without these rights, liberal trade can easily lead to the abuse of deregulation.[94] He concludes that liberal trade needs competition and social rules to limit abuse of deregulation.[95] When these rights are in place, however, human beings become better economic actors, as they can participate and invest in trade when they know their rights are protected.

On the other hand, it is pointed out that markets are the means for the effective protection of human rights. Human rights cannot exist in an economic vacuum.[96] They need protection in the economy and depend on the supply of

[89] Lim, 2001, 277.
[90] Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 3, adopted on 15 April 1994, entry into force 1 January 1995.
[91] Wolter, 2000, 119.
[92] Petersmann, 2002, 628 (making a reference to European economic integration).
[93] Petersmann, 2000, 1376.
[94] Petersmann, 2002, 624.
[95] Petersmann, 2002, 647.
[96] Abbott, 2002, 126.

goods and jobs. Economists summarise that markets are the consequence and means for effective protection of human rights.[97] In conclusion, as former High Commissioner for Human Rights, Mary Robinson stated, "[t]he goals of trade and human rights are mutually reinforcing. They involve creating a stable, rule-based society necessary for economic growth."[98]

2.3 Summary

The arguments of the human rights and trade communities demonstrate the various ways in which human rights concerns have entered the debate for and against the liberalisation of trade. Most prominently, human rights serve to highlight the consequences of free trade. Both parties are eager to point out that the trading system of the WTO leads to changes in the lives of individuals to the extent that it affects the exercise of their human rights, but the two communities hold opposite opinions on whether the current system produces positive or negative effects on human rights. Free trade opponents cite human rights to express their resentment over the World Trade Organization. The credibility and integrity of the Organization is attacked by pointing to its lack of human rights considerations. While the trade community agrees that the WTO does not directly address human rights concerns, this is seen by the trade community as proof of the rule-based, and therefore fair nature of the WTO. The current rule-based approach is argued by the trade community to be of benefit to human rights indirectly through the economic benefit of greater access to agricultural products. Considering human rights directly during trade negotiations is seen by the trade community to distort the pursuit of equal rules for all, and to likely lead to protectionism. However, the human rights community employs the concept of human rights to battle against the overpowering trade rules and suggests that trade rules have a lower priority than human rights. In this fight, the human rights community has gone as far as suggesting that agriculture should be left out of the WTO trading system.

Before embarking on the study of the philosophical backgrounds of the human rights theory and the free trade theory, it needs to be pointed out that the picture sketched above is not always as black and white. Not all arguments of human rights defenders are targeted against the liberalisation of

[97] Petersmann, 2002, 629.
[98] Robinson, 2001, 210-211.

trade, nor do all activists deny that trade also has positive effects on the enjoyment of human rights. The abolishment of export subsidies, for instance, is an argument favouring more liberalised trade. On the other hand, not all actors looking for more profit support free trade, as many protectionist measures limit competition and benefit local producers. Similarly, some economists admit that liberalisation measures may leave some sections of the population worse off.[99] For the purpose of investigating how human rights concerns are used to support opposing views, however, the communities are divided into those who cite human rights as arguments against the liberalisation of trade, and those who cite them as reasons to further liberalise trade.

[99] Referring to globalisation, Bhagwati states that it will occasionally do harm that requires attention. See Bhagwati, 2004, 32.

3 THE HUMAN RIGHTS VERSUS THE TRADE APPROACH

3.1 Introduction

Human rights have found their way into the speeches of both supporters and opponents of liberalising trade in agricultural products, even speeches by those who initially refused to consider the subject as part of their field of operation such as the economists committed to full liberalisation of trade. The radical turn-around from their previous position of keeping economic and human rights issues separate leads one to wonder about the motive behind this more recent inclusion. However, clearly this turn-around reflects the amplified importance of human rights considerations in this debate. From an optimistic point of view, their new inclusiveness means that the free trade camp has embraced human rights because it acknowledges the primacy of human rights over ordinary rights. To cite human rights benefits in support of their positions gives that community a stronger position in the debate, because human rights function as a trump over other arguments.

However, it is important to recognise that free trade supporters can only properly claim human rights benefits in two situations. First, human rights benefits can only properly be claimed by the trade community if there has been a demonstrated genuine concern for the protection of human dignity. It is insufficient for human rights benefits to be cited merely in order to justify trade liberalisation. Scrutiny of the human rights benefits claimed by those who favour trade liberalisation will show that often the human rights argument cited is not backed up by a demonstrated concern for human dignity. The other situation when the inclusion of human rights in the trade argument can outplay the contentions of the counter party is when that party does not understand the true nature of human rights either. When NGOs overuse the human rights dialectic in support of weak cause and effect relationships, claiming human rights violations insufficiently backed up by facts, they downgrade the value of human rights to the detriment of their own cause. They enable the free trade camp to use the human rights arguments against them.

Before dissecting the linkages between the liberalisation of trade and human rights, it is necessary to look into the different underpinnings of trade law and human rights law. Only when the values that form the foundation of the two disciplines are understood is it possible to evaluate the arguments of each side and come up with suggestions for an approach that addresses the conflicts between them.

3.2 Principles versus consequences

3.2.1 The trade community's approach to human rights

Different rationales underpin trade and human rights. The free trade theory is very straightforward. For economists, "the sum or average of resulting individual welfare levels determines the correctness of an act, principle of policy."[100] The consequences of the comparative advantage system, that is to say the augmented wealth that peoples and individuals obtain from a more efficient trade regime, are cited to justify free trade as a worthy goal.[101]

In the pursuit of maximising the efficient function of the free market, trade rules try to get rid of all obstacles that are in the way of the free flow of goods. What makes trade most efficient is the elimination of "barriers." These barriers are set up by governments, and come in two forms: non-tariff barriers and tariff barriers, depending on whether they can be expressed in monetary terms (tariff) or not (non-tariff). The former include all kinds of custom duties,[102] the latter is extremely wide and covers any other measure intended to discourage importation. Examples are legislation concerning food safety and health requirements, packaging, sanitary standards, technical standards, licensing requirements, labelling, and subsidies. Why the government put them there, for instance to protect consumers from unsafe products, is only of secondary concern to those pursuing free markets; all of these measures are interpreted as restrictions to trade. In other words, the justification for the barrier as such is not important, the consequences are, which is why some contend that economic policy is formulated in a vac-

[100] Garcia, 2001, 88.
[101] Garcia, 2001, 88.
[102] Types of tariffs are *ad valorem*, specific, mixed, compound, seasonal, technical, and alternative tariffs. See Desta, 2002, 16.

uum.[103] In the rationale of economists, human rights can be trade obstacles – or non-tariff barriers – if they obstruct free trade, for example by prohibiting products assembled by the hands of children. From the trade perspective, such restrictions refer to process and production methods (PPM) and should be left out of the picture when it comes to goods' entry into markets. Rather than looking at aims of protecting children and workers' rights, trade law treats the low labour costs that result from poor conditions as a primary source of comparative advantage, and the non-tariff barriers implemented by countries with higher standards as measures to protect their markets from the competition of countries with that "advantage."

It must be pointed out that trade has left some space for the consideration of values other than those based on the efficiency of trade. It does so through GATT Article XX, which allows for general exceptions from the trade rules, among other reasons to protect public morals and human life or health, provided they do not amount to disguised protectionism.[104] However, theses exceptions have been interpreted narrowly. So far, the Dispute Settlement Body (and the panels that preceded it) has not interpreted Article XX to include human rights considerations. Furthermore, the Article does not allow for exceptions on the grounds of process and production methods, which would be "the most frightening scenario to free trade proponents."[105] In contrast to prison labour,[106] child labour, to use the example mentioned above, is not a permissible exception under Article XX GATT.

The trade-distorting effect of human rights, as well as the argument that developed countries can use human rights concerns as hidden protectionism, leads the trade community to be very careful about using human rights language. It prefers to keep human rights completely out of the WTO, and to

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[103] Promoting People-Centred Economic Growth, Joint Civil Society Statement at ECOSOC, 1999, 219.

[104] See art. XX GATT: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(...).

[105] Nichols, 1996, 704.

[106] At the time of the conclusion of GATT 1947, prison labour was already prohibited by the ILO Convention concerning Forced and Compulsory Labour (No. 29), 39 U.N.T.S. 55, adopted on 28 June 1930, entry into force 1 May 1932.

limit the Organization to dealing purely with trade. It is no coincidence that the WTO is not part of the United Nations system, and that it has a hostile attitude towards NGOs and the Office of the High Commissioner for Human Rights (OHCHR), which to date has not been granted WTO observer status, despite strong lobbying from the human rights community.[107] When free trade proponents embrace human rights to support the liberalisation of trade, they focus on rights that benefit the functioning of the market. Yet one has to be careful before accepting their line of reasoning. A solid knowledge of the legal and philosophical foundation of human rights is needed to understand how the trade community uses the concept for its own purposes.

3.2.2 The human rights approach

By contrast, human rights focus on the principles of how persons should be treated. The status of the human person is an end in itself, meaning that the nature of an action affecting human status must be right, not merely the consequences of the action. Furthermore the rule- and decision-making that generated the act must also be just, which means that popular participation must have been involved in the process. The touchstone for human rights is not specific results, but the "inherent dignity (…) of all members of the human family," as the Universal Declaration of Human Rights (UDHR) puts it.[108] The protection of human dignity is the pre-eminent goal of all human rights. It is from this understanding of priorities that the human rights movement operates. The consequence of the dialectical base of human rights is that their utility is not at their core. Rather, the norms according to which individuals are to be treated are at the essence of human rights.

From a legal point of view, human rights, as well as trade commitments, are obligations of states. Yet the nature of these two commitments is different. States commit to adapt their national legislation to achieve conformity with trade rules agreed to on a multilateral basis, because all other signatories to that trade treaty will do so as well. The reciprocity of the obligations encourages states to mandate that their citizens adhere to trade rules. This reciprocity also explains their multilateral origin. Trade rules originating in international treaties are obligations between contracting states. By contrast, human

[107] See Resolution 2002/11 of 14 August 2002 of the Sub-Commission on the Promotion and Protection of Human Rights, paragraph 5.
[108] See preamble of the Universal Declaration of Human Rights, General Assembly Resolution 217A (III), 10 December 1048.

rights create obligations by states to their populations. These obligations not only emanate from international treaties, such as the International Covenant on Civil and Political Rights (ICCPR)[109] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[110] but also from *ius cogens*, national constitutions, and customary law, including those rights of the Universal Declaration of Human Rights that have attained customary law status. To hold states to their human rights obligations and to allow other states and individuals to invoke the accountability of the duty bearing state, legal remedies have been put into place. In addition to national courts, there is a plethora of bodies that are entrusted with the enforcement of human rights. Some of them are courts, others are committees, but they all find their authority in the various treaties. Their jurisdiction is therefore limited to the rights laid down in the treaties.

International human rights law is focused on recognising and preserving the equal moral worth of every human being.[111] It is this goal that elevates human rights obligations over other commitments of the state, including multilateral obligations flowing from international treaties. Thus, when human rights obligations collide with trade liberalisation commitments, the human rights obligations should prevail due to their higher status. Although trade relations may be classified as private inter-individual relations, rather than state obligations or relations between the state and an individual, they cannot be exempt from scrutiny if they affect human rights. On the other hand, the primary status of human rights makes them immune from challenge, except by another human right. The primacy of human rights over concurrent international obligations has been acknowledged by the Vienna Declaration,[112] which underlined that human rights are the first responsibility of states.[113] Although a soft law instrument, the Declaration does reflect the political will of states to grant human rights primacy over all other rules. Moreover, it can be argued that the supreme value of human rights follows directly from their philosophical foundation, making political statements superfluous. There-

[109] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, adopted on 16 December 1966, entry into force 23 March 1976.
[110] International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, adopted on 16 December 1966, entry into force 3 January 1976.
[111] Garcia, 2001, 89.
[112] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Document A/CONF.157/24 (Part I).
[113] See paragraph 1 of the Vienna Declaration and Programme of Action: "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments."

fore, when states negotiate, formulate and implement trade rules, they must keep in mind, and not jeopardise, their human rights duties.[114] After all, both trade rules and human rights are founded in international treaties. State parties to the AoA have also ratified human rights instruments. Furthermore, for the achievement of some rights, states have a duty to cooperate with each other. For instance, the ICESCR stipulates a duty for governments to cooperate to realise the right to food.[115] This duty to cooperate was repeated in General Comment No. 12 of the Committee on Economic, Social and Cultural Rights.[116]

The timeless, absolute, and universal nature of human rights norms makes them an inter-disciplinary asset. The fact that the trade community cites human rights considerations to justify its positions supports the concept that notions of freedom, fairness, justice, dignity, equality and solidarity make them valuable to all disciplines of law.[117] At the same time, however, the universal appeal of human rights makes them vulnerable to misuse, as the next chapter will demonstrate.

3.3 Conclusion

Understanding the different philosophies behind trade and human rights, one realises why a clash between their respective lines of reasoning produces difficult debates. If either side does not fully grasp the fundamental values of, and definitions used by the other, the discussions are doomed to lead to a deadlock. The objective of the free trade lobbyist is the overall economic well being of the world population. Inequalities in wealth and human rights are accepted, as in the long run, benefits will "trickle down" to everyone. To achieve greater wealth, free trade advocates seek to eliminate any form of state intervention, while his or her counterpart, the human rights lobbyist,

[114] See Resolution 2002/11 of 14 August 2002 of the Sub-Commission on the Promotion and Protection of Human Rights, preambular paragraph 6: "*Emphasizing* the responsibility of States to ensure the realization of all human rights, including those to which the provision of such basic services is relevant, and the role of States in the process of trade liberalization, not only as negotiators of trade law and makers of trade policy, but also as the primary duty bearers for the implementation of human rights, (…)"; see also Article 103 of the United Nations Charter, 1 U.N.T.S. xvi, adopted on 26 June 1945, entry into force 24 October 1945.
[115] See Article 11 (2) ICESCR.
[116] Committee on Economic, Social and Cultural Rights, General Comment No. 12, Right to adequate food, Twentieth Session (1999), UN Document E/C.12/1999/5.
[117] Addo, 2002, 145.

petitions for the protection of those disadvantaged by trade liberalisation in order to preserve human dignity. Human rights involve problems that cannot easily be measured in economic values and cannot simply be realised through trade liberalisation. Their goal, the protection of human dignity, often requires government intervention.[118] Interestingly, contrary to what the name suggest, free trade also depends on governmental regulation. The market does not regulate itself, but only functions well if certain conditions are guaranteed, such as the validity and enforceability of contracts, the regulation of competition, the independence of justice etc.[119] Nevertheless, for the trade campaigner government should confine itself to creating circumstances that support proper functioning of the free market, whereas the human rights activist pleads for government support to avert human rights violations.

The contrasting fundamental values of trade and human rights cause the parties to react differently to state regulation. From the free trade perspective, both the insistence on labour and social standards abroad as well as limiting trade liberalisation at home to support vulnerable segments of society, translate into "protectionism," meaning the (partial) closure of domestic import and export markets to foreign products to shelter local labourers and their products from international competition.[120] This view collides with the point of view of human rights activists, who welcome measures that are designed to guarantee a higher level of protection of human rights abroad and at home. While human rights law is neutral with regard to trade liberalisation, as it focuses on processes and outcomes,[121] the free trade camp sees the conflict as one between trade liberalisation and protectionism.

However, the goal of human rights law is the protection of non-trade values; it does not differentiate between banning products which conflict with human rights (*e.g.* child pornography, which is opposed by the human rights community on the grounds of public morals protection – an exception to trade rules that is allowed under article XX GATT), and banning a product made in a way which impinges on human rights (PPM, not allowed under the trade regime).[122] From a human rights perspective, such bans cannot be

[118] Dunoff, 1998, 351.
[119] The market of the European Union, for instance, is heavily regulated.
[120] Nichols, 1996, 659.
[121] Office of the High Commissioner for Human Rights, *Human Rights and Trade*, 5th WTO Ministerial Conference, Cancún, Mexico, 10-14 September 2003, page 4, at http://www.unhchr.ch/html/menu2/trade/cancunfinal.doc (last visited 5 July 2004).
[122] Nichols, 1996, 704.

challenged. The reason for this is that labour and social laws for the promotion of human rights "are grounded in normative arguments that purport to trump or countervail market values."[123] Economists, on the other hand, characterise social provisions as a "foreign element" in economic agreements, because they tend to subscribe to "the myth, not unpopular in economic circles, that economic issues exist in a world apart from people and that a single-minded emphasis on matters such as the statistical dimensions of productivity, wage/output ratios and trade aggregates will, in time, inevitably lead to improved social conditions for the masses."[124]

Adherents to the free trade philosophy speak out of the conviction that improvement in living conditions – essentially the human rights goal they proclaim – can best be achieved through implementing the WTO rules of trade liberalisation. After all, its preamble reassures us that the WTO pursues the increase in living standards.[125] The approach of the trade community towards human rights is the same as its approach to trade liberalisation: utilitarian. Human rights and free trade are perceived as tools that lead to the desired outcome – a general increase in wealth. In that line of thinking any tool that does not lead to the fulfilment of that objective needs to be replaced by one that will. However, by using trade policies as a substitute for social policies, human beings become instruments of trade, not its raison d'être.[126] In this line of thinking, human beings are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy.[127] Trade-related rights are granted to individuals for instrumentalist reasons, namely the attainment of a comparative advantage through efficient trade. This process turns humans into pawns in the pursuit of greater general wealth rather than holders of individual inalienable rights.

In other words, and maybe risking an oversimplification, human rights are about accountability and values, trade is about efficiency and profit.[128] The conviction that liberalisation of trade is the means to achieve the desired end, increased welfare, leads economists to view policies that affect trade in

[123] Dunoff, 1998, 352 (referring to environmental regulation).
[124] Alston, 1981, 459.
[125] See preamble of the Marrakesh Agreement Establishing the World Trade Organization: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, (...)."
[126] Addo, 2002, 146.
[127] Alston, 2002, 826.
[128] Fox, 2002, 203.

terms of either contributing or standing in the way of that end. In that picture, human rights can do either. Hence the designation of policies that limit trade to preserve the livelihoods of potential losers of trade liberalisation as trade barriers, and the praise for those human rights that facilitate trade liberalisation. When trade law, therefore, employs human rights language, it selects human rights that support the free trade cause, and only to the extent that they do. Faithful to the overall policy of the trade dialectic, human rights are used as a means to an end. The effect that this has on human rights seriously harms their primary status. Reducing human beings to tools and claiming that trade increases human rights undermines human rights, detaching them from the foundation in human dignity.

The conclusions from studying the different philosophies behind international trade and human rights will now be used to scrutinise the arguments presented by each party for and against the liberalisation of trade to verify whether or not they reflect the true nature of human rights.

4 SCRUTINY OF THE USE OF THE HUMAN RIGHTS ARGUMENT

4.1 Flaws in the arguments

The arguments of both sides make it clear that when the trade mandate of the WTO was expanded as a result of the Uruguay Rounds to include agriculture, broad questions of human rights were brought within the purview of international trade. It is no longer possible for the human rights community to ignore international trade and leave it in the hands of the trade technocracy,[129] nor is it possible for international trade to hold itself aloof from human rights concerns. Rather, it needs to be acknowledged that the two areas of law raise difficult problems involving the resolution of conflicting views of fundamental rights. More specifically, the core issue at stake in the human rights and trade debate is *how* human rights are employed in the debate for or against the liberalisation of trade.

As illustrated above, both supporters and opponents of free trade are using human rights in their arguments for or against the liberalisation of trade. Yet the overuse of human rights language threatens to devalue the concept of human rights, reducing it to a catchphrase employed by both sides of the discussion to convince the challenger of the legitimacy of their claims. This not only seems to blur the picture rather than clear it up, it also has negative effects on the concept of human rights. Both sides bend the concept of human rights in such a way as it suits their argument best. In that process, NGOs often underplay positive effects of trade, while supporters of free trade ignore the negative distributional impact.[130] A reason for the misuse or abuse of human rights arguments stems from the fact that the linkage between the two areas of law has not been well explored.

[129] Ala'i, 2001, 539.
[130] Fox, 2002, 201.

Both parties cite human rights as an argument to prove that liberalising trade is either to the detriment or benefit of developing countries. In other words, they use human rights to claim a cause and effect relationship. Yet neither side bases the link they have laid between human rights and free trade on the law, and on the facts. Human rights are a legal concept: violations are proved in court using arguments based on the law and facts. Both are missing in the reasoning of NGOs, who are very quick to equal low productivity in developing countries with the violation of the right to food. Similarly, economists too eagerly claim human rights benefits from the liberalisation of trade. Neither the proponents nor the challengers of trade liberalisation have formulated their arguments in legal language. [131] Instead, vague formulations are used, such as "violations are committed where people's sources of income are destroyed as consequence of the existing trade regime."[132] However, human rights violations in developing countries are often the consequence of structural problems. This makes it difficult to identify the perpetrator, and to hold that person or state directly responsible. Causality is somehow assumed, rarely proven. Crucial questions are left unanswered, for example, on what grounds a state is accountable for the alleged violation, what the obligations of the state are that were not fulfilled, if the state could invoke any exceptions, etc. In other words, questions a court or a committee would have to answer before finding that a state has violated its human rights obligation(s).

Instead of overusing the human rights dialectic, thereby doing it more harm than good and handing the counterpart a carte blanche to equally abuse human rights arguments, impact studies might be a better alternative in the fight for and against the liberalisation of trade in agricultural products. If empirical data can prove what the actual consequences of free trade in a certain sector in a certain country are, then maybe those figures say more than vague human rights arguments.

4.2 The use of impact studies

Empirical data on the implementation and impact of the Agreement on Agriculture is in fact quite vast. The Food and Agriculture Organization (FAO),

[131] Dillon, 2002, 102.
[132] FIAN, Policy & Analysis, Trade Issues, Trade and Human Rights, *The Agreement on Agriculture of the WTO and the Right to Food, Context, Conflicts and Human Rights Violations*, at http://www.fian.org/english/includes/Policy/Trade.php (last visited 5 July 2004).

the International Grains Council, the International Monetary Fund, the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the World Bank, and the World Trade Organization have all published studies on the effects of trade liberalisation. Yet there is disagreement about what they reveal.[133] Also, the number of studies is quite large,[134] which has as its result that the conclusions are rather diverse – giving each camp the opportunity to invoke the report or outcome that is most favourable to their cause. A number of empirical studies support the theory of the efficiency model, that is to say that opening markets to trade contributes to the growth of the economy and that this can, in turn, be favourable for food security and the reduction of poverty.[135] Nevertheless, the FAO cautions that in "studying the correlation between more trade and higher economic growth, researchers need to be careful about implying causality."[136] Economic growth can be the result of many different factors. Moreover, a growing economy does not necessarily imply benefits for all, as unequal distribution might cause some segments of the population to be negatively affected by the liberalisation measures. For example, a report of the World Bank[137] on the effects of globalisation – which from a trade perspective means the liberalisation of trade – on the reduction of poverty comes to the conclusion that while some countries gain from more integration into the world economy, a considerable number of countries are becoming more marginalised. Also, while one report confirms the positive correlation between openness to international trade and economic growth,[138] another suggests that differences in economic growth find their cause in a wide array of factors, such as differences in climate, population dynamics, technical development, and internal legislation.[139] Rodrik goes a step further by challenging the consequential link between trade liberalisation and economic growth, asserting that countries first protected their markets to

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[133] O'Neal, 1998, 658.

[134] For an overview, see the compilation by the WTO Secretariat: *Studies on the Implementation and Impact of the Agreement on Agriculture*, G/AG/NG/S/16, 9 October 2000.

[135] Food and Agriculture Organization, *Trade Reforms and Food Security, Conceptualizing the Linkages*, Rome 2003, at http://www.fao.org/DOCREP/005/Y4671E/y4671e00.htm#Contents (last visited 5 July 2004).

[136] Food and Agriculture Organization, *Trade Reforms and Food Security, Conceptualizing the Linkages*, Rome 2003, at http://www.fao.org/DOCREP/005/Y4671E/y4671e00.htm#Contents (last visited 5 July 2004).

[137] World Bank, *Globalization, Growth and Poverty: Building an Inclusive World Economy*, Washington DC, 2002, at http://econ.worldbank.org/prr/globalization/text-2857/ (last visited 5 July 2004).

[138] Diaz-Bonilla and Reca, 2000, 219-229.

[139] Sachs and Warner, 1995, 1-118.

achieve economic growth and only opened their borders gradually as they became more affluent.[140] Based on these studies, the FAO concludes that there is no consensus that the liberalisation of trade results in economic growth.[141]

This short survey of outcomes of empirical studies illustrates that not only the human rights argument, but also impact studies are used by both sides to demonstrate their points. While economists claim that an impact study proves the success of trade liberalisation when the figures indicate an overall increase in the Gross Domestic Product, the human rights community, using the same results, points to the losers of the free trade regime, highlighting that some regions in a country have suffered decreases in wealth.

Another difficulty lies in the fact that the research object of many impact studies, the level of poverty or development, is determined by numerous factors. Before claiming a violation of, for instance, the right to food and blaming the liberalisation measures introduced by the Agreement on Agriculture, it is necessary to evaluate all aspects contributing to the low agricultural output of developing countries. They include, to quote one scholar, "political instability, mal-functioning transport systems, energy networks, irrigation systems, telecommunication and other infrastructure, the need for enhanced education and training systems, wider dissemination of knowledge about appropriate production technologies and product varieties, improvements in pest and disease control system, advances in product quality management, appropriate credit institutions and facilities, reforms of domestic regulatory systems, including agricultural price and distribution systems, appropriate macroeconomic policies, and so forth."[142] The majority of the factors is interrelated, which makes appointing one factor, namely the liberalisation of trade, as the cause for human rights violations even more controversial.

This revelation signals the need for more empirical studies specifically on the effects of free trade on the livelihoods of people in developing countries. Only targeted research can prove what the direct consequences of freer trade

[140] Rodrik, Dani. *The Global Governance of Trade: As if Development Really Mattered*, July 2001, pp. 24-26, at http://www.ukglobalhealth.org/content/Text/Rodrikgovernance.pdf (last visited 5 July 2004).
[141] Food and Agriculture Organization, *Trade Reforms and Food Security, Conceptualizing the Linkages*, Rome 2003, at http://www.fao.org/DOCREP/005/Y4671E/y4671e00.htm#Contents (last visited 5 July 2004).
[142] Wolter, 2000, 123.

on human rights are. To conduct these studies, human rights indicators must be defined through which changes could be measured – a challenging exercise considering the many factors that have an impact in particular on the vulnerable segments of society.

Without the backing of sound empirical data, both sides need to recognise that liberalised trade neither causes nor solves all problems of development. As shown above, poverty (which does not necessarily mean infringement of a particular human rights, such as the right to food) has many causes, so even if trade is made more or less free, there are big inequalities between, and within, countries. Besides minimising the negative impact that trade might have on the enjoyment of human rights, developed countries need to assist in reducing poverty. With regard to the right to food, this has repeatedly been pointed out. General Comment No. 12 pertaining to the right to food, as well as the Special Rapporteur, Jean Ziegler,[143] remind states of their obligations under Article 11 (2) of the ICESR. Under that article, states "shall take, individually and through international co-operation, the measures, including specific programmes (…)."[144] It can be imagined that some of the steps that need to be taken are the transfer of know-how and technology as well as helping developing countries to establish good and transparent governance.

After having uncovered the weak claims of causality between free trade and human rights benefits or violations, it is now time to revisit the specific arguments outlined in chapter 2 in order to investigate their validity from a proper understanding of human rights and trade. To recapitulate, the arguments of the human rights community centred around the detrimental effects of subsidies and market access obligations on the enjoyment of human rights of individuals in developing countries, the isolation of the WTO from human rights considerations, as well as the priority granted to trade policy to the expense of the furtherance of human rights. The trade community integrated human rights arguments in so far as they supported the purpose of the efficiency model, which is to be achieved through the lowering of trade barriers and reduction of government intervention. It also underlined that economic integration leads to the furtherance of human rights and that trade is essentially about human rights, as it incorporates the principles of fairness, equal-

[143] See paragraph 28 of the Report submitted by the Special Rapporteur on the Right to Food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2002/25, UN Document E/CN.4/2003/54, 10 January 2003.
[144] Article 11 (2) ICESCR.

ity and non-discrimination, and has as its goal the attainment of a higher status of living.

4.3 Subsidies

Applying the conclusions with regard to the different underpinnings of trade and human rights law to the subsidies debate, one discovers that, actually, effective argument against the main target of NGOs in their fight against the liberalisation of agricultural products does not need a human rights dimension to be convincing. In fact, given that the link between subsidies and infringement of the right to food is easy to claim but difficult to prove, it may in this situation be wiser for the human rights community to adopt the same line of reasoning as the trade community, to wit that subsidies are not beneficial. From an economic point of view, it is difficult to support subsidies, although "some defend the practice (…) as an important instrument of domestic economic policy for development."[145] A subsidy, however, "necessarily goes against the very economic theories on which the whole GATT/WTO system claims to have been based: the theories of comparative advantage and specialization,"[146] as subsidised producers artificially attain higher market shares at the expense of unsubsidised producers at home and abroad. Economic theory teaches that artificial stimuli, such as quotas and subsidies, hinder the enhancement of global welfare. Thus, whereas subsidies are the natural "enemy" of liberal trade, they do not necessarily infringe on human rights, making it difficult for activists to rely on a human rights argument against subsidies.

Although the Agreement on Agriculture explicitly allows subsidies – it only requires states to reduce some of them – the WTO finally seems to have recognised their detrimental effect, even though the turn-around was more based on the negative impact on trade than on the livelihoods of inhabitants of developing countries. A panel report that is yet to be adopted by the WTO Dispute Settlement Body in the case "subsidies on upland cotton"[147] (*Brazil v. United States*) declares the subsidies paid to US cotton producers to be

[145] Desta (2002), 99.
[146] Desta (2002), 100.
[147] WTO dispute settlement body, case 267, "subsidies on upland cotton" (*Brazil v. United States*), brought by Brazil on 3 October 2002 (not yet published).

trade distorting.[148] Since that ruling, the contention that export subsidies are beneficial to trade has become difficult to maintain. Moreover, in a letter to the WTO and its member states, the EU – a few days after the panel decision became known – announced a turn away from its policy on export subsidies. Perhaps influenced by the WTO ruling, Franz Fischler, EU Commissioner for Agriculture, Rural Development and Fisheries, stated:

> "Provided we get a balanced deal on market access, domestic support and non-trade concerns and strict parallelism on export competition, we are ready to put all the export subsidies on the table. This means that our American, Australian or Canadian partners have to make clear that they will fully match the EU on the forms of export support they use, such as export credits, abuse of food aid or state trading enterprises."[149]

The report of the WTO panel and the letter by the European Commissioner are a step towards the abandonment of export subsidies. They also remind us of the need for the reform of the Common Agricultural Policy, which is based on price support and stabilisation schemes to achieve a higher domestic price than the world price. Under the current system, domestic price support measures encourage over-production. The resulting surpluses in turn require export subsidies, so that the excess goods can be sold at competitive prices on the international market. Unless the CAP is altogether changed, subsidies will persist. The letter of the Commissioner did of course contain an almost impossible condition before the EU would give up subsidies: the US and others will equally have to give up export subsidies.

From a human rights view, not all subsidies are "bad."[150] Their acceptability depends on their effect, rather than their existence as such. Affirmative action measures may include subsidies to ensure the survival of small farmers or the production of local foodstuffs. Similar to the classification at the WTO of agricultural subsidies into different boxes according to their level of trade distortion, the anti-subsidy rhetoric of the human rights community

[148] New York Times, *Brazil's Road to Victory Over U.S. Cotton*, by Elizabeth Becker & Todd Benson, 4 May 2004, Late Edition, Final, Section W, Page 1, Column 4.
[149] EU institutions press releases, 10 May 2004, IP/04/622, *WTO-DDA: EU Ready to Go the Extra Mile in Three Key Areas of the Talks*, at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/622|0|RAPID&lg=EN&display= (last visited 5 July 2004).
[150] Mehra, 2001, 79.

should reflect the fact that some subsidies do not have detrimental effects, neither on inhabitants of developing countries, nor on those in developed countries. At present, some human rights advocates make the distinction only between subsidies in developed countries, which are all claimed to be detrimental to the farming industry in developing countries, and those that should be allowed in developing countries to protect peasants from the negative effects of trade liberalisation.

4.4 Market access

Pro free trade activists seem to have a point when they say that liberalising trade is all about guaranteeing the principle of non-discrimination. By eliminating subsidies and granting market access to all on an equal footing, the external conditions for non-discrimination seem to be ensured. Yet the example of non-discrimination illustrates where the trade community and the human rights community use different approaches. From the trade rationale, it is the external circumstances that decide whether the principle of non-discrimination is ensured, such as the legal rules governing access to markets and ensuring equal treatment with regard to domestic products. Thus, from the trade rationale, trade is fair when the rules are the same for all involved – to be achieved through multilateral agreements, such as the AoA. Whereas this framework is also important from a human rights point of view, human rights advocates go a step further to examine whether or not policies have the effect of discriminating against individuals, in particular those who are vulnerable. For example, trade liberalisation may result in the presence of more foreign food on the market of developing states, foodstuffs with which the poor rural farmers cannot compete. These farmers would be hit disproportionately hard by such a policy, although the policy may be beneficial to the average population, because there is more food. Yet in its focus on economic efficiency, the theory of comparative advantage does not consider the distribution of economic gains. Its theory is proven correct when the overall wealth of nations increases. By contrast, the human rights perspective always takes the losers into account. Therefore, when designing trade policies, potential negative effects need to be considered and, when possible, prevented.

Mehra gives another twist to the different approaches and interprets them as the conflict between the human rights principle of non-discrimination and the trade principle of non-discrimination, the former referring to individuals

and groups, the latter to states and foreign firms.[151] The two principles that express the principle of non-discrimination at the WTO, the MFN and national treatment clauses, prohibit distinction between states and between domestic and foreign firms, respectively. Conversely, the human rights non-discrimination principle "is often set aside in order to promote greater social justice, [f]or example, through affirmative action programs which discriminate against an ethnically or otherwise dominant group in favor of a weaker group to promote social leveling."[152] In other words, the human rights principle of non-discrimination aims at ensuring equal treatment between individuals, not states. Invoking the principle to achieve greater access to foreign markets does not do justice to the protection of individuals and is therefore an improper use of the concept of non-discrimination.

As pointed out above, the market access obligations of the AoA do not take individual or community human rights into account. Developing countries are to open their markets for agricultural products regardless of the discriminatory effects that such an action might have on, for example, the rural poor. The main thrust of the argumentation of the human rights community is directed at this type of possible negative consequences for developing countries when they are forced to open markets.

In response to the general remarks of the free trade community that trade benefits all, the human rights community counters that the implications of human rights for trade liberalisation become more controversial when one moves beyond broad concerns for "increases in general welfare" and considers questions involving gross economic inequalities.[153] While free markets may have the potential to improve the enjoyment of human rights, they can only do so if sufficient protection is guaranteed to limit or ameliorate the naturally occurring negative consequences, and the abuses, of deregulation.[154] Yet developing countries often lack the necessary human rights guarantees. At the same time, they conclude free trade agreements and have to adhere to the general liberalisation obligations set by the WTO.

Moreover, NGOs complain about the discriminatory implementation of market access obligations. Developed states had high tariffs in place at the conclusion of the Uruguay Round, so even after the imposed reductions, ag-

[151] Mehra, 2001, 80.
[152] Mehra, 2001, 80.
[153] Garcia, 1998b, 414.
[154] Abbott, 2002, 122; and Fox, 2002, 202

ricultural imports face high custom duties. In addition, non-trade barriers, such as requirements pertaining to food safety and animal and plant health regulations,[155] as well as labour and social conditions, effectively bar access to many products originating in developing countries. In the mean time, products from developed countries can easily enter the markets of developing countries. These markets are often not well regulated and therefore can be open to abuse. Labour standards are lower than in developed countries and the legislation on competition is weak, which facilitates the establishment of large-scale foreign importers to the detriment of small-sized local producers. In other words, the market access obligations have a discriminatory effect on developing countries, which often have no choice but to open their markets, not just as a result of the AoA, but also because their economies heavily depend on income in hard currencies originating from exporting their own products.

The scenario sketched above reveals the human rights fallacy of policies based solely on market access obligations. The economies of developed states already, to a substantial extent, operate on the basis of respect for human rights. In the almost 60 years since the end of World War II, they have been prospering thanks to the rule of law, protection of workers' rights, etc. So when developed states pressure developing states to open markets, they deny their own past and present. It is moreover hypocritical of developed countries to demand free access to developing countries' markets while insisting on leaving human rights out of the picture, when their own markets owe their functioning to human rights.

Neither the rules in the AoA, nor their implementation consider the fact that developing and developed countries have different points of departure. The WTO treats unequal partners alike. It obliges developing states to follow the same rules as those imposed on developed states, thereby ignoring the fact that the playing field is uneven. From a human rights point of view, only the possibility of exceptions provides an opportunity for human rights to be taken into account at all. The extended deadlines for developing countries with regard to the reduction commitments are not a response to human rights concerns, but rather, were installed to give the unstable economies of developing countries more time to adapt to the increase of foreign goods in their markets.

[155] See Uruguay Round Agreement on Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 3, adopted on 15 April 1994, entry into force 1 January 1995.

4.5 The World Trade Organization

The WTO is criticised for not addressing human rights considerations when trade rules are negotiated and made. The trade community acknowledges this reality, but defends it as an asset of the Organization, justifiable on the theory that free trade in and of itself will increase the general economic well being. Again, this is an issue where the two different approaches become apparent. When the trade community brands human rights as potential barriers to trade, it really only perceives them from within the line of thinking that treats all legal rules as either contributing to or impeding the free flow of goods and services. The same rationale is used when economists use the isolation of the WTO from human rights considerations to speak out in favour of developing countries. From the trade perspective, non-trade barriers[156] play a large role in keeping developing countries from accessing the markets of developed states. So the argument goes that it is better to keep the focus on trade rules, as leading economist Bhagwati pleads: "[if] everything becomes a question of fair trade, the likely outcome will be to diminish greatly the possibility of agreeing to a rules-oriented trading system."[157] These non-trade issues could become the foundations for protectionism by the developed countries. Moreover, the argument goes, by condemning the WTO for its vision of human rights as trade barriers, [158] one has to keep in mind that, given the difficulty of determining the true impacts of reducing trade barriers, it may well be in the interest of developing countries that the WTO sticks to a rule-based approach. "Using human rights concerns as a mask for protectionism might undermine future economic development. By implementing rules to address non-trade interests, WTO members may risk throwing out the baby with the bathwater."[159]

Similarly, when human rights activists insist on the introduction of human rights into the WTO, they do so from the conviction that violations of human rights can never be tolerated. Every human being is entitled to the full enjoyment of his or her rights, no matter what consequences that might have on the economic performance of the state. In their view, to achieve this all

[156] See e.g. conditions in the Agreement on the Application of Sanitary and Phytosanitary Measures, or the Uruguay Round Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 3, adopted on 15 April 1994, entry into force 1 January 1995.
[157] Bhagwati, 1991, 21.
[158] Cohn, 2001, 432.
[159] Abbott, 2002, 126.

countries including developing countries must insist that, in the production of goods, labour and social standards are always upheld.

The summary of the two views illustrates that the clash regarding the scope of WTO's human rights concerns is not as straightforward as the disagreement about subsidies, which is in fact not a disagreement, or the disagreement regarding market access, where the one party focuses on the losers, the other on the winners of trade liberalisation. In the case of whether to leave human rights concerns outside the realm of the WTO or to force the Organization to consider human rights, both sides invoke protection of inhabitants of developing countries. However, it must be pointed out that the arguments of the two sides do not address the same issue.

The human rights community advances two critiques, which the trade community tends to answer with the same reply. When NGOs urge introduction of human rights into the WTO's scope of concerns, they target the fact that human rights are not considered when trade rules are adopted. That is not the same as the second argument, by which the human rights community would like to see free trade bound to human rights standards to prevent an abuse of low protection standards, which the trade community claims are in line with the efficiency model. Yet to both accusations the trade community seems to have the same answer based on protectionism. It claims to defend the interests of developing countries. Free trade lobbyists ward off attempts to include human rights considerations, stating "[i]f the WTO allows extensive participation by the rights advocates, it will be accused of introducing non-trade issues into the trade agenda, to the detriment of [developing countries]."[160] However, assessing human rights impacts of trade policies before adopting them means looking at the effects of trade rules on the enjoyment of human rights of all parties involved, instead of rating a policy according to its contribution to the liberalisation of trade.

The call for more consideration of human rights at the WTO is directed both at the process of rule-making, which would imply participatory rights of civil society, as well as at the implementation of trade rules, leading to the discontinuance of the application of harmful rules. To deny these demands by invoking the protection of the interests of developing countries either signifies that the trade community would prefer to keep low human rights standards in developing countries, or it attests to a phobia of introducing human

[160] Ala'i, 2001, 552.

rights concerns in the trade camp. Furthermore, by not directly addressing the issue of including human rights considerations, the trade community admits that there really is no good argument for keeping human rights outside the WTO. After all, who can defend the position that trade rules do not impact on human rights? The liberalisation process is arguably *the* driving force behind globalisation, which in turn has as one of its features that rules affecting individuals' lives are increasingly made at the international level.[161] Income and employment of large segments of the population of developing countries are based on agriculture, so it is crucial that the content of rules governing trade in agricultural products reflects their needs. The chances of these interests to be taken into account diminish rapidly when the decision-making is moved to the international plane, where the interests of farmers in developing countries have to compete with concerns of developed states and multinational corporations. As noted above, most aspects of agricultural policy are regulated by the Agreement on Agriculture, so there is not much room for state discretion and unilateral decisions.

Turning to the second point of dispute, the tying of human rights standards to liberalisation obligations, the debate is more complicated, as both the human rights and the trade efficiency positions make sense from their respective points of departure. Each position has its flaws, however. It is an oversimplification to claim that a market free of interference will lead to development of adequate standards that respond to the wishes of partakers in the market, making the need for active international human rights standards policies redundant.[162] This claim also does not show understanding of the objectives of human rights activists. Standards that serve the objectives of free markets may not meet the levels prescribed by human rights treaties. Quite contrary scenarios can be imagined. Free trade facilitates not just the movement of goods across borders, it also stimulates investments by foreign companies. Businesses are established in countries with the lowest cost of labour to ensure maximum turnover. In fact, one can conclude that according to the logic of the efficiency model, labour standards will not be raised, as that would reduce the comparative advantage of developing countries.

To summarise the dilemma, low labour standards are certainly not to be condoned from a human rights point of view, but for the time being they

[161] Although for international rules to become effective, in most legal systems they have to be transposed into national law, that exercise is a mere formality and does not enable disadvantaged stakeholders to have their concerns heard.
[162] Summers, 2001, 78.

might be the only factor that works to the advantage of developing states in a free market environment, ensuring employment and income. Others claim that "enforcement of the core labor rights would not deprive developing countries of their comparative advantage and would hardly shield workers in developed countries from cheap labor."[163]

As with the debate on the validity of the efficiency model, human rights language should only be used if empirical studies actually prove that the enjoyment of human rights has either been improved or worsened as a consequence of maintaining the "comparative advantage" of low labour and social standards. Without impact studies, we will never know whether children who lose their jobs in a shoe factory because developed countries insisted on prohibiting children from working indeed ended up begging in the street or in prostitution, or whether their parents have replaced them in the factories and are able to send the children to school.

Instead of trying to demonstrate who is wrong and who is right, it is in the purview of this inquiry and the following chapters to explore how the human rights argument figures in the debate and what consequences it has when both parties claim that their policy contributes to the furtherance of human rights.

4.6 Protectionism

In trade law, human rights emerge as "unfair advantages" or non-tariff barriers to trade. Essentially, that means that countries with low human rights protection have a comparative advantage in the global marketplace,[164] while states that insist on high human rights standards at home and abroad are viewed as protecting their market from foreign interference, as foreign products can be denied access because they were not produced according to the importing countries' standard of human rights. In this line of thinking, human rights are used as a tool for trade policy – a strategic instrument that countries can use to sabotage the free flow of goods. This line of reasoning denies the special status of human rights and treats them like any other external factor affecting the functioning of the market. It downgrades human rights to policy instruments that governments would choose to implement

[163] Summers, 2001, 76.
[164] Dunoff, 1998, 382.

depending on the advantage they could yield for trade. This improper designation of human rights denies them their unique purpose, which is the preservation of human dignity: a purpose that accords human rights their higher status. Governments do not have much choice concerning whether to grant human rights to their populations. Most states have signed international treaties that oblige them to respect, protect and fulfil human rights.[165] Hence, when the trade community presents human rights as conditions that negatively or positively influence the free flow of trade, thereby demoting human rights to the level of ordinary regulations, this unambiguously exposes the trade community's ignorance of the true concept and status of human rights.

Conversely, trade can be used as a tool to address human rights problems. This is done through including human rights conditionality into trade agreements[166] and imposing sanctions where these conditions are not met. As stated above, free trade lobbyists condemn the practice as being a form of protectionism.

Current trade laws do not consider the conditions under which goods are produced. This is due to the unwillingness of the Dispute Settlement Body to regard process and production methods as an acceptable exception to trade obligations. This lack of concern with conditions of production not only fails to reinforce the obligations of developing states to increase standards, it also denies developed states the choice to forgo the comparative advantage of free trade rather than sponsor and contribute to human rights abuses. Concerns for human rights abuses that have for years been judged socially and morally intolerable, are barred from transcending national frontiers.[167] In other words,

> "[t]hose who oppose any conditioning of free trade on recognition of the most fundamental labor rights proceed from an uncompromising laissez-faire premise that the international market should be left completely free of labor regulations, a premise that has been rejected by every industrial country in promoting its internal economy."[168]

[165] Granted, governments are given the possibility to limit human rights, but those possibilities are subject to strict conditions.
[166] Human Rights as the Primary Objective of International Trade Investment and Finance Policy and Practice, Joint Statement by the Lutheran World Federation and Habitat International Coalition, in consultation with INCHRITI, 1999, 127.
[167] Summers, 2001, 80.
[168] Summers, 2001, 79.

The market regime of western societies functions on the assumption that human rights have both moral and legal standing, so it is only fair that these developed countries should help establish similar protections for the functioning of the market of developing countries. To this end, "[t]he challenge is to protect against the exploitation of workers that civilized peoples do not and should not tolerate, while not raising too high the bar for developing countries to choose regulatory standards amenable to their task and state of development."[169] There is some danger that consideration of human rights by the WTO will translate into protectionism by developed states if trade is made conditional on unrealistically high standards.

In principle, human rights law is not opposed to employing trade to further human rights, provided that the rules in themselves do not amount to violations and that they do not have the effect of violating human rights. Yet several caveats need to be mentioned. First of all, although the human rights community may applaud a decision to refuse to trade in goods that were manufactured under circumstances amounting to human rights violations from a moral point of view, there is little proof that trade sanctions, such as embargoes, have the desired effect of improving conditions in the country under embargo. In fact, the examples of Cuba and, until recently, Iraq suggest the opposite.[170] Moreover, the power to grant trade benefits or to impose sanctions predominantly lies in the hands of developed states, so punishing states for not meeting the same standards as the developed world "too easily succumbs to the charge by developing countries of neo-colonialism."[171] The European Union[172] has, since 1995, systematically included a human rights clause in treaties with other countries.[173] In these treaties, it is stipulated that the human rights condition forms an "essential element" of the agreement.[174]

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[169] Fox, 2002, 213.

[170] The author does not intend to diminish the role of other factors, most importantly political leadership, that led to the abhorrent human rights abuses.

[171] UN Document E/CN.4/Sub.2/2000/13, 15 June 2000, *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights*, Preliminary report submitted by J.Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8, paragraph 17.

[172] Technically, it is the European Community and its Member States that conclude treaties. The European Union lacks legal personality.

[173] See Commission Communication COMM (95) 216 of 23 May 1995.

[174] See for example Article 9 of the Partnership Agreement between the Members of the African, Caribbean and Pacific Groups of States of the one Part, and the European Community and Its Member States, of the other ("Cotonou Agreement"), Official Journal L 317, 15 December 2000, pp. 3-353, adopted on 23 June 2000, entry into force 1 April 2003.

This designation gives the EU the power to suspend the execution of the treaty, and thereby sanction the partner state, because under the Vienna Convention on the Law of Treaties,[175] treaties can be terminated or suspended for "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."[176]

However, the most apparent flaw is that the effectiveness of the clause is greatly reduced by the inconsistency of its use. Developed countries are far from having a coherent policy of using trade sanctions (or "sticks") to express their dissatisfaction over human rights abuses abroad. If they were seriously committed to upholding human rights standards, there would not be so many double standards in the relations between developed and developing countries. This inconsistent practice renders the meaning of human rights superficial and casts doubts on the seriousness of the arguments of the developed countries. The EU has applied the clause in the recent past,[177] but numerous trading partners have gotten away with human rights violations without trade relations being suspended. The large number of agreements with developing countries renders coherent application of the human rights clause very difficult. Constant human rights monitoring by human rights experts would be necessary. Moreover, the treaties containing these clause are mixed treaties, meaning that they are concluded both between the European Community and partner states, as well as between each Member State and partner states. Consequently, each state can unilaterally suspend trade obligations that emanate from such a treaty. This adds to the inconsistency of the practice. Suspending trade relations with one country and not the other, and suspension by one Member State while the others keep trading, sends ambiguous signals to partner countries including, possibly, the message that they can get away with human rights violations. However, the clause does create a window for dialogue. Under article 96 of the Cotonou Agreement[178] consultations are to be held between the parties if one of them finds that the counterpart does not live up to its human rights obligations. These consulta-

[175] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, adopted on 22 May 1969, entry into force 17 January 1980.
[176] See Article 60 (1) and (3).
[177] Recently, Zimbabwe's government was reprimanded through such measures as the freezing of funds of individual government members, a ban on travel and transit, etc. (see Council Common Position concerning restrictive measures against Zimbabwe (2002/145/CFSP), Official Journal L 050, 21 February 2002, pp. 1-3, and Council Regulation 310/2002 of 18 February 2002, Official Journal L 050, 21 February 2002, pp. 4-12).
[178] Not all treaties that include the human rights clause specify an implementation method. This is another criticism of the system.

tions are intended to try to convince the party violating human rights to live up to international standards. The question is, however, whether or not human rights will once more be used as policy instruments to further trade interests. Are negotiations taken up to preserve human rights or trade? The infrequent use of the clause suggests that maintaining trade relations is often preferred over insisting on high human rights standards. Therefore, the use of human rights conditionality and sanctions in their present form seem to be more of a political instrument serving liberalised trade than a tool to defend global human rights standards.

The use of sanctions is controversial for another reason. The applications of human rights clauses based on trade agreements must meet the strict guidelines of the WTO, which, as discussed above, prohibits exceptions from the "national treatment" and "most-favoured-nation" clauses on the basis of human rights. Faced with this limitation on their foreign and trade policy, the United States of America and the European Union shifted to granting unilateral trade concessions through a so-called Generalised System of Preferences (GSP). These systems are recognised under the WTO and use incentives (often called "carrots") rather than sanctions, meaning that additional preferences are given if a country adheres to international human rights standards. The United States 1974 Trade Act, for instance, made the granting of the privileged trading partner status dependent on the condition that the country was not, *inter alia*, communist, terrorist-abetting,[179] and afforded internationally recognised worker rights to its workers.[180] The advantage of benefits accorded under the GSP is that they can be suspended if the receiver of the concessions does not uphold human rights standards. However, similar to citing human rights as a reason to sanction trading partners, using them as a condition for rewards is also problematic. To illustrate the shortcomings of the GSP mechanism, a closer look will be taken at the unilateral preferences currently granted by the European Union to developing countries. As in the rest of this inquiry, the rules on trade in agricultural products receive added scrutiny.

[179] See Trade Act of 1974. sec. 502, Pub. L. 93-618, 88 Stat. 2066 (1975), codified at 19 U.S.C.A. sec. 2462 (b) (1)-(6) (1980).
[180] Condition included by the Generalized System of Preferences Renewal Act of 1984, enacted as Title V of the Trade and Tariff Act of 1984. Pub. L.98-573, sec. 502 (b) (7), 98 Stat. 3020, codified at 19. U.S.C.A. 2462 (West Supp. 1988).

4.7 Illustration: Unilateral preferences under the GSP of the European Union

Since 1971, the EU has afforded preferential tariffs to developing countries. There are currently five different GSP arrangements. Together, they make for unilateral tariff reductions or duty free access to 178 developing countries.[181] The GSP arrangement that applies to the 49 least developed countries is known as the "Everything But Arms" (EBA) initiative. Council Regulation (EC) 416/2001 of 28 February 2001 introduced the full liberalisation of trade for products stemming from LDCs. As the name indicates, arms and munitions were excluded from the duty- and quota-free access. Nevertheless, the regime disfavours to some degree export of agricultural products that are directly competitive with those of EU Member States. Fresh bananas (until 2006), rice and sugar (until 2009) remain subject to protective tariffs and quantitative restrictions.[182] These products are, at the same time, the main export product for many least developed countries. Nevertheless, custom duties on all other products are abolished for LDCs.[183] The EBA scheme has been incorporated into the Regulation containing the provisions for the current GSP,[184] under which all developing countries benefit from tariff reductions on a plethora of products.[185] It lays down the rules of the GSP until 31 December 2004. However, according to Article 41 (2) the EBA regime will continue even after this deadline.

The GSP and the EBA initiative merit some positive remarks. Their unilateral character is an acknowledgement of the different starting points of the two trading partners. Contrary to the WTO rules on market access and tariff reductions,[186] developing countries do not have any obligations in return for their privileged access to the EU market. Furthermore, the scheme is to be welcomed because of the wide range of products it covers, in particular with regard to LDCs, whose products from September 2009 onwards will have unrestricted access to the EU market. This exception to the general WTO rules numbs the voices that criticise the tariffs that remain high even after

[181] EUGuide, *Generalised Schemes of Preferences*, at http://www.eubusiness.com/guides/gsp (last visited 5 July 2004).
[182] See Article 9 of Regulation (EC) 2501/2001, Official Journal L 346, 31 December 2001, pp.1-60, as well as Regulation (EC) 1381/2002, Official Journal L 200, 30 July 2002, pp. 14-17, and Regulation (EC) 1401/2002, Official Journal L 203, 1 August 2002, pp. 42-45.
[183] Article 9 (1) of Regulation (EC) 2501/2001.
[184] Regulation (EC) 2501/2001.
[185] See Annex II of Regulation (EC) 2501/2001.
[186] Notwithstanding the prolonged periods for developing countries.

meeting reduction commitments under the AoA. In fact, LDCs benefit from the circumstance that the products of other countries still face high custom duties at the borders of the EU, restricting competition in these markets.

However, before applauding the general GSP scheme and EBA initiative too much, it is necessary to take a closer look at the provisions of Regulation (EC) 2501/2001 that lay down the rules concerning suspension of the benefits. As mentioned above, human rights violations constitute one ground for discontinuing the preferential treatment accorded to a state. The legal base for this action is Article 26. It lists forced labour, serious and systematic violation of the freedom of association, the right to collective bargaining, the principle of non-discrimination, and the use of prison and child labour as human rights grounds for withdrawing benefits.[187] This inventory of human rights is a display of the trade orientation of the Regulation, as it is limited to trade-related human rights. It does not seem to matter if other fundamental rights are being abused; the privileges will not be suspended. Nevertheless, the withdrawal of privileges on human rights grounds may arguably be seen as an altruistic effort to force a state to improve the working conditions of its inhabitants. Yet the other grounds for suspension of benefits quickly correct that image. They refer to protecting the European Union's own economic interests. Article 31 stipulates:

> "Where a product originating in a beneficiary country is imported on terms which cause, or threaten to cause, serious difficulties to a Community producer of like or directly competing products, normal Common Customs Tariff duties on that product may be reintroduced at any time at the request of a Member State or on the Commission's initiative."

Moreover, the EU may decide to erode the benefits "[w]here imports of products (…) cause, or threaten to cause, serious disturbance to Community markets or their regulatory mechanisms."[188] These two provisions in the Regulation reflect what one might label "protectionist safeguards" and explain why the GSP is highly contestable. They cast serious doubt on the philanthropic nature of the scheme and leave the vigilant observer wondering how much the EU is actually willing to sacrifice in favour of developing countries. A closer look at the reduction rates that make up the "preferential

[187] Article 26 (1)(a), (b) and (c) of Regulation (EC) 2501/2001.
[188] See Article 32 of Regulation (EC) 2501/2001.

treatment" renders the same conclusion. Only very few products are entirely exempt from custom duties. They are the so-called non-sensitive products.[189] Agricultural products, however, even if they are non-sensitive, are excluded from the complete exemption. Of the sensitive products, most enjoy a modest 3,5 % reduction in tariffs.[190] Besides, the unilateral reduction commitments reflect neither the high tariffs that form the basis for the reductions nor the differences in tariffs according to processing or sensitivity, meaning the level of competition with EU products. In general, tariffs are higher on products that either have undergone more processing or pose a greater threat of competition. Although GSP reduces tariffs on products, the differences in tariffs between processed and unprocessed, as well as between competitive and harmless products remain unchanged. Thus, developing countries are still discouraged from processing foodstuffs and from trading in competitive products. Therefore, despite its widespread implementation, the GSP effort is widely judged to be a failure, as most often the exports of greatest interest to developing countries are only marginally affected. The complexity and discretionary nature of the programme undermine its utility.[191] Instead, some go as far as to argue that, with respect to developing countries, wealthy states are under a moral duty to give preferential trade treatment. If that were true, conditionality would be a violation of that moral duty, unless the conditions were intended to benefit the lot of the poorest.[192] Although some progress has been achieved through giving the LDCs unrestricted access under the "Everything But Arms" initiative, still more needs to be done.[193] In particular the granting of the most favourable conditions to unprocessed produce benefits developed states more than developing states. Processing provides great financial gain to the importing state, which can cheaply buy the raw products thanks to the GSP.

The limited benefits accorded to developing countries as well as the safeguard provisions in the GSP Regulation raise questions as to the reasons behind the constraints to the EU's charity. As with the subsidies, internal legislation is the main factor. The Common Agricultural Policy of the European Union protects the interests of European farmers from external competition. This protection impinges on the generosity of the EU towards other states, as

[189] See Article 7 (1) of Regulation (EC) 2501/2001.
[190] See Article 7 (2) of Regulation (EC) 2501/2001. Silk, cotton and other textiles and fabrics enjoy a 20% reduction (Article 7 (2) *jo.* Annex IV).
[191] Brown, 1994, 362-363.
[192] Garcia, 1998b, 431.
[193] Wolter, 2000, 127.

reflected by the failure to engage in genuine negotiations with developing countries and the limited benefits that they enjoy under the Lomé Conventions and subsequent Contonou Agreement and the GSP.[194] The CAP is built on the preservation of the European farming industry – through guaranteeing high and stable domestic prices – as well as keeping it competitive on the world market by giving subsidies to lower export prices. No treaty with developing countries will be able to jeopardise the goal and functioning of the CAP. It is thus very much a game of protectionism versus protection, that is to say the interest to shield European farmers from international competition conflicts with the interest to aid developing countries in increasing agricultural export and preserving human rights. As long as the CAP is not reformed, protectionism will only allow marginal benefits granted to developing countries.

Another piece of legislation denigrates the goodwill of the European Union in affording preferential tariffs to developing countries and LDCs: the Agreement on Agriculture. The tariffication component of the AoA has the potential to erode benefits under preferential trading arrangements such as the Cotonou Agreement and the GSP.[195] The AoA, after all, orders the reduction of tariffs towards all countries. This process has cut down the advantages that preferential trading partners of the EU enjoy. For example the reduction in EC tariffs on coffee and cocoa as a result of the AoA has diminished preferential treatment to developing countries for tropical products.[196]

In addition to the scant economic benefits that developing countries enjoy under the GSP, the scheme can be criticised from a philosophical point of view. The gesture of the EU towards LDCs and developing countries is paternalistic; it treats the developing countries as states that cannot function on their own without the benevolence of developed states. In that sense, the system also attacks the sovereignty of the receiver state by placing the well being of developing countries at the mercy of the EU. This program does not reflect well on the EU either, as the benefits of these "privileges" are so slight that the EU seems more hypocritical than generous. Finally, the rules on suspending the privileges are spelled out in such broad terms that they leave great leeway for the EU to reintroduce high tariffs. This is to the detriment of legal certainty of developing states and LDCs, as they cannot predict how long they will enjoy privileged access for each of their products.

[194] McMahon, 1998, 636.
[195] Ng'ong'ola, 1999, 31.
[196] McMahon, 1998, 642.

It is a positive development that the European Union seems to be showing some concern for the priority of human rights over economic interests, and encouraging changes could actually be induced by the prospect of trade benefits. However, neither the trade sanctions nor the marginal incentives to protect human rights are satisfactory solutions to balance out the adverse impacts of the current trading system on developing countries. The human rights sanction as well as the incentive scheme of the GSP are weak and uncertain, leaving the EU broad discretionary powers in when and how to apply the clauses. Transparent and formalised mechanisms for invoking the human rights exceptions are missing, leaving these mechanisms open to the criticism of the trade community, which claims that the application of trade sanctions and the withdrawal of privileges on the basis of human rights violations are protectionist.

4.8 Priority of trade over human rights

The human rights community complains that in domestic and foreign policy of both developed and developing states, the focus of governments is on trade instead of human rights. The objection of the human rights community is fully justified in this respect. Although, in theory, human rights are the first obligation of states, in practice commitments towards liberalising trade enjoy a higher priority. Human rights activists must continually point out that human rights obligations should have primacy over all other multilateral agreements: A closer look at institutions and interests behind the two dogmas reveals that the priority trade policy currently enjoys over social policy is based on power.

The free trade camp is made up of a very powerful lobby. Not just the governments of powerful states, such as the United States and the countries of the European Union, but also large international corporations push for the opening of the markets of developing countries. They gain financially from the lowering of tariffs and the access to the economies of developing countries. Cheap labour and production costs, as well as new markets await the investor. There are substantial profits to be made. Big money is also involved when it comes to human rights protection. Here, however, expenditures are made in the interest of respecting, protecting and fulfilling human rights, rather than with the anticipation of financial gains.

Legal and institutional mechanisms have been established to facilitate and enforce both trade rules and human rights protections.[197] The WTO and its Dispute Settlement Body stand guard for trade rules, whereas regional courts and the United Nations bodies are the patrons of human rights on a the global level. A crucial difference between trade rules and human rights is the number and powers of enforcement bodies.

The trade community has a powerful patron in the World Trade Organization. All international trade rules emanate from there, which ensures a high level of coherency. More importantly, disagreements over the observance of the trade rules agreed to under the auspices of the WTO are dealt with by a judicial organ, the Dispute Settlement Body, independent of the consent of parties to a dispute. Adding to the strength of the DSB is the obligatory nature of its settlements. Unilateral countermeasures by states are prohibited, recourse to the dispute settlement system is obligatory.[198] Any state that is a member state of the WTO can bring a claim before the DSB, as a legal interest to have international trade rules upheld is presumed. Finally, and this is were the real force comes in, if a violation has been found and the violator does not bring its law into conformity with WTO rules or end the prohibitive practices, the suing party can take retaliatory measures.[199] This is an automatic punitive process that pressures violators to uphold the law. As a consequence of this strict method of observation, including the threat of sustaining financial damage, states are compelled to uphold trade rules, if necessary to the detriment of their human rights obligations.

The human rights judicial process offers some strong sanction mechanisms on the regional level, in particular the European Court of Human Rights. However, even in that court, the party that wins the dispute cannot enforce the decision of the Court through automatic sanctions. On a global level, the enforcement mechanisms for human rights violations are much weaker. In considering state reports and communications, the Human Rights Committee may only submit reports reprimanding a state for its violations of the human rights enumerated in the ICCPR. Similarly, the Committee on Economic, Social and Cultural Rights has no real powers to force a state to observe the

[197] Garcia, 2001, 86.
[198] See Article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, adopted on 15 April 1994, entry into force 1 January 1995.
[199] See Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

human rights of the ICESCR. Therefore, "the reality is that, whereas the rules that favour the expansion of the global economy have become stronger and more enforceable, equally important rules relating to human rights as well as environmental and labour standards have not kept pace in terms of their implementation."[200] Whereas the WTO norms are watched over by a single, strong entity, there is no supreme institution that can enforce human rights on a global level. In other words, "the human rights branch of international law is effectively unenforceable and non-legal when compared with the entirely separate activities – including the creation of increasingly coercive legal structures – of the WTO, as well as the other international economic bodies."[201] This may be an overstatement of the facts as, in particular, the European Court of Human Rights has substantial powers in enforcing the human rights set out in the European Convention on Human Rights and Fundamental Freedoms. Yet that does not help developing countries, which see their rights violated as a consequence of international (*e.g.* the Agreement on Agriculture) and national (subsidies) legislation. The state complaint mechanisms in the area of human rights suffer from a genuine lack of automatic sanction mechanisms. At the end of the day, states will choose to prioritise enforcing rules whose infringement is heavily sanctioned with real economic consequences, over fulfilling obligations whose violation only leads to some negative remarks by a UN committee, which is one of the reasons for the priority given to trade policy.

States' preference for trade policy may not even be voluntary, but rather deemed necessary in order to be competitive. Pressure on governments seeking to attract trade and investment influences them to adopt policies to maximise producer interests. This might have an adverse impact on the social policies that governments would otherwise pursue in the context of human rights protection.[202] Moreover, impoverished countries need to meet loan conditions set by the World Bank and the International Monetary Fund, which often require cuts in the public sector, limiting the budget allocated to the fulfilment of human rights obligations. NGOs seem to fight a lost battle on this issue. Whereas they have the support of the countries on issues such as subsidies and the WTO, developing countries may not be strong enough to back NGOs when producer influence is brought to bear. Governments of developing countries seem to increasingly seek to solve problems of poverty and development through trade, and to feel that a better trade position is a

[200] Robinson, 2001, 211.
[201] Dillon, 2002, 108.
[202] Abbott, 2002, 122.

higher priority than improving the enjoyment of human rights of the local population. It is therefore worthwhile to now examine one of the strategies that has evolved in practice to deal with the imbalance between trade and human rights protection – food sovereignty.

4.9 Food sovereignty

It is no surprise that agriculture is such a hotly debated issue. As stated above, it was long treated as an exception to the liberalisation obligations of the multilateral trade system to allow for quantitative restrictions. This allowed governments to protect local farmers from international competition, and to establish export subsidies so local products would enjoy a competitive advantage in foreign markets.[203] Even after the liberalisation commitments of the AoA, developed countries continued to find ways to shield their agricultural sectors from foreign interference, while at the same time guaranteeing a competitive edge in the markets of developing states. In the light of the past and current habits of developed states, it is only natural and reasonable that developing countries also aspire to achieve a secure food sector.

Naturally, the concept of secure food sectors for developing nations has not gained backing from economists. By stressing the state's right to protect and support its agriculture market, the concept of food sovereignty goes against everything the free trade community fights for. From a human rights point of view, the concept as such is to be applauded, as it is aimed at protecting human rights. While the philosophy of international trade, the efficiency model, is centred around the elimination of barriers to trade, and perceives state policies, including policies to further human rights, as potential tools to achieve trade liberalisation, the philosophy behind food sovereignty takes the a human rights cause as its authority and treats other policies, including (protectionist) trade policies as the tool to achieve the protection of human rights. Yet those fighting for the replacement of free trade by the notion of food sovereignty must be careful in how they formulate their demands to avoid making the same mistake as free trade proponents. Not all rights are human rights, and only if human rights are employed as an end in themselves, rather than a means to an end, can they be a convincing factor in the debate on the liberalisation of trade.

[203] Desta, 2002, 6.

4.10 The potential of trade to enhance or endanger human rights

In this section, the human rights arguments put forward by the free trade lobbyists are given greater scrutiny. Trade lobbyists argue that liberalised trade in and of itself furthers human rights. The link between the two is presented as being quite natural. After all, the Preambles of the Marrakesh Agreement Establishing the WTO and the United Nations Charter both refer to the objective of raising standards of living. Furthermore, it is stated that the relationship between human rights and international economic law has firm doctrinal grounding in Article 1 (3) of the UN Charter, where States undertake to cooperate with each other to solve "international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[204] According to trade advocates, it is a confirmation of the view that economic, social, cultural, humanitarian etc., domains are inextricably connected in the effort of creating a better society. [205] The link between economic cooperation and furthering human rights was mentioned already back in 1941 when, at the meeting between American President Franklin D. Roosevelt and UK Prime Minister Winston S. Churchill, the two nations stated:

> "[T]hey desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security."[206]

Yet the syllogism that follows from those statements seems too good to be true: Economic cooperation and human rights are presented as being aimed at the same objective, raising standards of life; economic cooperation can best be achieved through the liberalisation of trade; therefore, the liberalisation of trade leads to human rights benefits. The initial suspicion proves not to be unfounded; the syllogism is incorrect. The conclusion, *i.e.* that the liberalisation of trade leads to human rights benefits, is based on the supposition that economic cooperation and human rights always go hand in hand. That hypothesis not only overestimates the role that the objective of human

[204] Article 1 (3) of the United Nations Charter.
[205] Addo, 2002, 148.
[206] Atlantic Charter, 14 August 1941, published in U.S. Department of State Executive Agreement Series No. 236.

rights play in the WTO, but also mistakenly assumes that having the same goal means being "about" the same thing. The WTO in reality is more about the tool – free trade – than anything else, most of all human rights, which in turn are all about the objective, instead of the tool.

Similarly, the assumption that free trade leads to greater general wealth, which in turn leads to improved human condition, and that therefore all efforts to support free trade improve human rights, ignores the fact that not everyone benefits from trade liberalisation. Moreover, it does not question whether free trade actually increases wealth and whether that wealth is used to improve the living conditions of all.

The argument that the WTO is aimed at improving human rights places the focus on "market-friendly" human rights, such as the non-discrimination principle, the freedom of association, and labour rights.[207] The most important rights cited by the trade community to serve as proof that economic liberalisation supports human rights in fact demonstrate the fallacy behind that line of reasoning. The right to property and, even more so, the right to trade are highly contestable from a human rights point of view. Although the right to property is recognised by all of the major regional instruments,[208] on the international level only the soft-law Universal Declaration lists it in Article 14. Neither the ICCPR nor the ICESCR, both adopted after the UDHR, repeat the right to property as a human right, making the customary law status of the right questionable.[209] Without a doubt, the right to trade is not perceived as a human right. Neither international nor regional human rights instruments elevate the right to trade to human right status. Thus, to designate the right to trade as a human right displays ignorance of the true concept of human rights. Citing the "right to trade" as a human right raises doubts as to the credibility of the human rights arguments brought in by the trade community.

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[207] As some companies prefer to invest in states with low labour standards, human rights are not always perceived as "market-friendly." However, the focus of the inquiry is on those who use the human rights argument to plead for the liberalisation of trade.

[208] Article 14 of the African Charter on Human and Peoples' Rights (1520 U.N.T.S. 217, adopted on 27 June 1981, entry into force 21 October 1986), Article XXIII of the American Declaration of the Rights and Duties of Man, Article 21 of the American Convention on Human Rights (1144 U.N.T.S. 143, adopted on 22 November 1969, entry into force 18 July 1978), and Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (E.T.S. No. 9, adopted on 20 March 1952, entry into force 18 May 1954).

[209] For more on the right to property, see Krause, 2001, 191-209.

As seen above, some economists go a step further and state that trade depends on human rights, because the well functioning of the market requires the protection of human rights.[210] States in Southeast Asia whose economies have flourished although their populations were denied basic human rights seem to suggest the opposite. What could be said instead is that only in combination with human rights can trade reduce poverty. If free trade is achieved while human rights are not protected, trade may have more negative than positive effects on the livelihoods of populations of developing countries. In other words, "[u]nbridled economic liberalisation has the potential to wreak havoc on human rights unless checked in a timely manner."[211]

At present, there are no mechanisms to protect those who take the negative consequences of free trade decisions. Once again, economists focus on the efficiency model; success is counted if the barriers to the flow of goods and services are as low as possible. The validity of the theory behind the efficiency model, that lower barriers automatically improve human rights, is taken for granted; it is not questioned. From a human rights point of view, the success of a policy is evaluated by the impact it has on the lives of individuals. One of the main condemnations of the liberalisation policy is that it produces winners and losers. The winners are those who can quickly benefit from more export opportunities, and the losers are those who have difficulties adapting to a market influenced by foreign forces. Diversification, a natural and intended consequence of the efficiency model, does not happen over night. Economic analysis will only show the overall changes in the wealth of country. Therefore "[t]he lack of mandate or mode in the trading system to take account of distributional concerns (other than what can be secured in bargaining among nations), (…) should be counteracted."[212] At present, the WTO has no mechanisms in place to prevent trade liberalisation from victimising sectors of the population, nor are there mechanisms to identify or provide relief to the victims of liberalised trade. When trade lobbyists draw syllogisms between free trade and human rights, they seem to only want to link trade to those human rights that support the argument for free trade and enhance the functioning of the market. The fact that human

[210] See chapter 2.2.5 (where Petersmann is referred to).
[211] UN Document E/CN.4/Sub.2/2000/13, 15 June 2000, *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights*, Preliminary report submitted by J.Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8, paragraph 55.
[212] Fox, 2002, 201.

rights pay special attention to the losers of such policies is widely ignored. While some NGOs within the human rights community use the losers of free trade as illustrations that the liberalisation of trade must be stopped, others also see the benefits of trade, but acknowledge that those whose lives are negatively affected must be taken care of. Among the latter are even some economists, who see a role for the monetary institutions in reducing the adverse impacts of the liberalised trading system: "The Bretton Woods institutions must be geared to providing compensation or adjustment assistance to poor countries harmed by the freeing of trade at the WTO."[213] This statement offers insight into the shortcomings of the WTO policy and is a welcome change from the usual trade talk, which tends to only praise the benefits of trade. It nevertheless is an economic solution to a human rights problem.

At the conclusion of the Uruguay Round, the Trade Negotiations Committee issued a decision addressing the effect of liberalisation on LDCs and net food-importing countries. In it, it was acknowledged that "[l]east-developed countries and net food-importing developing countries may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions (…)."[214] The measures suggested to remedy the detrimental impact, however, tackle neither possible shortcomings of the trade regime itself, nor the structural problems of LDCs and developing countries in coping with economic and human rights challenges. Ensuring the same level of food aid and enabling disadvantaged states recourse to resources of international financial institutions, two of the proposed solutions, may even worsen economic and food-related problems, as states become further indebted and the weak agricultural sector has to compete with free food aid. As pointed out above, the third measure, granting LDCs and developing countries preferential treatment, in practice does not give those countries sufficient possibilities to prevent and remedy negative effects on human rights of their populations.

[213] Alvarez and Bhagwati, 2002, 127. See also Bhagwati, 2004, 33.

[214] Uruguay Round Ministerial Decisions and Declarations, Decisions adopted by the Trade Negotiations Committee on 15 December 1993 and 14 April 1994, *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, at http://www.wto.org/english/docs_e/legal_e/35_dag.doc (last visited 5 July 2004).

5 CONCLUSION: THE WAY FORWARD

Careful assessment of the use of human rights arguments by supporters and opponents of free trade reveals that both parties should exercise more caution in waving the human rights banner to support their positions. Both parties present their arguments as if the links between trade and human rights were a logical development, rather than representing a dramatic break with existing policies.

The discourse of international human rights law is taken to describe an agenda with fundamentally different ideological underpinnings.[215] As outlined above, the trade dialectic is based on utility, whereas human rights are targeted at processes and outcomes. Therefore, human rights are neutral with respect to trade policies. Accepting that human rights make the argument for or against liberalisation of trade would detach them from their foundations in human dignity and they would instead be viewed as primarily instrumental means for achieving economic policy objectives, thereby reducing individuals to objects of rights, rather than seeing them as endowed with rights.[216] The human rights community should therefore be more cautious in invoking human rights as an argument against free trade and focus on impact studies or, in the case of fighting subsidies, on trade logic instead. On the other hand, the trade community refers selectively and imprecisely to human rights. It exploits the human rights concept by citing rights that are beneficial to trade, but often ignores that free trade may also lead to human rights violations. Yet "[i]t is frankly absurd to present GATT/WTO rules as simply beneficial to nations without identifying the relevant winners and losers."[217] In this instance, free trade supporters emphasise rights that have not necessary attained general consensus as being human rights. Examples of human rights that are cited by the trade community, but are not generally accepted to fall within the rubric of human rights include the right to property and the right to trade. When both parties cite human rights logic in a distorted man-

[215] Alston, 2002, 841.
[216] Alston, 2002, 843.
[217] Dillon, 2002, 140.

ner to support their case, the result is that the moral imperative and legal efficacy of human rights as a standard are lost. It is crucial that human rights maintain their inherent strength and superiority over ordinary legal rules, in particular if they are to survive the challenges faced as they penetrate a domain with which they have neither longstanding ties, nor are they warmly greeted.

The human rights community might do well to welcome the appearance of human rights language in trade discussions as a sign of the increasing prevalence and impact of human rights law throughout all aspects of the societies of countries engaged in trade.[218] However, the human rights community must continue to scrutinise the links made and to identify any distortions of basic concerns for the inherent dignity of all members of the human family.

Introducing human rights language in the trade debate impacts both human rights and trade law. The trade community needs to realise that "[t]he trade linkage phenomenon is changing not only the way we understand trade law and policy, but also the formulation and direction of trade policy itself."[219] A similar conclusion can be drawn from the debate in this paper with regard to human rights. By recognising and accepting the linkages between human rights and trade, a new understanding of human rights becomes apparent. It alters the way we look at human rights by extracting them out of their isolation from other disciplines. The linkages expose the need for a new approach towards human rights, one that takes account of the interdependence of trade and human rights and responds to the globalisation process.

If the inevitable collision between trade policies and human rights is to come to any satisfactory solution, both sides need to make adaptations to their approaches. If human rights are to be used in the trade debate, which is only a logical consequence of the expanding mandate of the WTO, as well as a growing recognition that human rights penetrate into all fields of law, a balance must be struck between adapting human rights to the trade rationale without compromising their inherent authority. Although NGOs are right when they insist on using human rights language, "[t]he human rights community needs to stop finding easy market-friendly, corporate-friendly ways of articulating human rights."[220] Similarly, the trade community should stop rejecting the consideration of anything except free trade issues. It is not just

[218] Garcia, 1998b, 393.
[219] Garcia, 1998a, 202.
[220] Shiva, 1999, 107.

shortsighted, but by remaining aloof from the consequences of trade decisions, the trade community becomes a very easy target for attacks from the NGO community.

First and foremost, the primacy of human rights obligations needs to be recognised.[221] Human rights are not only linked to trade rules, they are often in conflict with them. Conversely, trade rules are often in conflict with the realisation of human rights. The WTO must confront this interconnectedness; it cannot hide behind the argument that it is a specialised and self-contained organisation whose mandate does not include human rights.[222] WTO members are parties to human rights instruments and subject to the rules of customary international law. To ensure that trade rules are in compliance with human rights obligations and do not cause harm four changes to the current situation are needed: First, attentiveness to human rights concerns in the *adoption* of trade rules; second, allowing *differential treatment* to developing countries and LDCs with regard to liberalisation obligations; third, assisting in the *protection of human rights before requiring liberalisation*; and fourth, taking human rights concerns into account in the *oversight* of WTO rules.

As concerns the *adoption* of trade rules, the process must guarantee that human rights obligations of states are supported and possible negative impacts mitigated. Behind any successful exercise in rule making should be a necessary consensus on such elements as the core rights to be protected.[223] Related to this is the need to focus on those marginalised by the liberalisation of trade. At the conclusion of the Uruguay Round the ministers stated that "difficulties whose origins lie outside the trade field cannot be redressed through measures taken in the trade field alone."[224] The quote is a recognition that trade is not "the only interest a society or country may have."[225] At the same time, however, the ministers seem to wash their hands off all non-trade issues, expelling them from the WTO and ignoring that trade might aggravate problems. The trade community keeps fighting against non-trade

[221] Vienna Declaration and Programme of Action, paragraph 1: Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.
[222] De Feyter, 2003, lecture.
[223] Garcia, 1998a, 205.
[224] See paragraph 4 of the *Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking*, at http://usinfo.state.gov/usa/infousa/laws/gatt/iii2.htm (last visited 5 July 2004).
[225] Nichols, 1996, 716.

issues at the WTO and for the promotion of free trade over any other concern. Instead of clinging to the efficiency model and letting the IMF and WB clean up the unfortunate by-products liberalised trade generates, human rights impacts need to be considered *before* adopting a policy. Trade decisions might have more evenly distributed positive impacts on human rights if preceded by first, a careful look at actual consequences of trade decisions that have already been made and second, by including human rights concerns in both the development process, and the content, of trade decisions. Protection of the right to food, for instance, should play a determinative factor in the reform process of the Agreement on Agriculture.[226] Only if the Agreement is remodelled in such a way that the new draft reflects the concern for human rights protection instead of having liberalisation as its only goal, will there be a chance that developed and developing countries agree to changes in the current rules.

To achieve increased human rights sensibility at the WTO, not only must the OHCHR and NGOs obtain better access to the Organization, but also all relevant actors must acquire expertise in the field of human rights. This is an exercise that the trade community will likely resist, but that is nevertheless indispensable, in particular for the Dispute Settlement Body, which has the final say over conflicts of trade rules with other norms. With human rights linked to trade issues, human rights concerns necessarily become involved in trade conflicts and their adjudication by international economic institutions. Thus, the impact of linkage issues is felt not only in which trade rules are adopted and how they are created, but also in the ways in which international economic institutions operate and in the circumstances in which nations have recourse to them.[227]

Furthermore, greater leeway for developing countries could be achieved by incorporating more *differential treatment* in the AoA and other trade agreements to guarantee protection against gross inequalities. Such special safeguard provisions could include allowing for exceptions from the liberalisation requirements in instances where human rights are violated, and putting social safety nets in place to deal with shocks on the rural populations. Prior

[226] At the International Conference on Non-Trade Issues in Agriculture (Ullensvang, Norway, 2-4 July 2000), Mauritius presented a discussion paper in which it proposed that human rights should play a major role in the reform process of the AoA. See WTO Document G/AG/NG/W/36/Rev.1, Committee on Agriculture, Special Session, *Note on Non-Trade Concerns*, 9 November 2000, p. 43.
[227] Garcia, 1998a, 205.

to opening markets of developing countries to foreign trade, adequate human rights protection must be in place. In this regard, international cooperation will also be crucial.[228] It needs to be recognised that the same action, trade liberalisation, can have both positive and negative human rights effects. If we agree with the view of economists that free trade is beneficial to society as a whole, then society bears the obligation to assist those who suffer so that others may enjoy the gains.[229] The trouble is that most societies do not want to pay taxes to fulfil this social and moral duty, but prefer to indulge in the profits of free trade while letting others carry the burden.[230] Similarly, on the international level, states classify distributional shortcomings flowing from the efficiency model as purely domestic issues. This policy of looking away from the human rights impact of market access obligations disregards the reality that developing countries need *assistance* specifically in overcoming those challenges.

In their unwillingness to consider human rights in policy making, the trade community continues to insist that there are pure trade issues even in the face of countervailing evidence. And even where it is acknowledged that the liberalisation of trade may lead to adverse effects, the validity of the efficiency model is left unquestioned. Instead of treating the source of the disease, the symptoms are temporarily repressed. To proclaim that "where reform adversely impacts poverty, the appropriate response is to provide support and alleviate hardship for the poor rather than to abandon the policy reform process,"[231] underplays the immense differences between trading partners of developing and developed countries. The Office of the High Commissioner for Human Rights points out that "trade liberalisation can result in 'losers' if the right form, pace and sequencing of trade reform is not chosen," and goes on to stress that "a human rights approach seeks the progressive introduction of trade policies that take into account the needs and rights of individuals and communities, particularly those who could lose out as a result of the reform process."[232] There is some danger that, unless the vast gap between the protection of human rights in developing countries com-

[228] Office of the High Commissioner for Human Rights, *Human Rights and Trade*, 5th WTO Ministerial Conference, Cancún, Mexico, 10-14 September 2003, page 10, at http://www.unhchr.ch/html/menu2/trade/cancunfinal.doc (last visited 5 July 2004).
[229] Summers, 2001, 88.
[230] Summers, 2001, 89.
[231] Wolter, 2000, 121.
[232] Office of the High Commissioner for Human Rights, *Human Rights and Trade*, 5th WTO Ministerial Conference, Cancún, Mexico, 10-14 September 2003, page 5, at http://www.unhchr.ch/html/menu2/trade/cancunfinal.doc (last visited 5 July 2004).

pared to that of developed countries is narrowed, the trading system will worsen and take advantage of those differences instead of contributing to their reduction. The only way forward is intense assistance from developed countries, in the sense that they do not impose the same economic obligations on developing countries as on developed countries. Therefore, opening markets needs to go hand in hand with ensuring human rights. Put differently, it can be argued that the universal enjoyment of human rights depends on making human rights an integral part of a social and sustainable market economy.

Yet the human rights community does not have all of the answers either. In practice, protecting children from exploitation by prohibiting child labour may hurt them more, condemning them to the streets and into prostitution. That does not mean, however, that child labour or other human rights abuses should be tolerated. It means that, just as the trade community needs to create a safety net for the loser of free trade, the human rights community needs to acknowledge that insistence on high standards may result in economic losers, who must be supported. Alternatives such as education or training could be set in place to support the children displaced from their jobs by child labour laws.[233]

A reversal of certain current practices is needed to balance human rights concerns with recognition of the realities in less developed countries. The Agreement on Agriculture needs to be reformed to permit developing states to first ensure human rights protection to their populations before having to meet liberalisation commitments. Neither the present "preferential treatment" clauses in the Agreement on Agriculture, nor the Generalised Systems of Preferences go far enough. Even if empirical evidence supports the allegation that free trade will eventually lead to substantial economic improvements in developing countries, active support needs to be provided to ensure that the developing countries are sufficiently stable to deal with the dangers of liberalised trade, dangers such as increases in inequity of wealth distribution. Whereas in the EU a system of wealth transfer prepares applicant member states to overcome gross inequalities and make integration possible,[234] a similar construction is absent from the WTO framework. The membership of states with a record of human rights violations may even close the door for human rights as an active WTO concern for good, as the consensus

[233] For an economic view on the reduction of child labour as a result of globalisation, see Bhagwati, 2004, 68-72.
[234] Dillon, 2002, 139.

voting system gives those states the possibility to veto the entry of human rights considerations into trade debates.

Revision of current trade rules, such as those flowing from the Agreement on Agriculture, as well as the reform of the Common Agriculture Policy, do not appear to be completed in the near future. Despite, or perhaps because of their impact on economies of developing countries, agreement over trade rules, such as market access and subsidies, seems impossible at the moment. To mitigate negative effects of the current regime, LDC and developing countries with demonstrated human rights violations resulting from the impact of international trade rules should be granted the possibility to forego these rules and protect the livelihoods of their populations instead. Although developed countries, which oppose any "protectionist" measures, frown upon any such policy they need to acknowledge that they themselves use them. What does constitute protectionism that impinges on free trade are the steps taken by developed countries to circumvent the rules of the WTO while staying within the letter of the law. Examples include imposing high tariffs just prior to the conclusion of the Uruguay round, and shifting subsidies into the "blue" and "green" boxes. These issues should be addressed by the WTO, and the preliminary ruling in the *Brazil v. United States* case is a first signal in the right direction. However, it also important to tackle other barriers that developing countries face when exporting their products. It is easy to predict that developed states will not allow exceptions from the strict packaging, labelling, sanitary and phytosanitary regulations. Therefore, developing countries require help in meeting those guidelines before their products leave the national market.

However, there is one barrier that could be abolished very simply from a technical point of view. It concerns the increase in tariff corollary to the degree of processing. This truly protectionist measure denies developing countries the opportunity to earn more from the products that originate on their own soil. It also prevents processing industries from being established in developing countries. This is a trade barrier whose dismantling has the potential to drastically improve the livelihoods of the populations of developing countries.

Finally, in the *oversight* of trade rules, the Dispute Settlement Body, the WTO panels and the Appellate Body need to take human rights concerns into account when deciding trade questions. The present imbalance in enforceability between trade rules and human rights protections leads to a

highly undesirable outcome, which is that in a conflict between the two sets of regimes, trade rules will overpower human rights. The result is a complete reversal of the theory in which human rights have a primary status over all other rules. As the DSB has no legal base for interpreting and enforcing human rights treaties, another way must be found to ensure that human rights are not treated as irrelevant to trade disputes. One possibility is permitting more exceptions to free trade obligations – by allowing laws whose purpose is the protection of core values and human rights but are in conflict with trade rules to survive scrutiny by the DSB.[235] The current interpretations of Article XX GATT are too limited to incorporate this type of exemption. In fact, "it is far from clear whether the violation of human rights could be covered by any WTO exceptions."[236] Until the text of WTO agreements is amended to provide for human rights exceptions, the only way the DSB can take human rights into account is through evolutionary interpretation – a difficult task given the vague character of human rights, and hardly doing justice to the primary status of human rights over all other international obligations.

Endowing the Dispute Settlement Body with the mandate to oversee the implementation of rulings on human rights violations would certainly boost the compliance rate of current findings by international treaty bodies. Yet the necessary expertise is at the moment lacking at the WTO. It is true that the WTO is not well equipped to deal with complex human rights questions.[237] If human rights are to be given more than lip service, this situation must change. However, the main difference between the bodies that enforce human rights and those that enforce trade rules is that the organisations supporting trade rules were installed in pursuit of economic justice, while regional courts and the UN were established to protect human dignity.[238] It is these different underpinnings that make the introduction of human rights concerns into the dispute settlement system a challenging but necessary exercise. Nevertheless, it would be necessary to have human rights experts sit on the DSB to ensure a high degree of professionalism. However, there is hardly any political support to execute this radical transformation. It is unlikely that governments have moved away from the point expressed at the 1996 Ministerial Conference of the WTO in Singapore, namely that "[t]he

[235] Nichols, 1996, 713-714.
[236] Marceau, 2002, 789.
[237] Alvarez and Bhagwati, 2002, 132.
[238] Garcia, 2001, 86.

International Labour Organization (ILO) is the competent body to set and deal with [internationally recognised core labour] standards."[239]

Yet to leave the enforcement of labour rights to the ILO and other human rights bodies, denies the human rights impacts of trade decisions and banishes human rights to the weak oversight mechanisms that currently exist. In effect, it banishes human rights from trade considerations, thereby contradicting what has become apparent through the debate on human rights and trade, namely that they are inextricably bound together. Instead, "as the IMF, World Bank, and the WTO collectively diminish the powers and status of the modern nation-state, national powers that existed in the public interest must logically be shifted in a supranational direction."[240] As with trade law, human rights protections should be enforced by means of automatic enforcement rules and a permanent court similar to the Dispute Settlement Body of the WTO. An International Court of Human Rights with the power to impose retaliatory trade measures would elevate human rights to an appropriate status. Of course, the establishment of such a court has at present no political backing, so the defence of human rights remains weak. That is why it is so important that when human rights are cited in debates, they do not lose their primary status by being reduced to a catchphrase or a tool to fight for or against trade liberalisation. Only if the protection of human dignity is the purpose behind the argument, and violations or benefits are supported by facts and causality, can human rights play a role in the trade liberalisation debate.

[239] See paragraph 4 of World Trade Organization, Singapore Ministerial Declaration, WTO Document WT/MIN(96)/DEC/W, 13 December 1996.
[240] Dillon, 2002, 135.

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