TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 15 SPRING 2007 NO. 2

# Re-thinking Trade and Human Rights

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## I. INTRODUCTION

There is a story, told by a former member of the Office of the High Commissioner for Human Rights (OHCHR), of a visit she received some years ago from the "Geneva trade representative of a major developed country." The trade representative had heard that the OHCHR was preparing a series of reports on the trade regime: they had come to ask why, and expressed "sheer incredulity that a trade agreement was any

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business of a UN human rights institution."[1] The trade and human rights debate has clearly come a long way since those days, when it was a struggle to convince many of any connection between the two fields. There is now a relatively widely held view that the connections between international trade and human rights are interesting and in need of investigation. The literature on the subject is already large and growing not only in quantity, but also in its range of participants, the scope of its subject matter, and its mainstream appeal. Nevertheless, while this literature has without doubt produced much work of great value, taken as a whole it is flawed in at least two serious ways. First, it lacks clear and explicit thinking about what human rights actors and human rights language contribute to trade policy debates—what function they perform and what distinctive "value-added" they bring. As long as thinking about this issue remains unclear and poorly articulated, serious engagement between trade and human rights scholars will continue to be hampered, and participants on all sides of the debate will in many cases continue to talk past one another. Second, the debate has so far proceeded on the basis of an unduly limited, and in many ways misleading, map of the ways in which the international trade regime affects the effective protection of human rights. Because it is on the basis of this map that critiques and reformative proposals are generated, the result has been that the trade and human rights debates have so far produced a relatively narrow and constrained transformative agenda. In this Article, I substantiate these two critiques and offer some thoughts as to how those interested in progressing the trade and human rights debate might respond to them.

The social history of the trade and human rights debate is yet to be written, and we still have no fully satisfactory story about who and what provided its initial impetus, nor the factors that have shaped its progression since then. Nevertheless, it is possible to provide at least a brief impressionistic survey of some key moments in the debate's evolution and some basic features of its discursive landscape. Probably the most important feature, in terms of its shaping influence on the debate as a whole, has been the series of reports produced by U.N. human rights institutions on the impact of the international trading system on the enjoyment of human rights. This began formally around 1999, with the initiation of a broad work programme under the rubric of

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1. Stefanie Grant, *Functional Distinction or Bilingualism? Human Rights and Trade: The UN Human Rights System*, *in* INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 133, 133 (Frederick M. Abbott, Christine Breining-Kaufmann & Thomas Cottier eds., 2006) [hereinafter INTERNATIONAL TRADE AND HUMAN RIGHTS].

"Globalization and its impact on the full enjoyment of all human rights."[2] Among the first fruits of this programme was a report of that name by Oloka-Onyango and Udagama dealing, among other matters, with a variety of critiques of the World Trade Organization (WTO).[3] This report is remembered by many as controversial,[4] and there are those who saw it as setting an early adversarial tone to the debate. While that progress report certainly was critical of the trade regime, in hindsight the critiques advanced in it are better understood as a reflection of and response to the strength of contemporary concerns about economic globalization prevailing at the time. Since then, perhaps the most sustained and influential contribution has come from the OHCHR, in the form of a series of (so far) six reports. The first, released in 2001, addressed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and its impact on human health,[5] and since then, the topics covered have included agricultural liberalisation and the right to food,[6] the liberalisation of trade in services,[7] investment liberalisation,[8] and the

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2. See, for example, High Comm'r for Human Rights, *Globalization and Its Impact on the Full Enjoyment of All Human Rights*, U.N. Doc. E/CN/4/RES/1999/59 (Apr. 28, 1999); and the General Assembly resolution of the same name, G.A. Res. 54/165, U.N. Doc. A/RES/54/165 (Feb. 24, 2000). This program, according to Zagel, was in turn in part the result of attention directed to the issue at a variety of large U.N. conferences in the preceding years, such as the International Conference on Population and Development (Cairo 1994), the World Summit for Social Development (Copenhagen 2005), and the Fourth Conference on Women (Beijing 1995). *See* Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages & Suggesting Convergence* 27 & n.90 (Int'l Dev. Law Org., 2 IDLO Voices of Dev. Jurists Paper Series, Paper No. 2, 2005).

3. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Prot. of Human Rights, *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights, Preliminary Report*, U.N. Doc. E/CN.4/Sub.2/2000/13 (June 15, 2000) (*prepared by* J. Oloka-Onyango & Deepika Udagama); ECOSOC, Sub-Comm. on the Promotion & Prot. of Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights, Progress Report*, U.N. Doc. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (*prepared by* J. Oloka-Onyango & Deepika Udagama); ECOSOC, Sub-Comm. on the Promotion & Prot. of Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights, Final Report*, U.N. Doc. E/CN.4/Sub.2/2003/14 (June 25, 2003) (*prepared by* J. Oloka-Onyango & Deepika Udagama).

4. As a result of the phrasing of one sentence in the Preliminary Report, that report has come to be known in some circles somewhat disparagingly as the "nightmare report."

5. High Comm'r for Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner, delivered to the Sub-Commission on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter *Impact*].

6. High Comm'r for Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights, Report of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Resolution 2001/32, delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/2002/54 (Jan. 15, 2002) [hereinafter *Globalization*].

7. High Comm'r for Human Rights, *Liberalization of Trade in Services and Human Rights, Report of the High Commissioner, delivered to the Sub-Commission on the Promotion*

principles of non-discrimination[9] and participation[10] as they apply in the context of trade policy.[11] While these reports certainly have a critical edge, they have taken a self-consciously and consistently moderate line, stressing always that the international trading system can and ought to work for the protection and promotion of human rights. They have been read and distributed widely, and have been strongly influential in mobilizing and shaping the present debate. Other bodies, including treaty-monitoring bodies, have made significant contributions to this broad work programme.[12]

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*and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002) [hereinafter *Liberalization*].

8. High Comm'r for Human Rights, *Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights*, *delivered to the Sub-Commission on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003) [hereinafter *Human Rights, Trade and Investment*].

9. High Comm'r for Human Rights, *Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-Discrimination in the Context of Globalization, Report of the High Commissioner, delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/2004/40 (Jan. 15, 2004) [hereinafter *Analytical Study, Non-Discrimination*].

10. High Commissioner for Human Rights, *Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Participation and Its Application in the Context of Globalization, Report of the High Commissioner, delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/2005/41 (Dec. 23, 2004) [hereinafter *Analytical Study, Participation*].

11. *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, HUMAN RIGHTS AND WORLD TRADE AGREEMENTS: USING GENERAL EXCEPTION CLAUSES TO PROTECT HUMAN RIGHTS (2005) [hereinafter GENERAL EXCEPTIONS].

12. For a selection of other trade-related work carried out by a variety of UN bodies, see: the series of reports from the Office of the Secretary-General; Secretary-General, *Globalization and Its Impact on the Full Enjoyment of All Human Rights, Preliminary Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/55/342 (Aug. 31, 2000); The Secretary-General, *Globalization and Its Impact on the Full Enjoyment of All Human Rights, Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/56/254 (July 31, 2001); The Secretary-General, *Globalization and Its Impact on the Full Enjoyment of All Human Rights, Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/59/320 (Sept. 1 2004); The Secretary-General, *Globalization and Its Impact on the Full Enjoyment of All Human Rights, Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/60/301 (Aug. 24, 2005); the work of the Committee on Economic, Social and Cultural Rights, in particular its general comments; ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights—General Comment 12*, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (the right to adequate food); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising from the Implementation of the International Covenant on Economic, Social and Cultural Rights—General Comment No. 13*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) (the right to education); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising from the Implementation of the International Covenant on Economic, Social and Cultural Rights—General Comment No. 14*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (the right to the highest attainable standard of health); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising from the Implementation of the International Covenant on Economic, Social and Cultural Rights—General Comment No. 15*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *Comment 15*] (the right to water); as well

Of course, this body of work did not arise in a vacuum, and U.N. human rights institutions were not the first to make a connection between human rights and international trade. This seems to have been an innovation of some elements of civil society, particularly in the context of the campaigns conducted during the negotiation of both North American Free Trade Agreement (NAFTA) and the aborted Multilateral Agreement on Investment (MAI).[13] Thus, while it is true that the work of U.N. human rights institutions continues to generate, sustain, and focus civil society activism on trade matters, at the same time the U.N. work programme can itself be understood in part as a response to civil society pressure—or at least to a growing perception (arising in part as a consequence of these campaigns) that international trade matters ought to be a central part of modern human rights agenda. The result is that at present, Nongovernmental Organizations (NGO) play a central and expanding role in the trade and human rights debate and have been some of the most important drivers of it. It is hard to single out the work of particular NGOs without a degree of arbitrariness, but the important place of civil society in the trade and human rights debate can be seen in a number of different developments: the diffusion of human rights language into the work of NGOs primarily interested in trade matters; the trend among human rights NGOs to develop new expertise and activities on international economic questions; and the significant growth in groups—and networks—specifically mandated to work at the nexus between the trade and human rights regimes and to facilitate conversation between the two.[14]

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as various statements made by the Committee, including at WTO ministerial conferences, ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights–Follow-up to the Day of General Discussion on Article 15.1 (c), Monday, 26 November 2001: Human Rights and Intellectual Property, Statement by the Committee on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001); and the work of the Sub-Commission's special rapporteur on the right to health; ECOSOC, Comm. on Human Rights, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Report of the Special Rapporteur, Paul Hunt*, U.N. Doc. E/CN.4/2004/49/Add.1 (Mar. 1, 2004) [hereinafter *Report of the Special Rapporteur*].

13. For some early work on trade and human rights arising from this context, see HUMAN RIGHTS AND ECONOMIC GLOBALIZATION: DIRECTIONS FOR THE WTO (Malini Mehra ed., 1999) [hereinafter DIRECTIONS FOR THE WTO]; L'INSTITUT INTERNATIONAL DES DROITS DE L'HOMME, COMMERCE MONDIAL ET PROTECTION DES DROITS DE L'HOMME: LES DROITS DE L'HOMME À L'ÉPREUVE DE LA GLOBALISATION DES ÉCHANGES ÉCONOMIQUES / WORLD TRADE AND THE PROTECTION OF HUMAN RIGHTS: HUMAN RIGHTS IN FACE OF GLOBAL ECONOMIC EXCHANGES (2001).

14. For those interested in perusing the work of NGOs in this area, the ESCR-Net network (http://www.escr-net.org) is a good starting point. Some NGOs active in the field include: 3D (Trade, Human Rights, Equitable Economy); Amnesty International, the

Alongside the work of both U.N. institutions and civil society has arisen a very large and diverse academic literature, produced by scholars of both the international trading system and the human rights regime. A number of events and publications have been important in generating a momentum and a sustained interest in the theme. From 2002 to 2004, the American Society of International Law, in co-operation with a number of other institutions,[15] organised three influential conferences on trade and human rights, the proceedings of which have been published relatively recently.[16] Earlier, in 2001, a lively and high-quality exchange of views between leading scholars in the pages of the *European Journal of International Law* served to excite interest and raise the profile of the debate.[17] More generally, there has been something of an explosion of conferences, edited collections and monographs looking at the impact of international trade on a wide range of human rights, either as a topic in its own right, or as part of larger studies looking at economic globalization more generally.[18]

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International Federation for Human Rights (FIDH); Ethical Globalization Initiative (EGI); the Center for International Environmental Law (CIEL), International Gender and Trade Network (IGTN); the Centre for International Trade and Development (CECIDE); the People's Movement for Human Rights Education (PDHRE); Dignity International; Association for Women's Rights in Development (AID); the Lutheran World Federation; and formerly the International Centre for Human Rights in Trade and Investment (INCHRITI), among others. Some prominent NGOs working closely on trade matters, such as Oxfam, Institute for Agriculture and Trade Policy (IATP), Trade Law Centre for Southern Africa (TRALAC), and the Third World Network, have in varying degrees also incorporated some aspects of human rights language into their publications.

15. Georgetown University Law Center, Max Planck-Institute for International Law (Heidelberg), and the World Trade Institute (Berne).

16. HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi Bonanomi eds., 2005); INTERNATIONAL TRADE AND HUMAN RIGHTS, *supra* note 1; *see also* INT'L LAW ASS'N, DRAFT SEVENTH REPORT OF THE INTERNATIONAL TRADE LAW COMMITTEE (2006), *available at* http://www.ila-hq.org/pdf/Trade%20Law/Draft%20Report%202006.pdf.

17. Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002); Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651 (2002); Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002) [hereinafter Petersmann, *Global Compact*]; Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 EUR. J. INT'L L. 845 (2002) [hereinafter Petersmann, *Human Dignity*].

18. Among the vast literature, some early examples from a diversity of perspectives include: ALISON BRYSK, GLOBALIZATION AND HUMAN RIGHTS (2002); DIRECTIONS FOR THE WTO, *supra* note 13; GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999 (Matthew J. Gibney, ed., 2003); Tony Evans & Jan Hancock, *Doing Something Without Doing Anything: International Human Rights Law and the Challenge of Globalisation*, INT'L J. HUM. RTS., Autumn 1999, at 1; INT'L INST. OF HUMAN RIGHTS, *supra* note 13; Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735 (1999); Asif H. Qureshi, *International Trade and Human Rights from the Perspective of the WTO*, *in* INTERNATIONAL

An interesting dynamic of this scholarly literature (and indeed of the debate more generally) has been its tendency to expand its substantive scope progressively; in many ways, it seems as if the literature has proceeded by borrowing critiques of the trading system originally developed in other contexts and rearticulating them in human rights language. Early on, discussions on trade and human rights tended to concentrate on essentially two main topics: human rights conditionality (particularly in respect of trading relations between the United States and China, Cuba, and Burma[19]) and the labour and employment impacts of international trade.[20] While these subjects retain their place in the contemporary literature, the debate has significantly expanded, and they occupy a far less central position. An early addition was intellectual property, as human rights language was heavily deployed

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ECONOMIC LAW WITH A HUMAN FACE 159 (Friedl Weiss, Erik Denters & Paul de Waart eds., 1998); Alice Erh-Soon Tay, *The New Century, Globalisation and Human Rights*, 8 ASIA PAC. L. REV. 139 (2000); Symposium, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 1 (1999).

19. Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 HUM. RTS. Q. 155 (1982); Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62 (2001); Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353 (2002); Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133 (2002); James A. Dorn, *Trade and Human Rights: The Case of China*, 16 CATO J. 77 (1996); Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws Under the WTO Government Procurement Agreement*, 2 J. INT'L ECON. L. 3 (1999); Robert W. McGee, *Trade Embargoes, Sanctions and Blockades: Some Overlooked Human Rights Issues*, 32 J. WORLD TRADE 139 (1998); James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793 (1994); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996).

20. The question of the effects of trade on employment and working conditions is invariably a part of virtually all general commentaries on the relationship between trade and human rights. *See, e.g.*, BRYSK, *supra* note 18; ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION 15-17 (2000); HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996); ANNIE TAYLOR & CAROLINE THOMAS, GLOBAL TRADE AND GLOBAL SOCIAL ISSUES (1999); Marjorie Cohn, *The World Trade Organization: Elevating Property Interests Above Human Rights*, 29 GA. J. INT'L & COMP. L. 427 (2001); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 135 (1999); Hoe Lim, *Trade and Human Rights: What's at Issue?*, 35 J. WORLD TRADE 275, 297 (2001); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273 (2002); Tay, *supra* note 18, at 139; Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime*, 14 EUR. J. INT'L L. 35 (2003); Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861 (1995). There are those, it should be noted, who do not think that labour rights issues are properly part of a human rights agenda.

in the "TRIPS and public health" debate.[21] More recently, a great deal of work in the trade and human rights field centres on questions of development: whether and how international trade regimes disadvantage developing countries and (certain sections of) their populations. Furthermore, recent work has started to concentrate on concerns which have been raised about the potential constraining impact of international trading systems on what has been termed "social regulation"—that is, health and safety regulation, consumer protection regimes, equal opportunity legislation, and labour market regulation, among others, all of which are seen as tools for the protection of human rights.[22] From around 2000 or 2001, the debate has also encompassed questions concerning the impact of services liberalisation on the provision of essential services to the poor.[23]

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21. *See Impact*, *supra* note 5; *Report of the Special Rapporteur*, *supra* note 12; Frederick M. Abbott, *The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 279 [hereinafter Abbott, *Rule of Reason*]; Frederick M. Abbott, *TRIPS and Human Rights: Preliminary Reflections*, *in* INTERNATIONAL TRADE AND HUMAN RIGHTS, *supra* note 1, at 145; Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. INT'L ECON. L. 861 (2002); Jamie Crook, *Balancing Intellectual Property Protection with the Human Right to Health*, 23 BERKELEY J. INT'L L. 524 (2005); Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUM. RTS. Q. 1 (2002); Eleanor M. Fox, *Globalization and Human Rights: Looking out for the Welfare of the Worst off*, 35 N.Y.U. J. INT'L L. & POL. 201 (2002); Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123 (2004) [hereinafter Helfer, *Interactions*]; Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004) [hereinafter Helfer, *Regime Shifting*]; Wai, *supra* note 20.

22. For discussions of these and other regulatory issues, see: HOWSE & MUTUA, *supra* note 20; *Analytical Study, Non-Discrimination*, *supra* note 9; Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 BROOK. J. INT'L L. 113 (1999); Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT'L ECON. L. 111 (2002); Dommen, *supra* note 21, at 1; James Thuo Gathii, *Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis*, 7 WIDENER L. SYMP. J. 137 (2001); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753 (2002); Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 171 (1998).

23. *See, e.g.*, CTR. FOR INT'L ENVTL. LAW, GATS AND WATER: RETAINING POLICY SPACE TO SERVE THE POOR (2003), *available at* http://www.ciel.org/Publications/GATS_5Sept03.pdf; CTR. FOR INT'L ENVTL. LAW, GOING WITH THE FLOW: HOW INTERNATIONAL TRADE, FINANCE AND INVESTMENT REGIMES AFFECT THE PROVISION OF WATER TO THE POOR (2003), *available at* http://www.ciel.org/Publications/Waterbrief_3Sept03.pdf [hereinafter FLOW]; CTR. FOR INT'L ENVTL. LAW, WATER TRADED (DRAFT VERSION) (2003), *available at* http://www.ciel.org/Publications/WaterBrief_Mar03.pdf; AARON OSTROVKSY, ROBERT SPEED & ELISABETH TUERK, CTR. FOR INT'L ENVTL. LAW & WORLD WILDLIFE FUND FOR NATURE, GATS, WATER AND THE ENVIRONMENT: IMPLICATIONS OF THE GENERAL AGREEMENT ON TRADE IN SERVICES FOR WATER RESOURCES (2003); Andrew Lang, *The GATS and Regulatory Autonomy: A Case Study of*

How, then, does this Article fit into that literature? As already stated in the opening paragraph, I bring to bear two core critiques of the trade and human rights debate as a whole, which correspond to Parts II and III of this Article. In Part II, I look at what has been said about the impact of the trade regime on the enjoyment of human rights. In most of this literature, the trade regime is understood as primarily a system of formal rules and associated enforcement machinery. For most commentators, we know the human rights impact of the trade regime by analysing how these formal legal obligations constrain governments' ability to take measures to protect human rights. Inevitably, this analysis has produced a narrow reformative agenda, one which concentrates on formal amendment to WTO rules (and rule-making processes) and focuses largely on relaxing the obligations imposed by them, creating greater "policy space" for WTO Members. In my view, formal analysis of WTO rules yields a highly incomplete and, in many respects, misleading picture of the impact of the trade regime. This is partly because such analysis tends to overestimate the coercive impact of WTO rules on real-life regulatory processes. It is also because formal legal analysis fails to capture *other*, arguably more important, ways in which the WTO system shapes global trade policies, through processes of persuasion, socialization, and knowledge production. Furthermore, such analyses focus solely on the direct constraining effect of the WTO legal system, and are blind to the indirect, context-dependent, and often contradictory deeper social transformations to which that system gives rise. I argue, therefore, for the need to build a richer and more complex picture of the impacts of the WTO system on human rights protection—not just because all aspects of the WTO ought to be subject to critical scrutiny, but more importantly because attention to the myriad processes through which the trade regime makes its influence felt enables us to see how the trade regime can most productively help us collectively to re-imagine and re-create a better international trading order.

In Part III, my focus shifts from the trade regime to the human rights regime. In particular, I am interested in exploring what the engagement of human rights actors and languages has brought to debates about the international trading system. I ask how the engagement of human rights has re-shaped and reconstituted debates about global economic governance. What productive function has it performed in these debates, and how (if at all) has it helped to progress them? What

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*Social Regulation of the Water Industry*, 7 J. INT'L ECON. L. 801 (2004); *Liberalization*, *supra* note 7.

do human rights actors, as human rights actors, have to offer debates about the nature and future of the global trading order? In my view, the literature so far has been seriously hampered by the lack of coherent and clearly articulated answers to these questions. I argue that the present trade and human rights literature is implicitly structured by primarily three different conceptions of what human rights can offer. Human rights may be understood as: a set of rules providing substantive guidance to trade policy-makers and defining the parameters of acceptable trade policy; a set of political technologies which can be deployed to achieve particular trade policy outcomes; or a set of social objectives and values which at times run counter to the liberal trade project and therefore necessitate decisions about complex policy trade-offs. I show how these conceptions have led commentators down some initially promising but, in my view, ultimately unsatisfying paths. I then offer two other models which may lead in more promising directions: first, I suggest that human rights may be best understood less as a source of substantive policy prescriptions and more as a *trigger* for policy learning; and second, that human rights provide a means of challenging the norms of technical rationality which presently legitimate and structure the trade regime.

It will be clear already that my intervention into this debate looks somewhat different from most, and for that reason it may be necessary to prepare the reader in advance for what to expect. For one thing, unlike many commentators, I do not attempt to take a position on the contested question of whether and how trade liberalisation undermines or enhances the enjoyment of human rights. On such questions, the underlying normative commitment of my Article is a thin one; it takes for granted that the critiques of the trade regime raise important issues, it proceeds from the presumption that the most fundamental issues they raise can never be finally settled, and it acknowledges the possibility that profound transformation in the trading order may be necessary to adequately respond to them. My primary concern is with the trade and human rights debate itself—specifically, whether and to what extent it enables or forecloses transformative change and whether and to what extent it maintains its "critical bite." Furthermore, my account differs from those which take for granted that human rights represent a presumptively legitimate and appropriate standpoint from which to address trade issues. Of course, I find it perfectly natural that human rights bodies have taken an interest in trade issues, and I do not think it is necessary to *justify* that interest by asking what human rights bring to the debate. But I do think it is important to determine precisely what the effects of the engagement

of human rights are in the debate and to think critically about the relative strengths and weaknesses of that engagement. Finally, I do not seek, as many others do, to map the relationship between trade and human rights.[24] This is partly because such exercises too often produce little more than marginally useful generalities. But more importantly, as explained further below,[25] I am sceptical of that very project. The reality is that, now more than ever, the relationship between the two regimes is constantly evolving. I am less interested in what that relationship *is* than in the processes through which it is constantly *becoming*. Indeed, what I am most interested in are the ways that the trade and human rights debate itself is part of the processes by which that relationship is being socially reconstructed.

## II. THE WTO AS CONSTRAINT: LEGAL CENTRALISM IN THE TRADE AND HUMAN RIGHTS DEBATE

Let me turn first of all to a question which has been a central focus of much of the work in the trade and human rights debate, namely the impact of the international trading system on the promotion and protection of human rights. At the outset, a distinction should be drawn between accounts of the social impacts of international trade itself, and analyses of the impact of the international trade regime on the policies and policy-making processes of its Members. The criticisms I advance in this Part apply only to the latter.

In fact, it is worth taking a moment to note that the literature relating to the former question is typically highly sophisticated and exhibits many of the features which I will be arguing are lacking in relation to work on the political impact of the trade regime. During the 1990s, when the trade and human rights debate was just beginning, discussion of the impact of trade liberalisation on human rights arose in the context of a broader interest in the social impact of what is often referred to as "economic globalization." Many accounts during this time drew heavily on contemporary scholarship on globalization—much of which was at pains to note the complexity, multidimensionality, multidirectionality, unpredictability, and context-dependence of the effects of globalization.[26] These lessons seem to have deeply influenced

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24. For a classic and sophisticated example, see Cottier, *supra* note 22.

25. *See infra* Part III.C.

26. Classic texts with the body of scholarship I am talking about include: THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE (David Held & Anthony G. McGrew eds., 2003) [hereinafter GLOBAL TRANSFORMATIONS]; GOVERNING GLOBALIZATION: POWER, AUTHORITY, AND GLOBAL GOVERNANCE (David Held & Anthony

many commentators writing on trade liberalisation and its effects on the enjoyment of human rights. Work within the trade and human rights literature has, for example, consistently demonstrated that the outcomes of international trade vary across time and place and depend heavily on all aspects of the social, political, ideological, regulatory, cultural, and economic context in which they take place.[27] Human rights scholars in particular have demonstrated a reluctance to generalize about the impacts of trade liberalisation, preferring the claim that liberalisation may, but need not, lead to improved living conditions.[28] No doubt in part because these scholars saw their arguments as correcting some of the more Panglossian and overstated promises made about the benefits of liberal trade, they were less likely to make the same mistakes themselves. Moreover, the trade and human rights literature has also been noteworthy for the ways in which it has clarified the huge variety of different, indirect pathways by which trade flows can affect social outcomes, as well as drawn attention to the complex mutual interactions between trade liberalisation and other socioeconomic trends such as the increasing concentration of capital, the growth of transnational enterprises, new waves of migration, and so on. Furthermore, this literature has played an important part in sensitizing us to the multidimensionality of trade's impact. It has done this in part by focussing our attention not simply on traditional topics such as the effects of trade on growth, income, and employment, but also on impacts on such factors as human health, equality and discrimination, and access to food, particularly of vulnerable groups.

In my view, the question of the impact of the international trade *regime*—that is, the question of how the international trade regime influences the character, dynamics and operation of the international trading system—raises similar issues. That is to say, it is complicated in a similar way by multidimensional, multimodal, context-dependent, and interactive effects. However, the literature on this question demonstrates little awareness of these complications. Instead, it tends to adopt a oversimplified framework in which the international trade regime (which

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McGrew eds., 2002) [hereinafter GOVERNING GLOBALIZATION]; PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE (2d ed. 1999); JAN AART SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION (2000).

27. It is interesting to note in this regard that, by and large, the preferred methodology on the question of trade's impacts has been the case study, an analytical form which is well suited to understanding and evaluating the specific dynamics of trade liberalisation in particular contexts.

28. For good examples, see the series of reports of the OHCHR, sources cited *supra* notes 5-11.

in this context is the same as the WTO) acts primarily as an external constraint on its Members' behaviour, by imposing a set of powerful, binding, and enforceable legal obligations, requiring states to adopt certain kinds of policies and to refrain from adopting others. Within this framework, we know the impact of the trade regime primarily by looking at the rules it establishes and the ways these rules are interpreted and applied.

The framework I describe here has much in common with what Wolfe has described as a tendency towards "legal centralism" in discussion of the international trade regime.[29] Drawing on Wolfe's work, we can break this tendency down into at least four more specific premises. One is that the WTO is essentially a rule-making institution, and that any influence that the WTO wields is primarily felt through the direct constraining effects of those rules. A second is that the nature and content of those rules can be ascertained most reliably and authoritatively by looking at the texts of WTO agreements, as well as the interpretation of those agreements through the decisions of WTO panels and the WTO Appellate Body. A third concerns the centrality of the WTO. In part because of its hierarchical superiority in the (international) legal order, the WTO, and more specifically the rules it promulgates, is seen to play a uniquely central and powerful role in defining the nature of the trading order and determining the conduct of participants within it. WTO rules, in other words, are presumptively thought to be more significant than other sources of normativity. The final premise is that the magnitude of the impact of WTO rules is determined, most significantly, by their precision and by the availability of effective mechanisms of coercive enforcement. This is because precision is vital if rules are to provide meaningful guides for actor behaviour, and enforcement is crucial to ensuring that the strategic costs and benefits associated with a particular course of action are significantly modified.

While they almost always remain implicit, it is not hard to see the ways in which these premises strongly influence the trade and human rights debate and guide the arguments deployed in it. Simplified, the

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29. Robert Wolfe, *See You in Geneva? Legal (Mis)Representations of the Trading System*, 11 EUR. J. INT'L REL. 339 (2005). The term "legal centralism" is chosen by Wolfe in part because his critique draws much from the tradition of legal pluralist thought. My critique differs somewhat, in that it has its origins in a critique of the limitations of rational choice approaches to the study of institutions, so perhaps the term "legal centralism" is less appropriate in the present context. *See also* Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 743 (2001), for another account which sees rational choice perspectives on institutions and positivist understandings of law as closely related and often associated.

typical line of argument is in two stages: first, commentators scrutinize WTO agreements carefully to determine the kinds of policy choices these agreements may require or proscribe; and second, these policy choices are themselves carefully analyzed to determine whether and in what ways they may respectively undermine or enhance the enjoyment of human rights in particular circumstances. For example, initially in response to the WTO *EC Measures Concerning Meat and Meat Products* (*Hormones*) (*EC—Hormones*) dispute,[30] some commentators have expressed concern that certain provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) may undermine the ability of WTO Members to put in place adequate food safety regimes in respect of new and potentially dangerous foods and that such regimes often play an important part in promoting and protecting the right to health.[31] Another very familiar example is the concern that TRIPS article 31(f) may limit the import and export of generic drugs, a measure which, again, might be necessary in the fight against particular health epidemics and, thus, the promotion of the right to health.[32] A third is work on the impacts of the Agreement on Agriculture (AoA).[33] Concern has been expressed that this agreement limits the circumstances in which many developing countries can put in place protective measures such as tariffs, subsidies, and safeguards mechanisms, which may in some circumstances be the only effective means of protecting vulnerable communities from the dislocations caused by agricultural import liberalisation.[34] The point is that investigations into the influence and impact of the trade regime on human rights focus primarily (often exclusively) on the degree of

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30. Appellate Body Report, *EC Measures Concerning Meat and Meat Products* (*Hormones*), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *E.C.—Hormones*]; Panel Report, *EC—Measures Concerning Meat and Meat Products* (*Hormones*), WT/DS26/R/USA (Aug. 18, 1997) [hereinafter *Panel Report Hormones*].

31. *See, e.g.*, Orford, *supra* note 22, at 183-89; Dommen, *supra* note 21, at 17-20; Marceau, *supra* note 22.

32. *See supra* note 21 and accompanying text.

33. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

34. *See, e.g.*, Christine Breining-Kaufmann, *The Right to Food and Trade in Agriculture*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 341; *Globalization*, *supra* note 6; Mark Ritchie & Kristin Dawkins, *WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food*, 9 MINN. J. GLOBAL TRADE 9 (2000); Penelope Simons, *Human Security, Corporate Accountability and the Regulation of Trade and Investment* (Canadian Consortium on Human Sec. Fellowship Working Paper, 2004), *available at* http://www.humansecurity.info/sites/cchs/files/pdfs/Fellow%20papers/simons,%20Penelope,%20paper.pdf; Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433 (2002).

constraint its laws impose on the policy choices of its Member States, so that assessing its impact becomes first and foremost a formal legal question. In such analyses, the technical details of WTO agreements take on paramount importance, and the pronouncements of the WTO Appellate Body in high profile cases are carefully scrutinized for their implications for Members' policy autonomy. Typically, the analysis ends at this point. Once textual inadequacy or ambiguity is identified, there is usually little attempt to investigate the real-world impacts of those texts on regulatory choices and decision-making processes.

The legal centralist framework, and the forms of analysis and critique to which it gives rise, have achieved a kind of commonsense status in discussions of the impact of the trade regime. In many respects, this is for good reason. My claim is not that this framework is wrong in any simple way, rather that it is seriously incomplete, and that on its own, it generates a potentially misleading map of the impacts of the trade regime. In what follows, I set out four different dimensions for which this framework fails adequately to account, and then I go on to explain why these inadequacies matter so much.

### *A. The Salience and Centrality of WTO Law*

My first concern is related to the normative centrality or "salience" of WTO obligations—that is, the extent to which WTO obligations are central or peripheral in policy-making processes and the degree of importance which national policy-makers place on them in practice. The legal centralist framework encourages us to think of WTO obligations as enjoying a high degree of salience, certainly compared to other international legal obligations. Primarily, of course, this is because of the WTO's dispute settlement mechanism, including the existence of a credible threat of sanctions for non-compliance. It is also because of the relative precision of many WTO obligations (which in principle augments their capacity to act as a guide to behaviour), as well as their hierarchical superiority (which tends to generate a perception of salience as compared to domestic sources of legal normativity). Furthermore, the present high levels of compliance with formal WTO dispute settlement rulings are often treated as sufficient empirical evidence of the strong coercive force of WTO obligations.[35]

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35. For a selection of the literature on compliance with the WTO dispute settlement mechanism, see *Symposium Issue on WTO Dispute Settlement Compliance*, 33 LAW & POL'Y INT'L BUS. 555 (2002).

But while these indications are clearly significant, they tell only part of the story. They must be balanced against a variety of other factors, which give us good reason to suspect that WTO legal constraints are not in all circumstances as central to national policy-making processes as is often assumed. For instance, it is important to remember that high levels of compliance with dispute settlement rulings provide direct evidence only of levels of post-dispute compliance. This kind of evidence tells us little if anything about the extent to which WTO law influences day-to-day regulatory decision-making in those vast majority of cases which never reach dispute settlement.[36] In such cases, whether WTO obligations are central or only peripheral in decision-making processes depends on much more than their precision and the existence of a credible threat of sanctions. Their practical impact depends, for example, on a high degree of awareness of relevant WTO provisions amongst national governmental decision-makers, as well as on the existence of routinized and systematic practices of WTO compliance review as a standard part of regulatory decision-making. We have surprisingly little empirical evidence on the extent to which WTO obligations are systematically considered in domestic legal processes in this way. At the very least, however, we would expect this to vary considerably from country to country and from issue area to issue area—depending on the resources and administrative capacity of domestic governments, the availability of local officials with relevant WTO expertise, and previous dealings between particular government departments and the WTO legal system.[37] Many countries, it seems, find it more efficient to rely on post hoc complaints by trading partners and exporters as the most efficient method of ensuring acceptable levels of compliance with WTO law.[38]

Moreover, it has long been recognised that compliance with legal rules depends not solely on the existence of a sanctioning mechanism, but also to a significant extent on their congruence with pre-existing

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36. The same point is made by Dunoff in his article in the *Journal of International Law & International Relations*. Jeffrey L. Dunoff, *Why Constitutionalism* Now*? Text, Context and the Historical Contingency of Ideas*, 1 J. INT'L L. & INT'L REL. 191, 206 (2005).

37. Anecdotal evidence, from interviews with the legal departments in the governments of a variety of WTO Members, suggests the (unsurprising) conclusion that the experience of being the subject of WTO proceedings in a particular regulatory sub-field (be it quarantine, or environmental measures) has the effect of sensitizing decision-makers in that area to the existence of WTO rules and increasing their impact on future decision-making processes.

38. Again, anecdotal evidence from interviews with numerous governmental officials suggests that, at least in respect of legislative and regulatory measures in place prior to the creation of the WTO, it is common practice not to review such measures systematically for WTO compliance, but rather to wait to see if trading partners raise them as legal issues.

value commitments in the regulated polity.[39] It may be argued that the great lesson of sixty years of experience with international trade law is such that law cannot be effective in the long run in the absence of a broad and lasting consensus that its strictures are necessary and mutually beneficial.[40] There is no doubt that at some level this consensus currently exists, but few would claim that it is equally strong in all circumstances. Even at the level of individual governmental agencies, WTO law represents only one of many normative claims to which regulatory decision-makers are subject. Even apart from their embeddedness in local political cultures, domestic regulatory authorities are also influenced by very strong organizational cultures, including powerful social norms concerning the kinds of policy choices which are legitimate, desirable, and politically possible. Where WTO norms are not internalized into that culture, even the hardest of coercive legal mechanisms can be relatively ineffective in fundamentally altering the form and content of policy-making processes. Indeed, a number of incidents in the history of General Agreements on Tariffs in Trade (GATT)/WTO dispute settlement illustrate this general effect well.[41] Furthermore, as many have noted in other contexts, the act of making the GATT/WTO legal system "harder"—that is to say, made more legally precise, subject to binding and coercive dispute resolution and so on—may in some circumstances actually *undermine* the normative cohesion

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39. This basic point has been made by many commentators. *E.g.*, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 631-32 (2004).

40. The experience over the first decades of the General Agreement on Tariffs and Trade with regional trade agreements, agriculture, and (later) with so-called voluntary export restraints surely suggests that without such a consensus, it will usually be a relatively simple matter to find a way around even tightly drafted legal rules. It should be noted that this is not the lesson that is typically drawn. It is more usual to suggest that the history of the GATT teaches us that international trade commitments cannot be effective without a binding and enforceable dispute resolution. *E.g.*, Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 29 (2005). No doubt there is some truth to both accounts.

41. There are at least three obvious and interesting examples of this. The first is the history of the Domestic International Sales Corporation (later Foreign Sales Corporation) dispute, recounted by Hudec in ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 59-100 (1993), a history which, to my mind, illustrates the difficulty of ensuring compliance with trade law, when the WTO is seen by regulators to be over-extending itself into regulatory fields which are not within its core perceived competence. The second and third examples (which teach the same lesson) are the post-ruling histories of the *E.C.—Hormones* and *Japan—Measures Affecting Agricultural Products* disputes. Daniel Wüger, *The Never Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone-Treated Beef*, 33 L. & POL'Y INT'L BUS. 777, 789-814 (2002); Joseph P. Whitlock, *Japan*—Measures Affecting Agricultural Products*: Lessons for Future SPS and Agricultural Trade Disputes*, 33 L. & POL'Y INT'L BUS. 741, 761-65 (2002).

on which its effectiveness is (partially) based. Finnemore and Toope, for example, note that judicialization may lead to reduced levels of adherence to the spirit of the law, in part by encouraging aggressive legal argumentative strategies and fostering an environment in which compliance with legal formalities is understood as all that is required.[42]

Even to the extent that we acknowledge the importance of the WTO's coercive machinery in ensuring the effectiveness of WTO obligations—and of course to a certain extent we must—we should still be careful not to over-generalize the contexts in which WTO law plays a central role. In many circumstances, a threat of legal action in response to non-compliance with WTO obligations can be less than perfectly credible or immediate and, therefore, less effective. For example, a decision-maker wishing to enact a potentially WTO-inconsistent measure may find the threat of WTO action less compelling in the absence of a relatively substantial trade impact on the measure in question, a relatively powerful export lobby in the complaining country (which is both sensitized to the possibility of WTO proceedings and has the resources and political capital to press for them), and of sufficient levels of trade flows between the two relevant countries for the threat of sanctions to bite.

What I have been calling the salience of WTO obligations also depends in practice on what these obligations actually require—that is, the extent to which they actually do impose genuinely burdensome obligations on national decision-makers that require them to take substantively different decisions from those which they might otherwise prefer. This is largely an interpretive or doctrinal question and clearly one which cannot be answered adequately without detailed consideration of specific legal issues. Much depends on the particular provision and the specific circumstances at issue in any particular context, as well as on the perceptions of the individual commentator. Nevertheless, it is worth making the generally under-emphasized observation that obligations in WTO agreements are often ambiguously worded, impose procedural rather than substantive requirements, or are hedged around by a variety

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42. Finnemore & Toope, *supra* note 29, at 752-53; *see also* Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603, 627 (2000); Goodman & Jinks, *supra* note 39; Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1854-58 (2002); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 658 (2000).

of overlapping safeguards, exemptions, and flexibilities.[43] Taken together, these features are often more productive of confusion and uncertainty than precision—they look more like flexibility rather than constraint—and in fact make available a variety of legal strategies available to determined regulators wishing to pursue a path of action in apparent defiance of WTO requirements. Of course, this is less true in some areas than in others. Some disciplines are indeed extremely precise and difficult to legitimately work around, tariff bindings being perhaps the obvious example. But in my view, the existence of significant flexibility is particularly apparent in relation to constraints on those areas of policy-making—such as regulation concerning food safety, consumer protection, environmental protection, among other matters—which tend at present to concern human rights scholars and commentators the most.

Finally, it is important to be realistic about the *relative* centrality of formal WTO obligations as determinants of trade policy and more generally as determinants of the character of the international trading system. The imperatives of WTO law, of course, are only some among a very large number of pressures facing regulatory authorities—indeed, only some among a diversity of *legal* pressures facing them.[44] Structural and other factors driving trade liberalisation may in the end be much more important than WTO obligations in shaping the international trading order.[45] It is certainly arguable that recent periods of dramatic liberalisation in international trade (structural adjustment in developing countries during the 1970s and 1980s being an example) have had little directly to do with legal obligations imposed by the international trade regime. We may also legitimately wonder how big a difference increasing the formal flexibilities provided to developing countries under

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43. For a substantiation of this claim in relation to a particular legal question, see Lang, *supra* note 23.

44. To take the point one step further, public regulation is far from the only legal pressure guiding the activities of private traders. *See* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

45. For interesting recent work attempting to measure the impact of the trade regime, see Andrew K. Rose, *Do We Really Know That the WTO Increases Trade?*, 94 AM. ECON. REV. 98 (2004); Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly* (Nat'l Bureau of Econ. Research, Working Paper No. 10024, 2003); Michael Tomz, Judith Goldstein, & Douglas Rivers, Membership Has Its Privileges: The Impact of GATT on International Trade (2005) (unpublished manuscript, available at http://www.stanford.edu/~tomz/working/TomzGoldsteinRivers2005a.pdf); Andrew K. Rose, Response to Tomz, Goldstein, and Rivers' "Membership Has Its Privileges: The Impact of GATT on International Trade" (2005) (unpublished manuscript, available at http://faculty.haas.berkeley.edu/arose/Tomz.pdf); Joanne Gowa & Soo Yeon Kim, An Exclusive Country Club: The Effects of the GATT on Trade, 1950-54 (2006), *available at* http://www.yale.edu/irspeakers/Gowa2006.

WTO agreements may actually make. It is interesting how often trade commentators find themselves arguing that countries ought to use existing flexibilities in WTO agreements more than they currently do.[46] It is hard to resist the impression that (at least in a significant proportion of cases) the importance of WTO obligations can be somewhat marginal to the decisions of trade policy-makers. Of course, I do not wish to stretch the point; my claim is not, of course, that WTO obligations are unimportant. It is merely to correct what I see as a tendency to over-emphasize the determinative role of these obligations on trade policy.

### *B. The Multiple Modalities of WTO Effects*

If in the previous Part, I argued that the legal centralist frame tends to *over*estimate the constraining impact of WTO law; in this Part, my claim is that it *under*estimates or overlooks a variety of other important mechanisms by which the international trade regime makes its influence felt. There is a large and growing body of literature—much of it informed by strands of constructivist thinking and drawing on traditions within sociological enquiry—attempting both to theorize and empirically map the various non-compulsory[47] modes of influence and power which international organizations wield.[48] Within this literature, international institutions like the WTO are understood not so much as exogenous constraints on state behaviour, but rather as social environments in which states (or the individuals who represent them) come to re-define, reformulate and re-conceive the kinds of trade policies they wish to pursue. There are at least three relevant lines of enquiry which this literature pursues.

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46. See, to take one among many possible examples, *Liberalization*, *supra* note 7.

47. I borrow the term "compulsory power" here from Barnett and Duvall's introductory chapter in POWER IN GLOBAL GOVERNANCE 1-32 (Michael Barnett & Raymond Duvall eds., 2005).

48. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999) [hereinafter POWER OF HUMAN RIGHTS]; Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999); Goodman & Jinks, *supra* note 39; Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487 (2001). *See generally* Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324 (1998); Albert S. Yee, *The Causal Effects of Ideas on Policies*, 50 INT'L ORG. 69 (1996). For international legal scholarship from a somewhat similar perspective, see Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

First, we can think of international organizations as technologies for the production, authorization and dissemination of policy *norms*. This is a conceptual model which has been developed primarily in studies of international institutions in the fields of development and human rights, among others.[49] A number of scholars have argued, in fact, that normative diffusion represents the primary function of many international institutions and the most powerful mechanism at their disposal to influence the behaviour of states.[50] There is a sophisticated literature on the various microprocesses by which this kind of normative diffusion takes place. Some commentators concentrate on the role of persuasion, argumentation and conscious deliberation.[51] They see international institutions as forums for the engagement of these deliberative processes, where state representatives are prompted to 'think harder' about issues in light of persuasive evidence and over time, come to change their mind to accord more closely to the dominant normative framework favoured by the international institution in question.[52] Others focus more on acculturation—that is, the often tacit processes by which members of an organization come to share its normative commitments.[53] Within international organizations, these commentators note, psycho-social pressures to conform arise from processes of identification, shaming, back-patting, status maximization, and habituation.[54] Others still concentrate on the discursive practices by which norms are propagated, communicated, and valorised within international organizations. They show how the distinctive conceptual frameworks, modes of speaking, and forms of argument characteristic of particular international regimes can construct particular policy orientations as appropriate, rational, modern, legitimate, and so on.[55] These three processes—persuasion, acculturation, and discursive legitimation—can

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49. *See, e.g.*, FINNEMORE, *supra* note 48; POWER OF HUMAN RIGHTS, *supra* note 48.

50. *See, e.g.*, FINNEMORE, *supra* note 48; POWER OF HUMAN RIGHTS, *supra* note 48.

51. FINNEMORE, *supra* note 48.

52. On the role of persuasion, see for example Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1, 6-13 (2000); Johnston, *supra* note 48.

53. FINNEMORE, *supra* note 48.

54. *See* Johnston, *supra* note 48; Goodman & Jinks, *supra* note 39 (drawing heavily on a wide variety of sociological literature on pressures on individuals to conform in social groups).

55. For commentators who make this claim in relation to the trade regime, see David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L L.J. 373 (1991); Andrew Lang, *Beyond Formal Obligation: The Trade Regime and the Making of Political Priorities*, 18 LEIDEN J. INT'L L. 403 (2005); Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, 23 B.C. THIRD WORLD L.J. 57 (2003); Daniel K. Tarullo, *Logic, Myth, and the International Economic Order*, 26 HARV. INT'L L.J. 533 (1985). *See generally* Yee, *supra* note 48 (explaining the effect of ideas on global politics).

act directly by affecting those policy-makers who are themselves active participants in a regime, as well as indirectly by working on special interest groups who, in turn, persuade domestic audiences and political leaders.[56]

Although to date there is still little empirical work on these processes, there are strong reasons to think that they play an important role within the present international trade regime. Through many of its institutional practices, the WTO tends to teach states about the kinds of trade policies which are desirable and in their best interests. There are, for example, a number of venues within the current WTO system which we might expect to function as sites of normative socialization: accession negotiations teach new Members what it means to be a modern liberal trading nation, the Trade Policy Review Mechanism helps to produce and disseminate norms concerning the proper shape and objectives of domestic economic policy, and technical assistance programmes are (or at least have the potential to be) the mechanism by which government leaders are taught norms of appropriate trade policy behaviour.[57] Furthermore, there are indications that socialization and persuasion historically played an important role in producing outcomes in the GATT system. A number of commentators have noted that, at least in its first few decades, one of the primary achievements of the GATT system was the creation of a close-knit community of trade experts and policy-makers. Through regular interaction, these players developed strong bonds of trust as well as shared cognitive frameworks, normative commitments, internalized social roles and expectations, and habits of thought, all of which contributed to the maintenance of a stable elite preference for trade liberalisation.[58] This social network, it is argued,

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56. Goodman & Jinks, *supra* note 39, at 654-55.

57. To these three might be added multilateral trade negotiations themselves. For example, as Weissman has noted, while it is common to understand the inclusion of intellectual property in the Uruguay Round negotiations as a blatant exercise in power politics for the benefit of intellectual property producers from developed countries, the reality is more complex than that. The Uruguay Round negotiations provided an impetus for the production and dissemination of a huge amount of research into the potential benefits of stronger intellectual property protection for developing countries. Weissman notes that this research and related processes of persuasion were at least convincing enough to encourage prominent developing countries to believe that TRIPs was something they could live with. Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive To Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069 (1996).

58. This point has been made by a number of commentators. *See, e.g.*, EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, at xvi (2001); HUDEC, *supra* note 41; CHAYES & CHAYES, *supra* note 48, at 278-82; J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of*

was a primary factor in creating and maintaining a generalized and long-term commitment to liberal trade among policy-makers in the post-war political order. While the nature, size, intensity, and orientation of transnational policy networks in the field of international trade have of course changed since that time, there is every reason to assume that the role of the WTO in creating and shaping such networks is equally significant today.

One important aside: I should not be misunderstood as suggesting that the international trading system is always or necessarily associated with the global projection of a particular *economic ideology*. I have argued elsewhere that literature on the trade regime is too often characterized by an uncritical assumption that the normative framework of the regime is naturally associated with economic neoliberalism or radical free market fundamentalism.[59] Historical scholarship reminds us that the values and norms disseminated through the international trade regime are fluctuating and contingent. In fact, the post-war regime began very far from free market fundamentalism, has been associated with a variety of political and normative programmes since, and has always been characterized by a degree of contestation and internal contradiction.[60] Research into mechanisms of persuasion and socialization within the WTO, while in my view vital, needs therefore to be undertaken carefully, so as to make no assumptions about the character, durability, and orientation of its normative influence.

Second, other scholars have focussed on the role of international institutions in the production and dissemination of socially sanctioned *knowledge* about the world. This "knowledge-production" function of international institutions has been conceptualized and described in different ways by different commentators. One helpful model rests on a linguistic analogy. International institutions are associated with particular languages (the languages of human rights, development, and trade) and are understood in their character as discursive environments.

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*WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 194-95 (2001); Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy* (John F. Kennedy Sch. of Gov't, Working Paper No. 4 (n.d.)), *available at* http://www.ksg.harrard.edu/visions/publication/kechane_nye.pdf. *See generally* Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992) (noting the strong dependence of states on each other's policy choices).

59. Andrew T.F. Lang, *Reflecting on Linkage: Cognitive and Institutional Change in the International Trading System* (forthcoming 70 MOD. L. REV. (2007)).

60. The classic text making this point is John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order*, *in* INTERNATIONAL REGIMES 195 (Stephen D. Krasner ed., 1983).

These languages or discourses, it is said, provide actors with a particular repertoire of categories and concepts with which to make sense of the world. They are founded on, and express, particular theories about how the world operates and provide an interpretive framework through which we can access various aspects of reality. This linguistic analogy allows us to understand a variety of often hidden ways in which international institutions wield power and influence social and political outcomes. For example, Barnett and Finnemore describe international organizations as exercising the power of *classification* and the power to *fix meanings* to social phenomena.[61] They note that, in various circumstances and for various purposes, the World Bank defines people as peasants, day labourers, farmers, or others, and that this classification has important consequences for whether these people are understood as possessing the kinds of knowledge useful to guide the development process.[62] Similarly, they note (drawing on the work of Escobar[63]) that the World Bank is a key venue for the authoritative definition of the notion of development.[64] The power to define the social meaning of development is crucial, they suggest, because it "determines not only what constitutes the activity (what development is) but also who (or what) is considered powerful and privileged, that is, who gets to do the developing . . . and who is the object of development."[65]

Similar observations can be made in respect of the WTO. The WTO's power of classification is perhaps illustrated through its ability to authoritatively label particular governmental activity as an "intervention" (or a "trade barrier" or an "impediment to trade"). Such a label matters, because it can act to mobilize constituencies for or against the activity in question, as well as to frame debates about its desirability and define the range of permissible arguments in circulation in those debates. Moreover, the WTO acts as a venue in which the key terms of trade discourse are constructed, contested, authorized, and disseminated. It is a key site for the social construction of the meaning of free trade—that is, the definition of the purpose and nature of the liberal trade project. The importance of this is the same as in the case of development cited above. It helps to determine what constitutes free trade, who gets to do it, and (indirectly) who benefits. The WTO, in other words, can be understood

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61. Barnett & Finnemore, *supra* note 48, at 710-12.

62. *Id.* at 711 (citing Guy Gran, *Beyond African Famines: Whose Knowledge Matters?*, 11 ALTERNATIVES 275 (1986)).

63. ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 164 (1995).

64. Barnett & Finnemore, *supra* note 48, at 710-11.

65. *Id.* at 711.

as a mechanism for the social construction of the international trading order, for defining the categories through which actors interpret the trading system and their place within it, or at least mediating struggles over them. In this way, rather than simply constraining states' behaviour, it *enables* (particular kinds of) action by providing a conceptual framework within which particular kinds of actions are made meaningful.[66] Another, less abstract model focusses on the ways in which international institutions produce and disseminate technical knowledge about the causal mechanisms which govern the operation of various aspects of international life. International organizations are, most simply, involved in the production of reports and technical documents that explicitly develop causal models for guiding policy development. They also facilitate the creation of knowledge networks, mediating the channels through which policy-makers are exposed to particular forms of expertise and regulating the form in which policy ideas are introduced to decision-makers.[67] The applicability of these insights to the WTO hardly needs explanation.

The third and final set of mechanisms is of a different kind, more familiar to mainstream thinking about the role of international organizations in political life. In this story, international organizations like the WTO shape political outcomes by influencing the dynamics of domestic political debates. One way in which the WTO does this is by changing the constellation of actors involved in such debates by helping to incorporate the voices of foreign actors. As Swenarchuk has noted, one practical effect of the national treatment obligation in WTO law—by which foreign products are entitled to equivalent treatment to that granted to their domestic equivalents—is to give foreign producers an interest in the governmental regulation of domestic businesses.[68] In some circumstances, the result has been direct lobbying by foreign businesses in favour of policies of domestic liberalisation.[69] More directly, the WTO also facilitates the input of foreign actors into domestic trade policy decision-making by opening up intergovernmental channels through

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66. The kind of power I am talking about here overlaps with the notion of "productive power" used by Barnett and Duvall in their introductory chapter to POWER IN GLOBAL GOVERNANCE, *supra* note 47, at 20.

67. *See, e.g.*, THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS (Peter A. Hall ed., 1989); Yee, *supra* note 48, at 92.

68. MICHELLE SWENARCHUK, FROM GLOBAL TO LOCAL: GATS IMPACTS ON CANADIAN MUNICIPALITIES (2002).

69. *See, e.g.*, Daniel Roseman, *Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects Under the GATS*, *in* DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION 84 (Aaditya Mattoo & Pierre Sauvé eds., 2003).

which affected foreign businesses can make their complaints heard, as well as by focussing international attention on obstacles to trade in particular countries. Furthermore, the WTO can also lead to the formation of new political actors on the domestic political scene by altering the political opportunity structure facing various interest groups.[70] For example, it was in significant part the expansion of the WTO into the arena of services that lead to the creation of new service industry coalitions and business networks loosely tied together by the new concept of "trade in services."[71] While such groups are important actors within the trade regime itself, they also are directly involved in domestic debates concerning liberalisation policies relevant to a variety of service industries. Finally, WTO processes might more indirectly lead to changes in the range of actors involved in domestic political debates. For example, the creation of domestic systems of intellectual property protection, in compliance with international trade law, may lead to the creation of new domestic constituencies in favour of further and more extensive intellectual property protection.[72]

Closely related are the processes by which the international trading system can help to mobilize actors in favour of liberal trade who might otherwise remain relatively politically disengaged. Thus, for example, numerous commentators have noted that the reciprocal nature of international trade obligations, which make access to foreign markets conditional on inward liberalisation measures, can mobilize export-oriented domestic producers in favour of domestic liberalisation projects, and thus alleviate, to some extent, the well-known public choice problem characteristic of domestic trade policy.[73] Furthermore, periodic multilateral trade negotiations provide ongoing opportunities for domestic policy elites regularly to revisit trade policy questions and to re-energize domestic pro-liberalisation interest groups. (Interestingly, in direct contrast to widespread perceptions, multilateral trade negotiations are only sometimes instigated and shaped by already-mobilized industry

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70. Duina provides fascinating examples of this process in the context of Mercosur and NAFTA. FRANCESCO DUINA, THE SOCIAL CONSTRUCTION OF FREE TRADE: THE EUROPEAN UNION, NAFTA, AND MERCOSUR (2006).

71. Some examples might include the Coalition of Service Industries, European Services Forum, Global Services Coalition, Australian Services Roundtable, and the Hong Kong Coalition of Service Industries, among many other national lobby groups.

72. I take this example from Kingsbury. Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 353 (1998).

73. This is a commonly noted effect of the trade regime. *E.g.*, I.M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 215 (1986); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 147 (2d ed. 1997).

groups. It is at least as common for governments to use such negotiations as a means to galvanize such groups and proactively ask for their input in defining and supporting national trade policy priorities.)[74] Of course, these processes can work in the other direction. Goldstein and Martin note, for example, the way in which the ratification and incorporation of international trade agreements by domestic legislative authorities can provide a focal point for those groups resistant to liberal trade agenda and in favour of more protectionist policies.[75]

Finally, the existence of the WTO and its legal system can alter the dynamics of domestic trade debates by adding to the array of arguments that can legitimately be deployed in such debates. Hudec has noted, for example, the way in which domestic policy-makers can (whether or not there is strict legal justification) use the excuse of WTO obligations to justify politically unpopular liberalisation measures.[76] In the United States for example, as Destler has described, policy elites have been able to galvanize support for specific liberalisation initiatives by referring to the need to maintain American leadership in international economic affairs, as well as to maintain the integrity and stability of the international trading system more generally.[77] He also describes the ways in which the international trading system has allowed American trade policy elites to respond to domestic political pressures in new ways: for example, responding to widespread concern about the U.S. trade deficit by waging an aggressive campaign to open foreign markets, rather than the more traditional response of raising barriers to imports.[78]

To summarize, the international trade regime does far more than simply place formal legal obligations on trade policy-makers. It influences the constellation of actors involved in policy-making processes, helps to establish the terms of their discussion, shapes their understanding of the purpose of their endeavour and of the liberal trade project more generally, helps to generate shared conceptions about the boundaries of acceptable and legitimate trade policy, and provides sanctioned technical knowledge and cognitive tools for the formulation of trade policy interests. Contrary to the implicit claims of legal

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74. *See, e.g.*, Andrew Hurrell & Amrita Narlikar, *A New Politics of Confrontation? Brazil and India in Multilateral Trade Negotiations*, 20 GLOBAL SOC'Y 415 (2006); Andrew Hurrell, *Hegemony, Liberalism and Global Order: What Space for Would-Be Great Powers?*, 82 INT'L AFF. 1, 17 (2006); Amrita Narlikar, *Peculiar Chauvinism or Strategic Calculation? Explaining the Negotiating Strategy of a Rising India*, 82 INT'L AFF. 59, 70 (2006).

75. Goldstein & Martin, *supra* note 42, at 606.

76. HUDEC, *supra* note 41.

77. DESTLER, *supra* note 73.

78. *Id.* at 96.

centralism, these processes are likely to be far more significant—if less visible—than processes of legal compulsion.

### *C. Multidirectionality and Indirect Impacts*

A third criticism of the legal centralist frame is that it tends to focus our attention on the *direct* and *immediate* impacts of WTO law in the context of individual disputes. Significantly less attention is paid, however, to the longer-term and more indirect social impacts of the WTO legal system as its legal norms embed themselves into particular socio-political contexts. Attention to these deeper effects yields a vastly richer and more complex picture of the social effects of the WTO legal system, in which the impact of international legal norms is acknowledged to be unpredictable and often unintended,[79] dynamic, highly context-dependent, and multidirectional.

Take the impact of the GATT/WTO system on patterns of protectionism. We are accustomed to thinking of the GATT/WTO as constraining protectionism, putting in place an expanding collection of prohibitive rules which gradually tend to eliminate protectionist policies. And, of course, this is a large part of the story. But in addition to these direct and most visible effects, the prohibitions set out in the GATT/WTO legal framework have generated a variety of often surprising *indirect* effects, which have ultimately played a crucial role in shaping the contemporary international trading order. For example, while the GATT/WTO system has certainly reduced the incidence of protectionist policies, it has also tended to shift the focus of protectionist efforts onto those measures which remain permissible under that law. Thus, Hughes and Waelbroeck tell the story of a simultaneous decrease in tariff restrictions and an increase in use of export and production subsidies during the 1960s and 1970s, both by industrialized country governments and (partly as a consequence) by their developing country counterparts.[80] This reconfiguration of the instruments of trade policy, they argue, in some cases served to entrench and even facilitate protectionist pressures, primarily because it provided new—often less transparent and less easily reversible—avenues for the expression of

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79. Martin and Simmons have noted the tendency of secondary rules in particular (concerning how substantive rules are made) to have significant unanticipated effects. Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT'L ORG. 729, 750 (1998).

80. Helen Hughes & Jean Waelbroeck, *Can Developing-country Exports Keep Growing in the 1980s?*, 4 WORLD ECON. 127 (1981).

these pressures.[81] In fact, one can plausibly tell the story of the post-war trading system as a complex game, in which Members agreed to certain restrictions on their trade policy options, while leaving certain other options conspicuously open. Over time, they developed new strategies for responding to protectionist pressures while still remaining (more or less[82]) within the boundaries imposed by the GATT/WTO, in turn prompting further periodic revision of the rules in response to these broad reconfigurations of trade policy tools.[83] From this perspective, mapping the effects of the GATT/WTO system is not just a question of the extent to which it has been effective in reducing trade barriers, but also a question of how it has helped to restructure and reorganize protectionist pressures. It is a system which, even as it has helped to exclude protectionist pressures from particular loci of trade policy-making, has actually in practice facilitated the insertion of protectionist forces into others.[84] The point of this is a general one. The story of the impacts of the GATT regime on the political economy of protectionism is much more complex and multilayered than a typical analysis of the GATT texts would suggest. It raises the possibility—indeed the near certainty—that these impacts will look fundamentally different in different social and political contexts and even have diametrically opposed results across different countries.

A similarly complex and contradictory story can be sketched out in respect of the impact of the WTO system on democratic control of trade policy decisions. Because we focus on the direct and immediate impacts of WTO obligations, and think of them in terms of constraints and prohibitions on policy choices, it is customary to understand the WTO as reducing the democratic controls of national polities over the trade policies that their governments pursue. The line of cases in which the WTO dispute settlement system has purported to decide the permissibility under WTO law of particular national health- and environment-related regulatory measures has been the subject of a great deal of critique along these lines.[85] Of course there is a degree of truth to

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81. *Id.*

82. The history of voluntary export restraints tends to be understood on the contrary, as an example of GATT Members acquiescing in a breach of the rules.

83. The increased use of antidumping duties, and trade remedies more generally, over the last few decades, has been explained in this way. DESTLER, *supra* note 73, at 123-25.

84. For example, there is a strong argument that the international trade regime has actually legitimated and perpetuated patterns of protectionism in the context of agricultural trade, in part by redirecting pressures in favour of liberalisation, as well as building a consensus that agriculture was different from other sectors.

85. The line of cases to which I am referring, and which will be very familiar to readers, includes: *E.C.—Hormones*, *supra* note 30; *Panel Report Hormones*, *supra* note 30; Appellate

this claim, but again, it tells only part of the story. It is also true that this line of cases has—inadvertently and unpredictably—given rise to an unprecedented level of public scrutiny of WTO decisions and has facilitated the engagement of a huge variety of social actors into trade policy debates. It is clear that, partly as a response to the perceived excesses of WTO law, the degree of public interest in, levels of information on, and general engagement with international economic issues, has significantly increased. More specifically, the reference in the SPS Agreement to standards developed by some international standards-setting bodies[86] has given rise to critiques concerning the rising influence of relatively non-transparent and unaccountable international administrative bodies. But these very critiques have actually led to some institutional changes in these bodies in the direction of *greater* democratization.[87] This point is not a complex one, and has been made before in the context of studies of globalization.[88] It is simply that, like most processes associated with globalization, trade liberalisation and institutions of trade governance tend to generate their own resistance and their own counter-pressures. Whether these counter-forces actually overpower those primary institutional influences, and the ways in which the two contradictory impulses interact, is in all cases an empirical question, the answer to which cannot be presumed or determined in advance.

A particular tendency of the legal centralist frame is to encourage a focus on the *harmonizing* or *homogenizing* impulse of the international trade regime. Put simply, to the extent that its Members are subject to the same constraints and are forced to abide by the same rules, we might

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Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001); Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sept. 18, 2000); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (35th Supp.) at 155 (1993) (unadopted); Panel Report, *Dominican Republic—Measures Affecting the Importation of Internal Sale of Cigarettes*, WT/DS302/R (Nov. 26, 2004).

86. *See* Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 (referring to Codex Alimentarius, the International Office of Epizootics, and the International Plant Protection Convention).

87. *See, e.g.*, Marsha A. Echols, *Institutional Cooperation and Norm Creation in International Organizations: The FAO-WHO Codex Alimentarius*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 192, 194.

88. *See, e.g.*, GLOBAL TRANSFORMATIONS, *supra* note 26; GOVERNING GLOBALIZATION, *supra* note 26.

expect the trade regime to produce a degree of uniformity of trade policy choices across its membership. But once we pay closer attention to the indirect social effects of WTO rules, it becomes apparent that even uniform rules can be productive of diversity and variation.[89] An interesting example is provided by the provisions of the SPS Agreement mentioned above, which deal with the use of international standards and with the scientific basis for SPS measures. These provisions are typically understood as embedding a tendency towards regulatory harmonisation into the SPS Agreement, as well as a tendency towards the reduction of regulatory diversity across WTO Member States. To a large extent this is unsurprising: the presumption that SPS measures in conformity with international standards comply with the SPS Agreement clearly encourages harmonisation to some extent, while the science-based disciplines raise at least the possibility of regulatory convergence to the extent that scientific knowledge becomes more unified (on any particular question) over time. But, as Atik has perceptively noted, over the long term, precisely the opposite is also perfectly plausible.[90] Because the science on which SPS measures are based typically deals with questions of immense complexity, it can have a tendency towards variegation over time and in different contexts.[91] This tendency may, Atik suggests, be reinforced by the SPS Agreement itself, which by its operation encourages the multiplication of scientific agencies with input into the regulatory processes of WTO Members, and thus the multiplication of distinct scientific communities and scientific knowledges.[92] This in turn can lead to greater regulatory diversity: "As scientific activity is dispersed across a greater number of societies, a multiplicity of scientific views can be expected. More and more regulatory positions will be defensible by colorable claims of a scientific basis."[93]

Of course, such indirect long-term effects are still speculative. The precise manner in which the SPS Agreement interacts with and helps to reconstitute the geography of scientific knowledge is, again, an empirical question, even if it is one that is not amenable to easy measurement. It will depend, for example, on the extent to which the production of the relevant scientific knowledge remains centralized and the precise mechanisms by which such knowledge is transmitted globally and

89. *See* Martin & Simmons, *supra* note 79, at 729, 752.

90. Jeffery Atik, *Science and International Regulatory Convergence*, 17 NW. J. INT'L L. & BUS. 736, 737-39 (1997).

91. *Id.* at 739, 747-49.

92. *Id.* at 748.

93. *Id.* at 750.

reformulated in local contexts. The point is that it is not possible to say definitively in advance to what extent and in what circumstances the SPS Agreement encourages regulatory convergence or regulatory diversity—and, more importantly, that studying the SPS Agreement text, and the decisions of the WTO Appellate Body which deal with that text, can of necessity yield only a small and partial insight into that question.

### *D. Sources and Nature of WTO Normativity*

The fourth and final criticism is that the legal centralist frame can give a misleading impression of the overall impact of the WTO because it focusses attention on the formal sources of WTO law—texts of the agreements and dispute settlement reports—to the exclusion of a wide variety of informal or semi-formal norms and norm-generating processes which also form part of the broader WTO legal system. Before the creation of the WTO in 1995, observers of the international trade regime were acutely aware that the formal texts of the GATT and related agreements provided only a partial window into the normative system that the regime embodied. It was well understood that, despite their formally binding and hard legal status, the legal obligations imposed under these agreements were heavily mediated by shared social understandings and political consensuses among participants in the trading regime.[94] Such understandings consisted of shared perceptions as to the intended meaning and coverage of these provisions, as well as tacit agreements designating certain disputed areas as off-limits (whatever the formal wording of the agreements).

These perceptions have changed since the creation of the WTO. Primarily as a result of the creation of the new dispute settlement system, there seems now to be a general consensus that extra-legal and informal norms play a far less central role than they used to. There is a stronger sense than there ever was that it is sufficient to study formal WTO texts and their associated jurisprudence to discover the nature and extent of the WTO's normative framework and, therefore, its potential impact. In many ways this sense is justified. There is no doubt that important changes occurred at the transformation of the GATT into the more formal WTO system. But it is equally important not to overstate these transformations and fall into an excessively formalist approach to the WTO legal system. In the same way as in *any* legal system, the texts of WTO law are embedded within a rich framework of social norms at play

94. *See generally* Weiler, *supra* note 58, at 197 (noting the importance of crafting mutually acceptable outcomes).

within the trading regime. These informal norms interact with—modify, reconstitute, express, and give meaning to—those formal rules in various complex ways and at a variety of stages in their operation.[95]

For one thing, they influence the kinds of social situations in which legal norms are typically operative. Take for example, the prohibition on discrimination in respect of domestic regulation, contained in article III of the GATT and article XVII of the General Agreement on Trade in Services (GATS).[96] While the formal scope of application of these provisions is very wide, in principle covering virtually the universe of internal regulatory measures which affect trade, in practice their operation has been considerably more limited. This is, in part, because of the existence of a variety of informal norms and tacit understandings that tell us which regulations can properly be thought of as an impediment to trade and which regulations have nothing to do with trade. Of course, these informal norms are not always well-defined and certainly vary over time. Before the 1980s, for example, internal regulations of any sort were rarely the subject of trade dispute. Since then, however, particular regulatory fields have come to be perceived as potential sources of trade barriers and as legitimate targets of trade disputes: health and safety regulation, consumer protection regulation, and industrial policy are examples. Other fields—such as public interest regulation of essential service suppliers, affirmative action policies in respect of marginalized groups, social labelling schemes, or even renewable energy policy[97]—are arguably in the early stages of the same process. It is important to make clear that here I am not referring to the changes to the formal scope of application of WTO disciplines on domestic regulation. Rather, I am referring to the evolution of the broader social and normative framework regulating which domestic regulatory interventions typically come to the attention of trade policy-makers and, conversely, determining whether private traders tend to think of trade law as a possible remedy when they are confronted by particular regulatory difficulties.

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95. Finnemore & Toope, *supra* note 29, at 743.

96. General Agreement on Tariffs and Trade, art. III, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 194; General Agreement on Trade in Services, art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994).

97. For some attention to some of these issues in terms of their character as potential trade barriers and their WTO consistency, see, for example, *Analytical Study, Non-Discrimination*, *supra* note 9, and the report by the Renewable Energy and International Law Project, POST-HEARING SUBMISSION TO THE INTERNATIONAL TRADE COMMISSION: WORLD TRADE AND RENEWABLE ENERGY: THE CASE OF NON-TARIFF MEASURES (2005), *available at* http://www.yale.edu/envirocenter/renewableenergy/REIL_WTO_paper.pdf.

Similarly, informal or tacit normative understandings regulate which disputes are ultimately brought before the WTO dispute resolution machinery. A decision whether or not to bring WTO proceedings is not just a matter of strategic calculation, it is also partly determined by social norms—particularly norms which tell participants the kinds of situations which the provisions were originally intended to cover, the purposes for which dispute settlement can legitimately be used, and the kinds of questions dispute settlement bodies are capable of answering. Again, the non-discrimination norms can be used as an example, particularly the application of those norms to sub-federal measures. There is a genuine question whether differential treatment across state jurisdictions within a federal state can constitute discriminatory treatment under GATS articles II and XVII. Authority on the question is thin, but some comments within both GATT and WTO jurisprudence seem to suggest that cross-jurisdictional differential treatment may constitute discrimination.[98] Discussions on the question in the context of the Negotiating Group on Services revealed a widespread consensus that (whatever the precise wording of the GATS) the non-discrimination norm was never intended to catch differential treatment of this sort, though WTO Members could not agree on an appropriate way forward on the issue.[99] Documents from those meetings evidence an informal agreement that dispute settlement proceedings will not be brought in respect of such matters—an understanding which appears to have been relatively effective in the period since.[100] Few examples will be so explicit and easily identified.

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98. Group of Negotiations on Services, *Informal GNS Meeting—10 December 1993: Chairman's Statement*, MTN.GNS/49 (Dec. 11, 1993) (GATT Uruguay Round Negotiations) [hereinafter *Negotiations Group*]; Preparatory Comm. for the WTO, Sub-Comm. on Servs., *Communication from the United States: Subsidies and Taxes at the Sub-Federal Level*, ¶ A.1, PC/SCS/W/4 (June 30, 1994); Preparatory Comm. for the WTO, Sub-Comm. on Servs., *Report of the Meeting Held on 16 December 1994: Note by the Secretariat*, PC/SCS/M/6 (Feb. 22, 1995); WTO Council for Trade in Servs., *Interim Report on the Status of Consultations on Taxes and Subsidies at the Sub-Central Level: Note by the Secretariat*, S/C/W/13 (Jan. 30, 1996). The United States believed it necessary to inscribe a wide variety of subfederal taxes as limitations to articles 11 and XVII in its GATS Schedule of Commitments on the grounds that state tax authorities would otherwise be required to provide foreign service supplies with the most favourable treatment to be found in any other state. See also Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, DS23/R (June 19, 1992), GATT B.I.S.D. (39th Supp.) (1993), for an example which some offer of when differences across different jurisdictions gave rise to a finding of discrimination.

99. *Negotiations Group*, *supra* note 98.

100. *See id.* ¶ 4:

> I wish to re-emphasise, perhaps more strongly than in my earlier statement, that pending further clarification of this and other questions relating to the scope of the Agreement, that it is assumed that participants would refrain from taking issues arising in this area to dispute settlement but would try to settle them through bilateral

Most often understandings about what kinds of measures may legitimately be the subject of dispute settlement are by nature tacit, submerged, fluid, and often underspecified. Nevertheless, they can be powerful; to exclude them implicitly from our definition of trade law inevitably on occasion leads to an incomplete and sometimes skewed portrait of the content and effects of WTO legal constraints.

### *E. A Limited Reformative Agenda*

Taken together, these four critiques add up to the core claim that the trade and human rights literature—like most literature on the trade regime generally—has so far proceeded on the basis of a partial and somewhat misleading picture of the impact of the trade regime on the enjoyment of human rights. But why does this matter? It matters because our knowledge of the impacts of the trade regime fundamentally shapes our reformative efforts. It helps us to determine which are the most important issues to address (and which are not), it informs our ideas of what kinds of change are possible and desirable (and those that are not), and it deeply structures the way we imagine the range of potential futures for the trade regime. In the trade and human rights debate, the legal centralist framework within which it operates has tended to generate a reformative agenda focussed predominantly on changes to the formal legal rules contained in WTO agreements and the processes by which these rules are generated, interpreted, and applied.[101] Sometimes, this may mean imposing stricter liberalisation commitments: stronger disciplines on domestic agricultural subsidy programmes, rules ensuring enhanced market access for developing country exports, and so on. More often, however, it takes the form of advocacy for a relaxation of the constraints imposed by trade law, on the basis that the policies required (or prohibited) by trade law can undermine (or enhance) the enjoyment of human rights. It is notable that human rights language has most often and most forcefully been deployed to advance the concept of "policy space."[102] For example, human rights considerations have been advanced

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> consultations. However, participants must assume their own responsibilities in deciding whether any measures of this sort which they maintain should be scheduled or made the subject of MFN [most favoured nations] exemptions—though in this respect also it is hoped that restraint will be shown.

101. Often, in fact, this is coupled with a claim that incorporating human rights into these processes in some sense will contribute to that agenda. I explore the claim that human rights have something to offer trade policy-making processes *infra* Part III.

102. For clarity, the notion of "policy space" refers to at least three distinct claims: (1) that WTO Members should not be required to put in place liberalizing policies where such policies have a negative impact on the enjoyment of human rights; (2) that Members should not be

to argue in favour of: new general exceptions to GATT disciplines, less restrictive interpretations of GATT non-discrimination obligations, an exemption from certain AoA obligations in respect of development measures, increased flexibilities for developing countries in respect of both the level and timing of liberalisation commitments, and interpretations of the SPS Agreement which allow greater scope for precautionary regulation, among many others.[103] The influence of legal centralism here is clear: since the WTO is conceptualized as a constraint on behaviour, remedial proposals tend to focus on removing those constraints and creating greater policy autonomy.

My main concern with the agenda is what it does *not* do. I explained above how the trade regime does much more than simply act as a constraint on state behaviour and is much more than simply a set of binding legal obligations. It is an environment in which the liberal trade project is constituted and given meaning, in which states are taught what it means to be a liberal trading nation, in which norms of legitimate and appropriate trade policy are generated and disseminated, and in which authorized knowledge about the trading system and how it operates is generated and deployed by states in the formulation of their interests. Far from simply permitting or prohibiting specific trade policies, it helps to constitute the fundamental ideational and political context in which trade policies are imagined and implemented—and which in many respects determines their ultimate effects. The point is that an agenda which focusses on modifying the obligations imposed in WTO agreements simply does not engage with these broader processes and has little to say

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prohibited from pursuing policy options which have (or could have) a beneficial impact on the enjoyment of human rights; and (3) that individuals and communities should as far as possible be free to choose their own goals and make their own choices without undue external constraint or impediment.

103. The work of the High Commissioner for Human Rights, for example, has strongly emphasised the need for further flexibility in WTO agreements, as well as the need to use existing flexibilities. *See Globalization*, *supra* note 6, ¶¶ 34, 48, 53; *Impact*, *supra* note 5, ¶ 28; *Liberalization*, *supra* note 7, ¶¶ 51-67. *See generally* FLOW, *supra* note 23 (noting the importance of interlinkages among economic policies); MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES: THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY (2003) (advocating interpretation of GATS in deference to national autonomy); PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND IFIS (Kevin P. Gallager ed., 2005); Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi, *Linking Trade Regulation and Human Rights in International Law: An Overview*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 23 ("Trade regulation should be shaped in a manner that permits Members of the WTO to pursue appropriate domestic human rights policies."); Caroline Dommen, *Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 199, 200 (promoting "collaboration" among trade and development professionals).

to them. More than that, it tends to divert attention away from these processes and make them less visible. By equating the absence of overt legal disciplines on states' policy choices with policy autonomy, the trade and human rights literature encourages us to see the preferences and choices of WTO Members as pre-existing their interaction with the WTO and as a given part of the landscape in which the international trade regime operates.

This is problematic from two perspectives. First, there is, I believe, an urgent need for the critical energies of human rights (and other) commentators to be directed toward these more diffuse mechanisms by which the trade regime determines the nature and effects of the present international trading system. It is important to understand the precise processes by which these mechanisms work and to build a picture of their impacts. This would then enable engagement with, and transformation of, those processes as appropriate. If I am right, and these more diffuse mechanisms are in the long run more significant determinants of the character of the international trading system than the specific obligations imposed in WTO agreements, then failure to critically engage with them means that the trade and human rights debate is simply missing the point. Second, attending to the variety of modes of influence that the WTO yields can help us to imagine productive ways in which the trade regime can be involved in the pursuit of a range of desirable social projects, such as development, or the protection of human rights. When we think of the WTO as essentially a set of constraining rules, then the kinds of things it can offer these projects is relatively limited—primarily, the task is to ensure that it does not interfere with their pursuit. But once we realise that, for example, the WTO plays a *teaching* function, the possibility is raised that it might be harnessed as a site of policy learning, a venue for the production and exchange of innovative policy knowledge.[104] Similarly, once we realise that it also plays a *normative* role—disseminating ideas of legitimate and desirable trade policy and constructing the values and purposes associated with the liberal trade project—then it becomes clear that the WTO could function as a valuable space for the deliberative and discursive renewal of the liberal trade project and provide tools and a venue for the collective re-imagining of that project. Finally, if it is true

104. On the potential of the WTO as a site of learning, see, for example, Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405 (2005); and Rosie Cooney & Andrew T.F. Lang, *Taking Uncertainty Seriously: Adaptive Governance, Alien Invasive Species and the WTO* (forthcoming 2007).

that the WTO acts in part to mobilize particular constituencies and facilitate their insertion into trade policy-making processes, then it might be fruitful to ask how these spaces and mobilizing forces might be exploited to generate broader and more active public participation in respect of trade policy questions.[105]

But if my main concern is what the present trade and human rights literature fails to address, there is also a real question whether its present reformative agenda is likely or able to achieve the kind of transformative change which it promises. For one thing, I observed above that modifications to the rules of the GATT/WTO system can often have surprising and complex social effects, which vary significantly from context to context both in their nature and their strength and which, at times, run directly counter to those which are intended. This suggests that the agenda for change should be formulated not so much in terms of changes to particular rules—new exceptions for developing countries, alternative interpretive choices in the GATT article XX jurisprudence, greater aggregate measure of support reduction commitments, and so on—but rather in terms of the social outcomes which those changes are intended to produce. It also suggests the need for constant monitoring of the extent to which they do, in fact, produce those outcomes, and for flexibility, critical reflection, and revision where they do not, or where they produce additional unintended and undesirable effects. This runs counter to the implicit tendency in the current debate to spend far more time discussing and debating the merits of particular rules on the basis of their intended or apparent effects, and far less attention to the socio-legal questions of how particular changes to the rules play themselves out over time in different contexts.

I also observed above that GATT/WTO legal disciplines, while clearly important, are not as important or salient a factor in regulatory decision-making as is often assumed. Is it reasonable, then, to pursue a strategy of achieving transformative change to the trading order primarily through a modification of WTO rules? Current efforts to achieve dramatic increases in market access for developing country goods through the negotiation of significantly stricter legal commitments on the part of the industrialized world seem based on an overestimation of the centrality of international legal obligations in the formulation of trade policy, as well as a misreading of the way the GATT/WTO system has operated over its history. There is a strong case to be made that the

105. This last possibility, it should be noted, is to some extent already happening within the broader literature connecting the WTO with principles of democratic governance.

success of that system in presiding over a dramatic period of successful liberalisation owes much more to its ability to generate and sustain among policy elites a shared normative commitment in favour of liberalisation and to teach them to think about the trading system in ways which make liberalisation appear rational and desirable to them. Similarly, much advocacy in favour of greater policy flexibility under WTO law seems equally to be based on an overestimation of the central role that WTO law plays in directing and constraining policy-making. As argued above, the reality is that WTO law is often only one relatively minor constraint in a sea of pressures facing regulators; most domestic regulation of direct concern to human rights advocates is determined only at the margin by WTO legal constraints. Policy-makers in developing countries, for example, are subject to acute constraints emanating from other international organizations, from the demands of capital markets, bilaterally from trading partners, from local industry groups, and so on.[106] There is therefore no guarantee that, were WTO Members to be accorded greater flexibility under WTO law, they would necessarily be either willing or able to exploit it. Arguably, therefore, there might be more productive directions for the energy of the human rights movement than ensuring sufficient regulatory autonomy from the strictures of trade law.[107]

It is important not to overstate my case. My claim is emphatically not that the present reformative agenda which has arisen out of the trade and human rights debate is necessarily ineffective, nor that changes to WTO obligations are unimportant. Rather, I am arguing for a more realistic assessment of their importance and, therefore, a more open and explicit consideration of what is the most important use of critical energies. I am suggesting that a much more fine-grained analysis is needed of the trade-offs implicit in advocating for legal change at the WTO. What are the opportunity costs of pursuing an agenda of legal

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106. The point I make here, about the existence of multiple and interrelated causes, is related to a point made by other commentators that the human rights movement tends to focus on the responsibility of individual actors (or organizations), with the result that it is less able to recognise and adequately address structural causes of injustice and poverty. *See, e.g.*, Evans & Hancock, *supra* note 18, at 2.

107. It may be argued, that, far from taking energy and resources away from other issues, major public campaigns critical of the WTO have in fact *energized* support for related initiatives. Matthews, for example, has argued that probably the most important role of the TRIPs and public health campaign was its role in raising the profile of the issue of particular epidemics in developing countries and thus generating a momentum for other (non-WTO) mechanisms to address them. Duncan Matthews, *WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?*, 7 J. INT'L ECON. L. 73 (2004).

change to (say) TRIPS article 31(f)? What is not on the WTO agenda because this issue is? How much political capital is being spent which could have been spent on other issues? What issues and venues escape notice because our attention is focussed on the WTO? In part because of the legal centralist frame within which the debate is carried out, many human rights critiques of the WTO too often simply assume the central importance of WTO law on the relevant issues. They too rarely include a detailed and explicit comparison of the most pressing needs facing WTO Members in particular areas of concern to human rights actors and an evaluation of the best allocation of scarce political, institutional, financial, and advocacy resources. A more accurate and fine-grained representation of the varied impacts of the trade regime would help to make the arguments of human rights advocates more responsive to the realities of decision-making practices on the ground.

## III. LEAVE IT TO THE EXPERTS? UNDERSTANDING THE ROLE OF HUMAN RIGHTS IN TRADE POLICY DEBATES

At this point in my argument, I want to shift the focus from the trade regime to the human rights movement. If one of the core claims of the trade and human rights literature is that the trading system can have negative effects on the enjoyment of human rights, the other is that human rights can in some sense help to produce a better or more just trading system. "Achieving fair and equitable trade liberalization by adopting human rights approaches to WTO rules," the U.N. Human Rights Commissioner has argued, "will be an important step in establishing a just international and social order."[108] In this Part, I interrogate this notion of a human rights approach to trade liberalisation. What role can the human rights movement play in re-making the trading system? What precisely do human rights have to offer trade policy debates?[109] My aim is not to analyse and evaluate competing proposals for reform of the WTO, nor to argue for or against particular trade policy

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108. *Globalization*, *supra* note 6, ¶ 9; *see also* Dommen, *supra* note 103, at 199 (suggesting that collaboration between trade and human rights professionals "can really contribute to ensuring that trade rules are developed and applied in ways that promote an equitable economy").

109. A somewhat similar set of questions has been asked in relation to human rights and development. For an excellent critical discussion, see Philip Alston, A Human Rights Perspective on the Millennium Development Goals (n.d.) (unpublished manuscript, available at http://www.appg-popdevrh.org.uk/publications/population%20Hearings/Evidence/UNHCHR%20report%202.pdf). *See also* ECOSOC, Sub-Comm. on the Promotion & Prot. of Human Rights, *Study on Policies for Development in a Globalizing World: What Can the Human Rights Approach Contribute?*, U.N. Doc. E/CN.4/Sub.2/2004/18 (June 7, 2004) (discussing the issue of implementing human rights in development at the national level).

changes. Rather, it is to reflect, and to encourage further reflection, on what role—if any—human rights actors and institutions can constructively play in debates about these questions.

There is one point I should make about the perspective from which I approach this task. In part because the language of human rights seems primarily to offer normative guidance, I am most interested in what human rights have to offer at the level of ideas and knowledge about what kind of trade policy is desirable and legitimate. My starting point for thinking about this more specific issue is to draw a distinction between two different sets of ideas. The first set is made up of primary ideas about what trade policy ought to be, and what the trading system ought to look like. Such ideas are continually evolving and subject to contestation, but at any point in time there is an identifiable set of beliefs which can be characterised as orthodox and which is widely shared among policy elites. These ideas themselves are founded upon a body of technical knowledge of the causal dynamics of the trading system and what the effects of particular trade policy interventions are likely to be. The second set of ideas consists of secondary ideas about how primary ideas ought to be produced—a set of beliefs about how societies ought properly to go about finding solutions to the problems thrown up by international trade. In trade policy, as in many other policy areas, these beliefs are currently shaped by a normative framework of technical rationality. They include the beliefs that international trade forms a relatively independent policy domain and that questions arising in this domain ought to be decided by trained experts deploying socially sanctioned forms of rational knowledge. They also include a set of ideas about who counts as an expert, how experts act, and what counts as relevant knowledge for these experts to use. The result of these secondary norms is that the production and evaluation of ideas and knowledge about what trade policy ought to be tends to involve particular kinds of people, particular kinds of vocabularies and arguments, and particular kinds of cognitive and conceptual frameworks.

These observations are hardly new, but they have a twofold significance in the trade and human rights debate. On the one hand, they suggest that the human rights movement *must* engage at the level of ideas and knowledge if it is to fulfil its promise of helping to re-make the international economic order. Whatever else shapes trade policy, it is clear that prevailing technical ideas about what kind of trade policy is rational and desirable deeply influence the nature of the international

trading system.[110] Without some change in these ideas, a genuine transformation of the international trading order is considerably less likely. On the other hand, this same commitment to technical rationality makes it *more* difficult for human rights actors to engage substantively in trade policy debates and, therefore, to influence the evolution of policy knowledge. After all, human rights actors—at least in their capacity as human rights actors—are not trade policy experts. What, then, can they tell us about what trade policy ought to be which those experts do not already know? It is not just a question of expertise, but also a linguistic question. The technical idiom of technical trade policy debates tends to exclude from the start the kind of "values talk" characteristic of human rights language. It is a presupposition of such debates that the kinds of questions that they deal with are not amenable to resolution through moral language; by definition, they call for the application of technical expertise. Furthermore, as is commonly observed, it is fundamental to experts' identity and ongoing legitimacy that they present themselves as apolitical, in the sense of rationally implementing social goals defined elsewhere.[111] Values talk does not easily fit within that culture. As will become clear below, my thinking about the role of the human rights movement in producing a new international trade order is deeply informed by both prongs of this dilemma—the crucial need to engage in the domain of trade policy knowledge and the considerable obstacles to doing so.

Under the first three headings which follow, I set out and interrogate what I see as the three most common conceptions of what human rights bring to trade policy debates.[112] Some argue that the trade and human

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110. On the role of ideas in the formulation of trade policy, see generally JUDITH GOLDSTEIN, IDEAS, INTERESTS, AND AMERICAN TRADE POLICY (1993); IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE (Judith Goldstein & Robert O. Keohane eds., 1993); Judith Goldstein, *Ideas, Institutions, and American Trade Policy*, 42 INT'L ORG. 179 (1988).

111. *See* MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004).

112. Because of the way that I have framed this dilemma, there is at least one model which I do not address in this Article. This model sees human rights protection—conceived in traditional terms as the protection of freedom of expression and other democratic freedoms, some guarantees of distributive justice, and so on—as in many respects complementary to, and supportive of, well-functioning markets and international trade. To simplify, human rights law in this model provides a set of flanking policies which ought to accompany trade liberalisation, in order to ensure that trade liberalisation brings its promised benefits. *See* Cottier, *supra* note 22; Thomas Cottier & Sangeeta Khorana, *Linkages Between Freedom of Expression and Unfair Competition Rules in International Trade: The* Hertel *Case and Beyond*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 245, 245-46; *see also* Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19 (2000); Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their*

rights debate is essentially one about coherence between international regimes, and, therefore, it makes no sense to ask what human rights bring to the debate. I suggest that this framework obscures more than it reveals and explain how it actually helps to undermine the transformative power of the human rights movement. Others suggest that human rights provides a set of substantive values and rules which can guide trade policy choices. I argue, on the contrary, that this is illusory, and represents an oversimplified account of how human rights language and advocacy works. And yet others claim that, even if human rights cannot define on their own what trade policy ought to be, they do provide a variety of potentially effective political tools for achieving desirable trade policy outcomes. While I substantially agree with this claim as far as it goes, I question whether—if this is *all* that human rights do—the human rights movement can ever instigate genuinely transformative change. Under the fourth and fifth headings, I offer two more ways to conceptualize the role of human rights in trade policy debates. In keeping with my interest in the production of trade policy knowledge, I argue first that the human rights movement can help provide a trigger for policy learning—it can help, in other words, to facilitate and enable the production of new ideas about desirable trade policy. Second, I suggest that the human rights movement may be helping to transform the secondary beliefs I referred to above—beliefs about how trade policy ideas ought to be generated and evaluated, and by whom. In some ways, these two conceptions are simply explicit theories describing what human rights actors are already doing. But they are also more than that, to the extent that clearer understandings of what it is that human rights actors can and do offer can lead to more targeted and more productive interventions into trade policy debates.

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*Interrelationships*, 4 J. INT'L ECON. L. 3 (2001); Petersmann, *Global Compact*, *supra* note 17; Petersmann, *Human Dignity*, *supra* note 17, at 845; Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37 J. WORLD TRADE 241 (2003); Ernst-Ulrich Petersmann, *The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?*, 7 J. INT'L ECON. L. 605 (2004); Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 29, 29-31. Furthermore, I do not address (increasingly rare) arguments that the WTO system can be used positively to enforce human rights norms, as in the debates on human rights conditionality. On the distinction between the positive and negative aspects of the trade and human rights debate, see Maria Green, *Integrating Enforcement of Human Rights Laws with Enforcement of Trade Laws: Some Baseline Issues*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 236, 237; Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 205, 206; Petersmann, *Global Compact*, *supra* note 17.

### *A. Fragmentation and Coherence*

For many commentators, the trade and human rights debate is fundamentally concerned with balancing competing social values. As desirable and legitimate as the liberal trade project is, many argue, it is still only one among a huge variety of social projects which states and their populations value. Alternative values, such as consumer protection, economic stability, and environmental protection, at times need to be balanced against the demands of trade liberalisation. At the national level, complex institutional, legal and political mechanisms typically exist to resolve such policy trade-offs. But (so this argument runs) no such mechanisms exist at the international level; international political and institutional life is characterized primarily by *fragmentation*, by a relative absence of mechanisms of co-ordination, collaboration and coherence across policy fields. The crucial task, therefore, is to design precisely those kinds of mechanisms, "in an attempt to provide greater coherence to international . . . policy-making and a more balanced international and social order."[113] This is particularly true for the trade regime. "The relationship between trade values . . . and other values," writes Trachtman, "is a critical challenge [for] the WTO."[114]

Within what I will call the "coherence framework," these normative conflicts between trade values and other values also have an institutional and legal dimension. Different categories of social preferences or values tend to be associated with different institutions: the WTO with a preference for trade liberalisation (or the benefits that trade liberalisation is thought to provide, however they are conceptualized), the International Labour Organisation (ILO) with the value of labour rights protection, environmental organizations with the value of environmental protection, and so on. Because institutions are seen in this way in functional terms—as created by way of response to a particular subset of social demands[115]—problems of normative coherence come to be seen as closely related to patterns of institutional isolation and collaboration.

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113. *Liberalization*, *supra* note 7, ¶ 4.

114. Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 634 (2006). For works which illustrate this coherence framework in a clear and sophisticated manner, see, for example, Breining-Kaufmann, *supra* note 34; Cottier, *supra* note 22; Dommen, *supra* note 103; Victor Mosoti, *Institutional Cooperation and Norm Creation in International Organizations*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 165; and Prabhash Ranjan, *International Trade and Human Rights: Conflicting Obligations*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 311.

115. For a seminal account of functionalism as it relates to various theoretical traditions on the role of institutions in political life, see Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996).

Similarly, as each international regime is associated with a particular sub-field of international law, international trade law, international environmental law, or international human rights law—formal conflicts between the rules of these different sub-fields of international law are understood as the "legal face" of underlying normative conflicts.[116]

How are human rights said to fit into this framework? It is useful to distinguish between two different claims, which might be termed the "strong" and "weak" claim respectively. The strong claim is that human rights provide a normative framework within which to resolve value trade-offs.[117] Human rights, in other words, can help us to solve the problems thrown up by fragmentation in a legitimate and appropriate way. Different commentators have forwarded different reasons for why the language of human rights is particularly well-suited to the task of balancing of competing social values. First, and most obviously, human rights themselves can be understood as representing a set of values which ought to be given special weight in resolving value trade-offs. Arguably, the entire human rights edifice can be thought of as an attempt to define and categorize those values which are regarded as particularly fundamental and as commanding special moral force and legitimacy. Second, human rights bodies have considerable experience with the task of balancing competing social values in particular contexts. As a result, human rights law and discourse contain a wide variety of tools and mechanisms with which policy-makers and judicial bodies are familiar and which have proven to be operationally robust in a variety of different contexts.[118] Third, it is said that human rights is a sufficiently open discourse in which many different kinds of values or social demands can be expressed. The sensibility of human rights, that is to say, is peculiarly sensitive to a variety of competing social demands. Furthermore, within human rights discourse, different values (as interdependent and indivisible rights) begin from a position of presumptively equal strength. Human rights therefore may offer a language which is less susceptible to claims of systematic bias than other languages. This claim, it should be noted, is typically made in the context of an analogous critique: that decisions involving trade-offs should not be left to the trade regime,

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116. Trachtman, *supra* note 114, at 635.

117. Petersmann is a strong proponent of this kind of claim. *See* Petersmann, *Global Compact*, *supra* note 17. *See also* Dommen, *supra* note 103, at 202.

118. Judicial interpretations in human rights law of such concepts as necessity, proportionality, legitimate pubic purpose, and non-discrimination are all of obvious utility in helping the system of trade law—which after all is the younger partner in the relationship—in its development of similar concepts and tools.

because it is more likely to exhibit a systemic bias in favour of trade values and to be less responsive to the full breadth of social demands.[119]

How attractive is this as a way of thinking about what human rights offers trade policy debates? In my view, it is vulnerable to a number of compelling criticisms. For one thing, trade-off questions raise vitally important and highly contested political issues, of the kind that can never finally be resolved. It is therefore misleading to talk as if they can be conclusively settled simply by reference to a set of human rights norms, as if the relative priority to be accorded to new and evolving international projects has already been determined in advance. Too often, this strong claim seems to be deployed to close off debate about normative conflicts, rather than open it—to take these disputes beyond the realm of the political, rather than to re-politicise them.[120] Second, it is not self-evident that social projects and values which are expressed in rights terms need necessarily be given more weight than those which cannot.[121] It is important to remember that what constitutes a "human rights violation" or "human rights issue" at any particular point in time is in part socially and politically constructed and that the processes by which particular injustices are produced as human rights issues are inevitably selective and partly arbitrary. Who decides which social projects are expressive of human rights values, and which are not? And why, indeed, should we accord less priority to those deeply held values which, for one reason or another, cannot be or have not been expressed in the language of human rights? Third, there is the question of institutional competence. The claim that normative conflicts ought to be resolved by recourse to human rights principles does not necessarily imply the further claim that human

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119. Marco C.E.J. Bronckers, *More Power to the WTO?*, 4 J. INT'L ECON. L. 41, 46 (2001) (liberal trade bias); Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT'L L. 625, 640 (2004) (pro-trade bias); Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 133 (2003) (free trade bias); Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 306 (2004) (trade bias); John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 1 (2004) (biased); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 12 (2001) (neoliberal bias); Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L.J. 608, 611 (2000) ("closed, trade-biased . . . institution"); Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 451 (1999) (pro-trade bias).

120. For a similar argument in a different context, see Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647 (2006).

121. Howse makes a similar point. *See* Howse, *supra* note 17.

rights institutions ought themselves to play a central role in the resolution of such conflicts. Nevertheless, that is a likely outcome of taking seriously the use of human rights in this way. It is not at all clear, however, that international human rights bodies as presently constituted are up to this task. At the very least, there is a need to make a stronger case that these institutions are well-placed—or at least are better suited than imaginable alternatives, including a reformed trade regime. Fourth and finally, although it is claimed that the use of a human rights framework can help to resolve trade-off questions, often the result is simply to defer or displace these questions. For example, even if we agree that social values expressed as human rights should be accorded a degree of priority, a question remains as to which values can and should in fact be expressed in human rights terms. Petersmann, for example, sees trade-offs between trade liberalisation and (say) the protection of vulnerable minorities as involving a balancing of competing *rights*.[122] Others strongly disagree.[123] While some contestation of the language of human rights is to be expected, and we should not too hastily conclude that human rights language is indeterminate, we do well to remember that the content and meaning of human rights language is itself strongly contested and may not always provide the substantial guidance that it promises.

Let me turn then to the weak claim. This argument is that the protection of human rights is one normative project among the many needing to be balanced against the demands of trade liberalisation. Greater coherence in international policy-making, on this view, means striking a better balance between the demands of trade liberalisation and the protection of human rights. Different commentators have different views on what an appropriate balance is. Some suggest that human rights ought usually to take priority. Others note simply that it is "difficult to say which in the abstract should prevail as a matter of principle."[124] Observe that within this framework, it makes little sense to ask what human rights *offer* trade policy debates. Since the problem to be addressed is precisely the potential for conflict between the trade and human rights regimes, or the values they are taken to represent, the relevance of human rights language is assumed from the beginning. To the extent that the language of human rights has a role to play, it is simply

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122. *See supra* note 112 and accompanying text. The TRIPS debate is a good example, where intellectual property rights are often portrayed as one human right in contest with another (the right to health).

123. *See, e.g.*, Alston, *supra* note 17.

124. Cottier, *supra* note 22, at 114.

to ensure that the goal of protecting human rights is given due weight. As noted above, it ought to be remembered that the debate about coherence takes place against the background of a concern that, because of the institutional strength of the WTO, trade values tend in practice to be given priority over other values at the international level. The virtue of human rights, on this view, is that it provides a powerful institutional voice in which to articulate alternative social demands on the international level. Human rights, it is said, can help correct the perceived imbalance in the international system, according to which the liberal trade project tends in practice to undermine or override other legitimate social projects.[125]

This vision of how and why human rights are relevant in trade policy debates has proved very influential. As a result, many human rights commentators have concentrated much of their energy on identifying and evaluating those circumstances in which actors within the trade regime are required to balance the requirements of trade liberalisation with the demands of those "non-trade values" associated with human rights.[126] These circumstances typically involve trade-restrictive measures designed to achieve a human rights purpose. (The purpose of the relevant measure ranges widely, from consumer protection, to food safety, to public health protection, to protection of minorities.) The declared aim of much of this work is to design an institutional and normative framework to ensure that decisions involving such sensitive balancing are made in an appropriate and legitimate manner. Thus, Cottier argues that we "need a framework which allows equality of legitimate interests to be taken into account, brings about practical co-ordination of differing policy goals, and allows for balancing of the fundamental interests involved."[127]

Different commentators have proposed different means for ensuring that decision-making processes within the trade regime take due account of their impact on human rights. The United Nations High Commissioner for Human Rights (High Commissioner) argues for assessments of the human rights impacts of proposed trade rules before they are agreed, as well as direct participation by U.N. human rights bodies in some aspects of the WTO's work.[128] The United Nations

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125. *See supra* note 119 and accompanying text.

126. The use of the term "non-trade values" and analogous terms is characteristic of the idiom of the coherence framework. *See* sources cited *supra* note 119.

127. Cottier, *supra* note 22, at 129.

128. *See, e.g.*, *Globalization*, *supra* note 6, ¶ 46; *Liberalization*, *supra* note 7, ¶ 72; *Human Rights, Trade and Investment*, *supra* note 5, ¶ 63. On the question of a human rights office at the WTO see Ochoa, *supra* note 55, at 93.

Committee on Economic, Social and Cultural Rights (CESCR) has reminded WTO Members that they are bound by human rights obligations in multilateral trade negotiations.[129] Abbott makes a case for the WTO to create "highly integrated relations . . . [with] other multilateral institutions,"[130] while Dommen calls for better integration and the national level, between government departments.[131] A complementary line of argument addresses questions of allocation of decision-making power as between the trade and human rights regimes. Howse and Nicolaidis, for example, argue that the trade regime ought (in some circumstances) to show deference to other international institutions, including those comprising the human rights regime.[132] Trachtman, too, argues that we need "rules that allocate authority" among different functional institutions.[133] Another important focus of attention has been research into the potential use of human rights law to guide decisions made by WTO quasi-judicial bodies in cases that implicate sensitive normative conflicts. This body of work has covered a range of issues: the rules of international law governing questions of priority where international legal obligations conflict, the potential uses of human rights law as an interpretive guide by WTO panels and the Appellate Body, as well as arguments relating to the use of human rights law as a substantive defence to violations of WTO law.[134] In a similar vein, others have argued for the incorporation of a reference to human rights into the texts of WTO agreements, either as an objective of trade liberalisation within the preamble of the treaty establishing the WTO, or more specifically in the form of general human rights exception(s) to liberalisation obligations.[135] What is common to all of these mechanisms of co-ordination—whether legal, organizational, or normative—is that they are seen as a response to the same basic dilemma: how to ensure

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129. *Comment 15*, *supra* note 12, ¶ 35.

130. Frederick M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3 J. INT'L ECON. L. 63, 63 (2000).

131. Dommen, *supra* note 16.

132. Robert Howse & Kalypso Nicolaidis, *Legitimacy through "Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far*, *in* THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO 307 (Thomas Cottier & Petros C. Mavroidis eds., 2003).

133. Trachtman, *supra* note 114, at 634.

134. Some key references include JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Marceau, *supra* note 22; Pauwelyn, *supra* note 112; and Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999).

135. *Impact*, *supra* note 5, ¶ 68; Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1 (1999).

that an appropriate balance is struck where the imperatives of the liberal trade project must be weighed against the need to protect human rights.

Is this, then, a useful and productive way of thinking about the role of human rights language in trade policy debates? There is no doubt that this literature on coherence between the trade and human rights regimes has produced important insights and research. Nevertheless, I have one significant concern about this literature, the source of which lies in the premises on which the coherence framework is based.

As I have explained elsewhere,[136] in my view, contemporary public debates over the international trade regime are fundamentally about the social purpose of the liberal trade project. We commonly think of the purpose of the trade regime in stylized, functional terms as "the liberalisation of trade." But the reality is that the regime is informed by a much thicker sense of purpose, deeply connected to the social and political context within which it operates. Over the course of its history, a variety of different overarching goals of the post-war trading regime have been given different emphases at different times. These include the reconstruction of post-war Europe, the maintenance of international and domestic economic stability, the reduction of tariffs (or, at different times, trade barriers and trade distortions), the generation of a global market in goods and services, and the effort to drive global economic growth.[137] This evolving sense of purpose plays a hidden but vital role in shaping the architecture of the trade regime, as well as specific trade policy decisions at all levels. It helps participants understand what they are doing and why, and it influences their attitudes to particular trade policies by determining the meaning that such policies have for them. To say that contemporary debates are about the social purpose of the liberal trade project, then, is to suggest that these debates represent political contestation over the definition and constitution of the trade regime itself and an opportunity to re-think some of its most basic features and orientations.[138]

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136. Lang, *supra* note 59.

137. *See generally*, Ruggie, *supra* note 60, at 195 (noting liberal trade post war); Frank Trentmann, *Political Culture and Political Economy: Interest, Ideology and Free Trade*, 5 REV. INT'L POL. ECON. 217 (1998); Frank Trentmann, *National Identity and Consumer Politics: Free Trade and Tariff Reform*, *in* THE POLITICAL ECONOMY OF BRITISH HISTORICAL EXPERIENCE, 1688-1914, at 215 (Donald Winch & Patrick K. O'Brien eds., 2002).

138. Another way of putting this point is that these debates raise questions about the meaning of free trade, see Barnett & Finnemore, *supra* note 48; David M. Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279 (2001); BARNETT & FINNEMORE, *supra* note 111.

From this perspective, the normative conflicts, or 'values trade-offs,' described earlier look different from how they are normally understood. What matters is less in the *outcomes* of those trade-off decisions—that is, which values win out in any particular instance—than in the *processes* by which they are resolved. This is because it is in the process of discussing, debating, and resolving these normative conflicts that shared ideas about the purpose of the liberal trade project are generated and disseminated; it is, after all, by reference to such shared ideas that normative conflicts are identified in the first place. Thus, from my point of view, the primary reason that decisions involving value trade-offs are interesting and important is that they represent a key site in which the fundamental goals and value commitments of the trade regime—what we think of when we say trade values—can be contested, re-negotiated, and re-defined. They represent points at which internal contradictions and tensions within prevailing narratives can be leveraged to force a reconsideration of the underlying purposes of the regime. Such trade-offs are not exceptional, but ubiquitous. And, crucially, they do not involve a contest between trade regime and other social projects, but rather are constitutive of the liberal trade project itself.

Through the language of coherence and fragmentation, however, such contestation over the goals, purposes, and normative foundations of the liberal trade project is re-cast as a conflict between the liberal trade project and the protection of human rights. Admittedly, it is not common to see coherence discourse in this way as discursively re-characterising normative conflicts, as in some sense constructing the problem of inter-regime conflict. It is much more common to think of inter-regime conflicts as objectively existing, pre-existing problems demanding solutions. It is worth pausing, therefore, to register that conflicts between the trade and human rights regimes are not given but *produced*, usually as a result of deliberate and strategic choices by political actors. Helfer's notion of "regime-shifting" provides a useful analytical lens to make this point clear.[139] Helfer's primary concern is with the strategies which participants use when a regime, such as the trade regime, begins to evolve in ways which are contrary to their interests. One such strategy is that of "regime-shifting." This involves taking particular issues which have traditionally fallen within the mandate of, for instance, the trade regime, and debating and discussing these issues in alternative international institutional forums. The purpose of this is to generate

139. *See* Helfer, *Regime Shifting*, *supra* note 21. *See also* Helfer, *Interactions*, *supra* note 21, at 123 (viewing intellectual property rules "through the lens of the international relations theory of regimes").

"counter regime norms," which provide "new opportunities for states and NGOs to contest established normative orthodoxies."[140] One of the perceived benefits of this strategy is that it allows counter-hegemonic actors to re-frame their arguments as claims for *coherence* between regimes (rather than as claims for different rules which suit their interests better).[141] This is seen to be advantageous. After all, it is hard not to agree that international organizations ought to work together and ought not to undermine each other. It is particularly hard to disagree with the general principle that the trade regime ought not to undermine the human rights regime and ought not to force its Members to violate their human rights obligations. Helfer's analysis is rich with implications, but for present purposes, the lesson I wish to draw is a simple one: through the strategy of regime-shifting, normative conflicts over what the trade regime ought to be have been re-framed as, raising questions about the *relationship between* the trade regime and "other organizations, other sources of international law, and non-trade values" and the relationship between trade liberalisation and the protection of human rights.[142] In this sense, incoherence between the trade and human rights regimes is a choice, not simply an historical fact.

Once this is understood, it becomes apparent that the real question we should be asking is not whether human rights language helps us to identify and address trade-off questions in a more appropriate or desirable manner. Rather, it is whether it is useful or constructive to frame normative conflicts over the trading system as essentially problems of incoherence and symptoms of the fragmentation of the international system. On balance, my view is that it is not. Put simply, the reason is that re-framing the argument in this way actually undermines and limits the ability of human rights actors to generate real change to the trading order. This is counter-intuitive, but relatively easy to explain.

One consequence of deploying the discourse of coherence and fragmentation is that our attention is directed away from some of the most important questions that human rights actors should be asking of the trade regime. First, as already intimated, questions about the underlying value commitments and social purpose of the liberal trade project tend to be put to one side. In their place, we have constitutionalist discussions about how to ensure coherence between the trade project and the human rights project, as well as formal discussions about how to resolve legal conflicts between obligations imposed by the trade and

140. Helfer, *Regime Shifting*, *supra* note 21, at 14.
141. *See id.* at 10-27; Helfer, *Interactions*, *supra* note 21, at 128.
142. Trachtman, *supra* note 114, at 634.

human rights regimes. Through the language of coherence, critical arguments which suggest a need for the re-constitution or reconstruction of the liberal trade project have been redirected, so that they are now seen as raising questions which are relevant solely to the relation between the WTO and the human rights regime. The result is that the underlying purpose of the liberal trade project is neither discussed nor re-visioned. Second, the coherence framework diverts our attention away from the value choices which are necessarily involved in *constituting* the liberal trade project. Instead, discussion is focussed on the normative conflicts between human rights values and (pre-constituted) trade values. The result is that there is no indication or exploration of the ways in which the values associated with human rights—which of course change according to who is speaking, but often include such matters as equality, the protection of vulnerable groups and minorities, social welfare, consumer protection, and poverty elimination—might be productively involved in contesting and reconstituting the liberal trade project in the first place. Within this framework, human rights tend to appear in debates about trade policy solely as exceptions, adjuncts, or complements to trade policy prescriptions.[143] Third, the coherence framework discourages critical engagement with the processes by which the trade regime is continually contested and re-defined. This is because it reifies the trade regime. The trade regime appears to us in this framework unproblematically as an "avatar"[144] of particular values or social demands. Its internal contradictions, and its contingency, its indeterminacy are shielded from view. The "politics of regime definition"[145] are made invisible, and human rights actors are thereby discouraged from contesting them.

Another consequence is that—paradoxically—the coherence framework tends to reinforce prevailing ideas about what the trade regime ought to look like. It does this in at least a couple of different ways. First of all, I said above that discussions of how to resolve conflicts between trade values and non-trade values tend to produce and disseminate shared ideas about what trade values are. In the trade and human rights debate, the concept of trade values, to the extent that it is defined at all, tends to be equated with the pursuit of "growth and

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143. This is very clearly seen in the fact that much of the trade and human rights literature, at least that which operates within the coherence framework, has focussed heavily on GATT Article XX and the jurisprudence under it. *See* GENERAL EXCEPTIONS, *supra* note 11.

144. Joel P. Trachtman, *The WTO Constitution: Tertiary Rules for Intertwined Elephants* (ExpressO Preprint Series, Working Paper No. 753, 2005).

145. I borrow this phrase from Koskenniemi in his Chorley Lecture, London School of Economics, June 2006.

prosperity,"[146] the pursuit of material wealth, or "efficiency and money."[147] Putting to one side questions about the historical accuracy of these characterizations, it is clear that speaking as if these are the values of the trade regime helps to make it so. Similarly, speaking as if such values as distributional equity, poverty elimination, protection of minorities, and economic and social stability are non-trade or human rights values clearly affects the way that the trade regime responds to such goals. It makes them marginal to its essential project. The essential point is that how we define the boundary between trade and human rights values affects our understanding of what the animating purpose of the trade regime is and, therefore, profoundly shapes the deeper structure and operation of the trading system in the long term. Second, and less obviously, the mere fact that the objectives, values, and orientation of the trade regime are treated as pre-given also reinforces the status quo. I noted at the beginning of this Part that trade policy knowledge tends to be produced and evaluated by those with technical expertise, and that it is not clear what human rights actors can add in that domain. The coherence framework essentially attempts to sidestep these difficulties; while we may look to technical experts to tell us what the international trading system ought to look like, these experts tell us nothing about how to resolve trade-offs between the demands of rational trade policy and other social demands—nor can they. Even within a framework of technical rationality, such trade-offs are inevitably a question of values, not a question of knowledge. The problem with this move is that it reinforces the sense that questions of pure trade policy raise solely technical questions (not value trade-offs), and these questions are not an appropriate domain of contestation for human rights actors. That is, the coherence framework helps to exclude human rights actors from debates about pure trade policy—that is, about what trade policy and the trade regime ought ideally to look like—and to re-inforce the claims that such questions are appropriately determined by traditional experts deploying prevailing trade policy knowledge.

Against these criticisms that I have advanced, it may be argued that, even if the discourse of coherence forecloses certain transformative possibilities, it opens up others. This is an important point, and it is emphatically *not* my claim that the trade and human rights literature arising from the coherence framework is unproductive or fruitless. Nevertheless, on present evidence, the possibilities that this framework

146. Trachtman, *supra* note 114, at 634.
147. Fox, *supra* note 21, at 203.

opens seem to me to be far less important than those which it forecloses. For example, I am somewhat sceptical that the use of human rights law as an interpretive guide to WTO law will often make a significant difference on how WTO agreements are ultimately interpreted. After all, a requirement to consider the content of (often ambiguous) human rights instruments will, in my view, have little effect unless the decision-makers are *already* sensitive to the values which such instruments are designed to protect and predisposed to interpreting WTO law in a way which respects them. Conversely, if such sensitivity *is* present, it is not clear that the interpretive guidance provided by human rights instruments adds much other than a more legally sound justification for those decision-makers. Similarly, without wishing to downplay either the desirability or importance of inter-institutional collaboration, it is easy to see how most of the proposed mechanisms of inter-regime engagement—formal and informal collaborations, mutual observer status, systematic consideration of mutual impact, and so on—might have little actual impact on the outcomes of the trading system, and in the end actually substitute for a more thoroughgoing, reconstitution from the ground up of the trade regime itself. It is for these reasons that I see the discourse on fragmentation and coherence as, in the end, limiting, channelling, and constraining the potentially disruptive and destabilizing influence of critical human rights voices.

### *B. Human Rights as Substantive Policy Guidance*

Not all interventions into the trade and human rights debate see the debate primarily in terms of inter-regime coherence. It is also very common to see human rights as offering a normative framework for substantively re-orienting trade policy and the trade regime. The core claim is that human rights norms, principles, and rules can help to guide trade policy-makers as they re-design the international trading system and make difficult trade policy choices. In a speech entitled "Shaping Globalization: The Role of Human Rights," for example, Robinson argues for the need to bring "the values of international human rights to the tables where decisions about the global economy are being made."[148] Howse and Mutua have similarly suggested that "[t]he spirit of human rights law must frame the development of trade law,"[149] while Green

148. Mary Robinson, Address at the Fifth Annual Grotius Lecture, American Society of International Law 97th Annual Meeting: Shaping Globalization: The Role of Human Rights (Apr. 2, 2003) (transcript available at http://www.realizingrights.org/index.php?option=content&task=view&id=118).

149. HOWSE & MUTUA, *supra* note 20, at 6.

refers to the need to "see [the] WTO and other trade mechanisms restrained by human rights standards."[150] In this model, human rights values and rules define the boundaries of acceptable trade policy choices and provide the substantive basis of an alternative vision for the international trading system.

There have been a number of attempts to flesh out a little what this might look like. One of the most influential of these attempts is that of the High Commissioner, in the context of the series of reports referred to earlier.[151] Apart from procedural prescriptions (dealt with below), the High Commissioner argues, for example, that a human rights approach to trade liberalisation "sets the promotion and protection of human rights as objectives of trade liberalization, not as exceptions."[152] At the level of general principle, the High Commissioner believes that a human rights approach is cautious about "relying [solely] on market forces to resolve problems concerning human welfare," and instead "emphasises the role of the State in the process of liberalization."[153] The High Commissioner also emphasizes the importance of international co-operation as a primary means of achieving a fairer and more equitable international order.[154] A human rights approach to trade liberalisation is said also to "focus on individuals, in particular vulnerable individuals and groups."[155] Thus, trade policies which have an adverse impact on such groups tend not to be favoured by human rights. This last point has been picked up and developed by others. Dommen, for example, argues that the focus of human rights on "the most vulnerable and disadvantaged sectors of society is the yardstick" that enables them to provide substantive policy guidance.[156] A human rights approach "will assess the effects of a particular policy on the most vulnerable people within a country and will rule against choices that involve discrimination."[157]

Notwithstanding the utility of these more general claims, it is clear that greater specificity is required if human rights norms are to provide genuinely meaningful guidance to trade policy-makers.[158] While it is not

150. Green, *supra* note 112, at 237.
151. *See* sources cited *supra* note 5.
152. *Liberalization*, *supra* note 7, ¶ 7.
153. *Id.* ¶ 10.
154. *Id.* ¶ 13.
155. *Id.* ¶ 9.
156. Dommen, *supra* note 16, at 202.
157. *Id.*
158. *See, e.g.*, Abbott, *supra* note 21, at 294; Breining-Kaufmann, *supra* note 34. Alvarez has criticised the deployment of human rights law for this reason, see Jose E. Alvarez, *How Not To Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001).

in the nature of human rights principles to be fully reducible to a universal set of policy prescriptions, nevertheless there would seem to be value in enhancing the specificity of human rights obligations as they apply to trade policy, thereby enhancing their practical utility to policy-makers. If it is not possible to specify fully and in advance the kinds of trade policy which are prohibited or required by human rights law, at least some examples can be developed, and a process and methodology can be refined by which these questions can be answered in particular contexts. So, those commentators who see the role of human rights in these terms—as providing substantive policy guidance—largely see their task as spelling out in more detail the precise normative and legal content of human rights as they apply in the field of trade policy, so as to increase their utility as guiding principles.

How might this be done? The basic logic is clear: governments must not implement certain trade policies where to do so would lead to a violation of their human rights obligations; they must conversely pursue those trade policies which, in their circumstances, facilitate the progressive enjoyment of human rights. As applied to the WTO, the basic claim is that WTO law must not require particular trade policies to the extent that they may undermine the enjoyment of human rights, nor is it permitted to prohibit policies to the extent that they enhance the enjoyment of human rights.[159] This in turn leads to a particular form of enquiry: elaboration of the normative and legal content of the relevant human right, analysis of different trade policies (and WTO rules) and their practical effects, comparison of those effects to the kinds of outcomes envisaged or required by the relevant right, and advocacy of changes to either trade policies or WTO rules to make them conform more closely to what human rights obligations require. In this way, general human rights norms can apparently be transformed into concrete policy prescriptions.

An example will help to make the critique I advance below clearer. The High Commissioner's report on liberalisation of trade in services is in a typical form. After an introduction to the notion of "trade in services" and the basic framework of the GATS, the High Commissioner spends considerable time setting out the content of the rights to health, education, and development, drawing on the General Comments of

159. There are also two further logical implications, though they tend in practice to be emphasized less: (1) that WTO law ought to prohibit particular trade policies which clearly undermine human rights, and (2) that WTO law ought to require those trade policies which are clearly of benefit to the enjoyment of human rights.

CESCR in doing so.[160] The Commissioner emphasises that the right to health covers the availability, accessibility, acceptability, and quality of health facilities; that states have an obligation to take the right into account when negotiating trade treaties; that states have a tripartite obligation to respect, protect, and fulfil the right; and that the implementation of any retrogressive policy will usually constitute a violation.[161] In the next Part, the High Commissioner analyzes the outcomes of particular forms of services liberalisation, emphasizing the negative outcomes that can arise.[162] For example, foreign direct investment in health services can result, it is argued, in a "two-tiered service supply with a corporate segment focused on the healthy and wealthy and an underfinanced public sector focusing on the poor and sick."[163] Similarly, "the introduction of user fees can reduce and even cut off service supply to the poor."[164] In order to ensure that services liberalisation works for human rights, the High Commissioner observes, strict monitoring and strong regulatory oversight of private service supplies will often be essential.[165] Further, the High Commissioner analyzes the extent to which the disciplines in the GATS may actually impede the ability of governments to provide such regulatory oversight and, therefore, their ability to protect human rights.[166] The report therefore argues that WTO Members ought to take a cautious approach to making GATS commitments, that the GATS ought to be construed in various ways which allow greater policy space for social regulation, and that a mechanism should be put in place to ensure that Members can withdraw commitments where services liberalisation ultimately undermines the enjoyment of human rights.[167]

Of course, there are innumerable other examples I might have used. Precisely the same structure of argumentation has been used to claim that the right to health requires amendments to article 31(f) of the TRIPS agreement,[168] that the right to food requires the reduction of domestic

160. *Liberalization*, *supra* note 7, ¶¶ 28-37.
161. *Id.* ¶¶ 29-31.
162. *Id.* ¶¶ 38-50.
163. *Id.* ¶ 44.
164. *Id.*
165. *Id.* ¶ 50.
166. *Id.* ¶¶ 54-67.
167. *Id.* ¶¶ 55-64.
168. Clear and well-argued examples of this form of argumentation in the context of the TRIPS agreement and the right to health are Abbott, *supra* note 21; Sisule F. Musungu, *The Right to Health, Intellectual Property, and Competition Principles*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 301; Shelley Edwardson, *Reconciling TRIPS and the*

agricultural subsidies in industrialized countries,[169] and that the right to health requires WTO dispute settlement bodies to take a deferential attitude to precautionary food safety legislation.[170]

The question which interests me is: what role human rights norms and principles play in this kind of analysis? It is common to talk as if human rights are in some sense the source of the ultimate policy prescriptions in this kind of analysis—that human rights rules provide the criteria by which to arbitrate between alternative trade policy proposals. In fact, it takes only a moment's thought to realise that precisely the opposite is occurring: human rights commentators are drawing on work produced by trade policy experts in the context of contemporary trade policy debates as a source of policy ideas and arguments. There is invariably something of a shift in register when these commentators move from the first stage of their argument (the elaboration of human rights norms) to the second (the evaluation of particular trade policy proposals). When it comes to the analysis and evaluation of concrete policy proposals—and remember that within this model the elaboration of concrete proposals is precisely the point of the intervention—the discussion invariably tends to reproduce and rehearse precisely the same kinds of arguments which characterize trade policy discussions in other arenas and which are perfectly familiar to trade policy experts. At this point, the human rights language recedes into the background, and we are presented with a series of argumentative steps, sets of data, and ultimately policy prescriptions, which almost exactly reproduce those emanating from more traditional trade policy circles.

The point is that essentially all of the intellectual heavy lifting in these analyses is not done by human rights norms at all, but by precisely the kinds of technical argumentation which human rights purport to augment. After all, we do not need human rights to tell us that private providers of essential services need strict regulatory oversight. Nor do we need human rights to tell us that domestic agricultural subsidies ought to be reduced, nor that developing countries may at times need the flexibility to impose tariffs on agricultural imports. It is clear that what is actually happening in this kind of scholarship is that policy proposals and supporting arguments are being borrowed from contemporary trade

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*Right to Food in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 16, at 381; and Ranjan, *supra* note 114.

169. For two excellent academic papers, see Simons, *supra* note 34, and Breining-Kaufmann, *supra* note 34. See also the important report of the OHCHR, *Globalization*, *supra* note 6.

170. *E.g.*, Orford, *supra* note 22, at 184-88; Dommen, *supra* note 21.

policy discourse and rearticulated in human rights terms. I am not suggesting that human rights commentators tend to reproduce *orthodox* opinion on these questions. In fact, the opposite is almost always the case. Human rights have come to be seen as a language for articulating counter-orthodox critique of certain kinds of prevailing trade policy consensus. But, regardless of the substantive positions taken, the point is that the discussion of trade policy matters draws on precisely the same set of arguments, in essentially the same way, as have characterized trade policy discussions for some time. Any policy proposals which are put forward in these analyses, therefore, cannot meaningfully be said to be derived from human rights norms in any direct way and, in fact, usually appear to have only an attenuated and relatively obscure connection to the human rights obligations set out at the start.

The result is that one can often be left wondering why it is necessary for these policy proposals to be framed in human rights terms.[171] There may even be positive disadvantages in doing so. First, and most simply, framing the argument in human rights terms seems merely to confuse matters and to add an extra, unnecessary layer of analysis. Would it not be better and simpler for policy-makers to engage directly with the pros and cons of policy proposals, without having these arguments mediated through the prism of human rights? Second, re-framing traditional trade policy arguments in human rights terms may unhelpfully mystify policy debates: to speak as if particular trade policy choices were somehow mandated by human rights rules risks obscuring their contestability, lending them a falsely inflated legitimacy, and stifling ongoing debate about desirable trade policy. After all, whether they are put forward by human rights actors, these proposals may be mistaken, or superseded by better or different knowledge, and ought always to be open to question. Third, there is the risk that this kind of intervention can undermine the legitimacy and effectiveness of human rights themselves, by promising more than can be delivered. Within this framework, human rights are offered as a means of determining right or wrong answers to trade policy questions by conclusively determining better or worse trade policy. The more that human rights actors try to make good this promise—that is, the more that they attempt to turn human rights principles into concrete policy proposals—then the more the trade and

171. Breining-Kaufmann alludes to a similar difficulty in her study of the trade and the right to food: "What is the motivation for a rights-based approach with respect to food? Would it not be sufficient to recognize hunger and malnutrition as a serious moral evil or violation of a basic need?" Breining-Kaufmann, *supra* note 16, at 359. Her response seems essentially to be the desirability of the strong moral and legal imperative associated with rights-based approaches.

human rights debate becomes just another debate about the optimality of particular trade policies, a subject on which human rights actors have no particularly special expertise. Within this frame, human rights actors find themselves simply playing the role of a conduit: passive recipients of technical knowledge produced elsewhere, re-articulating that knowledge in the language of human rights. As a result, the peculiar authority of human rights themselves can be dissipated as it becomes equated with the persuasiveness of the technical knowledge on which it draws and with the mastery by human rights actors of technical trade policy knowledge.

Two clarifications are needed here. First, I am not suggesting that framing trade policy arguments in human rights terms performs no beneficial function. On the contrary, in the Parts which follow, I try to spell out a number of other very important functions that it performs very usefully. My basic claim is rather that we need to be clear about what kind of work human rights is doing in this kind of analysis, and what it is not. I do not think that human rights are providing substantive guidance for policy-makers, and it seems to me counter-productive to claim that this is what is happening. Second, I also am not suggesting that human rights rules *cannot* be developed and used in a way which gives concrete direction to trade policy-makers. My claim is merely that present attempts to do that end up as not much more than a process of reflecting and re-articulating policy proposals and arguments already circulating in trade policy debates. We need to look elsewhere and think harder if we are to understand the role that human rights norms play in contemporary trade policy debates.

### *C. Human Rights as Political Technologies*

When one asks NGOs and other commentators why they use the language of human rights in their critiques of the trade regime, one of the most common responses is that human rights rhetoric can add weight to the policy arguments that they make. Even if we do not need human rights to tell us that domestic agricultural subsidies ought to be reduced, it is said, it is helpful to be able to say authoritatively that this reduction is *required by human rights law*, because it endows that claim with a degree of moral legitimacy, the force of legal obligation, and a sense that they are somehow beyond the possibility of compromise or negotiation. In Alston's words: "[C]haracterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a

degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity."[172]

In short, the deployment of human rights language is said to make policy/political claims more persuasive and ultimately more effective. Furthermore, the *legal* framework human rights provide is often said to be particularly important. There seems to be a perception that, through the trade regime, certain powerful interests have been able to entrench their trade policy preferences in binding legal form and that human rights law provides a (satisfyingly symmetrical) means of contesting that political move in kind. Human rights are not just "aspirational moral principles," they are "norms codified in international law."[173] However these arguments are framed, the fundamental point is clear: the human rights movement offers a variety of political technologies which may be used to achieve desirable trade policy outcomes; the use of human rights language makes available a variety of strategies which can be used to exert considerable political pressure.

The techniques typically used by human rights actors to achieve political outcomes can take a number of forms.[174] First, the characterization of particular aspects of trade policy as human rights issues can help to mobilize transnational human rights advocacy networks. These networks have proved to be effective mechanisms for raising public awareness, shaping public opinion, uniting disparate political actors, and generating broad-based global consensuses in favour of particular policy objectives. They can bring powerful pressures to bear on policy-makers through grassroots campaigning and direct lobbying efforts. In the context of trade policy, the TRIPS and public health campaign is an obvious example. The engagement of U.N. human rights bodies on this issue and the consequent mobilization of the human rights movement more generally, in my view, influenced the dynamic of that debate in powerful ways. Human rights institutions and actors added weight to the campaign for the modification of TRIPS commitments by lending additional legitimacy, new constituencies, and an institutional voice for those groups pressuring for change. The deployment of human rights language also helped to frame the debate in terms of justice and fairness and, through the mobilization of moral outrage, helped to

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172. Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988).

173. INT'L FED'N FOR HUMAN RIGHTS, UNDERSTANDING GLOBAL TRADE AND HUMAN RIGHTS 3 (2005), *available at* http://www.fidh.org/IMG/pdf/wto423a.pdf.

174. These and other techniques have been explained in studies of the role of the human rights regime in other substantive policy areas. *See, e.g.*, POWER OF HUMAN RIGHTS, *supra* note 48; Goodman & Jinks, *supra* note 39.

generate a widespread sense that the TRIPS agreement in its current form could not be justified. Experience with this campaign has had the result that many human rights actors in the field of international trade now see their primary role as working closely with activist or lobby groups, particularly those with a developing country focus, demonstrating to them how human rights language and human rights law might be strategically deployed to help them achieve their policy agenda. Similarly, others work hard to get particular trade policy projects on the agenda of human rights institutions and use any resulting resolutions or reports as a tool in ongoing advocacy and lobbying efforts.[175]

Second, as Helfer has noted, the human rights regime can provide an institutional space for the development of norms about trade policy which are different from, and contrary to, those circulating within the trade regime.[176] Soft law instruments and declarations produced by consensus within a human rights framework can then feed back into the trade regime, as other countries seek to use such norms as a lever in trade negotiations, exploiting the "civilising force of hypocrisy" to extract concessions in the domain of trade politics.[177] A submission to the World Trade Organization Committee on Agriculture by a number of developing countries, in the context of a review of how the AoA might address "non-trade" concerns, provides an interesting example of this process.[178] In this submission, these developing countries referred explicitly to the Universal Declaration of Human Rights and to the work of the CESCR on the right to food in support of their proposals for reform to the AoA.[179] While it is hard to say how effective this strategy might be in any particular context, a number of commentators have drawn attention to this example as illustrative of the general potential of such strategies.[180] Third, the elaboration of international human rights law relating to trade policy may provide an impetus for the use of domestic human rights enforcement mechanisms to influence governments' trade policy positions. The most obvious example comes from South Africa, where proceedings were initiated on the basis of the constitutional right

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175. *See* INT'L FED'N FOR HUMAN RIGHTS, *supra* note 173; 3D: Trade, Human Rights, Equitable Econ., About Us, http://www.3Dthree.org/en/page.php?IDpage26 (last visited Feb. 13, 2007).

176. *See* Helfer, *Regime Shifting*, *supra* note 21, at 58; Helfer, *Interactions*, *supra* note 21, at 184.

177. DELIBERATIVE DEMOCRACY 12 (Jon Elster ed., 1998).

178. WTO Comm. on Agric., *Note on Non-Trade Concerns*, G/AG/NG/W/36/Rev.1 (Nov. 9, 2000).

179. *Id.* ¶¶ 2, 20.

180. *E.g.*, Breining-Kaufmann, *supra* note 34, at 349.

to health, in respect of health policies closely related to the TRIPS and public health campaign.[181]

Fourth, international human rights treaty-monitoring bodies may help to generate pressure for policy change in a variety of ways.[182] CESCR, for example, routinely examines certain aspects of countries' trade policies for their consistency with human rights norms.[183] In a recent country review of Ecuador, the CESCR heard submissions from NGOs concerned about the potential impact of the Free Trade Area of Americas agreement and the United States-Andean free trade agreements negotiations on access to medicines in Ecuador and expressed concern to the Ecuadorean representative.[184] It is true that such review processes are of varying effectiveness in achieving real policy change and rely on softer processes of awareness-raising, persuasion, and normative socialization to work. But while a degree of scepticism is useful, at the same time we should not write off these processes too quickly as ineffective. There is evidence that the Ecuadorean representative in question at least forcefully transmitted CESCR's concern to those government departments involved in trade negotiations and began a process of involving human rights norms in the crafting of negotiating positions.[185] It has been suggested that such processes are more effective in the case of smaller countries, simply because the same official represents the country in both the trade and human rights regimes.

This strategic deployment of human rights language and human rights mechanisms can be critiqued on a number of grounds. Some critique it on the basis of the desirability of the policy proposals advocated. I have previously said that the substantive merits of human rights claims are beyond the scope of this Article, so I cannot engage in detail with these arguments here. Suffice to say, while it is true that the policy agenda advanced under the banner of human rights may in

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181. Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC) (S. Afr.); *see* Abbott, *Rule of Reason*, *supra* note 21, at 294.

182. For a useful description of a variety of these means in the context of a discussion of human rights involved in debates about intellectual property, see Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property* 21 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 06-03 (n.d.)), *available at* http://ssrn.com/abstract=891303.

183. *Id.* at 11.

184. *See* ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, ¶ 55, U.N. Doc. E/C.12/1/Add.100 (June 7, 2004); 3D: TRADE, HUMAN RIGHTS, EQUITABLE ECON., TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS, ACCESS TO MEDICINES AND THE RIGHT TO HEALTH—ECUADOR (2004), http://www.citizen.org/documents/3D_IP_Ecuador_AFTA.pdf.

185. Interview with NGO Representative (June 2006).

principle be mistaken, counter-productive, or covertly deployed for the benefit of the powerful, it is also true that, so far, most aspects of this policy agenda—amendment of the TRIPS agreement, the reduction of domestic agricultural support, and further special and differential treatment for developing countries—have enjoyed broad-based public support. Others critique this framework on the basis of its effectiveness. There are numerous commentators who are sceptical of the ability of the soft mechanisms of the human rights regime to achieve real political change. In relation to the TRIPS and public health campaign, for example, Picciotto suggests,

> Although the political impact of the campaign has been very important, especially due to the global awareness of the AIDS issue, it is doubtful that the invocation of human rights discourses has had more than a marginal effect. The same can be said of the global campaign that resulted in the compromise in the Doha Ministerial Declaration on the TRIPS Agreement and Public Health and its subsequent implementation by WTO Council Decisions.[186]

Even if one concedes the effectiveness of human rights mechanisms in other fields of policy and politics, there may be reason to doubt their practical utility in respect to international economic matters. Human rights institutions are still in the process of building up their authority and legitimacy in relation to these matters and arguably are not yet in a position to speak as persuasively on international economic matters as they are in other fields. Furthermore, the human rights movement is also still building the necessary links with policy-makers to make direct lobbying efforts practically effective. At the same time, one ought not to draw conclusions too quickly; ultimately, it is an empirical question what practical effect the human rights movement may have on the political dynamics of trade policy in the long term, and one which it is difficult to predict in advance.

My primary concern about this model is somewhat different. It is that in this model, the human rights movement still is given no role in *policy* debates—that is, in generating new ideas about desirable and appropriate trade policy or alternative visions of the international trading system. That is to say, in this model, the human rights movement does not engage in the domain of policy ideas and policy knowledge. It is still figured as a passive recipient of policy knowledge and is seen as being

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186. Sol Picciotto, The WTO as a Node of Global Governance: Economic Regulation and Human Rights Discourses 13 (unpublished manuscript presented at the Conference on Human Rights and Global Justice at the University of Warwick, Mar. 29-31, 2006), *available at* http://eprints.lancs.ac.uk/152/).

deployed in the service of a policy agenda still defined in the context of traditional trade policy debates. Trade policy elites, deploying traditional conceptual frameworks, still play the role of gatekeepers of policy ideas, monopolizing the production, evaluation, and authorization of acceptable policy proposals. Thus, the human rights movement can be effective in achieving positive change only where the problem is not a lack of imagination, but rather political will. It may be a useful tool, that is to say, where we *know* what policy ought to be pursued, but where mobilizing constituencies in favour of it and overcoming political obstacles to change is difficult. The human rights movement can do nothing, however, to remedy those flaws in the international trading order which arise *as a consequence of prevailing policy knowledge*, or rather as a consequence of its flaws, blind spots, and other inadequacies. The influence of human rights actors is most likely to be strong where they are advocating policies consistent with the prevailing technical knowledge, and necessarily weaker and less convincing where they choose to advocate policies supported only by unorthodox or non-mainstream experts. Put another way, to the extent that the international trading system is already structured and informed by orthodox knowledge—and in my view this is a very significant extent—the human rights movement has, in this model, no critical or transformative power at all.

### *D. Human Rights as a Trigger for Social Learning*

Let me turn to confront this problem directly. I have said that the human rights movement must engage in the domain of knowledge, because transformative change to the international trading order cannot easily occur without the production of new thinking about the kinds of trade policies which are desirable and legitimate and the kinds of governance structures through which political power is constituted and exercised in the trading order. I have suggested that none of the three models considered in the previous Part provide any solid basis for thinking about how the human rights movement may be involved in that production. While it is common to speak as if human rights norms may provide the substance of an alternative vision for the international trading order, in my view that promise is illusory. Furthermore, the discourse of fragmentation and coherence, propagated in part within the trade and human rights debate, may actually make such new thinking *more* difficult, by reinforcing prevailing views and entrenching the hold of traditional experts over them. Does this mean, in the end, the human rights movement has only a marginal role to play in the ongoing

evolution of the trading system? The answer is still not clear, but I think not, and in this Part my aim is to sketch, in preliminary form, a fourth model for the engagement of the human rights movement in trade policy debates to explain why. Put most simply, the claim I make is that the human rights movement can *facilitate* the production of new forms of policy knowledge about the trading system. Even if human rights are not in themselves a source of new policy ideas, human rights interventions into trade policy debates perform the crucial function of providing a trigger for policy learning and helping to create the conditions in which learning is more likely. That is to say, the engagement of human rights voices and actors in trade debates acts as an impetus for the evolution of ideas about what is rational and desirable trade policy.

The kind of policy learning that I have in mind can take a number of different forms and occur in a number of different ways.[187] First, it may involve a change in the nature of causal beliefs held by policy-makers.[188] Contemporary ideas about desirable trade policy rest on particular understandings about the economic dynamics of the trading system: the impact of trade flows on allocative and dynamic efficiency; the relationship between factor endowments and patterns of international trade; the causal determinants of the changing size, composition, and direction of trade flows; and so on. They also rest on another set of causal understandings about the political dynamics of the trade system, such as the belief that the dynamics of domestic trade politics predispose governments towards protectionism or the belief that retaliation is the likely result of a unilateral decision to raise trade barriers. One form of learning, then, consists of a modification or refinement of this kind of causal belief. Second, learning may involve changes to policy beliefs, that is, ideas about the kinds of policies which ought to be pursued in light of our best understanding of the causal dynamics of the trading system.[189] These can themselves be broken down into a number of levels. At the lowest level, there can be an evolution in prevailing ideas about the best technical means of achieving policy goals. In the context of the WTO, this may involve changing ideas about what bargaining position to take within multilateral trade negotiations. At the national level, it may involve fine-tuning ideas about which sectors to liberalise, in what order, and what kinds of flanking policies are needed to make a program of liberalisation successful. At a somewhat deeper level, learning can

187. *See generally* Jack S. Levy, *Learning and Foreign Policy: Sweeping a Conceptual Minefield*, 48 INT'L ORG. 279 (1994).

188. *See id.* at 285.

189. *Id.* at 286.

involve a change to "strategic policy beliefs."[190] In the international context, prevailing strategic beliefs may include the belief that liberalisation is most effectively achieved through the exchange of reciprocal trade concessions, the belief that questions related to the distributive and equity effects of the international trading system ought to be addressed at the national level, or the belief that the international trade regime ought ideally to strive for universality in its membership and coverage. Finally, at the deepest level, learning can involve a change in nature of the overarching goals toward which trade policy-making is directed (or the relative weight given to different goals). I noted above some of the different goals which have informed the operation of the post-war trading system at different periods in its history.[191]

Policy learning, at any level, is not an automatic or natural process. Certain conditions and policy-making environments are conducive to learning, while others are not; certain organizations are better at learning than others.[192] Without more detailed study, it is hard to speak in general terms about the extent to which the international trade regime helps to generate a policy-making environment which is conducive to learning. Certainly it is not hard to point to at least one or two periods in the history of the post-war order in which policy learning of a profound kind appears to have occurred.[193] At the same time, it is also possible to point to a number of features of the trade regime which inhibit learning, and it is these obstacles which the activity of the human rights movement helps to overcome.

First, and most simply, the work of a variety of organizational theorists reminds us of the importance of feedback loops in the facilitation of organizational learning.[194] Causal and policy beliefs change through response to environmental stimuli—in other words, through the process of continuously monitoring the outcomes of policy choices and by systematically incorporating the lessons learnt into

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190. This term is taken from Philip E. Tetlock, *In Search of an Elusive Concept*, *in* LEARNING IN U.S. AND SOVIET FOREIGN POLICY (George W. Breslauer & Philip E. Tetlock eds., 1991).

191. *See supra* note 137 and accompanying text.

192. For some of the conditions which make some organizations better learners than others, see Bo Hedberg, *How Organizations Learn and Unlearn*, *in* HANDBOOK OF ORGANIZATIONAL DESIGN 3, 3-23 (Paul C. Nystrom & William H. Starbuck eds., 1981), and see generally CHRIS ARGYRIS & DONALD A. SCHÖN, ORGANIZATIONAL LEARNING II: THEORY, METHOD AND PRACTICE (1996); and Barbara Levitt & James G. March, *Organizational Learning*, 14 ANN. REV. SOC. 319 (1988).

193. The period from the beginning of the Tokyo Round through the Uruguay Round, until the creation of WTO, is the clearest example.

194. *See generally* Hedberg, *supra* note 192.

processes of policy formation and re-formation. The international trade regime, however, has always lacked a systematic, institutionalized system of monitoring the impact of decisions taken within it and feeding back lessons learnt into new decision-making processes. It is true that the committee system established with the WTO in 1995 to some degree began to reflexively monitor the activity of the WTO. However, these monitoring activities are focussed primarily on questions of compliance and implementation, rather than on reflexively evaluating the effects and outcomes of the WTO agreements themselves.[195] By contrast, over the past decade or so, human rights actors—and indeed transnational civil society networks more generally—have helped to perform precisely this function. A very large proportion of the work undertaken by human rights actors consists of collecting and collating information on the outcomes produced by the international trading system, formulating it into a relatively coherent and systematic body of knowledge, and repeatedly bringing it to the attention of trade policy-making elites. In doing so, they have helped to provide the impetus for learning by these policy-makers—that is, for a re-thinking of beliefs which these policy-makers hold concerning how the trading system operates and what the outcomes of their interventions are likely to be.

Of course, there are certainly ways in which human rights might more effectively be used to perform this function. The High Commissioner has very strongly advocated integrating a human-rights based feedback function more closely into trade policy-making processes at both the national and international level.[196] The High Commissioner suggests the need for "a constant examination of trade law and policy," arguing that "[a]ssessing the potential and real impact of trade policy and law . . . is perhaps the principal means of avoiding the implementation of any retrogressive measure."[197] The High Commissioner therefore repeatedly calls for systematic "human rights impact assessments" both before and after decision are made.[198] Taking up this challenge, a number of preliminary attempts have been made to set out methodologies for carrying out such assessments.[199] In my view, this work represents a

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195. Bernard Hoekman, *Making the WTO More Supportive of Development*, FIN. & DEV., Mar. 2005, at 14.

196. *Liberalization*, *supra* note 7, ¶ 12.

197. *Id.*

198. *See supra* note 128 and accompanying text.

199. *See, e.g.*, HUMANIST COMM. ON HUMAN RIGHTS, MATCHING PRACTICE WITH PRINCIPLES—HUMAN RIGHTS IMPACT ASSESSMENT: EU OPPORTUNITIES (2002), *available at* http://www.hom.nl/publicaties/Matching_practice_with_principles.pdf; MARIKE RADSTAAKE & JAN DE VRIES, "REINVIGORATING HUMAN RIGHTS IN THE BARCELONA PROCESS": USING HUMAN

valuable attempt to use human rights to drive policy learning in more effective ways—that is, to use human rights law to institutionalize and routinise practices of monitoring and feedback within trade policy-making processes.

Second, the human rights movement can help initiate reflection on the broader goals and values which the trading system is designed to achieve, and the responsibilities which trade policy-makers see themselves as bearing. Commentators such as Barnett and Finnemore have noted that there can be a tendency in international organizations for the broader goals associated with an institutional project to fade from view over time and for institutional actors to focus on institutionalized rules, routines, practices, and procedures in themselves and for their own sake.[200] The result can be a lack of any critical reflection on those original goals and the broader project which gives the institution its direction to determine whether they need to be updated as circumstances change. There are certainly indications of this dynamic in the context of the trade regime. It is reflected not only in the relative lack of discussion of the issue, but also in the fact that, to the extent that the purpose of the trading system *is* discussed, commentators generally settle for thin and stylized versions, such as the liberalisation of international trade or the reduction of trade barriers, which say nothing meaningful about the social purpose of the regime. Again, it is clear that the human rights movement has at least the potential to counter-act these tendencies and to help create an environment in which reflection on the trade policy goals is facilitated and encouraged. One of the most obvious characteristics of human rights interventions into trade debates is their preoccupation with the ultimate ends to which the international trading system is directed and, in particular, the claim that trade liberalisation ought not be pursued as if it were "an end in itself." While I have made it clear that I do not think human rights in themselves necessarily provide a vision of the most appropriate ends towards which the trade regime ought to be striving,[201]

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RIGHTS IMPACT ASSESSMENT TO ENHANCE MAINSTREAMING OF HUMAN RIGHTS (2004), *available at* http://www.hom.nl/publicaties/Morocco_paper_and_bibliography.pdf; Simon Walker, *Human Rights Impact Assessments of Trade-Related Policies*, *in* SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW 217 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

200. BARNETT & FINNEMORE, *supra* note 111, ch. 2.

201. A contrary point of view has been put forward by the OHCHR. *Human Rights, Trade and Investment*, *supra* note 8, ¶ 57. A subtler and perhaps more compelling variant of the same argument has been put forward by Abbott. In the context of a discussion of the relationship between human rights and competition law, he has argued that systems of competition law typically have at least three different basic objectives (consumer protection, protection of democracy, and protecting the integrity of the market) and that the emphasis given to each objectives changes across systems and over time. He suggests that integrating human rights law

human right actors have nevertheless been instrumental in generating something of a renewed critical debate about the social purposes of the international trading system. By forcing the trade regime to justify its activities and policies according to ethical criteria, it has helped to prompt reflexive questioning of both the means and ends of trade policy, thereby facilitating policy learning at the deepest level.

Third, and perhaps most important, human rights networks can help to overcome *cognitive* obstacles to trade policy learning.[202] Institutionalized processes of monitoring environmental feedback and encouraging critical reflection are not always sufficient to generate learning. The production of new knowledge can still be impeded by the cognitive frameworks which trade policy-makers use to make sense of the world and to draw lessons from past experience. These epistemological frameworks can be deeply embedded and highly resistant to change. Even when faced with unexpected and seriously adverse policy outcomes, it has been shown that decision-makers often tend to draw lessons which reinforce their pre-existing beliefs.[203] Institutions and organizations which are designed and rationalized on the basis of particular ways of seeing the world also tend to perpetuate and entrench such worldviews and can impede vital cognitive change. For example, many of the "strategic policy beliefs" mentioned earlier—that liberalisation is best conducted reciprocally and progressively, or that the distributive outcomes of international trade ought not to be the business of the trade regime—are deeply engrained in the architecture of the trade regime. They are sustained, disseminated, and given a commonsense character through institutional practices and procedures; routines and habits; histories and narratives; and a variety of discursive and institutional processes at work within the trade regime. The institutional features of the trade regime, in other words, do not simply guide participants' behaviour, but also teach them a particular way of understanding the trading system and how political power ought to be deployed within it.

The human rights movement can help to overcome these obstacles by providing an alternative environment for the generation and dissemination of knowledge about the trading system, which is not

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with competition law may mean a greater emphasis on its consumer protection function. Abbott, *Rule of Reason*, *supra* note 21, at 289. Whether or not we agree with the specifics of his analysis (and it has much to commend), his general point that human rights may work more indirectly by subtly reshaping constitutive ideas about the fundamental purposes of a regulatory system is a strong one, and one which may well have application in relation to trade law.

202. Hedberg, *supra* note 192.

203. ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS (1976).

subject to the same cognitive constraints. To take a simple example, I said above that our knowledge of the impacts of international trade has traditionally tended to focus on a limited set of questions, such as the impact of trade on growth, resource allocation, industrial competitiveness, or relative factor returns. Since this kind of knowledge is relatively well-understood, authoritative, developed, and familiar, these factors tend to figure prominently in decisions about what kind of trade policy to pursue and are prominent features in the policy evaluations which occur in and around international trade negotiations. In human rights discourse, however, different preoccupations tend to be given prominence. For example, the human rights movement tends focus on the impact of trade policy on access to food, the livelihoods of the rural poor, women and other vulnerable groups, and health. As the High Commissioner has observed, "a human rights approach [tends to examine] trade law and policy [differently], focusing not only on economic growth, markets or economic development but also on health systems, education, water supply, food security, labour, political processes, and so on."[204] Human rights, therefore, offers the possibility of influencing trade policy by reshaping the kinds of knowledge on which policy choices are based.

How might this work in practice? The International Federation for Human Rights has suggested that human rights actors "undertake empirical studies & evaluations" of the impact of trade liberalisation on factors and indicators of particular relevance to their work.[205] This may mean that such actors generate original research and new data based on the experience of "advocates working on the ground."[206] More commonly, however, it will involve collecting and collating available data, "collaborat[ing] with partners engaged in data analysis," and exploring ways of integrating their work with other actors involved in knowledge production and dissemination.[207] In this model, the human rights movement helps to re-shape the kind of knowledge which is produced about the trading system by engaging in collaborative work with traditional knowledge producers, asking new questions of these experts, providing a pre-existing network for the dissemination and circulation of new findings, as well as offering an institutional space in which new knowledge can be brought to the attention of policy-makers at the international level. For example, human rights actors have been at

204. *Liberalization*, *supra* note 7, ¶ 7.
205. INT'L FED'N FOR HUMAN RIGHTS, *supra* note 173, at 14.
206. *Id.*
207. *Id.*

the forefront of collaborative efforts to produce new data on the impact of international trade policies on women and gender equality.[208] This work has in turn helped to generate interest in the subject in more traditional venues of knowledge production, such as universities and think-tanks,[209] and thereby to re-define the domain of relevant knowledge which is deployed in trade policy debates. In this way, human rights actors are arguably helping to generate practices through which such knowledge is routinely taken into account in the kinds of strategic calculations which governments use to determine their trade policy interests.

Though it is rarely made explicit, in my view the human rights movement is therefore very much in the game of knowledge production. When human rights actors produce their numerous commentaries on the human rights impact of the trading system, one of the most important functions they are performing is facilitating the production of social knowledge: generating shared narratives; synthesizing some kind of consensus about how certain aspects of the trading system operate; and selecting, reframing, and imparting new meaning to information produced by various kinds of trade policy experts. The knowledge thereby produced can, of course, influence policy-makers directly, helping them to reformulate their strategies and explicit policy preferences. Just as important, however, is the destabilizing role it plays in respect of traditional trade debates. It facilitates the reconsideration and renewal of such debates by highlighting their inevitable cognitive limitations and by demonstrating that traditional trade experts have no monopoly on the truths which can be told about the trading system. As Jacobsen has noted in a different context, it is precisely the "public clashes" among different communities and different regimes of truth that can often "yield the most valuable and self-critical input into policy decisions."[210] It is, in my view, one of the most productive functions that the human rights movement has so far performed in trade policy debates, and one which, if made more explicit, may usefully guide their future interventions.

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208. KIMBERLY LEHMKUHL, 3D: TRADE, HUMAN RIGHTS, EQUITABLE ECON., NIGER: AGRICULTURAL TRADE LIBERALIZATION AND WOMEN'S RIGHTS (2006), *available at* http://www.3Dthree.org/pdf_3D/3DCEDAWNigerAg.pdf.

209. An interesting recent example is T. Paul Schultz, *Does the Liberalization of Trade Advance Gender Equality in Schooling and Health* (Yale Univ. Econ. Growth Center, Discussion Paper No. 935, 2006), *available at* http://www.ecov.yale.edu/growth_pdf/cdp935.pdf.

210. John Kurt Jacobsen, *Much Ado about Ideas: The Cognitive Factor in Economic Policy*, 47 WORLD POL. 283, 303 (1995).

Recognizing and making explicit this conception of the function of human rights has implications for the kind of activities that human rights actors engage in, as well as for the kind of scholarship which is produced in the context of the trade and human rights debate. Instead of focussing attention on elaborating more detailed human rights norms, on spelling out their apparent implications for particular trade policy questions, and on constructing an entire international legal system to complement and counter-act WTO law on the international level, human rights actors may prefer to focus on performing effectively as a knowledge network. Precisely what this looks like will naturally be worked out over time, but it may involve highlighting and paying closer attention to those questions to which trade policy experts traditionally do not address themselves, providing an impetus for the production of knowledge on those questions and creating a space in which such knowledge will be heard. It may involve providing social and institutional mechanisms for the distribution and exchange of such information, helping to transform it from mere information into the kind of processed and, crucially, *shared* knowledge about the trading system which informs policy-making on an ongoing basis. It may also involve more explicit and directed mechanisms for bringing such knowledge to the attention of relevant policy-makers.

### *E Challenging Technical Rationality*

There is a fifth and final model about what human rights brings to trade policy debates that is worth outlining briefly. I drew a distinction at the beginning of this Part between primary trade policy ideas (beliefs about what kinds of trade policy are best) and secondary trade policy ideas (beliefs about *how to judge* what kinds of trade policy are best). I suggested that at the level of secondary ideas, trade policy-making is deeply structured by beliefs that trade policy is a specialized technical field and that the determination of the best trade policy is best left to trained experts. Arguably, however, contemporary controversies about the international trade regime are in part the result of a widespread loss of faith in technical expertise. We are less sure than we have ever been of the ability of experts to fully, or even adequately, understand the world and are less convinced than we have ever been of the rationality and desirability of their policy prescriptions. The engagement of human rights into trade policy debates is arguably both an effect and a driver of this decline of faith in expertise (and all that that word implies). It is an effect in the sense that it is part of a more general search for new actors and new languages to augment trade policy debates. It is a cause in the sense that human rights discourse provides us with a *different* set of ideas

about "how to judge what kinds of trade policy are best"—specifically, a set of ideas which prominently includes notions of procedural fairness and distributive justice. Human rights, on this view, offer the possibility of transforming the governance of trade by prompting us to re-think the normative framework which tells us what represents an authoritative and legitimate intervention into questions of trade policy.

To a significant degree, we are accustomed to judging trade policy by how closely it conforms to substantive policy prescriptions established in the relevant economic literature. But human rights actors have been prominent among those making the claim that we ought not to judge trade policy (and the trade regime) solely by its substantive rationality, but also by its *procedural* rationality.[211] The OHCHR, for example, sees an urgent need to increase the breadth and depth of public participation in trade policy-making processes, including in the WTO itself.[212] This may involve giving civil society actors "direct access to WTO meetings and decision-making processes," potentially developing "mechanisms of redress" for individuals affected by decisions taken in the international trade regime, or being more willing to take the content of amicus curiae briefs into account in dispute settlement as "a means of strengthening civil society's participation in the multilateral trading system."[213] Moreover, the High Commissioner argues, international institutions such as the WTO must see it as part of their mission to encourage participation in policy-making at the national level.[214] Recent calls for WTO dispute settlement panels to concentrate on procedural review of national trade policy measures reflect a similar turn.[215] The High Commissioner has also emphasized the need for transparency in the WTO, "so that the outcomes of . . . negotiation processes . . . are open to

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211. *See Analytical Study, Non-Discrimination*, *supra* note 9; Jeffrey Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451 (2001); Steve Charnovitz, *The WTO and Cosmopolitics*, 7 J. INT'L ECON. L. 675 (2004); Robert Howse, *How to Begin To Think About the 'Democratic Deficit' at the WTO*, *in* INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 79 (Stefan Griller ed., 2003) (critiquing procedure in the WTO); Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003) (same).

212. *Analytical Study, Participation*, *supra* note 10, ¶ 23.

213. *Id.* ¶¶ 42-43.

214. *Id.* ¶ 22.

215. In the context of discussion of the SPS Agreement, see, for example, David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L.J. 817, 855-57 (1994). *See generally* OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT (2004); Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EUR. J. INT'L L. 307 (2004); David Winickoff et al., *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 YALE J. INT'L L. 81, 109 (2005).

public scrutiny."[216] The point here is that human rights norms are being deployed to challenge our ideas about how trade policy proposals ought to be judged and by whom. Within this human rights framework, what matters is not so much whether international trade policies are right or wrong, according to certain technical criteria, but rather who made them and how. Human rights are, in other words, helping to reconstitute our ideas of what is a valuable and worthwhile contribution to trade policy-making processes and who is in a position to provide such a contribution.

Human rights discourse also focuses our attention on questions of distributive justice. Bureaucratic international organizations, particularly those like the WTO, which rely heavily on technical expertise as an important source of their legitimacy, tend to structure their activity so that questions of distributive justice appear irrelevant to their tasks. This is because their continuing authority depends crucially on an appearance of a political neutrality.[217] One implication has been that explicit evaluation of trade policy from the perspective of distributive justice concerns has been discouraged; notions of fairness have therefore played a relatively minor role in shaping the activity and operation of the international trade regime.[218] Human rights discourse can help to counter-act this trend. Human rights have over the last decade or so provided a language and an institutional space in which concerns about justice and the fairness of the international trading order have been articulated and brought to the forefront of our attention. Human rights actors have drawn attention in particular to what they call the unfair treatment of developing countries in the trade regime: the stricter level of obligations imposed in practice on developing countries, the disproportionately small share of the benefits of international trade that they receive, and the difficulties they face in implementing their obligations (and in convincing developed countries to fulfil theirs).

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216. *Liberalization*, *supra* note 7, ¶ 12.

217. Barnett & Finnemore, *supra* note 48.

218. I should not be misunderstood as suggesting that questions of fairness and justice are entirely new to the trade regime, nor that they can fully supplant norms of technical rationality. A variety of normative frameworks are almost always in play in all fields of policy, co-existing and often interacting, in complex ways. This is just as true of international trade as any other area. For example, although a variety of different explanations exist for the centrality of the most-favoured-nation principle in the GATT/WTO system, the best is that it is the expression of shared beliefs about what constitutes a 'fair' global trading system. Amrita Narlikar, *Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO*, 29 WORLD ECON. 1005 (2006). Similarly, analyses of the processes by which part IV of the GATT 1947—as well as the variety of special and differential treatment provisions of that agreement pre-1994—suggest that these provisions are best understood as the result of a temporary consensus that developing countries ought in fairness to be give special treatment. ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987).

Human rights actors have also been instrumental in developing and disseminating knowledge about the distributive impact of international trade within countries. In the present context, the importance of this work is that it has helped to generate a consensus that we ought to judge the international trading order primarily by its *fairness* (not solely its rationality) and that desirable trade policy is above all *just* trade policy. This consensus, in turn, has contributed to a change in trade policy debates, so that we have begun once more to discuss and debate what fairness means in international economic relations,[219] what different forms fairness may take, how a more equitable international economic order might realistically be achieved.

## IV. CONCLUSION

This Article began with a conviction that the time had come for a critical appraisal of the foundation, shape, and direction of the present trade and human rights literature. It will be clear by now that the purpose of this exercise is intended to be constructive. While there is no doubt that engagement between trade and human rights scholars is to be desired, and similarly no doubt that the trade and human rights literature has to date produced some important and highly productive work, there are in my view still some significant gaps and flaws in the assumptions and modes of argumentation characteristic of the contemporary debate. The critiques I make are intended to help put that literature on a surer conceptual footing going forward, to facilitate a more sustained, direct, and productive engagement between trade and human rights institutions, languages, scholars, and communities.

Although my argument is divided into two distinct halves, both stem from my interest in the way that international law and international regimes shape the way we *think*. The first half of my argument is that insufficient attention is paid to the ways in which the trade regime shapes the way trade policy-makers think (and therefore act). We almost exclusively think of the trade regime in one-dimensional terms, as a set of formally binding rules constraining the behaviour of its Members. In the trade and human rights literature, this translates into a preoccupation with the ways in which trade law constrains the ability of governments to pursue human rights policies and fulfil their human rights obligations. Criticism and proposals for change therefore focus on getting the rules right and on

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219. *See generally* Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT'L ECON. L. 391 (1998); Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975 (2000).

removing excessive constraints and opening up sufficient policy space for WTO Members. But the trade regime is much more than a set of binding rules. It is a social environment in which ideas about the best and most appropriate trade policies are generated, legitimated, and disseminated. It is a cognitive environment in which states are taught how to interpret the international economic order and how to calculate their interests in it. It is also an institutional environment which re-shapes the mix of actors involved in trade policy-making and the avenues of influence available to them. The reason that recognizing these different functions of the trade regime is important is because they, too, affect human rights; the critical eye of human rights scholars should therefore be trained on them. It is also important because they represent some of the most significant mechanisms by which the trade regime might be engaged in re-building a different and better international economic order. They represent the means by which the trade regime can help us to re-think our ideas about what constitutes a desirable international trading order and help us to imagine a new future for it.

The second half of my argument is that insufficient attention is paid to the ways in which the *human rights* movement can help re-shape the way trade policy-makers think (and therefore act). When human rights actors attempt to engage in debates about what trade policy ought to be, they run up against very powerful beliefs that they do not have the expertise to speak authoritatively on these matters, at least not in their capacity as human rights experts. Sometimes, the result is that human rights actors act primarily as passive recipients of trade policy knowledge, so that the trade agenda of the human rights movement becomes essentially a rearticulation of proposals and arguments already in circulation. At other times, the debate is recast as a confrontation between two different types of expertise, responding to two different kinds of social demands—trade liberalisation and the protection of human rights. I have suggested that, for all the avenues they open, these two responses ultimately lead the debate away from the most important issues. However, I also suggested that human rights actors *are* involved in generating new thinking about desirable trade policy, even if not in any simple or direct way. The human rights movement has helped to facilitate policy learning by helping to create an environment in which such new thinking is made more likely. And it has helped to re-shape prevailing knowledge about desirable and rational trade policy by modifying the conditions in which such knowledge is produced. I suggested that there is nevertheless scope for human rights actors to re-

focus and target their interventions so as to perform these functions more effectively.