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**From 'tension' to 'justice à venir'**  
**Reararticulating the Relationship between International Human Rights**  
**Law and International Trade Law towards More Just Outcomes**

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## From ‘tension’ to ‘justice à venir’

### Rarticulating the relationship between international human rights law and international trade law towards more just outcomes

#### Abstract

This article proposes that the characterisation of the relationship between international trade law and international human rights law as one of tension or incoherence limits the conceptualisation of justice permissible within international trade law, locates international human rights law as trade law’s ‘other’ and masks a deeper problematique within both bodies of international law. Drawing from Derrida’s concept of ‘justice à venir’ to recognise the inherent ‘promise of justice’ quality of law, and from post-colonial and critical philosophical analyses of international law to identify some foundational conceptual and normative biases inherent to both bodies of law, this article proposes that greater attention to the tensions *within* international trade law may lead to an enhanced recognition and re-envisioning of the justice potential of international trade law.

#### Keywords

International trade law; international human rights law; justice; neoliberalism; colonialism; deviationist doctrine.

#### Introduction

The relationship between international human rights law and international trade law<sup>1</sup> has come under closer scrutiny in recent years.<sup>2</sup> One narrative of this relationship seeks to promote greater ‘coherence’ between both bodies of law in response to the so-called tension between them,<sup>3</sup> arising largely from the perceived unsatisfactory approach of international trade law to addressing the negative risks and impacts to human rights of trade liberalisation. In this story, each body of law is presented as functionally different and doctrinally distinct for reasons ranging from history to orientation,<sup>4</sup> and with international human rights law often positioned as international trade

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<sup>1</sup> International trade law is understood here to refer to the World Trade Organisation Agreement and its covered agreements. International human rights law is understood to refer to the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the core human rights treaties. It also includes the core labour standards contained in the ILO Declaration of Fundamental Principles and Rights at Work. The issue of trade sanctions for human rights purposes will not be dealt with here.

<sup>2</sup> See for example contributions in T Cottier, J Pauwelyn & E Burgi, eds, *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) and FM Abbott, C Breining-Kauffmann & T Cottier, eds, *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor, Michigan: University of Michigan Press, 2006).

<sup>3</sup> See for example Christopher McCrudden and Anne Davies, ‘A Perspective on Trade and Labor Rights’ (2000) 3 *JIEL* (1) 43-62.

<sup>4</sup> On the former, Trebilcock et al highlight how the legal, institutional and policy cultures of both bodies of law have ‘developed in isolation from one another’ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Oxon: Routledge, 2013) at 747. On the latter, Joseph writes ‘[U]nderlying economic theory of

law's 'other'. As a consequence, remedies proposed have largely focused on changes to the response from international trade law including use of human rights treaties as a defence in World Trade Organisation (WTO) proceedings,<sup>5</sup> the interpretation of WTO norms in light of relevant human rights norms,<sup>6</sup> and various approaches to the 'reconciliation' or linkage of both, including calls for the 'constitutionalisation' of trade and human rights.<sup>7</sup>

Though this 'trade and/vs ... human rights' approach has much merit,<sup>8</sup> this paper takes the view that constructing the debate thus has a number of limitations. It can direct consideration of the justice and human rights dimensions of trade to only that which is already constituted and prevalent within international human rights law. It may enable evasion from closer scrutiny, the response of international human rights law itself to the negative human rights effects of trade liberalisation. It can hinder the identification of opportunities and sites for progressive engagement of law at different levels of law, and from bodies and levels of law beyond human rights law, a strategy necessary in light of the challenges arising from globalisation.<sup>9</sup>

This paper argues for a reinvigoration of the 'trade law and human rights law' debate that moves beyond consideration of the relationship of each body of law to the other. It begins with a brief overview of the 'tension narrative' of the relationship between international trade law and international human rights law. Drawing from post-colonial and philosophical critiques of international law, it highlights a deeper difficulty within international trade law and international human rights law in relation to the approach of both to addressing the negative risks and impacts to human rights of trade liberalisation, concluding that international law itself contains a systemic bias in favour of a certain type of rights, which is masked by the language of universality. It proposes that by adopting an analytical approach inspired by Jacques Derrida's recognition of the inherent justice quality of law, allied to doctrinal development drawn from Roberto Unger's 'deviationist doctrine',<sup>10</sup> core concepts of international trade law can be revisited and reconceptualised in order to address and enhance trade law's potential for justice, from *within* that body of law. It concludes by speculating that such an approach draws attention to previously overlooked doctrinal potential of legal concepts within existing international trade rules

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trade sees economic and social rights as a 'trade off' against aggregate economic growth and places responsibility for responding to this firmly with WTO member states, not with international trade rules.' Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) at 42.

<sup>5</sup> Joost Pauwelyn, "Human Rights in World Trade Organisation Dispute Settlement" in Cottier et al., *supra* note 2 at 205. G. Marceau, "WTO Dispute Settlement and Human Rights" (2002) EJIL 753.

<sup>6</sup> Caroline Dommen, 'Raising Human Rights Concerns in the World Trade Organisation. Actors, Processes and Possible Strategies', (2002) 24 HRQ 1 1-50 at 49.

<sup>7</sup> Joseph *ibid.* at 52-53. See also the various contributions of scholars such as Ernst-Ulrich Petersmann from 'Human Rights and International Economic Law in the 21<sup>st</sup> Century. The need to clarify their interrelationships.' (2001) 4 JIEL 3-39 to 'Human Rights and International Economic Law' (2012) 4 Trade L & Dev 283-314.

<sup>8</sup> It engages and strengthens the application of international human rights law; it challenges the self-referent and self-contained nature of international trade law; it develops doctrine which may, in the longer term, lead to the progressive development of jurisprudence within international trade law.

<sup>9</sup> These challenges include those arising from the proliferation in recent years of regional free trade agreements which contain WTO-plus and WTO-extra clauses that may have significant human rights consequences, especially for developing countries e.g. in access to generic medicines through the inclusion of TRIPS-plus requirements.

<sup>10</sup> Roberto Unger, *The Critical Legal Studies Movement* (Harvard: Harvard University Press, 1986).

## **The so-called ‘tension’ between international trade law and international human rights law**

Though no inherent conflict between the objects and purpose of international trade law and international human rights law exists, nevertheless a tension between both is perceived to have emerged, more particularly in recent decades with the emergence of neoliberalism<sup>11</sup> and the consequent expansion of the application of international trade law into areas of concern to human rights law.<sup>12</sup> The particular interpretive approach of the earlier GATT and WTO panels to determining the legality of a number of regulatory measures to do with public health (e.g. in tobacco and pollution control regulation), consumer protection (in food and product safety regulation), and environmental protection have raised concerns amongst human rights observers.<sup>13</sup> However, the WTO regime and its Dispute Settlement Mechanism have proven reluctant to engage in explicit policy or doctrinal development that recognises and addresses conflicts between trade law and obligations under other treaty regimes (including human rights) in cases where these were raised.<sup>14</sup> While the legal provisions available within international trade law through which

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<sup>11</sup> The emergence of neoliberal approaches to development in the 1980s emphasise the ‘freeing of markets’ as the primary strategy for growth which will lead, it is held, to aggregate increases in wealth and prosperity. Since then, the scope and content of international trade law has shifted from increased multilateralism (more countries engaged in international trade) to enhanced liberalisation (reducing barriers to trade), leading to a much stronger focus on the compatibility of statutory regulation with international trade rules and the reduction, elimination or harmonisation of regulation. This has led to states’ policy and regulation on areas previously deemed sovereign and not strictly trade-related such as health and safety regulation, the environment, the provision of public services and so on, coming under closer scrutiny of the WTO for their compatibility with its trade regulation. Many of these areas – such as intellectual property protection and access to generic drugs – are clearly of direct relevance to human rights. However, human rights may also be indirectly affected. For example, for developing countries in particular, the implementation of the various trade agreements may undermine their abilities to fulfil their own international human rights obligations through loss of revenue from reduced or eliminated tariffs (for developing countries, revenue from tariffs constitute a larger proportion of government revenue and are easier and less costly to administer than other forms of taxation); the diversion of resources to build the regulatory and institutional mechanisms necessary to ensure compliance, and potential loss of income to owners and employees of industries unable to compete with foreign companies.

<sup>12</sup> Lang describes the evolution in the approach to trade liberalisation from the earlier GATT, in which a shared commitment to ‘embedded liberalism’ by GATT membership implied a qualified approach to trade liberalisation, where in order to achieve the goals of economic stability and full employment, a role for state intervention in liberalisation process was viewed as acceptable. With the emergence of a purer form of liberalism in the late 1960s/early 1970s a shift in thinking on trade liberalisation and key concepts therein emerged (primarily steered by the US in response to its own economic development needs). A ‘trade barrier’ came to be defined in terms of its economic effects, rather than from consideration of the intention of the government intervention, and more and more government regulations became viewed as ‘trade distortions’, expanding the scope of GATT/WTO law. Lang points out that under the later rationale, virtually any form of governmental action could be symbolically constructed as a trade distortion. Andrew Lang, *World Trade Law after Neoliberalism – Re-imagining the Global Economic Order* (Oxford: Oxford University Press, 2011) at 239-271.

<sup>13</sup> Thus for example, the Panel decision in *EC-Asbestos* found that the public health justification for a ban on the importation and sale of products containing asbestos was essentially irrelevant to the question of whether the ban was discriminatory for the purposes of Article III of the GATT. Lang *ibid* at 261-262. In another case, *China-Publications*, China sought to justify its measures as necessary to protect public morals on the grounds that they were needed to enforce its censorship laws. The panel and Appellate Body avoided considering the nature of China’s censorship laws themselves, focusing instead on whether there were less trade-restrictive alternatives available. Trebilcock et al *supra* note 2 at 735-737.

<sup>14</sup> See Lang *supra* note 12, 148-153.

human rights issues and concerns can be raised are acknowledged to be narrow, weak,<sup>15</sup> and ambiguous,<sup>16</sup> the values and approach of international trade law as has evolved and is currently constituted lead one to question whether it may have the capacity to adequately or appropriately address potentially negative human rights impacts of trade.<sup>17</sup>

Given this scenario, the response of international human rights law and the international human rights system to the negative impacts of trade becomes all the more important. It can be said that legal clauses in international human rights law that address states' human rights responsibilities when they engage in trade are implied rather than explicit.<sup>18</sup> Doctrinal clarifications from the UN Committee on Economic, Social and Cultural Rights on, for example, the right to food and the right to water have affirmed the existence of extraterritorial human rights obligations on states when they (or their citizens) engage in activities (including trade) beyond the jurisdiction of the state. In addition, a number of reports have been issued by the UN's High Commissioner for Human Rights in the early 2000s that outlined ways that states can ensure their approach to the implementation of their trade obligations was undertaken in a way that did not compromise their human rights obligations.<sup>19</sup> More recently, the UN's Special Rapporteur on the Right to Food has

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<sup>15</sup> Though the WTO Agreement and agreements do not explicitly address human rights, they can be indirectly addressed through a number of legal provisions. For example, a limited consideration of labour issues is possible within the remit of the GATT (e.g. Article XX (e) refers to measures relating to products of prison labour). Human rights-related areas have also been addressed through GATT Article XX (a) which refers to measures necessary to protect public morals, and Article XX (b) which addresses measures relating to human life or health. Waivers are another opportunity, though these have been very infrequently used (of note are the Kimberly waiver, which prohibits trade in conflict diamonds, and the 2002 TRIPS waiver that exempts least-developed country members from providing exclusive marketing rights for new drugs until 2016, with the opportunity for them to seek extensions. Trebilcock at al., *supra* note 4 at 748). The WTO's reluctance to engage with areas perceived to be beyond its mandate is exemplified in its Ministerial Decision, following the first WTO Ministerial Conference in Singapore in 1996, to effectively remove labour issues from the WTO agenda and remit them to the ILO, a position that was later affirmed by the Doha Ministerial Declaration in 2001. Trebilcock et al, *ibid* at 717. In practice, discussion of labour issues is now relegated to 'more marginal venue' of the WTO's Trade Policy Review Mechanism, which Lang describes as a typically weak form of integrating human rights with trade. He asserts that 'human rights become merely an accompaniment to trade liberalisation...(with) human rights law no longer connot(ing) a different way of doing trade policy.' Lang, *supra* note 12 at 141.

<sup>16</sup> Debra P. Steger, 'Afterword: The "Trade and" Conundrum – A Commentary' (2002) 96 AJIL 135-145 at 136.

<sup>17</sup> Sarah Joseph provides a very insightful analysis of the rights and freedoms promoted by the WTO that, at first glance, appear human rights compatible, but under closer scrutiny are revealed to have very different orientations. For example, international human rights law contains no right to trade or contract; international trade law confers rights on traders only, but doesn't ascribe any duties to these; non-discrimination and rule of law both have very different meanings in each body of law, and though the WTO Agreement includes 'raised standards of living' as the purpose of trade, and growth and development are central to the discourse of trade liberalisation, no trade rules address the disbursement of wealth generated to ensure that the standards of living of most people are raised. Joseph *supra* note 4 at 32-44.

<sup>18</sup> See for example the various oblique references contained within terms such as 'joint and separate action' in Article 56 of the UN Charter; the realisation of economic, social and cultural rights through 'national effort and international co-operation' in Article 22 of the UDHR. Additionally, extraterritorial obligations have also been enunciated by the Human Rights Committee in relation to the ICCPR in its General Comment 31 and by the Committee on Economic, Social and Cultural Rights vis à vis Article 11 of the ICESCR in its General Comment 15: The Right to Water. See also Joseph *supra* note 4 at 250-251.

<sup>19</sup> See Office of the High Commissioner for Human Rights, 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights' (27 June 2001) E/CN.4/Sub.2/2001/13; 'Liberalisation of trade in services and human rights' (25 June 2002) E/CN.4/Sub.2/2002/9; 'Human Rights and World Trade Agreements. Using general exception clauses to protect human rights' (New York & Geneva, 2005).

produced a number of reports that describe tools and methodologies on how states may address their trade obligations in a human rights-compatible way.<sup>20</sup>

Nevertheless, a clear imbalance between both regimes at a number of levels exists, not only regarding clarity of the norms and jurisprudence of both, but in particular in relation to the monitoring, accountability and dispute resolution mechanisms within both. Those of the WTO are much stronger and more effective at ensuring members' compliance with WTO agreements than those of the international human rights system in relation to ensuring compliance of states parties to their socio-economic human rights obligations that may arise when they engage in trade. When this institutional imbalance is combined with the doctrinal approach of the WTO's Dispute Settlement Body (DSB) to its consideration of human rights-related issues to international trade law, it is not surprising that approaches from both bodies of law to addressing the negative human rights impacts of trade remain unsatisfactory. It is worth exploring why this situation has emerged. In the following two sections I outline compelling rationales from post-colonial and critical legal scholarship that help explain this.

### **International law and the centrality of colonialism**

Post-colonial legal scholarship such as Anghie's research<sup>21</sup> highlights the centrality of colonialism to the constitution of international law, and traces how many of its central doctrines such as sovereignty were born of the attempt to create a legal order that would account for relations between European and non-European worlds that was built on, and subsequently maintained, a 'dynamic of difference' between both.<sup>22</sup> This 'dynamic of difference' resulted in the creation of an 'underlying pattern of subordination and domination'<sup>23</sup> that was cyclically repeated throughout key moments in the evolution of legal relations between Europe and non-European countries.<sup>24</sup>

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<sup>20</sup> Report of the Special Rapporteur on the right to food, Olivier de Schutter, 'Guiding Principles on human rights impact assessments of trade and investment agreements.' 19 December 2011 A/HRC/19/59/Add.5.

<sup>21</sup> Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005).

<sup>22</sup> Anghie *ibid* 3-4.

<sup>23</sup> James Crawford in Anghie, 'Foreword' *supra* note 21 at xi.

<sup>24</sup> From the attempts of the Spanish theologian and jurist Francisco de Vittoria in the sixteenth century to capture in law, relations (including trade relations) between the Spanish conquerors and the Indians of the Americas through asserting that Indians were at once similar to and different from the Spanish; to the rise of legal positivism and the processes through which 'civilised' European nations both excluded and sought to include 'uncivilised' non-European societies; through to the administrative innovations introduced under the Mandate System to transform colonial territories into sovereign states which, in fact, 'furthered a particular system of political economy that integrated the mandate territory into the metropolitan power, to the disadvantage of the former'; to the failure of the post-war United Nations legal system to deliver economic sovereignty to the newly independent postcolonial states, up to the emergence into dominance of neo-liberal economic 'Washington Consensus' policies within the international institutions which held the 'right to trade' as a central tenet. A key element of the latter is its historical association with the European civilising mission. (He cites how central this civilising discourse was at the Berlin Conference that established the Mandate System - '[t]he expansion of European commerce was not understood as a mechanism for the economic exploitation and sub-ordination of non-European peoples, but rather, a means of effecting the entry of the backward peoples into the world of civilisation'). Also, the right to trade's more modern iteration as a mechanism to progress the opening up of non-European states to foreign capital and trade. Anghie *supra* note 21 at 31; 20-30; 170; 211-223; 252.

Thus, as international trade law evolved from that introduced and administered by companies such as the British East India Company,<sup>25</sup> to the GATT<sup>26</sup> and later into the WTO and its (A)greements, the main legal provisions within the modern international trade regime designed to acknowledge and address the development needs of Third World/developing country members were largely ineffectual.<sup>27</sup>

A closer look at these provisions reveals how problematic they are. Two key legal mechanisms that permit favourable trading treatment of developing country and Least Developed Country members (LDC) members within the WTO are the Generalised System of Preferences (GSP) under the GATT<sup>28</sup> and the Special and Differential Treatment (SD&T) measures within the agreements introduced at the conclusion of the Uruguay Round of trade negotiations in 1995.

With its origins in the earlier GATT,<sup>29</sup> the GSP has evolved to become one of the main ways through which low-income developing countries seek and obtain special and differential treatment through the multilateral trading system from industrialized countries through preferential tariff arrangements. This is permitted by a waiver from its most-favoured-nation (MFN) obligation.<sup>30</sup> The theory behind GSP was that it would reduce the reliance of developing countries on exports of primary products and would promote industrialisation, with manufactured goods being the main beneficiaries of preferences, and agricultural products being treated less favourably<sup>31</sup>.

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<sup>25</sup> The British East India Company exercised sovereign rights in its administration of non-European peoples, through the establishment of legal and governance systems aimed at progressing their commercial relations. 'Commerce and governance were not merely complementary but identical: a corporation exercised the power of government'. Anghie *supra* note 21 at 252.

<sup>26</sup> General Agreement on Tariffs and Trade (1947) which was established with 23 signatories, including 11 developing countries. Trebilcock et al point out that despite developing countries making up nearly half the original members, the Agreement did not recognise them as a group and made no special provisions for them. Trebilcock et al., *supra* note 2 at 607.

<sup>27</sup> The legal provisions of the Enabling Clause and the Generalised System of Preferences (GSP), allied to those of Special and Differential Treatment (SDT) measures within international trade law, constitute the main ways that WTO members can depart from their Most Favoured Nation (MFN) obligations and permit the provision of more favourable treatment to developing country and Least Developed Country members.

<sup>28</sup> The GATT included three S&DT measures designed to recognise the challenges that developing countries had in relation to engaging in international trade. These were Article XVIII which permitted developing countries to take protective action against competition from imports to their own producers, in particular in relation to fledgling industries. A new Part IV of the GATT was introduced in 1965 which formalised non-reciprocity in the reduction of tariffs for developing countries. The third provision was the Enabling Clause.

<sup>29</sup> See Norma Breda dos Santos, Rogério Farias and Raphael Cunha, "Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization and Current Issues" (2005) 39 J World Trade 637 for a very insightful account of its historical origins from the time of the Havana Charter in the 1940s, the Harberler Report in the 1950s through to the UNCTAD (United Nations Conference on Trade and Development) conferences in the 1960s. This historical account traces the legacy of colonial times, within the Enabling Clause, and the patronage system that has defined the trade relationships between many newly-independent countries and their former colonial masters, and that still governs the trade relationship between developed and developing country/LDC members.

<sup>30</sup> "Under this programme, developed countries were allowed to give preferential market access to the developing countries by lowering tariffs for developing countries below the level of tariffs for developed countries". Simon Lester & Brian Mercurio with Arwel Davies and Kara Leitner, "World Trade Law Text, Materials and Commentary" (Oxford: Hart Publishing, 2008) at 784.

<sup>31</sup> Gene M. Grossman and Alan O. Sykes, "A preference for development: the law and economics of GSP", (2005) 4 WT Rev 41 at 43.

UNCTAD describes its objectives as (a) to increase export earnings; (b) to promote industrialization; and (c) to accelerate economic growth.<sup>32</sup>

Although GSP programmes are legally permissible within the WTO rules under the terms of the 1979 ‘Enabling Clause’ (a decision which ‘legalised’ the GSP within the GATT regime), in fact the preferences granted are a ‘privilege’ or a ‘gift’ of the donor country which can be removed or modified at their discretion. Beneficiary countries have no legal right to participate in a GSP programme or be granted GSP status by a donor country. Nor do they have any rights to determine what products for export and preferential tariff treatment may best serve their development interests. GSP schemes are controversial and critiques of their overly political nature and dubious real economic value to developing countries have been made. Herz and Wagner highlight, in addition to their complexity, a number of drawbacks to GSP schemes including eligibility requirements being dependent on complex rules of origin; the erosion of GSP recipients’ preference margins over time due to the continuous trade liberalization under the WTO that reduces their initial competitive advantage over non-GSP countries; the imposition of often highly restrictive side conditions by preference-granting countries; and the exclusion or graduation of countries or products from GSP schemes which may be sensitive to the preference-granting country’s domestic industry. Their 2010 research, based on all GSP schemes then notified to UNCTAD, found that GSPs tend to foster developing countries’ exports in the short-term, but hampers them in the long-run, with economically more advanced GSP recipients more likely to benefit from GSP schemes than less advanced countries.<sup>33</sup>

The introduction of the Uruguay round S&DT measures reduced further the extent of the flexibilities offered through the GATT, in particular for non-LDC members. These flexibilities now included the possibility of a deferral of full trade liberalisation obligations; some flexibilities in protecting vulnerable domestic sectors during the liberalisation process,<sup>34</sup> and calls for developed country members to recognise and take on board measures that could enhance the trade capacity of developing countries.<sup>35</sup> Moon notes that the latter horatory provisions became the most common type of S&DT in the WTO agreements, while those which increased the trading opportunities of developing countries became the least common.<sup>36</sup>

These S&DT measures have been roundly critiqued for their largely ineffectual nature. Of central concern is that the nature of the language used to express the ‘obligation’ is largely horatory and legally weak. Garcia, for example, points out the ‘troubling’ nature of the language used. He

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<sup>32</sup> United Nations Conference on Trade and Development (UNCTAD), *“Erosion of trade preferences in the post-Hong Kong framework: From “trade is better than aid” to “aid for trade”.*” (New York: United Nations, 2007), online: UNCTAD [http://www.unctad.org/en/docs/ldc20056\\_en.pdf](http://www.unctad.org/en/docs/ldc20056_en.pdf).

<sup>33</sup> Bernhard Herz and Marco Wagner, “Dark Side of the Generalized System of Preferences” Working Paper 02/2010, February 2010, German Council of Economic Experts, online: [http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/Arbeitspapiere/The\\_Dark\\_Side\\_of\\_the\\_Generalized\\_System\\_of\\_Preferences.pdf](http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/Arbeitspapiere/The_Dark_Side_of_the_Generalized_System_of_Preferences.pdf)

<sup>34</sup> See for example the permissible use of certain subsidies by developing countries to support agriculture in Article 6.2 in the Agreement on Agriculture.

<sup>35</sup> The WTO itself classifies S&DT measures differently, identifying six types. WTO Committee on Trade and Development ‘Special and Differential Treatment Provisions in WTO Agreements and Decisions’ (WT/COMTD/W/196) 14<sup>th</sup> June 2013.

<sup>36</sup> Gillian Moon, ‘Trade and Equality: A Relationship to Discover’, (2009) 12 JIEL 617 at 626.



identifies four types of language generally used in these SDT provisions – discretionary language; ‘best endeavour’ clauses; de facto nonbinding or ‘fake mandatory’ provisions; and mandatory provisions – of which the latter is used in a minority of clauses. The majority of existing SDT provisions is thus ‘unenforceable, employ[ing] vague or undefined standards’.<sup>37</sup> This lends to a general perception within and outside of WTO membership that these provisions are legally weak, lack significance when weighed against other legally binding obligations in the agreements, and are not an effective mechanism through which the trade-and-development needs of developing country and LDC members can be either recognised or addressed. In addition, the lack of specificity of some of the SDT provisions themselves – technical assistance linked with implementation and transition periods - has been critiqued.<sup>38</sup> This further lends to weak implementation, as the lack of enumeration of the nature of the obligation that means that both developed and developing country and LDC members have little basis from which to work through what the clause means in practice. Though the WTO has more recently undertaken a co-ordinating role in the delivery of technical assistance to developing country and LDC members, this does not address the nature of developed country members’ obligations or duties under the SDT provisions in the various agreements, or that the nature of these obligations and any response therein is essentially defined by the developed country member.

The WTO is aware of the current flaws in its S&DT provisions. The 2001 Ministerial Declaration included the announcement that all S&DT provisions would be reviewed ‘with a view to strengthening them and making them more precise, effective and operational’.<sup>39</sup> It instructed the WTO’s Committee on Trade and Development to examine ways in which S&DT provisions could be made more effective including considering the implications of converting S&DT measures into mandatory provisions.<sup>40</sup> However, the Committee has made little progress to date on this.<sup>41</sup>

The piecemeal progress made within the WTO on developing a more robust framework for ensuring that international trade rules adequately respond to and address the particular challenges facing developing country and LDC members in engaging in international trade is evidence of Anghie’s ‘dynamic of difference’ that continues to remain intrinsic to international trade law. Though a legal framework and institutional mechanisms exist<sup>42</sup> that, in theory and explicitly,

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<sup>37</sup> Frank J. Garcia, “Beyond Special and Differential Treatment” (2004) 27 BC Int’l & Comp. L Rev 291 at 312.

<sup>38</sup> Cottier points out that technical assistance and technology transfer provisions are not enumerated in detail. Thomas Cottier, “From Progressive Liberalization to Progressive Regulation in WTO Law” (2006) 9 JIEL 779 at 789.

<sup>39</sup> WTO *Ministerial Declaration* 14<sup>th</sup> November 2001 (WT/MIN(01)/DEC/1) at para 44.

<sup>40</sup> WTO *Ministerial Implementation-related issues and concerns*, 14<sup>th</sup> November 2001 WT/MIN(01)/17, at para. 12 Cross-cutting issues.

<sup>41</sup> See World Trade Organisation *Annual Report 2012* at 29. Available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep12\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep12_e.pdf).

<sup>42</sup> Such institutional mechanisms include the WTO’s dedicated Committee on Trade and Development but also include its Trade Policy Review Mechanism, whose purpose is to ‘to contribute to improved adherence by all members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system’, through a review and assessment of individual members’ trade policies and practices, ‘against the background of the *wider economic and developmental needs*, policies and objectives of the member concerned, as well as of its external environment’. WTO, *Annex 3 Trade Policy Review Mechanism*, online: WTO [http://www.wto.org/english/docs\\_e/legal\\_e/29-tpm\\_e.htm](http://www.wto.org/english/docs_e/legal_e/29-tpm_e.htm) (own emphasis).

provide for the recognition of and response to developing country and LDC members' challenges in engaging in international trade, neither have yet proven able to comprehensively address this task. As the impasse in the current Doha round of trade negotiations has demonstrated, this conundrum – the gap between the potential and reality of international trade law to address the challenges faced by developing country and LDC members to engage in international trade – goes to the heart of the international trade system, as currently constituted.

Given this scenario, it is not illogical to explore whether and how contributions from international human rights law may be helpful, both to deepen understanding of the constraints posed by the S&DT measures within international trade law as currently conceived and operationalized and, in particular, to address more explicitly states parties' obligations to respect, protect and fulfill their international human rights obligations when they engage in trade. However, as we shall see in the following section, the current orientation of international human rights law places some constraints and limitations on its potential role here.

### **The paradox of international human rights law**

Human rights and their current expression in international human rights law originated in the idea of rights in Greek law, in classical natural law, in Jewish and Christian theology and the ideas of the Enlightenment<sup>43</sup> and emerged as a defence against the abuse of power, wealth and privilege through such legal forms as the French and American Declarations on the Rights of Man, and the enunciation of the UDHR in 1948, and the ICCPR and ICESCR in 1966. Matua points out that though human rights discourse is presented as non-ideological, impartial and the 'quintessence of human goodness', in fact it is intrinsically linked with the values and approach to governance of Western liberal democracy.<sup>44 45</sup> It helps partially explain the early and continuing privileging of civil and political rights over economic and social rights in the codification of those rights within international law. This is exemplified in the language of both the ICCPR and ICESCR, in which deprivation of the former is clearly identified as an impermissible violation, though deprivations of food, shelter, medicines – rights contained in the ICESCR – are described as failures of progressive realisation.<sup>46</sup> By placing the state's relationship with the person as the matter of prime concern of international human rights law, Kennedy highlights how this foregrounds the harms

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<sup>43</sup> Costas Douzinas, *Human Rights and Empire The Political Philosophy of Cosmopolitanism* (Abington, UK: Routledge-Cavendish, 2007) at 15-26.

<sup>44</sup> Makau wa Matua, 'The Ideology of Human Rights' (1995-1996) 36 *Vir J I L* 589 at 591-593.

<sup>45</sup> In addition, Rajagopal highlights the chimera of the projected self-image of human rights discourse as post-colonial. The perception was that the emergence of the 'new' international law of human rights had superseded the 'old' international law of colonialism. In reality, the UDHR did not apply to the then-colony states, and prior to the membership of the newly-independent Third World countries to the United Nations, the UN's Commission on Human Rights rarely took up the issue of anti-colonial struggles. Balakrishnan Rajagopal, 'Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy', (2006) 27 *TWQ* 767-783. Though the newly independent states of Africa and Asia played a more prominent role in the later drafting of the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (both opened for signature in 1966), and subsequent rights areas (for example, in relation to articulating the right to development), Matua asserts that these have remained marginal to mainstream human rights discourse. Matua *supra* note 44 at 606-607.

<sup>46</sup> Upendra Baxi, *The Future of Human Rights*, (Delhi: Oxford University Press, 2001) at 123.

done by governments,<sup>47</sup> giving weaker protection from harms suffered through the actions of non-state actors such as corporate entities.<sup>48</sup> Though economic and social factors can be very real constraints to rights, these are largely disregarded. The focus on rights as procedure and participation at the expense of distribution means that the international human rights system is much less effective in dealing with matters of the economy (unless these are property rights), to the extent of taking redistribution off the human rights agenda altogether.<sup>49</sup>

Baxi's highlighting of a critical weakness arising from the UDHR's recognition of the human rights of human beings as well as that of legal/juristic persons is key to understanding international human rights law's weakness in addressing the negative human rights impacts of trade. This recognition makes possible the conversion of human rights 'into a paradigm of *trade-related, market-friendly human rights*'.<sup>50</sup> He asserts that this has led to the deployment of the rhetoric of human rights in an era of a 'new Cold War' characterised by a number of practices including the purported centrality of global capitalism to underwrite 'human rights futures' and the appropriation by capital of human rights discourse.<sup>51</sup> Grear quotes Baxi's astute observation on how corporations can convert the meanings of human rights into forms that serve corporate interests. Thus, for example, it is asserted that the human right to health is best served by protecting the research and development or patent rights of the pharmaceutical industries; or the right to development is realised by the export of Western technology to developing countries.<sup>52</sup> Similarly, Grear highlights the linguistic and conceptual ambiguities in law between non-human and human legal subjects as persons that has led, she asserts, to the favouring of corporations' interests over those of living persons<sup>53</sup>, as well as the enabling of corporate evasion of accountability for harms.<sup>54</sup> When combined with the ideological bias of liberal legal culture<sup>55</sup>, this poses a fundamental challenge to the efficacy of human rights law –

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<sup>47</sup> In a contemporary globalised context, where the activities of private entities such as transnational corporations (TNCs) can have strong negative human rights consequences, the primacy accorded to states' as guarantors of human rights has arguably led to a distinct lacunae in the applicability and capacity of international human rights law to hold non-state actors such as TNCs to account for human rights infringements or violations.

<sup>48</sup> Simons points out that corporate human rights impunity is 'deeply embedded' in the international legal system and notes that the 'Guiding Principles on Business and Human Rights' endorsed by the UN Human Rights Council in 2011 did not include a recommendation on the future development of binding international obligations. Penelope Simons, 'International law's invisible hand and the future of corporate accountability for violations of human rights,' (2012) 3 JHR & the Env 5-43.

<sup>49</sup> David Kennedy, *The Dark Sides of Virtue*, (New Jersey: Princeton University Press, 2004) at 14, 11 and 34.

<sup>50</sup> Upendra Baxi, *supra* note 46 at 157. Emphasis in the original. Baxi notes 'Article 17 protects individual as well as associational rights to property, a provision that for all practical purpose negates the radical looking assurances in Articles 23-6. Not surprisingly, intellectual property rights stands fully recognised in Article 27(2).' Footnote 136 in *ibid*.

<sup>51</sup> Baxi *supra* note 46 at 175. See also Douzinas *supra* note 43 at 452-453.

<sup>52</sup> See the recent indicators on the Right to Development produced in 2010 by the High Level Task Force of the Working Group on the Right to Development. 'Report of the high level task force on the implementation of the right to development in its sixth session.' 14-22 January 2010. A/HRC/15/WG.2/TF/2/Add.2. Available at <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/G10/118/37/PDF/G1011837.pdf?OpenElement>.

<sup>53</sup> She refers to groups made already vulnerable such as people in poverty, women, children and indigenous peoples as being at particular risk. Anna Grear, 'Human Rights – Human Bodies?' (2006) 17 L Critique 171-199 at 189.

<sup>54</sup> Grear *ibid* at 188.

<sup>55</sup> Trubek & Santos describe the emergence into prominence in the 1980s of a neo-liberal approach to law within the international institutions which viewed law as an instrument to foster private transactions, emphasised private law in

[I]f the language (and meanings) of human rights are taken over by other-than-natural human claimants, what language or rights-protective concept is left to defend the human *from* such claimants?<sup>56</sup>

However, this is not to deny that human rights law has nothing to offer international trade law to progress the conceptualisation and better implement an approach that adequately recognises and addresses the human rights impacts of trade liberalisation. For example, Moon argues convincingly that the S&DT measures within international law constitute a commitment to substantive equality, one that human rights law has developed a sophisticated approach to. She identifies three flaws with the current approach adopted by the WTO – the overly broad criteria adopted by the WTO for determining developing country status; its failure to impose binding obligations, and the frequent mismatch of current S&DT provisions with the actual trade-related needs and circumstances of developing country and LDC members.<sup>57</sup> She asserts that the framework of human rights equality law offers the WTO both a method of analysis, a different way of thinking about S&DT, as well as a framework to make S&DT stronger and more operationally effective that could go some way towards addressing the deep-seated trade liberalisation-development conundrum at the heart of the current impasse with the Doha round of trade negotiations.

Valuable though such contributions are, such proposals only partially address the weaknesses within international human rights law in articulating and responding to how states parties to international human rights conventions address their human rights obligations that arise from trade liberalisation. Given that the kind of human rights that trade liberalisation in a globalised context may place at risk are predominantly socio-economic and cultural rights and the ‘third generation rights’ such as the right to development – rights that are recognised as doctrinally and jurisprudentially less developed in international human rights law – it raises doubts about the capacity of international human rights law (as currently constituted) to effectively be that comprehensive ‘shield and sword’ with which to address the negative human rights impacts of trade liberalisation. Thus, if looking to the ‘outside’ of international trade law to international human rights law for tools and strategies to address its blindspots may be problematic, is there perhaps overlooked potential from within international trade law and the WTO itself?

### **Law’s duality and ‘promise of justice’**

Critical legal scholarship, in particular from the post-colonial or Third World Approaches to International Law genre, has long recognised and debated the dual nature of international law – its emancipatory potential lying alongside its constraining or negating effects.<sup>58</sup> It is posited that this

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order to protect property and facilitate exchange and sought to use the law to limit state intervention and ensure equal treatment for foreign capital. David Trubek and Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in David M. Trubek & Alvaros Santos eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 1 at 8-9.

<sup>56</sup> Gear *supra* note 53 at 179, emphasis in original.

<sup>57</sup> Moon *supra* note 36 at 632-640.

<sup>58</sup> See Rajagopal *supra* note 45. See also B. Chimini, ‘Capitalism, Imperialism and International Law in the 21<sup>st</sup> Century’ (2012) 14 *Or Rev Int’l L* 17 at 37-39.

space of tension between ‘law as is’ and its ‘promise of justice’ contains the potential to destabilise the hegemonic or imperial tendencies of international law.

‘Justice in itself...outside or beyond the law, is not deconstructible...Justice remains, is yet, to come, *à venir*...It will always have it, this *à venir*, and always has...[j]ustice, insofar as it is not only a juridical or political concept, opens up for l’avenir the transformation, the recasting or refounding of law and politics.’<sup>59</sup>

Thus the identification of spaces or sites within international trade law through which current reductionist or limiting conceptions or interpretations of trade rules can be explored more deeply, and perhaps reconceptualised or rearticulated could be key to identifying how S&DT can be made stronger and more effective for developing countries. Furthermore, scholars from the critical legal scholarship movement have highlighted the indeterminacy of legal doctrine and drawn attention to its contingency. Some, like Roberto Unger, have used concepts such as ‘deviationist’ or ‘expanded’ doctrine to identify and develop the potential for alternative interpretations of core doctrinal principles that reflect a wider range of political and social values than are currently captured.<sup>60</sup>

In exploring these concepts for their heuristic value to how international trade law is currently conceived and implemented, one under-recognised site within the WTO agreements that emerges is its Trade Policy Review Mechanism. Transparency in the multilateral trade regime is achieved through the WTO’s Trade Policy Review Mechanism (TPRM).<sup>61</sup> The purpose of the TPRM is ‘to contribute to improved adherence by all members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system’, through a review and assessment of individual members’ trade policies and practices, ‘against the background of the *wider economic and developmental needs*, policies and objectives of the member concerned, as well as of its external environment’.<sup>62</sup>

This is achieved by a structured periodic review on the basis of two reports – one from the WTO Secretariat and one from the government of the member under review. The Secretariat report’s contents have a common format providing overviews of the Economic Environment; the Trade Policy Regime; Trade Policies and Practices by Measure (e.g. imports and exports), and Trade

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<sup>59</sup> Jacques Derrida, ‘Force de Loi : Le « Fondement Mystique de L’Autorité’ »’Force of Law : The “Mystical Foundation of Authority”’ (1989-1990) 11 Cardozo L Rev 920 at 969-70. See also Costas Douzinas, “The End(s) of Human Rights” 2002 26 Melbourne UL Rev 445 at 456 when he says “Human rights struggles are symbolic and political; their immediate battleground is the meaning of words, such as ‘difference’ and ‘equality’...but if successful, they have ontological consequences – they radically change the constitution of the legal subject and affect people’s lives.’

<sup>60</sup> Roberto Unger, *supra* note 10 at 16-20.

<sup>61</sup> The TPRM was established on a provisional basis in 1989, and confirmed in Annex 3 of the Marrakesh Agreement establishing the WTO. Effectively it is the WTO’s General Council comprising the WTO’s full membership operating under special rules and procedures. WTO “Overseeing national trade policies: the TPRM”, online: WTO [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp\\_int\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm).

<sup>62</sup> WTO, *Annex 3 Trade Policy Review Mechanism*, online: WTO [http://www.wto.org/english/docs\\_e/legal\\_e/29-tpm\\_e.htm](http://www.wto.org/english/docs_e/legal_e/29-tpm_e.htm) (own emphasis).

Policies and Practices by Sector (e.g. agriculture, services, transport, telecommunications etc.). As yet, a more contextual analysis of the member's trade policies against the backdrop of their 'wider economic and development needs' and taking account of the 'external environment' is not included. Reviews are taken place over two half-days, where questions and comments from members can be posed and responded to by the member under Review. International bodies such as UNCTAD, the OECD and the FAO can attend as observers. The process thus engages internal WTO membership and relevant international institutions.

The primary function of the TPRM mechanism is information gathering and sharing on members' trade policies and in this it has enormous potential as a data gathering mechanism on the functioning of the multilateral trading system from developing country and LDC members' perspectives. This function is clearly within the purpose and mandate of the TPRM. However, this potential is not yet recognised by the TPRM body. While a number of reviews of the effectiveness of the TPRM have been undertaken, none of these have recognised this as a potential role for the TPRM; similarly annual reports by the Chairperson of the Trade Policy Review Body each year do not include reflections on the operation of the multilateral trading system as a whole from developing country and LDC members' perspectives. While coverage of LDC members within the TPRM is discussed within these reports, issues identified in relation to this largely relate LDC's technical assistance needs.<sup>63</sup>

The TPRM is a unique policy mechanism within the WTO through which individual member's trade policies and practices can be analysed; their approach to the agreements' binding obligations and horatory S&DT commitments scrutinised, and through which a universal analysis of the effectiveness and the impact of various trade rules and provisions can be undertaken from a developing country and LDC member perspective. It provides unique potential to explore the individual and global effectiveness of S&DT measures designed to address the development, finance and trade needs of development country and LDC members. The TPRM Agreement permits this. This potential has also been recognised by others. The International Trade Union Confederation has requested that a section on the implications of trade on core labour standards and decent work be included.<sup>64</sup> Though, this has not been taken up, the ITUC produces its own reports on the status of each member's internationally recognised core labour standards.<sup>65 66</sup>

Despite this, realising this potential will be difficult to achieve, if the slow pace of progress of the WTO's Committee on Trade and Development on progressing the 2001 Ministerial Decision on strengthening S&DT provisions is anything to go by. Yet, addressing the difficulties with S&DT

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<sup>63</sup> These annual reports follow the same format and have largely the same content each year (for this, annual reports from 2006, 2007, 2008 and 2009 were reviewed). See for example the 2009 report – WTO Trade Policy Review Body, "Trade Policy Review Mechanism, Report of the Trade Policy Review Body for 2009" (29 October 2009) WT/TPR/249, online: WTO [http://www.wto.org/english/tratop\\_e/tpr\\_e/tpr\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm).

<sup>64</sup> Steffen Grammling, *WTO's Trade Policy Review Mechanism: Explanations and Reflections* (Friedrich-Ebert-Stiftung Geneva Office, 2009) at 2, online: FES <http://library.fes.de/pdf-files/bueros/genf/06316.pdf>.

<sup>65</sup> See International Trade Union Confederation "WTO Reviews", online: ITUC <http://www.ituc-csi.org/documents.html>.

<sup>66</sup> Indeed, the potential of the content of WTO- and member-produced reports to be used as part of the periodic review of WTO members who are also states parties to the various UN international conventions has yet to be explored.

provisions within the TPRM, with its broader more context-focused brief, may perhaps provide the bigger-picture perspective, as well as broader membership engagement, that may help break through the stalemate in the Doha trade negotiations arising from the trade liberalisation-development conundrum.

## **Conclusion**

In exploring the so-called ‘tension’ between international trade law and international human rights law, this paper has drawn attention to a deeper weakness within international law itself in which a particular notion of rights has evolved and become privileged, masked by the language of universality. As currently formulated, this has skewed both bodies of international law in favour of First World over Third World, and particular private over public interests, as well as economic over social rights. In the context of an ever more deeply integrating world, facilitated by a rapidly evolving body of international law of which international trade law is key, there is a pressing need to examine the underlying conceptual and normative foundations of both bodies of law, and their expression through various legal modalities in order to reveal their biases and blind spots and the ways in which these are perpetuated. Doing so may uncover previously overlooked sites and spaces within international law where law’s ‘promise of justice’ can be further explored.