

v. 6 • n. 11 • Dec. 2009
Biannual
English Edition

● **Víctor Abramovich**

From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System

● **Viviana Bohórquez Monsalve and Javier Aguirre Román**

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● **Debora Diniz, Livia Barbosa and Wederson Rufino dos Santos**

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● **Julieta Lemaitre Ripoll**

Love in the Time of Cholera: LGBT Rights in Colombia

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

● **Malcolm Langford**

Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review

● **Ann Blyberg**

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● **Aldo Caliari**

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● **Patricia Feeney**

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INTERNATIONAL HUMAN RIGHTS COLLOQUIUM

● Interview with Rindai Chipfunde-Vava,

Director of the Zimbabwe Election Support Network (ZESN)

● Report on the IX International Human Rights Colloquium



ISSN 1806-6445

SUR - INTERNATIONAL JOURNAL ON HUMAN RIGHTS is a biannual journal published in English, Portuguese and Spanish by Sur - Human Rights University Network. It is available on the Internet at <<http://www.surjournal.org>>

SUR - International Journal on Human Rights is listed in the International Bibliography of the Social Sciences (IBSS) and Scientific Electronic Online (SciELO).

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SUR - HUMAN RIGHTS UNIVERSITY NETWORK is a network of academics working together with the mission to strengthen the voice of universities in the South on human rights and social justice, and to create stronger cooperation between them, civil society organizations and the United Nations. Conectas Human Rights, a not-for-profit organization founded in Brazil, is home to Sur. (See website <www.conectas.org> and portal <www.conectasur.org>. To access the online version of the journal, please go to: <www.surjournal.org>.)

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CONTENTS

VÍCTOR ABRAMOVICH	7	From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System
VIVIANA BOHÓRQUEZ MONSALVE AND JAVIER AGUIRRE ROMÁN	39	Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law
DEBORA DINIZ, LÍVIA BARBOSA AND WEDERSON RUFINO DOS SANTOS	61	Disability, Human Rights and Justice
JULIETA LEMAITRE RIPOLL	73	Love in the Time of Cholera: LGBT Rights in Colombia
Economic, Social and Cultural Rights		
MALCOLM LANGFORD	91	Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review
ANN BLYBERG	123	The Case of the Mislaid Allocation: Economic and Social Rights and Budget Work
ALDO CALIARI	141	Trade, Investment, Finance and Human Rights: Assessment and Strategy Paper
PATRICIA FEENEY	161	Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda
International Human Rights Colloquium		
	177	Interview with Rindai Chipfunde-Vava, Director of the Zimbabwe Election Support Network (ZESN)
	182	Report on the IX International Human Rights Colloquium

PRESENTATION



This issue of the Sur Journal was developed in collaboration with the International Network for Economic, Social, and Cultural Rights (ESCR-Net). This network is a global initiative dedicated to promoting collective work between organizations and scholars around the world that strive to guarantee economic and social justice through human rights. To this end, the Network contributes to the development of a collective voice and joint activities among members, the exchange of information and mutual learning, the promotion of new tools and strategies, and the strengthening of links between different regions, languages, and disciplines.

Four of the articles published in this issue are revised versions of documents produced for the International Strategy Meeting on Economic, Social, and Cultural Rights and the ESCR-Net General Assembly held in Kenya, December 5-8, 2008, that grew out of the intense and valuable debates led by the participants in the event. The objective of these documents was to provide a critical evaluation of human rights work, placing a special focus on economic, social, and cultural rights – and, in particular, the collective work that the members and participants of the ESCR-Net have been developing in different thematic areas. At the same time, the articles sought to evaluate the future opportunities and challenges and discuss potential strategic interventions for ensuring effective human rights protection*.

In this way, we are presenting a dossier in this issue that discusses which challenges and opportunities organizations and social movements fighting for global social rights are facing in certain areas, their main strategies, and a catalogue of recommendations for future action.

In the first article of the dossier, Ann Blyberg presents a brief history of civil society's use of budgetary analysis and explains in what working with a public budget as a tool for enforcing rights consists, in particular, in terms of economic, social, and cultural rights. She discusses different foci – transparency, gender, and right to food – of current work in this field and provides examples of experiences gained by civil society groups from different countries.

Aldo Caliori analyzes the manners in which increased international commerce and transnational financial flows, deregulation, privatization, and reduced State functions, have culminated in the debilitation of States' abilities to adopt active measures necessary for respecting, protecting, and satisfying human rights in their territorial jurisdiction. Based on a general description of tendencies posed by the intersection of commercial, financial, investment and human rights policies, Caliori presents a panorama of the strategies used by diverse organizations for protecting human rights in this context, including some success stories.

Patricia Feeney describes the ups and downs of the process for developing universal standards regarding corporate responsibility for human rights violations. She reflects on the reasons that lead to the disintegration of the Draft UN Norms on the Responsibilities of

* Other articles addressing the use of human rights strategies by social movements and base communities and work in the area of women's economic, social, and cultural rights were produced on this occasion and can be directly requested from the Network's secretary by email: info@escr-net.org.

Transnational Corporations and evaluates the strengths and weaknesses of 'Protect, Remedy and Respect Framework' adopted by the Human Rights Council in 2008, at the proposal of the UN Secretary-General's Special Representative for that subject, John Ruggie.

Finally, Malcolm Langford offers a socio-juridical panorama of the justiciability of economic and social rights in the national arena, formulating some questions regarding their origins, content, and strategies. He also includes the debate surrounding the impact of litigation and an evaluation of the main lessons learned. In conclusion, he offers some ideas about the future development of this field.

Completing this issue of the Journal are five articles, on diverse subjects, and an interview. In the first article, Víctor Abramovich presents a general panorama of some strategic discussions surrounding the role of the Inter-American Human Rights System (IAHRS) in the regional political scenery. The author suggests that, in the future, the IAHRS should expand its political role, setting its sight on the structural patterns that affect the effective exercise of rights by subordinate sectors of the population.

In their article, Viviana Bohórquez Monsalve and Javier Aguirre Román carry out a conceptual reconstruction of the three tensions existing in the concept of human dignity: i) the tension between one's natural and artificial character (or consensual or passive); ii) the tension between one's abstract and concrete character, and iii) the tension between one's universal and particular character.

In the third article, Débora Diniz, Lívia Barbosa, and Wederson Rufino dos Santos seek to demonstrate the way in which the field of disability studies has been consolidated into the concept of disabilities as constituting a social disadvantage. As a result of this new concept, as adopted by the 2006 UN Convention on the Rights of Persons with Disabilities, disabilities are not summarized as a catalogue of diseases listed by biomedical experts, but rather constitute a concept that denounces the inequality imposed by environments with barriers on bodies with impediments.

Building on a description of violence faced in Colombia by lesbian, gay, bisexual, transvestite, transsexual, and transgendered (LGBT) persons and on decisions passed down by the Constitutional Court regarding the protection of free sexuality options, Julieta Lamaitre Ripoll analyzes, in the fourth article, the law's symbolic role and argues that activists in her country have an ambivalent relationship with the law; at the same time as they distrust it, because of its ineffectiveness, they mobilize themselves for legal reform and celebrate the progressive jurisprudence of the Constitutional Court.

For the first time, and at the request of the event's participants, a brief account of the IX International Human Rights Colloquium will be included in the Sur Journal. Furthermore, during the IX Colloquium, an interview was conducted with Rindai Chipfunde-Vava, Director of the Zimbabwe Election Support Network (ZESN) that ends this issue of the Sur Journal. In it, Rindai emphasizes the importance of electoral observation in Africa and insists on the necessity for human rights defenders to see elections as a human rights issue.

We appreciate the support from the Ford Foundation, the ESCR-Net and the Observatório Interdisciplinar de Direitos Humanos of the Universidade Federal do Rio Grande do Sul (UFRGS) for the publication of the present issue of the Sur Journal.

Finally, we are extremely pleased to report that the Carlos Chagas Foundation will support the Sur Journal in 2010 and 2011. This new cooperation is exceptionally promising, because, in addition to financial support, this prestigious research institution will complement the Journal's editorial efforts.

ALDO CALIARI

Originally from Argentina, Aldo Caliari has a Master of International Policy and Practice from George Washington University (2007), with a focus on economics and finance. He also holds a Masters Degree from the Washington College of Law, American University, on International Legal Studies (2000), where he was honored with the Outstanding Graduate Award. He earned his first law degree in Argentina, at the Universidad Nacional de Tucuman Law School, in 1997.

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ABSTRACT

The emergence of trade, finance and investment policy as priorities for those engaged in promoting the respect and defense of economic and social rights has to do with the increasing realization that, in the struggle to promote those rights, such policies cannot be ignored or abstracted as a separate field. The human rights paradigm as shaped by post-World War II developments which relies on the responsibility of state actors is complemented by economic aspects of globalization, e.g. the rise of international trade and financial flows across borders, deregulation, privatization and the reduction of the role of the state, culminating in an eroding capacity of states to take active measures required to respect, protect and fulfill human rights in their territorial jurisdiction. On the other hand, international organizations such as the World Trade Organization, the World Bank and the International Monetary Fund have increased their influence on the capacity of states to implement human rights obligations. This paper seeks to fulfill several aims. Based on an overview of trends posed by the intersection of trade, investment and financial policies and human rights, the rich landscape of strategies and activities for human rights advocates will be presented. Before formulating some recommendations in the last chapter, the success stories and future trends, including opportunities and obstacles will be looked at.

Original in English.

Submitted in October 2009. Accepted in November 2009.

KEYWORDS

Human rights - Economic and social rights – Globalization - Human rights advocacy



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This paper is available in digital format at www.surjournal.org.

TRADE, INVESTMENT, FINANCE AND HUMAN RIGHTS: ASSESSMENT AND STRATEGY PAPER¹

Aldo Caliarì

The fields of investment, trade and finance have gained importance for the conditions of enjoyment of economic, social and cultural rights (ESCR). The trends towards the globalization of trade, finance and investment represent, in this regard, a great challenge that ESCR advocates have faced by resorting to a diverse set of strategies. Even as they made remarkable progress in expanding their level of knowledge, resources and skills, a large gap remains between the available resources and the dimension of the challenge. In particular, ESCR advocates struggle to address the advocacy targets relevant for trade, finance and investment issues in an effective way.

In what follows, Section I provides an overview of trends posed by the intersection of trade, investment and financial policies and human rights, and the emerging challenges for human rights advocates. Section II explores the rich landscape of strategies and activities that the human rights community has deployed so far as a response. Section III looks at the success stories and the future trends that will act as a context to the strategies going forward, including the opportunities and obstacles that they constitute. The final, Section IV, formulates some recommendations.

1 Trends and challenges: an overview

The emergence of trade, finance and investment policy as priorities for those engaged in promoting the respect and defense of economic and social rights has to do with the increasing realization that, in the struggle to promote those rights, such policies cannot be ignored or abstracted as a separate field.

Notes to this text start on page 157.

That has always been true of this set of rights, as the instruments that define the obligations regarding ESCRs are framed in language that forces resort to extra-legal assessments of an economics and economic policy nature. The obligation of States in this area is usually defined as to “take steps... to the maximum of its available resources”, “achieving progressively,” etc². The language specific to certain rights adds even further qualifications, such as when language about the right to health refers to the “highest attainable standard”. This is not to deny that there are standards according to which a violation is immediately configured by the deprivation of a right, such as, for instance, the obligation not to discriminate in the enjoyment of any of the ESCRs. But in most cases ESCR obligations are expressed in language that makes resort to economic policy judgments inevitable in order to ascertain whether states are, for instance, making “the best use” of resources or what are the “available resources” they actually have at their disposal.

Trends towards economic globalization have compounded the problems associated with these factors. This is because the human rights paradigm, as shaped by the post-World War II developments, comes to rely on the responsibility of State actors, making them the only direct holders of obligations. But economic aspects of globalization such as the rise of international trade and financial flows across borders, deregulation and privatization and the reduction of the role of the state, erode the capacity of States to take active measures required to respect, protect and fulfill human rights in their territorial jurisdiction. So something that - from a traditional civil and political rights perspective - used to be welcomed (the receding role of the State vis-à-vis the sphere of individual freedoms) - from an ESCRs perspective - represents a handicap. Economic and social rights call, by their essence, for a State more capable of taking active measures in economic and social policy—even when these active measures do not amount to intervention but to a more active regulation and oversight of private sector activity³.

The same phenomenon has meant that international organizations such as the World Trade Organization, the World Bank and the International Monetary Fund (IMF) have increased their influence on the capacity of states to implement human rights obligations. The same can be said of a number of actors in deregulated international financial markets, such as hedge funds or private equity funds. Put in other words, a range of policy areas that used to be left to domestic decisions alone, and have consequences on how human rights commitments are met, are increasingly being permeated by policies and rules defined at the international level, or in collegial processes of which the national state is only one part (trade, intellectual property, finance). Internationally-organized business actors have also growing weight on the domestic sphere, either directly or indirectly. This weight strongly intersects with the capacity of this sector to lobby on the policies and rules defined at international level.

Nonetheless, these organizations and actors are not themselves parties to the human rights instruments whose development and adoption constitute the result of long struggles by the human rights movement. Ultimately, of course, international organizations are made of States parties to human rights instruments. Likewise, private sector actors do not function in a vacuum but are, arguably, subject to the

jurisdiction of States parties to such instruments. But the fact remains that the chain of accountability in the case of these non-state actors is, to say the least, less straightforward just at a time when their influence has increased.

Therefore, with their growing importance, organizations and bodies with jurisdictions on trade, finance and investment, as well as the policies they issue, have gained more relevance in struggles to promote and respect ESCRs.

The challenges

The efforts to make economic policy- and rule-making accountable to the human rights framework face important challenges.

The first challenge is that posed by economic globalization. This is the one that logically emerges when pursuing rights-based claims (which by definition represent the other side of an obligation) in an increasingly globalized environment where the main economic actors are neither parties to, nor do they feel bound by, the existing human rights instruments that create such obligations. The removal of decision-making on economic policies from the national level also makes it more difficult to pursue accountability. It allows for national and supranational instances to start a “blaming game” whereby each of them alleges the other is responsible for a specific outcome, blurring the responsibility for upholding the right in question.

The difficulties to access information also are a challenge, and this challenge is two-fold. Instead of referring to a national government only, cross-border economic policy issues by definition affect the behavior and policies of more than one party. These parties may be the negotiating parties to a trade agreement or to a loan being drawn either from another country, or from an international financial institution (this financial institution having, in turn, also a broad membership collectively responsible for the decision). These parties may also be the home and host states in an investment project, or the donor and recipient country of a grant. For citizens it is hard enough to gather information about a party that is not their own government. But globalization has also made it more difficult for them to gather information about what their own government is doing in international negotiations, even if outcomes of such negotiations will eventually bind the national and local legislators.

Third, human rights demands on economic policy issues can be condescendingly dismissed by economic policy-makers as well-intentioned, but out of touch with the realities of limited resources. Economic policy practitioners who may entirely agree with those demands oftentimes wonder whether they offer any useful guidance in dealing with intricate policy questions such as: what is the optimal degree of openness in a particular industry, or where to obtain the resources to fulfill immediate and conflicting needs of different social groups. The challenge imposed by the limitation of resources is one that human rights advocates, whose demands oftentimes do not seem to leave room for the trade-offs that are a necessary ingredient of economics, have yet to answer credibly. Where attempts to develop such answers have been made, they are not widely known, lack a solid base on binding human rights standards or are vulnerable to the claim of not being based on sound economics.

Four, the legal human rights framework is also rather mute when seeking guidance on detailed policy prescriptions. Come to think of it, this is neither a flaw, nor should it be surprising. If one accepts the sensible notion that economic and development models should be tailored country-by-country, and even region-by-region, as a product of unique economic, political and social realities, trying to come up with universal best policies is an exercise doomed to failure. Just like the much-criticized structural adjustment programs, similar exercises to establish one-size-fits-all models will attract warranted criticism. But this lack of precise prescriptions, while a strength, may also mean that unscrupulous –or simply misguided—policy-makers can appropriate human rights language to justify ill-guided or questionable economic policies.

Five, the lack of widespread expertise about trade and financial policies and the policy formation process around them among human rights groups represents a hurdle to their operations to try to have an impact on economic policies and practices. This lack of a solid understanding of trade, finance and investment and their relative relevance to specific ESCR objectives hampers the capacity and confidence for human rights advocates to design strategies and propose actions based on evaluations of where a planned advocacy intervention may be useful⁴.

Given this backdrop, there is a temptation to confine human rights advocacy to the “micro” level, as it is in the limited context of a specific project or micro-economy that the impacts of a specific policy or project can be more easily identified and articulated. Yet, this approach cannot come to grips with macroeconomic environments that may be responsible for the need, feasibility or existence of alternatives to the same micro and specific projects. Focusing on the micro impacts amounts, in a sense, to focusing on the symptoms, without tackling primary causes. In addition, the “micro” focus is vulnerable to the claim of lack of rigor in not accounting for trade-offs among rights of different regions or portions of the population. For instance, in a dam project that will require removing a community from its habitat it is easy to identify the affected rights of the community but, from a larger perspective, the government doing so may argue it is simply trying to reduce poverty so other portions of the population can have access to education, health, electricity or even water. The questions of where the line should be drawn and what is an acceptable trade-off cannot be answered in the abstract, and will require a case-by-case examination. The human rights approach certainly does apply to the drawing of this line, as the guidelines issued by Treaty-monitoring bodies allow for measures that will imply retrogression on the enjoyment of certain rights but as long as they are justified in terms of the rights that are being promoted (UNITED NATIONS ORGANIZATION, 1990). The human rights framework does offer a framework for policy choices. But this framework is more difficult to utilize, its application requiring expertise on trade and financial policies, and its conclusions will not be as absolute and straightforward as the ones that can emerge from the micro approach.

Six, a growing number of decisions that would require a delicate balance

between principles of international human rights law and the imperatives of running a good economic policy seem to be *de facto* (or, in some cases, *de iure*) subject to decisions by bodies with purely economic (trade, investment, finance) backgrounds and on the basis of considerations that exclude human rights. This is the case, for instance, with disputes involving access to services that have been submitted to investment arbitration tribunals⁵.

At the same time, civil society organizations seem to find their highest level of comfort focusing on norm-setting and development by human rights bodies and mechanisms. This observation is not meant to, in any way, diminish the importance of developing standards. “Soft law” such as the Concluding Observations the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) can formulate after examination of country reports, or General Comments, are useful not only to human rights advocates, but also to governments. Yet, it is clear that international financial institutions, or the branches of government engaged in negotiations on trade agreements, pay little attention to such norms and standards, and consider them, in the best case, of an advisory nature.

This is certainly compounded by the enforcement structure. For instance, General Comments of the CESCR are the authoritative interpretation of the Covenant. But these interpretations are binding upon the primary obligation-holders, this is, states. Tenable arguments have been made to justify the applicability of the statements by this body to non-state actors (such as international organizations and private sector entities). At the end of the day, however, what matters is whether a tribunal exists to ventilate the claim. In the case of the CESCR, besides the national level jurisdiction, such tribunals are usually not available.

As a result, human rights advocates oftentimes find that, in order to have an impact on economic policy discussions and negotiations, they are forced to contest them at a disadvantage, in institutions for which human rights are, if anything, an ancillary consideration of rather discretionary application. There are supporters of the view that bodies with economic jurisdictions, if properly staffed, might be more open to applying human rights law. For instance, some scholars—including human rights scholars—invoke the World Trade Organization (WTO) dispute settlement system as a potential avenue to litigate human rights cases⁶. Building the human rights education and expertise of such bodies should certainly be considered, as a pragmatic alternative.

But the notion that changes in staffing can overcome the cultural and structural difficulties for bodies primarily oriented to economic law enforcement to give a fair hearing to human rights claims, or even admit them on a consistent basis, rests on thin grounds. This is because adjudication in such bodies takes place in the context of a primary body of law oriented to open markets for international transactions, as is the WTO law, or international investments. Moreover, the tool of building precedents before judicial tribunals and developing jurisprudence and principles on the interpretation of rights via strategic litigation is, as far as economic law- and policy-making bodies are concerned, not available. Investment arbitral tribunals, unlike courts, are simply not bound by precedent, nor are their proceedings—in most cases—publicly available. This means human rights

advocates are in the Sisyphean position of having to fight every case as if it were the first, in very unfavorable conditions, an endeavour for which the human rights community simply does not have enough resources.

Reform of the institutional machinery to direct the processes for economic policy decision-making towards the consideration of human rights matters would be of benefit to the whole human rights community. Yet, there is no concerted and collective strategy by the community to carry systematic advocacy on the reforms of these institutional processes (or build tactical alliances with the groups that are engaged in such reforms).

Seven, it is very difficult to identify a specific contribution of the human rights movement to changes and reforms. When it happens, it is more often a result of having joined efforts with a large number of non-human-rights based groups in an effort negatively formulated, such as “remove investment rules from the WTO”, or “remove the influence of the IMF in a specific country”. This is, indeed, good, and should not be minimized. To the extent that these efforts free space for rule- or policy-making at the national level that could be more in sync with the human rights obligations of the specific country, this can be considered progress. But less often is it possible to identify a positively formulated human rights message that states what the specific policy alternative should be. For instance, once the states are free to articulate an investment policy, what should these policies be in order to better foster the achievement of ESCRs? Or, once a country gains policy space vis-a-vis a previously-constraining IMF program, what does a human rights-based macroeconomic policy call for?

2 Strategies and activities

These numerous challenges have not prevented the emergence of a rich response from the human rights community in terms of strategies to promote accountability of economic policies to human rights. This section offers examples of activities and strategies. For the sake of presentation the exercise, rather than a long descriptive list, offers a classification by type of strategies, including one or two representative examples for each of them⁷. It should be kept in mind that the classification is for analytical purposes only. In reality, it would be hard to find an organization that focuses on only one of these strategies. Most of them focus on more than one strategy at a time and, in fact, try to make different strategies work together.

Types of strategies/activities:

- a. *Awareness-building amongst grassroots, other NGOs, government officials and broader public* consists of activities devoted to raising awareness in the public or in specific communities by holding of talks, workshops, preparation and distribution of materials, press campaigns, arts performances and other public events. The Malaysia-based South East Asian Council for Food Security and Fair Trade (SEACON), for example, is engaged in education of farmers’

interest groups about the implications of Free Trade Agreements on agriculture. Likewise, 3D builds awareness amongst trade, development and human rights organizations to ensure that trade rules are developed and applied in ways that promote an equitable economy.

- b. *Capacity-building and public mobilization* consists of activities devoted to organizing and mobilizing affected groups and NGOs. Some sections of the FoodFirst Information and Action Network (FIAN) in Latin American and African countries, for instance, work with other human rights NGOs to mobilize farmers and peasants' groups to demand their rights. Likewise, members of the Habitat International Coalition in Mexico and other countries have carried out particular work, and capacity-building is a traditional strength of the Secretariat of the Asian Forum for Human Rights and Development (FORUM-Asia headquartered in Bangkok) with regards to trade and human rights. The Land Center for Human Rights, for their part, work to build the capacity of small-scale farmers to analyze trade and investment policies for their impacts on their communities in Egypt. The Ecuador-based Centro de Derechos Económicos y Sociales (CDES) have also worked to thwart regional and bi-lateral trade agreements which have threatened human rights, specifically focusing on the role of public mobilization around the US-Ecuador Free Trade Agreement, the Free Trade Area of the Americas, and most recently the Community of Andean Nations (CAN)-EU Economic Partnership Agreement.
- c. *Influencing decisions, policy- and rule-making by national governments* seeks to change the behavior of a specific government with regards to trade, finance or investment policies. DECA Equipo Pueblo, for example, incorporates a strong component of advocacy work with the executive and legislative branches of the Mexican government (such as the Secretariat of Foreign Relations, the Secretariat of the Economy, the Chamber of Deputies and the Senate), the European Commission (EC) and the EC's Delegation in Mexico and with the Multilateral Development Banks (MDBs) and their offices in Mexico. Part of this work is to establish consultation mechanisms, particularly with the Mexican government, on the impacts of trade and economic policies on social development, sustainable development and human rights in the country. The Instituto de Servicios Legales Alternativos (ILSA), based in Colombia, challenges the ongoing US–Colombia Free Trade Agreement negotiations as unconstitutional before the Colombian courts⁸. The litigation in South Africa spurred by Treatment Action Campaign on the lack of access to HIV/Aids retroviral drugs which aimed not only at a domestic change, but had also an international dimension, seeking to force the South African government to pursue changes to the Intellectual Property Rights regime through available international negotiations (SOUTH AFRICA, 2002). The Mexican NGO FUNDAR, for their part, engages in the government fiscal policy-making process by monitoring and analyzing national budget negotiations from a human rights and gender perspective.

- d. Influencing decisions, policy- and rule-making in international fora and institutions* consists of activities that aim to influence the behavior of an international institution involved in economic policy such as the International Monetary Fund, the WTO or the World Bank. Halifax initiative and others work to ensure that human rights impact assessments become part of the procedures of such institutions for screening financing projects that they will fund. FORUM-Asia often advocates as a regional Asian platform for advocacy within such bodies as ASEAN, and the UN for a human rights-consistent trade regime. The Institute for Agriculture and Trade Policy's (IATP) Biodiversity and Intellectual Property Project advocates for significant reforms in the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs), which violate basic human rights jeopardizing access to AIDS drugs and other medicines as well as farmers' rights to save and sow harvested seeds. The Bretton Woods Project advocates within the World Bank so that it acknowledge its obligations by integrating a human rights approach into its own policies and programmes with transparency and public participation.
- e. Norm-development at the national level* consists of activities devoted to create national norms that may help challenge certain trade, investment or finance activities. Example: a number of groups-nucleated through networks such as those promoting the International Parliamentarians' Petition for Democratic Oversight of World Bank and IMF policies (BRETTON WOODS PROJECT, 2004), are engaged in campaign efforts to pass laws that will make it mandatory for Executive Branches to get Parliamentary approval for any loan they negotiate with the International Monetary Fund or World Bank, so the loan could be declared illegal, and beyond the authority of the government otherwise. The work of the Egyptian Initiative for Personal Rights (EIPR) on trade is connected to their Health and Human Rights program, mainly focusing on intellectual property rights in trade agreements and the affordability and availability of medicines. In this, they carry out lobbying within the European Union and the UN, particularly with the former Commission on Human Rights, UNGASS, and other mechanisms, which focuses on incorporating stronger human rights language on health and trade issues, access to medical treatment, etc.
- f. Norm-development at international level* consists of activities devoted to expanding and refining international human rights law, both through hard and soft norms, as it relates to trade, finance and investment. Example: the development of the Tilburg Guidelines on Human Rights in International Financial Institutions, by a group of experts convened by the University of Tilburg in 2000 (VAN GENUGTEN; HUNT; MATHEWS, 2003, p. 247-255); the engagement by some organizations in the design of general guidelines on a human rights-consistent design and implementation of economic reform policies and foreign debt programmes led by the Independent Expert on Foreign Debt and Human Rights (UNITED NATIONS ORGANIZATION, 2008a); efforts by groups such as 3D -> Trade - Human Rights - Equitable

Economy to ensure that General Comments of the Committee on Economic Social and Cultural Rights (CESCR) address trade, finance or investment and deal appropriately with other, trade-related issues such as intellectual property.

- g. Jurisprudence by judicial and quasi-judicial mechanisms at the national level* directed at creating national jurisprudence referred to the interpretation and implementation of trade and investment rules, or loan conditions. In a recent example, the Costa Rica Supreme Court placed an injunction on implementation of the Central American Free Trade Agreement with the US –to which Costa Rica is a party—on the basis that requirements on consultation with affected indigenous communities had not been followed, making the implementing provisions unconstitutional (INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, 2008). The Movimento do Atingidos por Barragens (MAB) in Brazil for their part have sought redress for the impacts of public financing of Brazilian hydro-electric sector by engaging with an investigative committee set up by Brazil’s Office of the Special Secretary for Human Rights (Secretaria Especial dos Direitos Humanos). The Kenya Human Rights Commission has developed national litigation challenging the Kenya-EU Economic Partnership Agreement. The Human Rights Law Network in India has challenged the intellectual property rights regime as related to access to medicines in the nation’s Supreme Court, successfully advocating for a court order forcing the government to guarantee that all essential drugs be available and affordable for all people living below the poverty line.
- h. Jurisprudence by judicial and quasi-judicial mechanisms, as well as human rights supervisory and monitoring bodies at international level* directed at establishing international jurisprudence referred to the interpretation and implementation of trade or investment rules, or loan conditions. Example: the Argentina-based Centro de Estudios Legales y Sociales (CELS) and Asociación Civil por la Igualdad y la Justicia (ACIJ) together with consumers organizations filed an amicus curiae with the International Centre for Settlement of Investment Disputes, on a case involving the Argentinean government’s concessions for water services provision to foreign companies (ICSID, 2003a); ICSID accepted presentation. 3D has successfully sought to get language warning about the potential consequences of intellectual property rights provisions being negotiated by specific countries in the relevant country reports by treaty-monitoring bodies⁹. A group of 4 NGOs—including the Centre for Applied Legal Studies and InterRights—have successfully petitioned an arbitration tribunal at the International Centre for Settlement of Investment Disputes (ICSID) to intervene in a case between the European owners of certain South African mining companies and the Republic of South Africa related to the implementation of the Black Economic Empowerment measures in South Africa. (INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, 2008)

- i. *Project-level Human Rights impact assessments* directed at designing methodologies and actually carrying out human rights impact assessments of trade, finance and investment policies or rules. When Human Rights Impact Assessments (HRIAs) are not yet official exercises nor have endorsement by a government, they can still be a tool for the qualitative value of the assessment, and to empower a community affected by a project by facilitating a vehicle for them to voice their concerns. The Canadian-based NGO Rights and Democracy in collaboration with Tebtebba, Association Africaine de Défense des Droits de l'Homme (ACIDH), Action Contre l'Impunité pour les Droits Humains (ASADHO) and/or CELS, Rights & Democracy have developed a series of publications and exercises of human rights impact assessments for foreign investment projects (RIGHTS AND DEMOCRACY, 2008).
- j. *Improving access to information* directed at expanding the access to information on government activity regarding trade, finance and investment. While access to information is not directly recognized in the International Covenant on Economic, Social and Cultural Rights, it is clearly instrumental and the authoritative comments by the CESCR so recognize. Access to information has proved essential to the timeliness and well-targeting of any substantive advocacy and mobilization for ESCRs in trade, finance and investment –this is particularly so given the degree of opacity that characterizes activity in this field.

3 Looking towards the future: Successes, opportunities and obstacles

Successes

In spite of the enormous difficulties, and taking into account the inevitably gradual pace of progress that can be expected in the ambitious goal of achieving human rights-accountable trade, investment and finance regimes, the last few years have seen some successes that should be noted as steps towards this direction:

- a. *Optional Protocol on ESCRs*: The adoption in 2008 of the Optional Protocol for ESCR, brings a mechanism for individual complaints that so far had been missing— placing accountability for ESCRs at sort of a handicap when compared to civil and political rights. Its achievement is tribute to the relentless campaigning by civil society organizations (UNITED NATIONS ORGANIZATION, 2008b).
- b. *TRIPs and Public Health*: The relentless campaigning, including litigation in countries such as Brazil and South Africa, led to framing some provisions of the TRIPs agreement as a violation of some ESCRs (notably the right to health). The CESCR, the Office of the High Commissioner for Human Rights and other human rights bodies seized on the matter and issued official documents that represent useful precedent to challenge intellectual property provisions

not only in the WTO, but also at the bilateral level (which is the case with a number of bilateral Free Trade Agreements - FTAs where the CESCR has issued pronouncements). In turn, national bodies in charge of protecting health goals or the right to health, and which otherwise would have probably lacked the clout to influence these decisions, seized on those precedents to maximize their impact, such as in Peru¹⁰ and Thailand¹¹. True, the Doha Declaration on TRIPS and public health gives countries the space to derogate from trade rules when required to uphold public health. Arguably, it should have been the other way round: countries should have been required to derogate from trade rules to protect public health. So, from a human rights perspective this is only a step in the right direction, but a step nonetheless.

- c. *IFC's human rights impact assessments*: After several years where environmental and social – but not human rights per se— were the norm in impact assessments, the International Finance Corporation (IFC) last year developed a guiding manual for human rights impact assessments. The document has been heavily influenced by transnational corporations and some criticize it as a public relations exercise. It is also of doubtful value as an expression of IFC and/or companies self-monitoring. But it is the first time that in one of the institutions of the World Bank group the notion of a human rights impact assessment is accepted. Before, human rights issues were condemned to being on the fringes and approached on a selective basis in assessments of environmental or social impacts. That IFC felt it necessary to issue such a document is also a sign of the seriousness with which claims of human rights violations by companies that it finances are beginning to be taken (INTERNATIONAL FINANCE CORPORATION, 2007).
- d. *The adoption of the Millennium Development Goals (MDGs)*: The MDGs are not exempt of criticisms. Not the least of these is that they are a diluted, watered down version of the human rights framework, only focusing on specific targets. Their blindness to the economic policies needed to achieve them, on which they are sort of neutral, is also a weak point. But, from the perspective of ESCRs, it is worth noting that they embody for the first time hard numbers accepted universally as a target for all countries. Given the perceived elusiveness of concepts usually associated to ESCRs, such as “progressive realization” and “minimum core,” and the reluctance of states to take steps to accept numerical targets, the MDGs, even if only doing this for some dimensions of some rights, should be taken as an element of progress. At the very least, they set a precedent to build upon demonstrating that the mobilization of political will is critical in pulling ahead progress in developing standards for ESCRs rather than expecting the process to run the other way around (or offering the lack of standards as an excuse for not mobilizing political will). MDGs, by containing a dimension that refers to the international environment, shed light on the fact that progress in ESCRs does not only rest on national governments, but also on the other members of the international community, including international organizations¹².

- e. *Development of human rights norms that address trade, finance and investment:* Here the movement has also scored some successes such as the General Comments of CESCR and the criteria for development partnerships developed within the Working Group on the Right to Development¹³. These all build a body of norms and interpretations that are useful tools for activists, organizations, researchers and national and international authorities in charge of adjudicating matters of economic rules and policies. Of course, as mentioned earlier in this paper, whether the bodies with economic policy competences that are de facto able to influence human rights implementation are willing to take such norms seriously in their decisions is rather questionable. But this should not diminish the importance that developing norms and standards for what are the intended changes in the practice, are a first step in any advocacy activity. It is for this reason that the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, while with an ultimately disappointing result,¹⁴ can be held as a positive story as far as the development of standards is concerned.
- f. *Marked increase of expertise on the political economy aspects of trade, finance and investment by human rights organizations.* Compared to a decade ago, human rights organizations have a more realistic approach to the shared responsibility of developed and developing countries in breaches of human rights obligations due to trade, finance and investment policy. This represents a step in factoring in the dynamics of a more globalized world. The better that the mechanisms by which policies are formed are understood, the more that framing of targets and the strategies and tactics to influence policy-making will be effective. The more that targets and tactics are effective, the more that the resources of the civil society community will be efficiently deployed.

4 Trends, opportunities and obstacles

Some of the observable trends in the field that will shape the scenario for future work of ESCRs defenders, are presented in this section, with some reflections on the opportunities and obstacles that they may imply.

The return to human rights?

The world of international advocacy has its fashions. In the light of campaigns for MDGs, debt relief, poverty reduction, the “Singapore issues”¹⁵, and a number of summits that followed the UN Conferences of the end of the 1990s - on women, population, social development, sustainable development - human rights as such have sort of “fallen out of fashion.” However, a certain fatigue is settling into the follow-up processes to different international conferences of the 1990s and early millennium. There is a noticeable lack of leadership by governments in tackling the issues that require a collective action in ways that acknowledge the increasing interconnection of economic policy issues and those in the social and environmental field.

The onus is falling back on civil society to generate new momentum in international struggle for social justice and, in doing this, the human rights framework, being legally binding, supported by a number of conventions that have been widely signed by governments, may regain prominence as a default framework of commitments that governments cannot sidestep and as the perennial mobilizing tool for grassroots.

*Halting of process of economic liberalization expansion
(WTO, IFIs): more policy space?*

The processes of liberalization and expansion of globalization, seemingly unstoppable until recently, are grinding to a halt. This opens an opportunity for a reframing and redefinition of paradigms for economic policy-making. The decrease in size and relevance of international organizations that have commanded a great deal of attention in the last few years (World Bank, IMF, World Trade Organization) has some countries regaining a measure of “policy space”. While the ongoing global financial and economic crisis is meaning for several countries a return to the constraints of IMF policy, it is also acting as a sobering note of caution with regards to the policy model that it is worth accepting in exchange for aid or finance.

Whether alternative policies that countries enjoying more policy space choose will be in accordance with human rights is certainly open to question. For instance, the halting of the WTO talks has brought added pressures on many countries to sign bilateral agreements that have been shown to be much more constraining for national governments than the multilateral rules have ever been. Resort to alternative sources of finance, in turn, poses its own challenges, whether they are emerging donors such as China and India, international financial markets or domestic private sector. It adds up to a more diverse landscape that challenges the logic of work of civil society organizations that for a long time became used to concentrate their advocacy on international meetings and events driven by international organizations such as the WTO or the World Bank (even if only to oppose them). For economic and social rights advocates the fragmented nature of the movement will become more apparent. Coalition-building in the new environment will have to be more issue-based, less reliant on using opposition to large global institutions as a galvanizing framework.

Expansion of role of IFC and, in all financial institutions, direct financing and public subsidization of private sector.

As the World Bank faces lower levels of lending, the IFC is reporting unprecedented growth. To the extent that the public sector financing arms of the World Bank are surviving, this is on condition of wider support to the subsidization of private sector activities in provision of services, resource extraction projects, etc. These trends are also noticeable in the dynamics between private and public sector arms of all regional development banks.

Emergence of regional financial and trade institutions, associated to a more social justice-friendly discourse.

The emergence of regional financial institutions such as the Banco del Sur, for example, spearheaded by most governments in South America and associated to political changes in the region that have generated more progressive governments, is an example of this trend. There is an opportunity to test in practice how a different paradigm for development finance might work but, as activists also warn, it may also be a case of the new masters carrying the same failed development model, with different means.

Role of new donors/ creditors.

The growing role as lenders and donors of Southern governments tests the usual “North-South divide” model that advocates tend to use for analysis. On the one hand, this contributes to the lack of predominance of the Bretton Woods Institutions and western governments, and paves the way for access to alternative financing, all of which has positive potential connotations. At the same time, the human rights track record at home, as well as the lending practices being already exhibited, by some of these new donors and lenders, gives reason for caution in examining the impacts of these new trends on ESCRs.

Confluence of food, energy, climate and finance crises.

The confluence of global crises in these areas is paving the way for a deep reexamination of the role ascribed to market forces during the last twenty five years. In act, the failure of markets to solve problems that mainstream economics had tried to minimize should provide a boost to heterodox schools, including the struggle of ESCR advocates rethinking approaches to these problems along lines that incorporate human rights.

5 Recommendations

1. The fact that trade, finance and investment regimes are collective phenomena that involve always more than one country, means that a collective, transnational approach, is a condition of success in holding them accountable to ESCRs. There is a need to strengthen platforms that can promote such type of collective work with interested human rights organizations.
2. The concept of extraterritorial obligations is promising and of particular interest for this field (given what was said above about cross-border trends in trade, finance and investment). ESCR advocates should focus more on it and seek to strategize on application in specific cases¹⁶.
3. More attention should be given to the human rights responsibilities of non-state actors, without diminishing the State’s obligation to protect human rights from

being affected by third parties. These responsibilities entail not only direct violations, but responsibility in lobbying activities that shape international legal norms and contracts that may enter in conflict with international human rights law.

4. There is a need to address the process dimension –e.g. how decisions on economic policy and human rights are made—rather than only the content dimension –e.g. what should be the content of decisions on such matters. Advocacy for more suitable forums to resolve the conflicts that emerge between human rights and economic policies/rules will be of benefit to all ESCR advocates, and, yet, are a clear example of collective action, as it is hard for individual organizations to have the incentives to pursue action in this field.
5. Though alliances will be eventually necessary, there is a strong need to make full use of the resources in the human rights community in a more synergic way. These resources include, notably, social movements, well-known human rights organizations, large networks that have developed expertise in approaching trade, finance and investment issues from a human rights perspective, and academics. In this regard, it is crucial to encourage and nurture efforts that go in this direction such as the International Network for Economic, Social and Cultural Rights (ESCR-Net)¹⁷.

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NOTES

1. This paper has been written for the Kenya International Strategy Meeting of ESCR-Net. The author wants to thank Areli Sandoval, Julieta Rossi, Caroline Dommen and Daria Caliguire for the valuable comments on previous versions that had benefitted this paper and to Nicholas Lusiani for his research assistance. The responsibility for mistakes, of course, is the author's alone.

2. This formulation, found in Art. 2 of the Covenant on Economic, Social and Cultural Rights, applies to all rights contained in the Covenant. Similar ones have been pursued in other instruments on economic and social rights, such as for instance the Protocol of San Salvador to the Inter-American Convention on Human Rights. (whereby Parties undertake to adopt the necessary measures "to the extent allowed by their available resources, and taking into account their degree of development..." , conf. Art. 1). This has led to a long held –but arguably wrong– perception that ESCR obligations are formulated in less assertive terms, or softer, than those on civil and political rights. This is far from being the case, even if the standards and indicators for determining non-compliance take more work to define, especially in concrete cases, for economic and social rights.

3. It is generally accepted today that the receding role of the state may, in fact, be also a handicap for its capacity to take measures on civil and political rights, especially to promote and fulfill them.

4. See the "Identified needs " in ESCR-Net 2006, "Human Rights, Trade and Investment Mapping." (Beginning in May 2006, in response to Members' expressed needs for capacity building, as well as interest in collective efforts and advocacy, the ESCR-Net Secretariat initiated a mapping of current work, expertise, challenges and proposals related to trade, investment and human rights of Member

organizations and active participants in Latin America, Asia and Africa. Building on extensive interviews with thirteen organizations, an analysis and assessment was completed in February 2007, in order to prioritize and strategize areas of work in discussion with mapping participants.)

5. Examples to mention in this regard are cases involving water and sewage services filed before the International Centre for Settlement of Investment Disputes (ICSID) against Argentine Republic by Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. (ICSID, 1997b), and by Azurix (ICSID, 2003b); as well as by Aguas del Tunari S.A. (controlled by Bechtel) against Bolivia (ICSID, 2002). Likewise, a case involving toxic waste disposal filed under NAFTA Chapter 11 by Metalclad against Mexico (ICSID, 1997a).

6. "The creation of the WTO gives the world a new opportunity to put Article XX in its rightful place in the GATT. Doing so must involve the re-interpretation of Article XX in light of the norms of international human rights law. (...) the construction of WTO jurisprudence by its dispute settlement organs must not contradict rules of interpretation set forth in the Vienna Convention on the Law of Treaties. This must include 'any rules of international law' relevant to the dispute" (HOWSE; MUTUA, 2000, p. 11).

7. As this is a non-exhaustive list, the lack of mention of some groups and activities does not imply a value judgment about their importance.

8. Comprehensive information on the actions filed to question constitutionality is available at (Gaviria Diaz, 2009).

9. See several country-specific briefings where 3D has done this posted at <http://www.3dthree.org/en/page.php?IDpage=23>

10. See (OVETT, 2006) subsequent to recommendations by the UN Special Rapporteur on the Right to Health to undertake an assessment of the US-Peru FTA the Ministry of Health undertook an impact assessment of the effect of proposed FTA rules on the cost of medicines in Peru, concluding that an extra 700 to 900 thousand people would be excluded from treatment

11. Subsequent to recommendations by the Committee on the Rights of the Child, the National Human Rights Commission of Thailand performed a human rights impact assessment of an FTA in negotiation between such government and the United States. See (UNITED NATIONS ORGANIZATION, 2006a) and (THIRD WORLD NETWORK, 2007).

12. See, for the relationship between MDGs and human rights, (UNITED NATIONS ORGANIZATION, 2006b) and (Idem, 2008c).

13. The open-ended Working Group on the Right to Development was established in 1998 by resolution of the Commission on Human Rights (resolution 1998/72). For the latest on the status of the efforts to develop the guidelines mentioned in the text see Human Rights Council 2009, 12th Session, Report of the Secretary-General and the High Commissioner for Human Rights on the right to development, A/HRC/12/29, 23 July.

14. After several years in the making, the UN Norms on the Responsibility of Transnational

Corporations and Other Business Enterprises with Regard to Human Rights were ultimately rejected by the UN Commission on Human Rights in 2005. The Commission recommended, instead, the appointment of a Special Rapporteur with a more restrictive mandate.

15. "Singapore Issues" is the shorthand used to refer to attempts to launch negotiations in the World

Trade Organization on investment, competition, government procurement and trade facilitation. These items were placed on the WTO agenda at the WTO Singapore Ministerial meeting of 1996. On strong pressure by developed countries to start full-steam negotiations, developing countries walked out of the WTO Ministerial at Cancun in 2003 and, as a result, the items were dropped from the WTO agenda, with the exception of trade facilitation (government procurement also is embedded in some ongoing WTO processes, in a partial way, but not as an independent negotiation process).

16. It is worth mentioning the work of the ETO Consortium, a network of around 30 NGOs, university institutes and individuals from different parts of the world, who is preparing a "document of principles" on extraterritorial state obligations for economic, social and cultural rights. FIAN's International Secretariat serves as the secretariat to the Consortium's steering committee consisting of Abo Akademi, Brot für die Welt, International Commission of Jurists, and the universities of Lancaster, Maastricht, North Carolina.

17. ESCR-Net's mandate is general, to strengthen economic, social and cultural rights by working with organizations and activists worldwide to -facilitate mutual learning and strategy sharing, -develop new tools and resources, -engage in advocacy, and -provide information-sharing and networking. But its contribution to the preexisting situation for connecting groups that work on trade, finance and investment from a human rights perspective has been particularly noteworthy. Since its foundation it has provided the fertile ground for discussion on topics of interest for this community, developments requiring a response, etc. In addition, it has successfully sought to involve not only NGOs but also social movements and academics.

RESUMOS

O fato de as políticas de comércio, financiamento e investimento se tornarem prioridades para aqueles que estão comprometidos com promover o respeito e a defesa dos direitos econômicos e sociais tem a ver com a percepção crescente de que, na luta em defesa desses direitos, essas políticas não podem ser ignoradas ou abstraídas como se fossem um campo separado. O paradigma dos direitos humanos tal como moldado pelos eventos posteriores à Segunda Guerra Mundial, que se baseia na responsabilidade dos atores estatais, complementa-se com os aspectos econômicos da globalização como, por exemplo, a ascensão do comércio internacional e dos fluxos financeiros transnacionais, a desregulamentação, a privatização e a redução do papel do Estado, culminando com o desgaste da capacidade destes de tomar as medidas ativas exigidas para respeitar, proteger e fazer cumprir os direitos humanos em suas jurisdições territoriais. Por outro lado, organismos internacionais como a Organização Mundial do Comércio, o Banco Mundial e o Fundo Monetário Internacional aumentaram sua influência sobre a capacidade dos Estados de implementar as obrigações relacionadas com os direitos humanos. Este artigo atende a vários objetivos. Com base numa visão geral das tendências apresentadas pela interseção das políticas de comércio, investimento e financiamento com os direitos humanos, apresentaremos um rico panorama de estratégias e atividades para os defensores de direitos humanos. Antes de formular algumas recomendações no último capítulo, examinaremos algumas histórias de êxito e tendências futuras, inclusive oportunidades e obstáculos.

PALAVRAS-CHAVE

Direitos humanos – Direitos econômicos e sociais – Globalização – Defesa dos direitos humanos.

RESUMEN

El surgimiento de las políticas de comercio, finanzas e inversiones como prioridades para quienes se dedican a promover el respeto y la defensa de los derechos económicos y sociales está relacionado con el hecho de que cada vez es más evidente que en la lucha por promover esos derechos, dichas políticas no pueden pasarse por alto ni abstraerse como si pertenecieran a un área separada. El paradigma de los derechos humanos, según quedó conformado por los acontecimientos posteriores a la Segunda Guerra Mundial, que depende de la responsabilidad de los actores estatales, se complementa con aspectos económicos de la globalización; por ejemplo, el aumento del comercio internacional y de los flujos financieros transnacionales, la desregulación, las privatizaciones y la reducción de la función del Estado, que culminaron en el desgaste de la capacidad de los Estados de adoptar las medidas activas necesarias para respetar, proteger y cumplir los derechos humanos en su jurisdicción territorial. Por otra parte, las organizaciones internacionales como la Organización Mundial del Comercio, el Banco Mundial y el Fondo Monetario Internacional han aumentado su influencia sobre la capacidad de los Estados de implementar obligaciones de derechos humanos. Este artículo se propone varios objetivos. En base a una descripción general de las tendencias planteadas por la intersección de las políticas comerciales, financieras y de inversiones y los derechos humanos, se presentará el rico panorama de estrategias y tendencias para los defensores de los derechos humanos. Antes de formular algunas recomendaciones en el último capítulo, se expondrán algunas historias de éxitos y las futuras tendencias, incluyendo las oportunidades y obstáculos.

PALABRAS CLAVE

Derechos humanos – Derechos económicos y sociales – Globalización – Defensa de los derechos humanos.

PREVIOUS NUMBERS

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Committed by the Argentine
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BOOK REVIEW

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Commonwealth Pacific

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