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● **Caroline Dommen**

Trade and Human Rights: Towards Coherence

● **Carlos M. Correa**

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● **Bernardo Sorj**

Security, Human Security and Latin America

● **Alberto Bovino**

Evidential Issues before the Inter-American Court of Human Rights

● **Nico Horn**

Eddie Mabo and Namibia: Land Reform
and Pre-Colonial Land Rights

● **Nlerum S. Okogbule**

Access to Justice and Human Rights Protection in Nigeria:
Problems and Prospects

● **María José Guembe**

Reopening of Trials for Crimes Committed by
the Argentine Military Dictatorship

● **José Ricardo Cunha**

Human Rights and Justiciability:
A Survey Conducted in Rio de Janeiro

● **Louise Arbour**

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High Commissioner for Human Rights



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PRESENTATION



Sur – International Journal on Human Rights is a biannual publication that presents an analytical and balanced standpoint on human rights in Southern Hemisphere countries. With the aim to strengthen the South-South and the South-North dialogue among human rights activists, scholars and UN officials, this journal promotes a critical debate on several issues related to the theme. It breaks away from a pseudo-consensus and opens up spaces to improve the quality of this discussion. It therefore invites dissent, since we believe that a consistent human rights doctrine will only be put into place after a wide-ranging exchange of ideas.

We firmly believe that the information that is being produced must be widely publicized and, for this reason, this journal is issued in three languages (English, Portuguese and Spanish). Approximately 6,000 copies of the first two issues have been distributed free of charge in over 100 countries and, to ensure an extended readership, we have made an unabridged version available at <www.surjournal.org>, in the three languages.

For this edition, papers have been submitted from thirteen countries (Argentina, Brazil, Cameroon, Chile, India, Ireland, Namibia, Nigeria, Switzerland, Tanzania, Uganda, United Kingdom, and United States). After a selection by an International Editorial Board, whose members are human rights scholars, specialists and UN officials, we are publishing eight contributions, one of which reports on a research project. The subject matters dealt with are: security and human rights; trade and human rights; access to justice on domestic and international levels; and land reform.

Two papers contributed by participants of the Knowledge Development Group, organized by **Sur** in April 2005, focus on the subject of **trade and human rights**. Caroline Dommen discusses mechanisms that, by protecting human rights, actually favor the trade practices in which they are inserted. Carlos Correa depicts the progresses made in the

process to lend more flexibility to the TRIPS Agreement for medical drugs, and shows how the Doha Declaration and the 2003 Decision of the TRIPS Board are insufficient to ensure a reduction in prices and the negotiation of voluntary licenses.

Tracing a bridge between **security and human rights**, the article of Bernardo Sorj deals with the concept of human security applied to Latin American problems.

Four articles – contributed by Alberto Bovino, Nlerum S. Okogbule, Maria José Guembe and José Roberto Cunha – discuss different aspects concerning **access to justice**, on domestic and international planes. From an international perspective, Bovino dwells on the peculiarities of evidence evaluation conducted by the Inter-American Court of Human Rights, underlining the flexibility shown by this jurisdictional body in dealing with grievous infringements of rights. Okogbule weighs the specific obstacles hampering access to justice in the Nigerian context. Guembe discusses the decision of the Supreme Court of Argentina, which deemed unconstitutional the amnesty laws that benefited military personnel involved in violations of human rights during the dictatorship. Cunha presents the results of his survey among magistrates in the state of Rio de Janeiro, Brazil, as to the extent of their familiarity with and their actual use of international law in issues involving human rights.

Land reform in Namibia is the theme of the text by Nico Horn, who considers the implications of the colonizing process and custom-law.

Although very varied in their themes and approaches, all these papers share a common point of departure – the contextualization of human rights – attempting to contribute to the reconstruction of these rights, with a view at their implementation, and to ensure a better coverage of local and regional demands.

We are wrapping up this issue with a summary of the plan of action submitted by the High Commissary for Human Rights, Louise Arbour, who proposes mechanisms to increase the effectiveness of human rights protection in the several UN member countries.

CONTENTS

CAROLINE DOMMEN	7	Trade and Human Rights: Towards Coherence
CARLOS M. CORREA	25	TRIPS Agreement and Access to Drugs in Developing Countries
BERNARDO SORJ	39	Security, Human Security and Latin America
ALBERTO BOVINO	57	Evidential Issues before the Inter-American Court of Human Rights
NICO HORN	81	Eddie Mabo and Namibia: Land Reform and Pre-Colonial Land Rights
NLERUM S. OKOGBULE	95	Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects
MARÍA JOSÉ GUEMBE	115	Reopening of Trials for Crimes Committed by the Argentine Military Dictatorship
JOSÉ RICARDO CUNHA	133	Human Rights and Justiciability: A Survey Conducted in Rio de Janeiro
LOUISE ARBOUR	165	Plan of Action Submitted by the United Nations High Commissioner for Human Rights

CAROLINE DOMMEN

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ABSTRACT

This article focuses on ways that human rights advocates can ensure that trade and trade rules promote rather than undermine human rights. The article concludes that an effective way to achieve respect for human rights in international trade policy is through engaging with trade policy-makers of national governments, and show the positive role a human rights contribution can play in ensuring a fair and democratic international trading system. The article points out that human rights defenders share concerns about trade with development groups, women's rights advocates, environmentalists and others already working on trade, and suggests that human rights advocates demonstrate, through applying the relevant human rights accountability mechanisms, how they can make a positive contribution to making trade more equitable and human rights-friendly. [Original article in English.]

KEYWORDS

Trade – Human rights – WTO – Development

TRADE AND HUMAN RIGHTS: TOWARDS COHERENCE*

Caroline Dommen

In the last few years, there have been many claims about whether or not trade liberalization enhances – or undermines – human rights, and about whether trade agreements should do more – or nothing – to promote human rights.

These claims come from various quarters: human rights advocates who want to ensure that trade and trade-related rules do not undermine the enjoyment of human rights (the “coherence” perspective), those who want to see trade sanctions used as tools to ensure respect for minimum standards of human rights (the “conditionality” perspective), believers in free trade and developing countries who fear that human rights standards might be applied in a way that works against free trade and thus undermine economic well-being, and development campaigners who see “human rights” as a useful slogan.

All of these very different actors bring very different perspectives to what they mean by “trade and human rights” and thus much confusion surrounds discussions on these topics.

This article will focus on how human rights advocates can ensure that trade and trade rules are developed in a way that promotes rather than undermines human rights. After looking at the human rights-inconsistent process of trade negotiations, it will consider ways in which application of trade rules risk undermining human rights. This article will then describe some ways to ensure that human rights are protected and promoted in international trade, and caution against some initiatives that could be counterproductive.

* I wish to thank Juana Kweitel for her assistance in preparing this article for publication. Responsibility for opinions expressed and any errors that may remain lies entirely with the author.

The article concludes that an effective way to achieve respect for human rights in international trade policy – especially that policy developed and applied in the World Trade Organization (WTO) – is through raising human rights concerns with the trade policy-makers of national governments, particularly through showing the positive role a human rights contribution can play in ensuring a fair and democratic international trading system.

Lack of transparency, narrow participation: human rights inconsistent

Trade policy is infamous for being untransparent and undemocratic. Lack of transparency and participation do not in themselves necessarily lead to human rights-harmful outcomes. But they often do. They also stand in direct contrast to human rights principles, such as the right of everyone to take part in the government of their country, embodied in Article 21 of the Universal Declaration of Human Rights; the right of access to information, embodied in Article 19 of the International Covenant on Civil and Political Rights (ICCPR); and citizens' rights to participate in the conduct of public affairs set out in Article 25 of the ICCPR.

While within the World Trade Organization there have been improvement in access to documents and meetings, many key documents are still not made public until they cease to be relevant, if they are made public at all. And progress within the World Trade Organization has been offset by the increasing number of bilateral trade negotiations which are so secretive that they make the WTO seem positively translucent in contrast.

Indeed, bilateral trade negotiations are almost invariably negotiated away from the public eye, and often progress so quickly that it is impossible for civil society groups – and sometimes even government ministries other than trade or the high-level political negotiators – to comment on draft texts or bring their expertise on specific issue-areas to the negotiations. An example can be found in Thailand. As the Thai group FTA Watch reports, in the Thai–US negotiations for a bilateral trade agreement, the United States demanded that the Thai government verbally agree to keep the process of negotiations secret.¹ The Thai government signed another trade agreement (with Australia) without the involvement of Parliament and without disclosing the content of the agreement to the public until after the pact was concluded, and then only in English.

In addition to being contrary to the international human rights standards set out above, this is contrary to the Thai Constitution, which encourages public

1. See FTA Watch Thailand, "Thailand's Free Trade Agreements and Human Rights Obligations" (March 2005). Available at <www.ftawatch.org/autopage1/show_page.php?t=21&s_id=8&d_id=8>. Last access on 6 September 2005.

participation in policy decision making and monitoring the state's exercise of power,² and United States trade rules which aim to obtain wider and broader transparency in the negotiating process.³ This situation is replicated across many of the bilateral trade agreements negotiated between industrialized and developing countries.

This lack of transparency facilitates human rights-inconsistent outcomes. In many cases, it gives a stronger role to business than public interest groups, as governments will tend to consult business groups and put forward their interests more than those that civil society is defending.⁴ For instance, the interests of the Pharmaceutical Research and Manufacturers of America (PhRMA) are reflected in almost all the recently-adopted US bilateral trade agreements,⁵ resulting in putting affordable medicines out of reach of many, contrary to the right to health principle of facilitating access to medicines.⁶

In addition, broader transparency of the negotiations could promote the accountability needed to help developing countries achieve trade agreements that are more development-friendly, and that serve the needs of the most vulnerable members of their population, consistent with human rights principles. This is particularly the case in bilateral trade negotiations where power imbalances are significant and developing countries are often pressured into agreements that are not in their own interest.

2. Section 76 of The Constitution of the Kingdom of Thailand says: "The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of State power at all".

3. Bipartisan Trade Authority Bill 2002, Section 2102 (b)(5).

4. For a discussion of the representation of business interests in the WTO, see C. Dommen, "The WTO, International Trade, and Human Rights", in M. Windfuhr (ed.), *Beyond the Nation State – Human Rights in Times of Globalization* (Global Publications Foundation, 2005). Available at <www.3dthree.org/en/page.php?IDpage=13&IDcat=5>. Last access on 6 September 2005.

5. See M. Asif Ismail, "Exporting Prices, Drug Makers' Trade Group Makes the Industry's Priorities US Trade Policy", (Center for Public Integrity, Washington DC, July 2005). Available at <www.bilaterals.org/article.php?id_article=2233>. Last access on 6 September 2005.

6. See UN Press Release, "US-Peru Trade Pact Negotiations: Special Rapporteur on Right to Health Reminds Parties of Human Rights Obligations" (July 2005). Available at <www.unhchr.ch/hurricane/hurricane.nsf/view01/502C4F87F9FF119BC125703D00396440?opendocument>. Last access on 7 September 2005. For a discussion of the benefits and disadvantages of bilateral trade agreements, with a focus on the impact of Intellectual Property rules on access to medicines, see Hamed El-Said & Mohammed El-Said, "TRIPS, Bilateralism, Multilateralism & Implications for Developing Countries: Jordan's Drug Sector" (*Manchester Journal of International Economic Law*, April 2005). Available at <www.bilaterals.org/article.php?id_article=2192>. Last access on 6 September 2005.

But even in the World Trade Organization, where broad developing country membership does help the economically weaker participants to negotiate together and resist pressures, developing countries have difficulty in having their interests taken into account. The WTO is in theory democratic as each member has an equal vote. But in reality, developing countries have difficulty in participating as equals.⁷ One reason for this is lack of capacity. Many of the poorest countries are not even able to have World Trade Organization representatives in Geneva. Others only have one part-time delegate to cover the whole breadth of WTO issues, and only a handful of trade policy staff in their capital. In contrast, Japan has 23 World Trade Organization delegates in its Geneva mission, and the USA has 14, as well as large and well-resourced trade offices in Tokyo and Washington DC respectively.⁸

Added to this, poor countries are often obliged to make concessions in order to trade with richer countries. So in practice, new trade rules are weighted in favor of the rich, and do not necessarily reflect the long-term interests of the poorest countries and their inhabitants. Even staunch World Trade Organization supporters agree that, during the negotiations creating the WTO, developing countries agreed to substantially more obligations than developed countries did.⁹ Subsequently, developed countries have demonstrated little political will to address issues dear to developing countries. This is exacerbated by the fact that the World Trade Organization Secretariat, supposed to be neutral, often acts in a way supportive of what industrialized countries ask for, against developing countries' wishes. In June 2005, for instance, both the World Trade Organization Secretariat and the Chair of the services negotiations took strong positions against proposals advocated by many developing countries.¹⁰

Although developing countries have improved their collective strength in the World Trade Organization in recent years, and have enjoyed some successes, both in terms of substance and of process, there is a flip side to this success. As developing countries have participated more meaningfully in the WTO's work and succeeded in having their concerns taken into account, there is a move of trade decision-making away from Geneva, such as to WTO "mini-ministerial", unofficial meetings hosted

7. A 1998 study showed that of the 97 developing countries that were then members of the WTO, 56 do not participate effectively in its work. See Constantine Michalopoulos, "The Participation of the Developing Countries in the WTO" (World Bank Policy Research Paper, 1998).

8. See Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO – The Real World of International Trade Negotiations* (London & New York: Zed Books, 2003).

9. Jeffrey Schott, "WTO 2000: Setting the Course for World Trade" (1998).

10. Alexandra Strickner & Carin Smaller, "Formula One Racing: Who's Going to Win the Grand Prix?" (IATP/TIP Geneva Update, June 2005).

by a World Trade Organization member, which play a crucial role in determining the outcome of negotiations. In general, only selected countries' Ministers are invited to these meetings, and powerful economies play a disproportionate role in them.

Just as worryingly, trade decision-making is taking place in bilateral or regional trade agreements. This move away from multilateralism and collective public scrutiny causes the most significant human rights concerns described throughout this article.

The shift away from one multilateral forum to a plethora of bilateral ones is why it is important to seek accountability from national governments on their trade policy positions, by demanding, for instance, that they make all their trade negotiating positions public, and ensure that they are aware of the human rights implications of the proposals.

WTO rules nationally: limiting policy space

The most common way that rules developed in the World Trade Organization affect human rights is through limiting governments' ability to regulate or to take other measures to promote or protect human rights at the national level. Indeed, in promoting "free trade" the WTO and bilateral agreements seek to do away with possible regulatory interferences with the free flow of goods and services, thus limiting governments' ability to regulate in favor of development, environmental protection, or to defend vulnerable groups. This has given cause for particular concern regarding essential elements of livelihood such as food or health,¹¹ and provision of basic services such as education, health care or water.¹²

The list of cases where World Trade Organization and other trade rules have hindered enjoyment of the rights to food, health, education, housing or others would be long. Also, many of these cases do not come to public light or are linked in complex ways to other aspects of economic policy, making it hard to distinguish the role of trade agreements. This article will look at one issue area where WTO-related rules could limit countries' ability to take measures that favor human rights: WTO rules on trade in services.

11. For a discussion relating to agriculture trade liberalization and human rights, see 3D & IATP, "Planting the Rights Seed – A Human Rights Perspective on Agriculture Trade and the WTO" (2005). Available at <www.3dthree.org/en/page.php?IDpage=38&IDcat=5>. Last access on 7 September 2005.

12. See also Caroline Dommen, "Raising Human Rights Concerns in the World Trade Organization – Actors, Processes and Possible Strategies" (*Human Rights Quarterly*, vol. 24, pp. 1-50, 2002); and OHCHR, "Human Rights and Trade" (paper prepared for the 5th WTO Ministerial Conference in Cancún, 2003). Available at <www.unhchr.ch/html/menu2/trade/index.htm>. Last access on 7 September 2005.

*Liberalization of trade in services and governments' duty to regulate*¹³

The realization of human rights requires effective national policies. The policies required will differ from country to country: one-size-fits-all solutions do not exist. Governments will need the regulatory space and flexibility to tailor domestic regulatory policies to the needs and particularities of the country, society and human right in question. International rules and negotiations on liberalization of trade in services risk curtailing governments' policy space and flexibility. Although services are included in most bilateral trade agreements, the global framework remains the World Trade Organization. This section will therefore focus on services trade liberalization through the World Trade Organization.

A service is a result of human activity which is not a tangible good. Liberalization means that foreign and domestic service providers can compete to provide services. The scope of services trade liberalization through the WTO and other trade agreements is vast, ranging from accounting and advertising to telecommunications, tourism or transport. Liberalization can have – and has had – implications for access to basic services and thus for human rights in areas such as education, health care, job security or access to water. Rules on services trade liberalization, however, can reach further within a governments' regulatory space and affect human rights in that way, as the US–Gambling case discussed below shows.

The World Trade Organization requires neither privatization nor deregulation of services, nor does the WTO require any country to open up any particular service sector to international competition. So why is the World Trade Organization held responsible for human rights concerns arising from services liberalization? To help us find the answer, this article will examine some human rights dimensions of these three points – privatization, deregulation, services covered – in turn.

Services were first introduced into the multilateral trading system in the late 1980s, resulting in the adoption of the General Agreement on Trade in Services (GATS) in 1995, as an integral part of the WTO Agreement. World Trade Organization efforts to liberalize trade in services are part of a broader global trend towards increasing private sector participation (and increasingly, participation of large and powerful multinational corporations) in the provision of state-like functions, provoking competition in areas that were once under the responsibility of government as service supplier.

Liberalization does not explicitly require privatization of any particular service sector. In practice, however, allowing competition in a service sector implies the elimination of a monopoly, including public monopolies. This process is frequently

13. For a more detailed discussion of how rules on liberalization of trade in services affect human rights, see 3D & Forum-Asia, "Practical Guide to the WTO for Human Rights Advocates" (2004). Available at <www.3dthree.org/en/complement.php?IDcomplement=36>. Last access on 7 September 2005.

tantamount to privatization. In the real world, therefore, there are clear links between liberalization and privatization, but international trade agreements including the WTO's, shy away from explicitly expressing any preference for private over public provision of services.

In some sectors, such as telecommunications in Asia, services have greatly improved after privatization and liberalization: quality and availability increased and prices dropped. In others, though, a two-tiered system has emerged, with a high-quality segment available to those who can afford it, and an underfinanced government-provided segment for the poor. In some cases, privatization has put services out of reach of poor people altogether: in Ghana for instance, even water prices which the government and the World Bank considered to be below the market rate are beyond the means of most families. Indeed, the private sector being driven by commercial, profit-oriented objectives, private competition in basic service provision is not the most effective means of ensuring universal access to services which are essential but not lucrative.

Human rights law does not oblige States to be the sole provider of essential services. However, it does require States to guarantee essential service supply, especially to the poor, vulnerable and marginalized. The increasing frequency of two-tiered availability of services *de facto* discriminates against the most vulnerable or marginalized sectors of a population, contrary to human rights. Indeed, the non-discrimination principle, central to human rights law, prohibits discrimination on the basis of the ability to pay for basic services.

In addition to making access to essential services harder, privatization and liberalization can make it harder for governments to regulate. In human rights terms regulation is not only a need but also a **duty**. Indeed, human rights law requires States to take appropriate legislative, administrative, budgetary, judicial and other measures to fulfill human rights.

Like other trade rules, those on services aim to eliminate obstacles to trade, including possible regulatory interferences. While barriers to trade in goods are usually imposed at national borders (for example through tariffs), barriers to trade in services are more diverse. In addition, barriers to trade in services frequently affect core areas of domestic regulation, such as licensing standards (such as facilities licensing for clinics and laboratories, or waste disposal permits), minimum professional standards, subsidies for providers of essential services, or social objectives that foreign investors and service providers must meet.

There is a practical and a legal aspect to governments' difficulty in regulating in the public interest to fulfill their role as primary duty bearer of human rights. The practical dimension relates to the difficulty of regulate an increasingly large and powerful private sector. In the health sector, for instance, the World Trade Organization has indicated that private companies can subvert health systems through political pressure and "regulatory capture", namely the co-opting of regulators to make regulations more favorable to private companies. When the service provider is foreign, it is even

harder for a government to impose conditions, particularly when the country in question is keen to attract foreign investment.

The legal aspect relates to the regulations that General Agreement on Trade in Services will allow. While GATS does recognize the right of WTO Members “to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives” it sets limits on government regulations, and can thus challenge national regulatory prerogatives.

A recent WTO Appellate Body ruling raised important issues in this regard: the US–Gambling case.¹⁴ Antigua and Barbuda had brought a challenge to the US internet gambling ban to the World Trade Organization dispute settlement system, saying it was a violation of the US’ General Agreement on Trade in Services commitments. The WTO Appellate Body ruled that in the case of internet gambling, the US ban is excused by the “public morals” exception in GATS, which allows countries to derogate from the provisions of the agreement. Human rights advocates can be encouraged that this decision could allow other countries to derogate from General Agreement on Trade in Services obligations in the future, to uphold the public interest objectives that GATS recognizes.¹⁵

Nevertheless, concerns remain. A significant one is that the Appellate Body’s broad interpretation of what restrictions are prohibited under GATS may threaten the validity of many domestic service regulations that were so far considered to be allowable.¹⁶

Another lies in bilateral trade agreements provisions relating to services. CAFTA for instance (the Central American Free Trade Agreement, the recently-concluded agreement between the US on the one hand, and several central American countries on the other) includes provisions that allow foreign investors to challenge government measures that are inconsistent with the Agreement. CAFTA does not contain an exception similar to General Agreement on Trade in Services “public morals” exception, so a Central American-based company might succeed in a legal challenge to strike down public interest measures, such as bans like the United States internet gambling one.¹⁷

14. “United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint Brought by Antigua and Barbuda)”. Report of the Appellate Body, WT/DS285/AB/R, issued on 7 April 2005.

15. These include measures necessary to protect public morals or to maintain public order; or necessary to protect human, animal or plant life or health. See GATS, Article XIV: General Exceptions.

16. Joost Pauwelyn, “WTO Softens Earlier Condemnation of US Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation” (April 2005). Available at <www.asil.org/insights/2005/04/insights050412.html>. Last access on 7 September 2005.

17. Peace through Interamerican Community Action (PICA), “CAFTA Jeopardizes Maine’s Gambling Regulations” (July 2005, on file with the author).

A particular aspect of human rights-based concerns about GATS relates to public services. Legitimacy of governmental regulation in this area, which covers basic services, is especially uncertain – and it is unclear whether it comes under the scope of General Agreement on Trade in Services (which would mean that governmental regulations including those designed to promote the realization of human rights such as subsidies to governmental providers would be prohibited) or not. Indeed, national regulations are subject to GATS' general obligations, including the prohibition on discrimination between different countries' service providers.

Suppose that the government of a WTO member (country A), has not made any commitments to liberalize trade in education services and runs most schools, although private education is also available. Faced with a shortage of teachers in the public schools, and the adverse impact of this shortage on the right to education, country A decides to enter into a bilateral agreement with country B to allow teachers from B special derogations from immigration requirements so that they can teach in country A. In spite of the fact that country A has not made commitments in the area of education, the agreement with country B might be found to violate the GATS non-discrimination principle, as it gives preferential treatment to service suppliers from country B over country C. The preference granted to B might have a genuine public policy purpose if the language spoken in country B is the same as in country A, for instance, or if they have more of a shared culture and history than A does with C.

However, in this scenario, if education services do not fall under General Agreement on Trade in Services, there would be no violation. The reason why it is unclear whether education or other public services come under GATS is that the agreement does not apply to services “supplied in the exercise of governmental authority”. The Agreement defines this as “any service which is applied neither on a commercial basis nor in competition with one or more service suppliers” – but the actual scope of this provision is clear to none, even the world's leading GATS experts. Indeed, the increasing supply of government services on a commercial basis has challenged the clear distinctions between governmental and non-governmental service provision.

Another way General Agreement on Trade in Services might reduce a country's flexibility to regulate in the public interest is through limiting a governments' ability to provide economic measures in favor of disadvantaged groups. Human rights law requires governments to take steps to ensure enjoyment by particularly vulnerable groups of their human rights. Some governments protect steps they take to this end in their GATS commitments. New Zealand for instance, exempts from its GATS obligations “current or future measures at the central and sub-central levels according more favorable treatment to any Maori person or organization in relation to the acquisition, establishment or operation of any commercial or industrial undertaking”. Australia and Malaysia do much the same for their indigenous peoples.

Pro-GATS advocates might rely on these examples to argue that General Agreement on Trade in Services does not limit a government's ability to pursue public interest

objectives, since countries have a lot of scope to choose which commercial sectors to commit to GATS and which sectors to exempt. Countries who need social policy exemptions, they argue, can carve out the policy space they need to pursue them. However, a country that has a policy to facilitate access of a disadvantaged group to a particular service, but omitted to exempt it from General Agreement on Trade in Services, may find itself in contravention of GATS, as might a country that introduces such a policy in the future. In addition, the political dynamics, power imbalances or simply the complexity of trade negotiations sometimes lead countries to make commitments in areas in which liberalization or deregulation go against their national interests. And this does not only affect small countries: the US–Gambling case was based on a commitment that US trade negotiators had apparently made erroneously, a mistake that went undetected for nearly 10 years until Antigua and Barbuda’s WTO challenge.

This points to another key concern about General Agreement on Trade in Services, which is its “lock-in” effect. Once a country has made a GATS commitment, it is virtually impossible to change, even if later circumstances require such change. Reversing the Agreement commitments is technically permitted, but governments can only do so by negotiating “compensation” for all affected trading partners, which can be prohibitively costly. This means that if subsequent events reveal negative social or economic effects, it may be too late to take corrective action, and that a government may be curtailed from taking steps to address a social problem that only becomes manifest after the government has made GATS commitments.

In short, it would appear that governments retain their freedom to regulate only to the extent that the regulations they adopt are compatible with GATS. The threat of being brought before a World Trade Organization dispute settlement panel because of a new regulation affecting foreign service providers could have a chilling effect on governments’ inclination to regulate to promote human rights or in the public interest. From a democracy and accountability perspective there is an additional concern: in the final instance the judgment as to whether a domestic regulation is GATS-compatible will be made not by governments but through WTO dispute settlement. And the panels’ mandate is to apply trade law – not to ensure the protection of the public interest in WTO member countries.

Negotiations to further liberalize services are currently under way in the WTO as well as in bilateral agreements, and many countries are coming under considerable pressure to liberalize more service sectors, or to eliminate limitations on their existing commitments. Moreover, developing countries are being asked to make GATS liberalization commitments across such a broad range of service sectors that they are unable to analyze what the potential losses of benefits of such liberalization would be, let alone request access to industrialized countries’ service markets.¹⁸

18. See for instance “Statement by Jamaica to the WTO Trade Negotiations Committee” (28 July 2005, on file with the author).

From a human rights perspective, it is important that countries not commit new sectors under GATS until their human rights effect has been evaluated. GATS itself provided that a comprehensive assessment of the impacts of services trade liberalization should have been undertaken before 2000, but this obligation remains unfulfilled, much to the dissatisfaction of developing countries. African trade ministers, for instance, noted in June 2003 that the “Services Council has not satisfactorily met the requirement of carrying out the assessment of trade in services as stipulated in the GATS”. Representatives of Latin American countries, and NGOs around the world have voiced similar concerns.

Human rights advocates have constructively added their voices to calls for assessment of the potential and actual impact of services policies, on the grounds that these are fundamental to ensure the most appropriate policies and regulations for development, and for human rights. The High Commissioner for Human Rights has for instance recognized that States have the responsibility to ensure that commitments they make in other areas, including trade, does not reduce their capacity to set and implement national development policy. In a detailed study of services trade liberalization and human rights, the High Commissioner has concluded that human rights require a constant examination of trade law and policy as it affects the enjoyment of human rights, and that assessment is a major means of avoiding the implementation of any retrogressive measure that reduces the enjoyment of human rights.¹⁹

Rights in: upholding human rights in trade

Human rights advocates have an important task ahead of them to ensure that trade and trade rules respect promote and fulfill human rights. This section will indicate some points worth bearing in mind to ensure that efforts to mainstream human rights into trade agreements are successful.

First, it is essential to be clear about what we really want when we talk of human rights mainstreaming. This article assumes that what human rights advocates want is that international trade and trade rules, including those developed and applied through the WTO, support rather than threaten human rights. How best then to achieve this?

Some human rights advocates call to abolish the World Trade Organization as the solution to human rights-inconsistent trade policies. Others call for adding the words “human rights” in WTO texts or other trade agreements. This section will argue that these calls are misguided, and that the best way to ensure that trade and trade rules promote human rights is to broaden the focus of the human rights lens from the World Trade Organization, to integrate the human rights concerns of

19. Report of the High Commissioner, “Liberalization of Trade in Services and Human Rights” (UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2002/9, 25 June 2002). Available at <[www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2002.9.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2002.9.En?Opendocument)>. Last access on 7 September 2005.

non-discrimination, monitoring, democratic participation and accountability at each step of the process of making and applying trade policy. This section will point out some effective ways in which human rights advocates can bring their experience to support efforts to promote a fairer and more human rights consistent international trading regime.

The World Trade Organization is often accused of being the cause of economic injustices; there no shortage of examples of unfair WTO rules and processes. But even amongst critics, views differ sharply as to whether abolishing the WTO would be the solution to the problem. Some argue that the WTO is so deeply flawed that it is beyond reform and should therefore be abolished. Others however point out the importance of a multilateral framework for international trade, as only a multilateral framework can help insulate the small economies from the strong.

Indeed, the process and content of regional and bilateral trade agreements have provided a glimpse of how trade rules developed outside the multilateral framework are a far worse threat to global economic equity and enjoyment of human rights than the World Trade Organization system. The way these agreements are negotiated is not only more secretive than the WTO, but imbalances of power are more extreme and the outcomes even less balanced and harmful to the public interest than what comes out of the World Trade Organization. As George Monbiot, a vocal critic of liberalization has recently said, the “only thing worse than a world with the wrong international trade rules is a world with no trade rules at all”.²⁰ He thus makes a plea not to scrap the World Trade Organization, “but to transform it into a Fair Trade Organization, whose purpose is to restrain the rich while emancipating the poor”.

Some human rights advocates have called for inclusion of the words “human rights” in World Trade Organization texts. This is a dangerous route for human rights, for three main reasons. First, the “no explicit reference” starting point in the WTO/human rights debate has been used to support fundamentally opposing views. Those who do not want to see human rights discussed in the World Trade Organization declare that since the legal texts are silent on the issue, the WTO has no human rights-related mandate or obligations. Those who want to see the WTO held accountable to human rights standards say that explicit rights language should be brought into its text. Both seem to assume that the only way that the World Trade Organization could be held accountable to human rights standards would be if human rights were explicitly mentioned. The implication is that until the words “human rights” are explicitly included in WTO texts, the World Trade Organization will have no human rights mandate.

20. George Monbiot, “I Was Wrong about Trade”, (*The Guardian*, UK, 24 June 2003). Available at <www.monbiot.com>. Last access on 7 September 2005.

Given the difficulty that World Trade Organization members have of agreeing on even the simplest matters, changing the WTO legal texts might take a long time, and be extremely time-consuming. This is particularly the case given that many World Trade Organization professionals still equate the term “human rights” with “labor standards” and strongly resist expanding the WTO’s mandate to either. The time involved is the second reason why seeking to insert the words “human rights” into WTO texts would be a perilous undertaking. Because the ultimate – and real – objective of work on human rights in the World Trade Organization is to ensure that economic actors go beyond lip service to human rights, and effectively promote and protect these rights in their trade dealings, a change in WTO wording is unlikely to be the best use of human rights advocates’ time.

A third reason why including human rights wording in World Trade Organization texts may not be a satisfactory outcome can be drawn from the experience of the environmental movement. Environmental issues began being discussed in earnest by the international trade community since the early 1990s; so environmental activists have a ten-year trade policy head start on their human rights advocates. References to the environment were already present, if somewhat timid in the 1995 Marrakesh Agreement that established the World Trade Organization. By the time of the Doha Ministerial Conference such references were frequent: the Doha Ministerial Declaration contains many references to the environment.

Yet almost no environmentalists are happy with the mandate crafted by trade officials, nor with the way that negotiations on the environment have been going in the World Trade Organization. Importantly, many environmentalists are now lamenting that bringing environmental issues formally into the WTO’s ambit has given the World Trade Organization a large role in developing the issues. Based on this experience, experts on trade and the environment advise human rights advocates to ensure that any recognition of human rights and related values in the World Trade Organization insulates those values from the trade regime, in order to avoid giving the WTO too much competence on human rights-related issues.²¹ In a similar vein, other public interest groups are seeking to reduce the WTO’s reach, and limit its activities strictly to regulating the technical aspects of trade.²²

21. 3D → Trade – Human Rights – Equitable Economy and Rights & Democracy, “Towards Development: Human Rights and the WTO Agenda” (report of a panel discussion held during the WTO Ministerial Conference in Cancún, September 2003). Available at <www.3dthree.org/en/page.php?IDpage=21&IDcat=5>. Last access on 7 September 2005.

22. See International Gender and Trade Network, “IGTN at Cancún”, calling for reduction of the scope of the WTO to specific trade issues (2003). Available at <www.igtn.org/page/404>. Last access on 7 September 2005.

Assuming that when asking that human rights be mainstreamed in trade, human rights advocates want international trade and trade rules, including those developed and applied through the WTO, to support rather than threaten human rights, the discussion in this section so far points to the fact that mainstreaming would best be achieved by applying human rights tools to trade policy at the points at which it is made and applied, rather than bringing human rights into the World Trade Organization.

As the previous sections have shown, the processes through which policy space for public interest regulation is reduced take place not just in the World Trade Organization but also through bilateral agreements, and the way in which trade agreements are implemented at the national level. We have also seen that when the economic powers – whether countries or private business – are unable to attain their aims through the WTO, they move away from the multilateral forum to bilateral or regional trade negotiations, where they can exert more pressure, and often do so more privately. This pleads in favor of maintaining the spotlight on the national level, as this is where trade policy is formulated and applied, whether the rules are established in the World Trade Organization or elsewhere.

Also, while devoting their attention to the WTO, human rights advocates concerns about trade have tended to let the human rights machinery languish in the background. Yet human rights rules and implementation mechanisms are a forceful basis for ensuring that trade and trade rules are equitable, work in the public interest and support rather than threaten human rights.

Paul Hunt, UN Special Rapporteur on the Right to Health, has for instance pointed to ways that human rights can play a positive role in defining national trade policies that are equitable, attentive to the particular needs of the most vulnerable, and respectful of human rights. He has demonstrated how a right to health-based analysis can, in relation to essential drugs, help to identify practical and precise policy interventions to ensure enjoyment of the medicines element of the right to health. This includes ensuring that an essential drug is **available** in a particular country. To this end, a developing country should use available TRIPS flexibilities to ensure availability of low-cost versions of the drug. The drug must be **accessible** to all within the country, especially those living in poverty. This might call for creative thinking about delivery mechanisms such as mopeds for nurses, and could also require a country to avoid imposing import duties that make that drug inaccessible to the poor. Finally, an essential drug should be of **good quality**, which also implies that a country must have a system for monitoring and checking essential drug quality.²³

23. For a more detailed analysis, see 3D → Trade – Human Rights – Equitable Economy and Rights & Democracy (op. cit., note 21).

The High Commissioner for Human Rights has also drawn attention to ways human rights can be applied in the trade context. The 2002 report on trade in services, for example, says that the human rights approach to assessment of services trade liberalization introduces a methodology for assessments that promotes popular participation and consultation of those affected by liberalization – the poor, people dependent on public services, small businesses, industry groups, as well as social, trade and finance Ministries. The report adds that a human rights approach to assessments emphasizes transparency and accountability so that the outcomes of assessments and negotiation processes in trade fora are open to public scrutiny.²⁴

Human rights advocates can further demonstrate the positive role they can play by participating in the development and formulation of trade policy at the domestic level. In some countries, coalitions of civil society groups already intervene in the formulation of trade policies, but – not counting trade unions – human rights groups rarely participate. Participation of human rights groups in these processes would not only broaden the range of stakeholders represented, but would improve understanding amongst human rights advocates of trade policy issues.

Even when the trade issues at hand are complex, an approach based on human rights can make a significant contribution through very simple steps. One such step would involve asking the trade ministry what steps it is taking, in its trade negotiations, to ensure that it is not reducing its policy space and flexibility to adopt measures for the protection of human rights. In the area of health, for instance, human rights advocates could ask the government trade officials whether they have ensured that proposals in areas such as intellectual property or services do not threaten enjoyment of the right to health.

If the information is not public, or if the response from government officials is that they do not know, human rights advocates can remind them of the human rights obligation to permit people to participate in decision-making on issues that concern them, and of the human rights obligation to monitor the human rights situation in their country in order to ensure that policies adopted promote human rights. Human rights advocates should also remind those responsible for governmental trade policy of the duty to ensure non-discrimination in the enjoyment of human rights. This implies that if a particular trade liberalization

24. OHCHR (op. cit., note 12). The Human Rights Commission Working Group on the Right to Development has also emphasized the necessity of introducing and strengthening human rights standards and principles in undertaking impact assessments of trade and development rules and policies. See "Right to Development", Report of the Working Group on its sixth session (2005). Available at <www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.25.pdf>. Last access on 7 September 2005.

policy discriminates against a particular sector of the population – and there is considerable evidence demonstrating that trade liberalization frequently has adverse effects on women²⁵ – it will be inconsistent with human rights law. As the High Commissioner for Human Rights has pointed out, respecting the human rights requirement to avoid discrimination means not only protecting individuals and groups against overt discrimination, but also not leaving certain individuals and groups out of the trade picture.²⁶

Reminding trade policy-makers of the obligation to refrain from discrimination is also a way of making trade-offs explicit. Public acknowledgment of who is being favored by a particular trade policy choice is an essential prerequisite for holding economic actors, including actors from the private sector, accountable for their actions and for possible adverse social effects of the private benefits they might derive from a particular trade policy.

As Mary Robinson, former High Commissioner for Human Rights has pointed out, increased participation by those affected contributes to trade policy that is more transparent, accountable and responsive to the needs of the people it is said to serve, as well as being more sustainable and more legitimate.²⁷ Experience in many countries confirms this. Uganda, for instance, has a process for civil society participation in national trade policy formulation, and an official from the government Trade Ministry recently said that “disadvantaged groups in this country like small farmers are ultimately affected by the economic and trade policies that are formulated. It is through the continuous engagement of civil society in this process, through shaping national positions and backing government officials that go to the negotiations, that the voice of these groups will be heard”.²⁸

Several countries also acknowledge that broader stakeholder participation at the national level strengthens developing countries’ voices in international trade negotiations and can improve their capacity to resist pressures from larger economies to make commitments in the area of trade that go against development or public interests. Experience in Kenya, for instance, demonstrated that civil society input to the Ministry of Trade resulted in Kenya being able to submit timely negotiating proposals to the WTO and thus participate in those negotiations in a meaningful way.

The human rights framework can provide an additional tool for resisting

25. Mariama Williams, *Gender Mainstreaming in the Multilateral Trading System – A Handbook for Policy-Makers and Other Stakeholders* (London: Commonwealth Secretariat, 2003).

26. OHCHR (op. cit., note 12).

27. 3D → Trade – Human Rights – Equitable Economy & Rights & Democracy (op. cit., note 21).

28. Quoted in David Ddamilura & Halima Noor Abdi, *Civil Society and the WTO: Participation in National Trade Policy Design in Uganda and Kenya* (London: Cafod Trade Justice Campaign, 2003).

pressures to agree to trade rules that would reduce flexibility and policy space to protect the public interest and human rights. Indeed, developing countries could, in trade negotiations, use their human rights obligations as a shield to protect them from engaging in liberalization commitments that would reduce their ability to protect human rights. Brazil did this from 2001, through introducing a series of resolutions on access to medicines in the UN Commission on Human Rights. These resolutions were part of a successful global strategy that Brazil spearheaded to achieve recognition of access to medicines as a human right, and which supported developing countries' efforts in the WTO to ensure recognition of their right to make low-cost generic drugs available to their populations.²⁹

Human rights advocates could make better use of international human rights mechanisms such as the UN human rights treaty bodies in support of national work to ensure that countries' policies on international trade support human rights. Treaty body members occasionally raise trade-related issues³⁰ but not in a concerted way, and rarely as part of a strategy to address a specific trade-related human rights concern.

Human rights concerns about lack of transparency and participation in trade policy are shared by development groups such as Focus on the Global South and Oxfam, with environmental groups such as the Center for International Environmental Law (CIEL) and with women's groups such as the International Gender and Trade Network (IGTN). Yet, although these groups occasionally refer to human rights, few actually apply the human rights framework in support of their work on trade. Human rights advocates could significantly move the public interest agenda in trade forwards by demonstrating the unique usefulness of international human rights monitoring and accountability mechanisms to other public interest advocates.

Indeed, given that human rights advocates share many concerns with other public interest advocates, the best way to ensure human rights are truly mainstreamed in international trade policy is for human rights groups to make their energy and expertise known to other public interest advocates and join forces with them to achieve international trade and trade rules, including those developed and applied through the World Trade Organization, that support rather than threaten human rights.

29. See C. Dommen, "WTO and Human Rights Bodies Reach Out to Each Other", in *Between Trade and Sustainable Development (Bridges)*, year 7, n. 3, April 2003). Available at <www.ictsd.org/monthly/archive.htm>. Last access on 7 September 2005.

30. See <www.3dthree.org> for a list of trade-related issues considered by UN human rights treaty bodies.