

Rethinking Trade and Human Rights

*Dr Andrew T. F. Lang**

ABSTRACT: The last decade has seen the development of a burgeoning literature on the relationship between international trade and the protection of human rights, driven in part by a series of influential reports produced by the Office of the UN High Commissioner for Human Rights. Some human rights commentators have been heavily critical of the trade regime, pointing to a variety of ways in which obligations under international trade law purportedly undermine the ability of governments to fulfil their human rights obligations. Others see the potential for strong synergies between the two regimes, and argue that international trade can be a powerful force for raising global standards of human rights protection.

This paper argues that the contemporary trade and human rights literature is seriously flawed, in two related ways. First, this literature has developed without any clear and explicit thinking about what human rights actors and human rights language bring to trade policy debates. As a result, serious engagement between trade and human rights scholars has been hampered. To help remedy this defect, the paper offers (and critiques) five distinct models for thinking about the function that the human rights movement is currently playing in debates about the future of the international trading system. Most importantly, it suggests that the human rights movement acts as a ‘trigger’ for policy learning in the field of international trade.

Second, the paper argues that accounts of the ‘human rights impact’ of the international trade regime are too often one-dimensional and over-simplified. This is because they focus solely on the *constraints* imposed on governments by international trade law. Drawing on a variety of institutionalist literatures from political sociology and political science, the paper shows how the trade regime acts through normative and cognitive channels to *socialize* participants – rather than merely regulate their behaviour – and thereby helps to define and constitute their trade policy preferences. Attention to these more complicated processes is important because they can be harnessed to help produce an international trading order which is yet more conducive to the protection of human rights.

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1. INTRODUCTION

There is a story, told by a former member of the Office of the High Commissioner for Human Rights, of a visit she received some years ago from the “Geneva trade representative of a major developed country”. The trade representative had heard that the OHCHR was preparing a series of reports on the trade regime: they had come to ask why, and expressed “sheer incredulity that a trade agreement was any business of a UN human rights institution”.¹ The ‘trade and human rights’ debate has clearly come a long way since those days, in which it was a struggle even to convince many of any connection between the two fields. There is now a relatively widely-held view that the connections between international trade and human rights are interesting and in need of investigation. The literature on the subject is already large and growing – not only in quantity, but also in its range of participants, the scope of its subject matter, and its mainstream appeal. Nevertheless, while this literature has without doubt produced much work of great value, taken as a whole it is flawed in at least two serious ways. First, it lacks clear and explicit thinking about what human rights actors and human rights language contribute to trade policy debates – what function they perform, and what distinctive ‘value-added’ they bring. As long as thinking about this issue remains unclear and poorly articulated, serious engagement between trade and human rights scholars will continue to be hampered, and participants on all sides of the debate will in many cases continue to talk past one another. Second, the debate has so far proceeded on the basis of an unduly limited, and in many ways misleading, map of the ways in which the international trade regime affects the effective protection of human rights. Since it is on the basis of this map that critiques and reformative proposals are generated, the result has been that the trade and human rights debates has so far produced a relatively narrow and constrained transformative agenda. In this article, I substantiate these two critiques, and offer some thoughts as to

*Lecturer, London School of Economics and Political Sciences. A.Lang@lse.ac.uk.

¹ S. Grant, 'Functional Distinction or Bilingualism? Human Rights and Trade: the UN Human Rights System' in T. Cottier, F. Abbott and K. Nadakavukaren Schefer (eds.), *Trade and Human Rights: Foundations and Conceptual Issues* (2005), 265 at 265.

how those interested in progressing the trade and human rights debate might respond to them.

The social history of the trade and human rights debate is yet to be written, and we still have no fully satisfactory story about who and what provided its initial impetus, or the factors that have shaped its progression since then. For now, however, it is perhaps enough to provide a brief impressionistic survey of some of the basic features of the literature. Among the most central of those features must be the work of UN human rights institutions on the impact of the international trading system on the enjoyment of human rights. This began formally around 1999, with the initiation of a broad work programme under the rubric of ‘Globalization and its impact on the full enjoyment of all human rights’.² Among the first fruits of this programme was a report of that name by Oloka-Onyango and Udagama dealing, among other matters, with a variety of critiques of the World Trade Organization.³ While it is remembered by some as controversial⁴ - and it certainly was critical – to a large extent the authors’ critiques of the trading system simply reflected and responded to the strength of contemporary concerns about globalization. But perhaps the most sustained and influential contribution has come from the High Commissioner’s office, in the form of a series of (so far) six reports. The first, released in 2001, addressed the TRIPs agreement and its impact on human health, and since then the topics covered have included agricultural liberalization and the right to food, the liberalization of trade in services, investment liberalization, and the principles of non-discrimination and participation as they apply in the context of trade policy.⁵

² See, for example, the resolution of the Commission on Human Rights, ‘Globalization and its impact on the full enjoyment of all human rights’, E/CN.4/RES/1999/59, 28 April 1999; and the General Assembly resolution of the same name, A/RES/54/165, 17 December 1999. This program, according to Zagel, was in turn in part the result of attention directed to the issue at a variety of large UN Conferences in the preceding years, such as International Conference on Population and Development (Cairo 1994), World Summit for Social Development (Copenhagen 2005) and the Fourth Conference on Women (Beijing 1995), see G. Zagel, ‘WTO and Human Rights: Examining Linkages and Suggesting Convergences’, (2005) 2(2) *IDLO Voices of Development Jurists*, 27.

³ ‘Globalization and its impact on the full enjoyment of all human rights’, Preliminary Report, E/CN.4/Sub.2/2000/13, 15 June 2000; Progress report, E/CN.4/Sub.2/2001/10, 2 July 2001; Final Report, E/CN.4/Sub.2/2003/14, 25 June 2003.

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

⁵ ‘The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights’, E/CN.4/Sub.2/2001/13, 27 June 2001; ‘Globalization and its impact on the full enjoyment of human rights’,

While these reports certainly have a critical edge, they have taken a self-consciously and consistently moderate line, stressing always that the international trading system can and ought to work for the protection and promotion of human rights. They have been read and distributed widely, and have been strongly influential in mobilizing and shaping the present debate. Other bodies – including treaty-monitoring bodies – have also made significant contributions to this broad work programme.⁶

Of course, this body of work did not arise in a vacuum, and UN human rights institutions were not the first to make a connection between human rights and international trade. This seems to have been an innovation of some elements of civil society, particularly in the context of the campaigns conducted during the negotiation of both NAFTA and the aborted Multilateral Agreement on Investment (MAI).⁷ In some ways, therefore, the UN work programme was a response to civil society pressure, or at least to a growing perception (arising in part as a consequence of these campaigns) that that international trade matters ought to be a central part of modern human rights agenda. But, at the same time, the work of UN human rights institutions has been a central driver in expanding and directing that civil society agenda. The result is that at present non-governmental

E/CN.4/2002/54, 15 January 2002; ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002; ‘Human rights, trade and investment’, E/CN.4/Sub.2/2003/9, 2 July 2003; ‘An analytical study on the fundamental principle of non-discrimination in the context of globalization’, E/CN.4/2004/40, 15 January 2004; ‘Analytical study of the HCHR on the fundamental principle of participation and its application in the context of globalization’, E/CN.4/2005/41, 23 December 2004. See also more recently, OHCHR, *Human Rights and World Trade Agreements: Using general exceptions clauses to protect human rights*, (New York and Geneva: UN, 2005).

⁶ For a selection of other trade-related work carried out by a variety of UN bodies, see: the series of reports from the Office of the Secretary-General under the common title of ‘Globalization and its impact on the full enjoyment of all human rights’, A/55/342 (31 August 2000), A/56/254 (31 July 2001), A/59/320 (1 September 2004), A/60/301 (24 August 2005); the work of the Committee on Economic, Social and Cultural Rights, in particular its General Comments on the right to adequate food (E/C.12/1999/5, 12 May 1999), the right to education (E/C.12/1999/10, 8 December 1999), the right to the highest attainable standard of health (E/C.12/2000/4, 11 August 2000), and the right to water (E/C.12/2002/11, 20 January 2003), as well as various statements made by the Committee, including at WTO Ministerials (E/C.12/1999/9, E/C.12/2001/15); and the work of the Sub-Commission’s Special Rapporteur on the Right to Health, eg, ‘The right of everyone to the enjoyment of the highest attainable standard of physical and mental health - Mission to the World Trade Organization’, E/CN.4/2004/49/Add.1, 1 March 2004.

⁷ For some early work on trade and human rights arising from this context, see M. Mehra and International NGO Committee on Human Rights in Trade and Investment, *Human rights and economic globalisation: directions for the WTO* (1999); International Institute of Human Rights, *Commerce mondial et protection des droits de l’homme: les droits de l’homme à l’épreuve de la globalisation des échanges économiques / World trade and the protection of human rights: human rights in face of global economic exchanges* (2001).

organizations play a central and expanding role in the trade and human rights debate, and have been some of the most important drivers of it. It is hard to single out the work of particular NGOs without a large degree of arbitrariness, but the important place of civil society in the trade and human rights debate can be seen in a number of different developments: the diffusion of human rights language into the work of NGOs primarily interested in trade matters; the trend among human rights NGOs to develop new expertise and activities on international economic questions, as well as the significant growth in groups – and networks – specifically mandated to work at the nexus between the trade and human rights regimes, and to facilitate conversation between the two.⁸

Alongside the work of both UN institutions and civil society has arisen what is by now a very large and diverse academic literature, produced by scholars of both the international trading system and the human rights regime. A number of events and publications have been important in generating a momentum and a sustained interest in the theme. From 2002 to 2004, the American Society of International Law, in co-operation with a number of other institutions⁹, organised three influential conferences on trade and human rights, the proceedings of which have been published relatively recently.¹⁰ Earlier, in 2001, a lively and high-quality exchange of views between leading scholars in the pages of the *European Journal of International Law* served to excite interest and raise the profile of

⁸ For those interested in perusing the work of NGOs in this area, the ESCR-Net network (www.escr-net.org) is a good starting point. Some NGOs active in the field include: 3D (Trade, Human Rights, Equitable Economy); Amnesty International, the International Federation for Human Rights (FIDH); Ethical Globalization Initiative (EGI); the Center for International Environmental Law (CIEL), International Gender and Trade Network (IGTN); the Centre for International Trade and Development (CECIDE); the People's Movement for Human Rights Education (PDHRE); Dignity International; Association for Women's Rights in Development (AID); the Lutheran World Federation, and formerly the International Centre for Human Rights in Trade and Investment (INCHRITI), among others. Some prominent NGOs working closely on trade matters, such as Oxfam, Institute for Agriculture and Trade Policy (IATP), Trade Law Centre for Southern Africa (TRALAC), and the Third World Network, have in varying degrees also incorporated some aspects of human rights language into their publications.

⁹ Georgetown University Law Center, Max Planck-Institute for International Law (Heidelberg) and the World Trade Institute (Berne).

¹⁰ T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005); F.M. Abbott, C. Breining-Kaufman and T. Cottier (eds.), *International Trade and Human Rights: Foundations and Conceptual Issues* (2006). See also the draft Seventh Report of the International Law Association, International Trade Law Committee, <http://www.ila-hq.org/pdf/Trade%20Law/Draft%20Report%202006.pdf>.

the debate.¹¹ More generally, there has been something of an explosion of conferences, edited collections and monographs looking at impact of international trade on a wide range of human rights, either as a topic in its own right, or as part of larger studies looking at economic globalization more generally.¹²

An interesting dynamic of this scholarly literature (and indeed of the debate more generally) has been its tendency to progressively expand its substantive scope: in many ways, it seems as if the literature has proceeded by borrowing critiques of the trading system originally developed in other contexts, and rearticulating them in human rights language. Early on, discussions on ‘trade and human rights’ tended to concentrate on essentially two main topics: human rights conditionality (particularly in respect of trading relations between the US and China, Cuba and Burma¹³); and the labour and employment

¹¹ P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', (2002) 13(4) *European Journal of International Law* 815; R. Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', (2002) 13(3) *European Journal of International Law* 651; E.U. Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13(3) *European Journal of International Law* 621; E.U. Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', (2002) 13(4) *European Journal of International Law* 845.

¹² Among the vast literature, some early examples from a diversity of perspectives include: T. Evans and J. Hancock, 'Doing Something Without Doing Anything: International Human Rights Law and the Challenge of Globalisation', (1998) 2 *International Journal of Human Rights* 1; A.H. Qureshi, 'International trade and human rights from the perspective of the WTO' in F. Weiss, E.M. Denters and P.J. de Waart (eds.), *International economic law with a human face* (1998), 159; R. McCorquodale and R. Fairbrother, 'Globalization and Human Rights', (1999) 21(3) *Human Rights Quarterly* 735; M. Mehra and International NGO Committee on Human Rights in Trade and Investment, *Human rights and economic globalisation: directions for the WTO* (1999); A. Tay, 'The New Century, Globalisation and Human Rights', (2000) 8(2) *Asia Pacific Law Review* 139; International Institute of Human Rights, *Commerce mondial et protection des droits de l'homme: les droits de l'homme à l'épreuve de la globalisation des échanges économiques / World trade and the protection of human rights: human rights in face of global economic exchanges* (2001); A. Brysk, *Globalization and human rights* (2002); M. Gibney, *Globalizing rights* (2002); as well as the Symposium issue, "The Universal Declaration at 50 and the Challenge of Global Markets" (1999) 25 *Brooklyn Journal of International Law*..

¹³ P. Alston, 'International Trade as an Instrument of Positive Human Rights Policy', (1982) 4(2) *Human Rights Quarterly* 155; J.F. Smith, 'NAFTA and Human Rights: A Necessary Linkage', (1994) 27 *UC Davis Law Review* 793; J.A. Dorn, 'Trade and Human Rights: The Case of China', (1996) 16(1) *Cato Journal* 77; P. Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization', (1996) 11(1) *American University Journal of International Law and Policy* 1; R.W. McGee, 'Trade Embargoes, Sanctions and Blockades - Some Overlooked Human Rights Issues', (1998) 32(4) *Journal of World Trade* 139; C. McCrudden, 'International economic law and the pursuit of human rights: a framework for discussion of the legality of 'selective purchasing' laws under the WTO Government Procurement Agreement', (1999) 2(1) *Journal of International Economic Law* 3; S. Bal, 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT', (2001) 10(1) *Minnesota Journal of Global Trade* 62; L. Bartels,

impacts of international trade.¹⁴ While these subjects retain their place in the contemporary literature, the debate has significantly expanded, and they occupy a far less central position. An early addition was intellectual property, as human rights language was heavily deployed in the 'TRIPs and public health' debate.¹⁵ More recently, a great deal of work in the trade and human rights field centres on questions of development: whether and how international trade regimes disadvantages developing countries and (certain sections of) their populations. Another recent focus has been on concerns which have been raised about the potential constraining impact of international trading system

'Article XX of GATT and the Problem of Extraterritorial Jurisdiction The Case of Trade Measures for the Protection of Human Rights', (2002) 36(2) *Journal of World Trade* 353; S.H. Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility', (2002) 5 *Journal of International Economic Law* 133.

¹⁴ The question of the effects of trade on employment and working conditions is invariably a part of virtually all general commentaries on the relationship between trade and human rights: S. Wright, 'Women and the Global Economic Order: A Feminist Perspective', (1995) 10(2) *American University Journal of International Law and Policy* 861; L.A. Compa and S.F. Diamond, *Human rights, labor rights, and international trade* (1996); R. Howse, 'The World Trade Organization and the protection of workers' rights', (1999) 3(1) *Journal of Small and Emerging Business Law* 131; A. Taylor and C. Thomas, *Global trade and global social issues* (1999); R. Howse and M. Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation, International Centre for Human Rights and Democratic Development (2000); A.E.-S. Tay, 'The New Century, Globalisation and Human Rights', (2000) 8(2) *Asia Pacific Law Review* 139; M. Cohn, 'The World Trade Organization: Elevating Property Interests above Human Rights', (2001) 29(3) *Georgia Journal of International and Comparative Law* 427; H. Lim, 'Trade and Human Rights - What's at Issue?' (2001) 35(2) *Journal of World Trade* 275; A. Brysk, *Globalization and human rights* (2002); D. Shelton, 'Protecting Human Rights in a Globalized World', (2002) 25(2) *Boston College International and Comparative Law Review* 273; R. Wai, 'Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime', (2003) 14(1) *European Journal of International Law* 35 There are those, it should be noted, who do not think that labour rights issues are properly part of a human rights agenda.

¹⁵ See OHCHR, 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights', E/CN.4/Sub.2/2001/13, 27 June 2001; the report of the Sub-Commission's Special Rapporteur on the Right to Health, eg, 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health - Mission to the World Trade Organization', E/CN.4/2004/49/Add.1, 1 March 2004; A.R. Chapman, 'The Human Rights Implications of Intellectual Property Protection', (2002) 5 *Journal of International Economic Law* 861; C. Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies', (2002) 24(1) *Human Rights Quarterly* 1; E.M. Fox, 'Globalization and Human Rights: Looking out for the Welfare of the Worst Off', (2002) 35(1) *New York University Journal of International Law and Politics* 201; R. Wai, 'Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime', (2003) 14(1) *European Journal of International Law* 35; L.R. Helfer, 'Mediating Interactions in an Expanding International Intellectual Property Regime', (2004) 36 *Case Western Reserve Journal of International Law* 123; L.R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', (2004) 29(1) *Yale Journal of International Law* 1; F. Abbott, 'The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the context of TRIPs' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 279; J. Crook, 'Balancing Intellectual Property Protection with the Human Right to Health', (2005) 23 *Berkeley Journal of International Law* 524; F. Abbott, 'TRIPs and Human Rights: Preliminary Reflections' in F.M. Abbott, C. Breining-Kaufman and T. Cottier (eds.), *International Trade and Human Rights: Foundations and Conceptual Issues* (2006), 145.

on what has been termed ‘social regulation’ – that is, health and safety regulation, consumer protection regimes, equal opportunity legislation, labour market regulation, among others, all of which are seen as tools for the protection of human rights.¹⁶ From around 2000 or 2001, the debate has also encompassed questions concerning the impact of services liberalization on the provision of essential services to the poor.¹⁷

How, then, does this article fit into that literature? As already stated in the opening paragraph, I bring to bear two core critiques of the trade and human rights debate as a whole, which correspond to Parts 2 and 3 of this article. In Part 2, I look at what has been said about the impact of the trade regime on the enjoyment of human rights. In most of this literature, the trade regime is understood as primarily a system of formal rules and associated enforcement machinery. For most commentators, we know the ‘human rights impact’ of the trade regime by analysing how these formal legal obligations constrain governments’ ability to take measures to protect human rights. Inevitably, this analysis has produced a narrow reformative agenda – one which concentrates on formal amendment to WTO rules (and rule-making processes), and which moreover focusses largely on relaxing the obligations imposed by them, creating greater ‘policy space’ for WTO Members. In my view, formal analysis of WTO rules yields a highly incomplete

¹⁶ Discussions of these and other regulatory issues can be found in: A. Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights', (1998) 8(2) *Transnational Law and Contemporary Problems* 171; S. Charnovitz, 'The Global Market as Friend or Foe of Human Rights', (1999) 25(1) *Brooklyn Journal of International Law* 113; R. Howse and M. Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation, International Centre for Human Rights and Democratic Development (2000); J.T. Gathii, 'Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis', (2001) 7 *Widener Law Symposium Journal* 137; T. Cottier, 'Trade and Human Rights: A Relationship to Discover', (2002) 5(1) *Journal of International Economic Law* 111; C. Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies', (2002) 24(1) *Human Rights Quarterly* 1; G. Marceau, 'WTO Dispute Settlement and Human Rights', (2002) 13(4) *European Journal of International Law* 753, as well as OHCHR, 'An analytical study on the fundamental principle of non-discrimination in the context of globalization', E/CN.4/2004/40, 15 January 2004.

¹⁷ OHCHR, 'Liberalization of trade in services and human rights', E/CN.4/Sub.2/2002/9, 25 June 2002; CIEL, Going with the Flow: How International Trade, Finance and Investment Regimes Affect the Provision of Water to the Poor, Center for International Environmental Law (2003); CIEL, Water Traded: A Center for International Environmental Law Issue Brief, Center for International Environmental Law (2003); CIEL, GATS and Water: Retaining Policy Space to Serve the Poor, Center for International Environmental Law (2003); A. Ostrovksy, R. Speed and E. Tuerk, GATS, Water and the Environment: Implications of the General Agreement on Trade in Services for Water Resources, World Wildlife Fund for Nature (2003); A. Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry', (2004) 7(4) *Journal of International Economic Law* 801.

and in many respects misleading picture of the impact of the trade regime. This is partly because such analysis tends to overestimate the coercive impact of WTO rules on real-life regulatory processes. It is also because formal legal analysis fails to capture *other*, arguably more important, ways in which the WTO system shapes global trade policies, through processes of persuasion, socialization, and knowledge production. Furthermore, such analyses focus solely on the direct constraining effect of the WTO legal system, and are blind to the indirect, context-dependent and often contradictory deeper social transformations to which that system gives rise. I argue therefore for the need to build a richer and more complex picture of the impacts of the WTO system on human rights protection. This is important not just because all aspects of the WTO ought to be subject to critical scrutiny. More importantly, it is because attention to the myriad processes through which the trade regime makes its influence felt, enables us to see how the trade regime can most productively help us collectively to re-imagine and re-create a better international trading order.

In Part 3, my focus shifts from the trade regime to the human rights regime. In particular, I am interested in exploring what the engagement of human rights actors and languages has brought to debates about the international trading system. One of the primary questions I address is how the engagement of ‘human rights’ has reshaped and reconstituted debates about global economic governance. What productive function has it performed in these debates, and how (if at all) has it helped to progress them? What do human rights actors, as human rights actors, have to offer debates about the nature and future of the global trading order? In my view, the literature so far has been seriously hampered by the lack of coherent and clearly articulated answers to these questions. I argue that the present trade and human rights literature is implicitly structured by primarily three different conceptions of what human rights can offer. Human rights may be understood as: a set of rules providing substantive guidance to trade policy-makers and defining the parameters of acceptable trade policy; a set of political technologies which can be deployed to achieve particular trade policy outcomes; or a set of social objectives and values which at times run counter to the liberal trade project, and therefore necessitate decisions about complex policy trade-offs. I show how these conceptions have

led commentators down some initially promising but in my view ultimately unsatisfying paths. I then go on offer two other models which may lead in more promising directions: I suggest first that human rights may be best understood less a source of substantive policy prescriptions and more as a *trigger* for policy learning; and second that human rights provide a means of challenging the norms of technical rationality which presently legitimate and structure the trade regime.

It will be clear already that my intervention into this debate looks somewhat different from most, and for that reason it may be necessary to prepare the reader in advance for what to expect. For one thing, unlike many commentators, I do not attempt to take a position on the contested question of whether and how ‘trade liberalization’ undermines or enhances ‘the enjoyment of human rights’. Indeed, for the purposes of this article, I remain explicitly agnostic about the substantive critiques and defences which have been made of the trade regime from a human rights perspective. On such questions, the underlying normative commitment of my article is a thin one: it takes for granted that the critiques of the trade regime raise important issues; it proceeds from the presumption that the most fundamental issues they raise can never be finally settled; and it acknowledges the possibility that profound transformation in the trading order may be necessary to adequately respond to them. My primary concern is with the trade and human rights debate itself – specifically, whether and to what extent it enables or forecloses transformative change, whether and to what extent it maintains its ‘critical bite’.

Furthermore, my account differs from those which take for granted that human rights represent a presumptively legitimate and appropriate standpoint from which to address trade issues. Of course, I find it perfectly natural that human rights bodies have taken an interest in trade issues, and I do not think it is necessary to *justify* that interest by asking what human rights bring to the debate. But I do think it is important to determine precisely what are the effects of the engagement of human rights is in the debate, and to think critically about the relative strengths and weaknesses of that engagement. And finally, I do not seek, as many others do, to map the relationship between trade and

human rights.¹⁸ This is partly because such exercises too often produce little more than marginally useful generalities. But more importantly, as explained further below,¹⁹ I am sceptical of that very project. The reality is that – now more than ever – the relationship between the two regimes is constantly evolving. I am less interested in what that relationship *is* than in the processes through which it is constantly *becoming*. Indeed, what I am most interested in are the ways that the trade and human rights debate itself is part of the processes by which that relationship is being socially reconstructed.

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

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

In fact, it is worth taking a moment to note that the literature relating to the former question is typically highly sophisticated, and exhibits many of the features which I will be arguing are lacking in relation to work on the political impact of the trade regime. During the 1990s, when the trade and human rights debate was just beginning, discussion of the impact of trade liberalization on human rights arose in the context of a broader interest in the social impact of what is often referred to as ‘economic globalization’. Many accounts during this time drew heavily on contemporary scholarship on globalization – much of which was at pains to note the complexity, multi-dimensionality, multi-directionality, unpredictability and context-dependence of the effects of

¹⁸ For a classic and sophisticated example, see T. Cottier, 'Trade and Human Rights: A Relationship to Discover', (2002) 5(1) *Journal of International Economic Law* 111.

¹⁹ See below, Section 3 of Part 3.

globalization.²⁰ These lessons seem to have deeply influenced many commentators writing on trade liberalization and its effects on the enjoyment of human rights. Work within the trade and human rights literature has, for example, consistently demonstrated that the outcomes of international trade vary across time and place, and depend heavily on all aspects of the social, political, ideological, regulatory, cultural and economic context in which it takes place.²¹ Human rights scholars in particular have demonstrated a reluctance to generalize about the impacts of trade liberalization, preferring the claim that liberalization may – but need not – lead to improved living conditions.²² No doubt in part because these scholars saw their arguments as a corrective to some of the more Panglossian and overstated promises made about the benefits of liberal trade, they were less likely to make the same mistakes themselves. Moreover, the trade and human rights literature has also been noteworthy for the ways in which it has clarified the huge variety of different indirect pathways by which trade flows can affect social outcomes, as well as drawn attention to the complex mutual interactions between trade liberalization other socioeconomic trends such as the increasing concentration of capital, the growth of transnational enterprises, new waves of migration, and so on. Furthermore, this literature has played an important part in sensitizing us to the multidimensionality of trade's impact. It has done this in part by focussing our attention not simply on traditional topics such as the effects of trade on growth, income and employment, but also on impacts on such factors as human health, equality and discrimination, and access to food, particularly of vulnerable groups.

In my view, the question of the impact of the international trade *regime* – that is, the question of how the international trade regime influences the character, dynamics and operation of the international trading system – raises similar issues. That is to say, it is

²⁰ Classic texts with the body of scholarship I am talking about include: P.Q. Hirst and G. Thompson, *Globalization in question: the international economy and the possibilities of governance* (1999); J.A. Scholte, *Globalization: a critical introduction* (2000); D. Held and A.G. McGrew, *Governing globalization: power, authority, and global governance* (2002); D. Held and A.G. McGrew, *The global transformations reader: an introduction to the globalization debate* (2003).

²¹ It is interesting to note in this regard that by and large the preferred methodology on the question of trade's impacts has been the case study, an analytical form which is well suited to understanding and evaluating the specific dynamics of trade liberalization in particular contexts.

²² For good examples, see the series of reports of the OHCHR referred to in n5 above.

complicated in a similar way by multi-dimensional, multi-modal, context-dependent and interactive effects. However, the literature on this question demonstrates little awareness of these complications. Instead, it tends to adopt a oversimplified framework in which the international trade regime (which in this context is the same as the WTO) acts primarily as an external constraint on its Members' behaviour, by imposing a set of powerful, binding and enforceable legal obligations, requiring states to adopt certain kinds of policies, and refrain from adopting others. Within this framework, we know the impact of the trade regime primarily by looking at the rules it establishes, and the ways these rules are interpreted and applied.

The framework I describe here has much in common with what Wolfe has described as a tendency towards 'legal centralism' in discussion of the international trade regime.²³ Drawing on Wolfe's work, we can break it down into at least four more specific premises. One is that the WTO is essentially a rule-making institution, and that any influence that the WTO wields is primarily felt through the direct constraining effects of those rules. A second is that the nature and content of those rules can be ascertained most reliably and authoritatively by looking at the texts of WTO agreements, as well as the interpretation of those agreements through the decisions of Panels and the Appellate Body. A third concerns the centrality of the WTO. In part because of its hierarchical superiority in the (international) legal order, the WTO – and more specifically the rules it promulgates – are seen to play a uniquely central and powerful role in defining the nature of the trading order, and determining the conduct of participants within it. WTO rules, in other words, are presumptively thought to be more significant than other sources of normativity. The final premise is that the magnitude of the impact of WTO rules is determined, most significantly, by their precision and by the availability of effective mechanisms of coercive enforcement. This is because precision is vital if rules are to

²³ R. Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System', (2005) 11 *European Journal of International Relations* 339. The term 'legal centralism' is chosen by Wolfe in part because his critique draws much from the tradition of legal pluralist thought. My critique differs somewhat, in that it has its origins in a critique of the limitations of rational choice approaches to the study of institutions, so perhaps the term 'legal centralism' is less appropriate in the present context. See also M. Finnemore and S.J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', (2001) 55(3) *International Organization* 743 for another account which sees rational choice perspectives on institutions and positivist understandings of law as closely related, and often associated.

provide meaningful guides for actor behaviour, and enforcement is crucial to ensuring that the strategic costs and benefits associated with particular course of action are significantly modified.

While they almost always remain implicit, it is not hard to see the ways in which these premises strongly influence the trade and human rights debate, and the guide the arguments deployed in it. Most commentators, for example, proceed as if we know the ‘human rights impact’ of the trade regime by analyzing its rules. Simplified, the typical line of argument is in two stages: first, commentators typically scrutinize WTO agreements carefully to determine the kinds of policy choices these agreements may require or proscribe, and second, these policy choices are themselves carefully analyzed to determine whether and in what ways they may respectively undermine or enhance the enjoyment of human rights in particular circumstances. For example, initially in response to the *EC – Hormones* dispute²⁴, some commentators have expressed concern that certain provisions of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) may undermine the ability of Members to put in place adequate food safety regimes in respect of new and potentially dangerous foods – and that such regimes often play an important part in promoting and protecting the right to health.²⁵ Another very familiar example is the concern that TRIPs article 31(f) may limit the import and export of generic drugs – a measure which, again, might be necessary in the fight against particular health epidemics, and thus the promotion of the right to health.²⁶ A third is work on the impacts of the *Agreement on Agriculture* (AoA): concern has been expressed that this agreements limits the circumstances in which many developing countries can put in place protective measures such as tariffs, subsidies and safeguards mechanisms, which may in some circumstances be the only effective means of protecting vulnerable

²⁴ *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I, 135, Panel Report, WT/DS26/R/USA, DSR 1998:III, 699, adopted 13 February 1998.

²⁵ Eg, A. Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights', (1998) 8(2) *Transnational Law and Contemporary Problems* 171; C. Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies', (2002) 24(1) *Human Rights Quarterly* 1; G. Marceau, 'WTO Dispute Settlement and Human Rights', (2002) 13(4) *European Journal of International Law* 753.

²⁶ See above n15.

communities from the dislocations caused by agricultural import liberalization.²⁷ The point is that investigations into the influence and impact of the trade regime on human rights focus primarily (often exclusively) on the degree of constraint its laws impose on the policy choices of its Member states, so that assessing its impact becomes first and foremost a formal legal question. In such analyses, the technical details of WTO agreements take on paramount importance, and the pronouncements of the Appellate Body in high profile cases are carefully scrutinized for their implications for Members' policy autonomy. Typically, the analysis ends at this point: once textual inadequacy or ambiguity is identified, there is usually little attempt to investigate the real-world impacts of those texts on regulatory choices and decision-making processes.

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

1. The salience and centrality of WTO law

My first concern is related to the normative centrality or 'salience' of WTO obligations – that is, the extent to which WTO obligations are central or peripheral in policy-making processes, and the degree of importance which national policy-makers place on them in practice. The legal centralist framework encourages us to think of WTO obligations as enjoying a high degree of salience, certainly compared to other international legal

²⁷ See, for example, C. Breining-Kaufman, 'The Right to Food and Trade in Agriculture' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 341; OHCHR, 'Globalization and its impact on the full enjoyment of human rights', E/CN.4/2002/54, 15 January 2002; Simons, "Human Security, Corporate Accountability and the Regulation of International Trade", CCHS Human Security Fellowship Working Paper, March 2004; C.G. Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries', (2002) 27(2) *Columbia Journal of Environmental Law* 433 M. Ritchie and K. Dawkins, 'WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food', (2000) 9(1) *Minnesota Journal of Global Trade* 9.

obligations. Primarily, of course, this is because of the WTO's dispute settlement mechanism, and in particular the existence of a credible threat of sanctions for non-compliance. It is also because of the relative precision of many WTO obligations (which in principle augments their capacity to act as a guide to behaviour), as well as their hierarchical superiority (which tends generate a perception of salience as compared to say domestic sources of legal normativity). Furthermore, the present high levels of compliance with formal WTO dispute settlement rulings is often treated as sufficient empirical evidence of the strong coercive force of WTO obligations.²⁸

But while these indications are clearly significant, they tell only part of the story. They must be balanced against a variety of other factors, which give us good reason to suspect that WTO legal constraints are not in all circumstances as central to national policy-making processes as is often assumed. For instance, it is important to remember that high levels of compliance with dispute settlement rulings provide direct evidence only of levels of post-dispute compliance. This kind of evidence tells us little if anything about the extent to which WTO law influences day-to-day regulatory decision-making, in those vast majority of cases which never reach dispute settlement.²⁹ In such cases, whether WTO obligations are central or only peripheral in decision-making processes depends on much more than their precision and the existence of a credible threat of sanctions. Their practical impact depends, for example, on a high degree of awareness of relevant WTO provisions amongst national governmental decision-makers, as well as on the existence of routinized and systematic practices of WTO compliance review as a standard part of regulatory decision-making. We have surprisingly little empirical evidence on the extent to which WTO obligations are systematically considered in domestic legal processes in this way. At the very least, however, we would expect this to vary considerably from country to country, and from issue area to issue area – depending on the resources and administrative capacity of domestic governments, the availability of local officials with relevant WTO expertise, previous dealings between particular government departments

²⁸ For a selection of the literature on compliance with the WTO dispute settlement mechanism, see (2002) 33:4 *Law and Policy in International Business* (Symposium issue).

²⁹ The same point is made by Dunoff in J.L. Dunoff, 'Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas', (2005) 1(1-2) *Journal of International Law and International Relations* 191, 206.

and the WTO legal system.³⁰ Many countries, it seems, find it more efficient to rely on *post hoc* complaints by trading partners and exporters as the most efficient method of ensuring acceptable levels of compliance with WTO law.³¹

Moreover, it has long been recognised that compliance with legal rules depends not solely on the existence of a sanctioning mechanism, but also to a significant extent on their congruence with pre-existing value commitments in the regulated polity.³² It may be argued that the great lesson of 60 years of experience with international trade law is that such law cannot be effective in the long run in the absence of a broad and lasting consensus that its strictures are necessary and mutually beneficial.³³ There is no doubt that at some level this consensus currently exists, but few would claim that it is equally strong in all circumstances. Even at the level of individual governmental agencies, WTO law represents only one of many normative claims to which regulatory decision-makers are subject. Even apart from their embeddedness in local political cultures, domestic regulatory authorities are also influenced by very strong organizational cultures, including powerful social norms concerning the kinds of policy choices which are legitimate, desirable and politically possible. Where WTO norms are not internalized into that culture, even the hardest of coercive legal mechanisms can be relatively ineffective in fundamentally altering the form and content of policy-making processes. Indeed, a number of incidents in the history of GATT/WTO dispute settlement illustrate this

³⁰ Anecdotal evidence, from interviews with the legal departments in the governments of a variety of WTO Members, suggests the (unsurprising) conclusion that the experience of being the subject of WTO proceedings in a particular regulatory sub-field (be it quarantine, or environmental measures), has the effect of sensitizing decision-makers in that area to the existence of WTO rules, and increasing their impact on future decision-making processes.

³¹ Again, anecdotal evidence from interviews with numerous governmental officials suggests that, at least in respect of legislative and regulatory measures in place prior to the creation of the WTO, it is common practice not to review such measures systematically for WTO compliance, but rather to wait to see if trading partners raise them as legal issues.

³² This basic point has been made by many commentators, eg: T.M. Franck, *The power of legitimacy among nations* (1990); R. Goodman and D. Jinks, 'How to Influence States: Socialization and International Human Rights Law', (2004) 54 *Duke Law Journal* 621, 632.

³³ The experience over the first decades of the GATT with regional trade agreements, agriculture, and (later) with so-called Voluntary Export Restraints surely suggests that without such a consensus, it will usually be a relatively simple matter to find a way around even tightly drafted legal rules. This is not, it should be noted, the lesson that is typically drawn. It is more usual to suggest that the history of the GATT teaches us that international trade commitments cannot be effective without a binding and enforceable dispute resolution: eg, J. Pauwelyn, 'The Transformation of World Trade', (2005) 104 *Michigan Law Review* 1. No doubt there is some truth to both accounts.

general effect well.³⁴ Furthermore, as many have noted in other contexts, precisely the act of making the GATT/WTO legal system ‘harder’ – that is to say, made more legally precise, subject to binding and coercive dispute resolution, and so on – may in some circumstances actually *undermine* the normative cohesion on which its effectiveness is (partially) based. Finnemore and Toope, for example, note that judicialization may lead to reduced levels of adherence to the ‘spirit’ of the law, in part by encouraging aggressive legal argumentative strategies, and fostering an environment in which compliance with legal formalities is understood as all that is required.³⁵

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

³⁴ There are at least three obvious and interesting examples of this. The first is the history of the *DISC* (later *FSC*) case, recounted by Hudec in R.E. Hudec, *Enforcing international trade law: the evolution of the modern GATT legal system* (1993), 99 – a history which to my mind illustrates as much as anything the difficulty of ensuring compliance with trade law where the WTO is seen by regulators to be over-extending itself, into regulatory fields which are not within its core perceived competence. The second and third examples (which teach the same lesson) are the post-ruling histories of the *Hormones* and *Varietals* disputes, see D. Wuger, 'Never Ending Story: The Implementation Phase in the Dispute between the EC and the United States on Hormone-Treated Beef', (2002) 33(4) *Law and Policy in International Business* 777 and J.P. Whitlock, 'Japan - Measures Affecting Agricultural Products: Lessons for Future SPS and Agricultural Trade Disputes', (2002) 33(4) *Law and Policy in International Business* 741, 761.

³⁵ M. Finnemore and S.J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', (2001) 55(3) *International Organization* 743, 753, see also J. Goldstein and L.L. Martin, 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note', (2000) 54(3) *International Organization* 603; E.L. Lutz and K. Sikkink, 'International Human Rights Law and Practice in Latin America', (2000) 54(3) *International Organization* 633; L.R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes', (2002) 102(7) *Columbia Law Review* 1832; R. Goodman and D. Jinks, 'How to Influence States: Socialization and International Human Rights Law', (2004) 54 *Duke Law Journal* 621.

them), and of sufficient levels of trade flows between the two relevant countries for the threat of sanctions to ‘bite’.

What I have been calling the salience of WTO obligations also depends in practice on what these obligations actually require – that is, the extent to which they actually do impose genuinely burdensome obligations on national decision-makers, which require them to take substantively different decisions from those which they might otherwise prefer. This is largely an interpretive or doctrinal question and clearly one which cannot be answered adequately without detailed consideration of specific legal issues. Much depends on the particular provision and the specific circumstances at issue in any particular context, as well as on the perceptions of the individual commentator. Nevertheless, it is worth making the generally under-emphasized observation that obligations in WTO agreements are often ambiguously worded, or impose procedural rather than substantive requirements, or are hedged around by a variety of overlapping safeguards, exemptions and flexibilities.³⁶ Taken together, these features are often more productive of confusion and uncertainty than precision – they look more like flexibility rather than constraint – and in fact make a variety of legal strategies available to determined regulators wishing to pursue a path of action in apparent defiance of WTO requirements. Of course, this is less true in some areas than in others. Some disciplines are indeed extremely precise and difficult to legitimately work around, tariff bindings being perhaps the obvious example. But in my view the existence of significant flexibility is particularly apparent in relation to constraints on those areas of policy-making – such as regulation concerning food safety, consumer protection, environmental protection, among other matters – which tend at present to concern human rights scholars and commentators the most.

Finally, it is important to be realistic about the *relative* centrality of formal WTO obligations as determinants of trade policy, and more generally as determinants of the character of the international trading system. The imperatives of WTO law, of course, are

³⁶ For a substantiation of this claim in relation to a particular legal question, see A. Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry', (2004) 7(4) *Journal of International Economic Law* 801.

only some among a very large number of pressures facing regulatory authorities – indeed, only some among a diversity of *legal* pressures facing them.³⁷ Structural and other factors driving trade liberalization may in the end be much more important than WTO obligations in driving trade liberalization.³⁸ It is certainly arguable that recent periods of dramatic liberalization in international trade (structural adjustment in developing countries during the 1970s and 80s being an obvious example) have had little to do with legal obligations imposed by the international trade regime, at least not directly. We may also legitimately wonder how big a difference increasing the formal flexibilities provided to developing countries under WTO agreements may actually make – it is interesting how often trade commentators find themselves arguing that countries ought to use existing flexibilities in WTO agreements more than they currently do.³⁹ It is hard to resist the impression that (at least in a significant proportion of cases) the importance of WTO obligations can be somewhat marginal to the decisions of trade policy-makers. Of course, I don't wish to stretch the point: my claim is not, of course, that WTO obligations are unimportant. It is merely to correct what I see as a tendency to over-emphasize the determinative role of these obligations on trade policy.

2. *The multiple modalities of WTO effects*

If in the previous section I argued that the legal centralist frame tends to *overestimate* the constraining impact of WTO law, in this section my claim is that it *underestimates* or overlooks a variety of other important mechanisms by which the international trade

³⁷ Indeed, to take the point one step further, public regulation is far from the only legal pressure guiding the activities of private traders: R. Wai, 'Transnational Liff-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', (2002) 40(2) *Columbia Journal of Transnational Law* 209.

³⁸ For interesting recent work attempting to measure the impact of the trade regime, see Rose, "Do We Really Know that the WTO Increases Trade?" (2004) 94 *American Economic Review*; Subramanian and Wei, "The WTO Promotes Trade Strongly but Unevenly," NBER Working Paper 10024, (2003); Tomz, Goldstein, and Rivers, "Membership Has Its Privileges: The Impact of GATT on International Trade," (2004), available at <http://www.stanford.edu/~tomz/working/TomzGoldsteinRivers2005a.pdf>; Rose, "Response to Tomz, Goldstein, and Rivers, "Membership Has Its Privileges: The Impact of GATT on International Trade"" (2005), available at <http://faculty.haas.berkeley.edu/arose/Tomz.pdf>; Gowa and Kim, "An Exclusive Country Club: The Effects of the GATT on Trade, 1950-1994", available at www.yale.edu/irspeakers/Gowa2006.

³⁹ See, to take one among many possible examples, OHCHR, 'Liberalization of trade in services and human rights', E/CN.4/Sub.2/2002/9, 25 June 2002.

regime makes its influence felt. There is a large and growing body of literature – much of it informed by strands of constructivist thinking and drawing on traditions within sociological enquiry – attempting both to theorize and empirically map the various non-compulsory⁴⁰ modes of influence and power which international organizations wield.⁴¹ Within this literature, international institutions like the WTO are understood not so much as exogenous constraints on state behaviour, but rather as social environments in which states (or the individuals who represent them) come to redefine, reformulate and reconceive the kinds of trade policies they wish to pursue. There are at least three relevant lines of enquiry which this literature pursues.

First of all, we can think of international organizations as technologies for the production, authorization and dissemination of policy *norms*. This is a conceptual model which has been developed primarily in studies of international institutions working in the fields of development and human rights, among others.⁴² A number of scholars have argued, in fact, that normative diffusion represents the primary function of many international institutions, and the most powerful mechanism at their disposal to influence the behaviour of states.⁴³ There is a sophisticated literature on the various microprocesses by which this kind of normative diffusion takes place. Some commentators concentrate on the role of persuasion, argumentation and conscious deliberation. They see international institutions as forums for the engagement of these deliberative processes, where state

⁴⁰ I borrow the term ‘compulsory power’ here from Barnett and Duvall’s introductory chapter in Barnett and Duvall (eds.), *Power in Global Governance* (2003), 1-32.

⁴¹ See, for example, A. Chayes and A.H. Chayes, *The new sovereignty: compliance with international regulatory agreements* (1995); M. Finnemore, *National interests in international society* (1996); M.N. Barnett and M. Finnemore, ‘The Politics, Power, and Pathologies of International Organizations’, (1999) 53(4) *International Organization* 699; T. Risse-Kappen, C. Ropp Steve and K. Sikkink, *The power of human rights: international norms and domestic change* (1999); A.I. Johnston, ‘Treating International Institutions as Social Environments’, (2001) 45(4) *International Studies Quarterly* 487; R. Goodman and D. Jinks, ‘How to Influence States: Socialization and International Human Rights Law’, (2004) 54 *Duke Law Journal* 621, and more generally A.S. Yee, ‘The causal effects of ideas on policies’, (1996) 50(1) *International Organization* 69; J.T. Checkel, ‘The Constructivist Turn in International Relations Theory’, (1998) 50(2) *World Politics* 324. For international legal scholarship from a somewhat similar perspective see H.H. Koh, ‘Transnational Legal Process’, (1996) 75(1) *Nebraska Law Review* 181; J. Brunnee and S.J. Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’, (2000) 39(1) *Columbia Journal of Transnational Law* 19.

⁴² See, eg. M. Finnemore, *National interests in international society* (1996); T. Risse-Kappen, C. Ropp Steve and K. Sikkink, *The power of human rights: international norms and domestic change* (1999).

⁴³ *Ibid.*

representatives are prompted to ‘think harder’ about issues in light of persuasive evidence, and over time come to change their mind to accord more closely to the dominant normative framework favoured by the international institution in question.⁴⁴ Others focus more on acculturation – that is, the often tacit processes by which members of a organization come to share its normative commitments. Within international organizations, these commentators note, psycho-social pressures to conform arise from processes of identification, shaming, back-patting, status maximization, habituation, and so on.⁴⁵ And others still concentrate on the discursive practices by which norms are propagated, communicated and valorized within international organizations. They show how the distinctive conceptual frameworks, modes of speaking, and forms of argument characteristic of particular international regimes can construct particular policy orientations as appropriate, rational, modern, legitimate, and so on.⁴⁶ These three processes – persuasion, acculturation and discursive legitimation – can act directly by affecting those policy-makers who are themselves active participants in a regime, as well as indirectly by working on special interest groups who, in turn, persuade domestic audiences and political leaders.⁴⁷

Although to date there is still little empirical work on these processes, there are strong reasons to think that they play an important role within the present international trade regime. Through many of its institutional practices, the WTO tends to teach states about the kinds of trade policies which are desirable and in their best interests, even if the trade

⁴⁴ On the role of persuasion, see for example T. Risse, "'Let's Argue!': Communicative Action in World Politics', (2000) 54(1) *International Organization* 1; A.I. Johnston, 'Treating International Institutions as Social Environments', (2001) 45(4) *International Studies Quarterly* 487, and references cited therein.

⁴⁵ See A.I. Johnston, 'Treating International Institutions as Social Environments', (2001) 45(4) *International Studies Quarterly* 487; R. Goodman and D. Jinks, 'How to Influence States: Socialization and International Human Rights Law', (2004) 54 *Duke Law Journal* 621, drawing heavily on a wide variety of sociological literature on pressures on individuals to conform in social groups.

⁴⁶ For commentators who make this claim in relation to the trade regime, see D.K. Tarullo, 'Logic, Myth, and the International Economic Order', (1985) 26 *Harvard International Law Journal* 533; D. Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures', (1991) 32(3) *Harvard International Law Journal* 373; C. Ochoa, 'Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse', (2003) 23(1) *Boston College Third World Law Journal* 57; A. Lang, 'Beyond Formal Obligation: The Trade Regime and the Making of Political Priorities', (2005) 18 *Leiden Journal of International Law* 403. See also, more generally A.S. Yee, 'The causal effects of ideas on policies', (1996) 50(1) *International Organization* 69.

⁴⁷ R. Goodman and D. Jinks, 'How to Influence States: Socialization and International Human Rights Law', (2004) 54 *Duke Law Journal* 621, 654.

policy obligations imposed by WTO law do not correspond precisely with this ideal. There are, for example, a number of venues within the current WTO system which we might expect to function as sites of normative socialization: accession negotiations teach new Members what it means to be a modern liberal trading nation; the Trade Policy Review Mechanism helps to produce and disseminate norms concerning the proper shape and objectives of domestic economic policy; while technical assistance programs are (or at least have the potential to be) the mechanism by which government leaders are taught norms of appropriate trade policy behaviour.⁴⁸ Furthermore, there are indications that socialization and persuasion historically played an important role in producing outcomes in the GATT system. A number of commentators have noted that, at least in its first few decades, one of the primary achievements of the GATT system was the creation of a close-knit community of trade experts and policy-makers. Through regular interaction, these players developed strong bonds of trust as well as shared cognitive frameworks, normative commitments, internalized social roles and expectations, and habits of thought, all of which contributed to the maintenance of a stable elite preference for trade liberalization.⁴⁹ This social network, it is argued, was a primary factor in creating and maintaining a generalized and long-term commitment to liberal trade among policy-makers in the post-war political order. While the nature, size, intensity and orientation of transnational policy networks in the field of international trade have of course changed

⁴⁸ To these three might be added multilateral trade negotiations themselves. For example, as Weissman has noted, while it is common to understand the inclusion of IP in the Uruguay Round negotiations as a blatant exercise in power politics for the benefit of IP producers from developed countries, the reality is more complex than that. The UR negotiations provided an impetus for the production and dissemination of a huge amount of research into the potential benefits of stronger IP protection for developing countries. Weissman notes that this research, and related processes of persuasion, were at least convincing enough to encourage prominent developing countries to believe that TRIPs was something they could live with: R. Weissman, 'A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries', (1996) 17(4) *University of Pennsylvania Journal of International Economic Law* 1069.

⁴⁹ This point has been made by a number of commentators: R.E. Hudec, *Enforcing international trade law: the evolution of the modern GATT legal system* (1993); A. Chayes and A.H. Chayes, *The new sovereignty: compliance with international regulatory agreements* (1995), 278ff; R.O. Keohane and J.S. Nye, 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy' in R.B. Porter, R. Vernon and G. Harvard University. Center for Business and (eds.), *Efficiency, equity, and legitimacy: the multilateral trading system at the millennium* (2001), xvi; J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats-Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', (2001) 35(2) *Journal of World Trade* 191, 334. See also generally, P.M. Haas, 'Introduction. Epistemic Communities and International Policy Co-ordination', (Winter 1992) 46(1) *International Organization* 1.

since that time, there is every reason to assume that the role of the WTO in creating and shaping such networks is equally significant today.

One important aside: I should not be misunderstood as suggesting that the international trading system is always or necessarily associated with the global projection of a particular *economic ideology*. I have argued elsewhere that literature on the trade regime is too often characterized by an uncritical assumption that the normative framework of the regime is naturally associated with economic neoliberalism, or with radical free market fundamentalism.⁵⁰ Historical scholarship reminds us that the values and norms disseminated through the international trade regime are fluctuating and contingent. In fact, the post-war regime began very far from free market fundamentalism, has been associated with a variety of political and normative programs since, and has always been characterized by a degree of contestation and internal contradiction.⁵¹ Research into mechanisms of persuasion and socialization within the WTO, while in my view vital, needs therefore to be undertaken carefully, so as to make no assumptions about the character, durability and orientation of its normative influence.

Secondly, other scholars have focussed on the role of international institutions in the production and dissemination of socially sanctioned *knowledge* about the world. This ‘knowledge-production function’ of international institutions has been conceptualized and described in different ways by different commentators. One helpful model rests on a linguistic analogy: international institutions are associated with particular languages (the languages of human rights, development, trade, and so on) and are understood in their character as discursive environments. These languages or discourses, it is said, provide actors with a particular repertoire of categories and concepts with which to make sense of the world. They are founded on, and express, particular theories about how the world operates, and provide an interpretive framework through which we can access various aspects of reality. This linguistic analogy allows us to understand a variety of often

⁵⁰ Lang, “Whose trade issues? What trade values? Cognitive and Institutional Change in the International Trading System” (forthcoming, copy on file with author).

⁵¹ The classic text making this point is J.G. Ruggie, 'International regimes, transactions, and change: embedded liberalism and the postwar economic order' in S.D. Krasner (ed.) *International Regimes* (1983), 195.

hidden ways in which international institutions wield power and influence social and political outcomes. For example, Barnett and Finnemore describe international organizations as exercising the power of *classification* and the power to *fix meanings* to social phenomena.⁵² They note that, in various circumstances and for various purposes, the World Bank defines people as peasants, day labourers, farmers, or others, and that this classification has important consequences for whether these people are understood as possessing the kinds of knowledge useful to guide the development process.⁵³ Similarly, they note (drawing on the work of Escobar⁵⁴) that the World Bank is a key venue for the authoritative definition of the notion of development. The power to define the social meaning of development is crucial, they suggest, because it

determines not only what constitutes the activity (what development is) but also who (or what) is considered powerful and privileged, that is, who gets to do the developing ... and who is the object of development.⁵⁵

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

⁵² M.N. Barnett and M. Finnemore, 'The Politics, Power, and Pathologies of International Organizations', (1999) 53(4) *International Organization* 699.

⁵³ *Ibid.*, 711, referring to G. Gran, 'Beyond African Famines: Whose Knowledge Matters?' (1986) 11 *Alternatives* 275.

⁵⁴ A. Escobar, *Encountering development: the making and unmaking of the third world* (1994).

⁵⁵ M.N. Barnett and M. Finnemore, 'The Politics, Power, and Pathologies of International Organizations', (1999) 53(4) *International Organization* 699, 711.

of the international trading order, for defining the categories through which actors interpret the trading system and their place within it, or at least mediating struggles over them. In this way, rather than simply constraining states' behaviour, it *enables* (particular kinds of) action, by providing a conceptual framework within which particular kinds of actions are made meaningful.⁵⁶ Another, less abstract model focusses on the ways in which international institutions produce and disseminate technical knowledge about the causal mechanisms which govern the operation of various aspects of international life. International organizations might, most simply, be involved in the production of reports and technical documents which explicitly develop causal models for guiding policy development. They might also facilitate the creation of knowledge networks, mediating the channels through which policy-makers are exposed to particular forms of expertise, and regulating the form in which policy ideas are introduced to decision-makers.⁵⁷ The applicability of these insights to the WTO hardly needs explanation.

The third and final set of mechanisms are of a different kind, more familiar to mainstream thinking about the role of international organizations in political life. In this story, international organizations like the WTO shape political outcomes by influencing the dynamics of domestic political debates about – in the case of the WTO – trade policy. While this body of literature is like the previous two in that it is interested in the processes by which state preferences are created and redefined, the focus here is less on the cognitive microprocesses by which individuals come to an understanding of their interests, and more on the social processes by which the (fixed) preferences of a multitude of individuals are aggregated within a state polity.⁵⁸

One way in which the WTO influences domestic political debates, for example, is by changing the constellation of actors involved in them. Often it can have the effect of expanding trade policy debates to include foreign actors. As Swenarchuk has noted, one

⁵⁶ The kind of power I am talking about here overlaps with the notion of 'productive power' used by Barnett and Duvall in their introductory chapter to *Power in Global Governance* (2003), 20.

⁵⁷ See, for example, P.A. Hall, *The political power of economic ideas: Keynesianism across nations* (1989); A.S. Yee, 'The causal effects of ideas on policies', (1996) 50(1) *International Organization* 69, 92.

⁵⁸ A.I. Johnston, 'Treating International Institutions as Social Environments', (2001) 45(4) *International Studies Quarterly* 487, 487.

practical effect of the national treatment obligation in WTO law – by which foreign products are entitled to equivalent treatment to that granted to their domestic equivalents – is to give foreign producers an interest in the governmental regulation of domestic businesses.⁵⁹ In some circumstances, the result has been direct lobbying by foreign businesses in favour of policies of domestic liberalization.⁶⁰ More directly, the WTO also facilitates the input of foreign actors into domestic trade policy decision-making, by opening up intergovernmental channels through which affected foreign businesses can make their complaints heard, as well as by focussing international attention on obstacles to trade in particular countries. Furthermore, the WTO can also lead to the formation of new actors on the domestic political scene, by altering the political opportunity structure facing various interest groups.⁶¹ For example, it was in significant part the expansion of the WTO into the arena of services that lead to the creation of new service industry coalitions and business networks loosely tied together by the new concept of ‘trade in services’.⁶² While such groups are important actors within the trade regime itself, they also are directly involved in domestic debates concerning liberalization policies relevant to a variety of service industries. Finally, WTO processes might more indirectly lead to changes in the range of actors involved in domestic political debates. For example, the creation of domestic systems of IP protection, in compliance with international trade law, may lead to the creation of new domestic constituencies in favour of further and more extensive IP protection.⁶³

Closely related are the processes by which the international trading system can help to mobilize actors in favour of liberal trade, who might otherwise remain relatively politically disengaged. Thus, for example, numerous commentators have noted that the

⁵⁹ M. Swenarchuk, *From Global to Local: GATS Impacts on Canadian Municipalities* (2002).

⁶⁰ See, for example, D. Roseman, 'Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects under the GATS' in A. Mattoo and P. Sauvé (eds.), *Domestic regulation and service trade liberalization* (2003), 83.

⁶¹ Duina provides fascinating examples of this process in the context of Mercosur and NAFTA: F.G. Duina, *The social construction of free trade: the European Union, NAFTA, and MERCOSUR* (2006).

⁶² Some examples might include the Coalition of Service Industries, European Services Forum, Global Services Coalition, Australian Services Roundtable, Hong Kong Coalition of Service Industries, among many other national lobby groups.

⁶³ I take this example from Kingsbury: B. Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', (1998) 19(2) *Michigan Journal of International Law* 345.

reciprocal nature of international trade obligations – by making access to foreign markets conditional on inward liberalization measures – can mobilize export-oriented domestic producers in favour of domestic liberalization projects, and thus alleviate to some extent the well-known public choice problem characteristic of domestic trade policy.⁶⁴

Furthermore, periodic multilateral trade negotiations provide ongoing opportunities for domestic policy elites to continuously revisit trade policy questions, and to re-energize domestic pro-liberalization interest groups. (Interestingly, in direct contrast to widespread perceptions, multilateral trade negotiations are only sometimes instigated and shaped by already-mobilized industry groups. It is at least as common for governments to use such negotiations as a means to galvanize such groups, and proactively ask for their input in defining and supporting national trade policy priorities.⁶⁵) Of course, these processes can work in the other direction: Goldstein and Martin note, for example, the way in which the ratification and incorporation of international trade agreements by domestic legislative authorities can provide a focal point for those groups resistant to liberal trade agenda, and in favour of more protectionist policies.⁶⁶

Finally, the existence of the WTO and its legal system can alter the dynamics of domestic trade debates by adding to the array of arguments that can legitimately be deployed in such debates. Hudec has noted, for example, the way in which domestic policy-makers can (whether or not there is strict legal justification) use the excuse of WTO obligations to justify politically unpopular liberalization measures.⁶⁷ In the United States for example, as Destler has described, policy elites have been able to galvanize support for specific liberalization initiatives by referring to the need to maintain American leadership in international economic affairs, as well as to maintain the integrity and stability of the international trading system more generally. He also describes the ways in which the

⁶⁴ This is a commonly noted effect of the trade regime: eg, J.H. Jackson, *The world trading system: law and policy of international economic relations* (1997); I.M. Destler, *American trade politics* (2005).

⁶⁵ See, for example, Hurrell and Narlikar, "The New Politics of Confrontation? Developing Countries at Cancun and Beyond" (2006) 20(4) *Global Society* (forthcoming); A. Hurrell, 'Hegemony, liberalism and global order: what space for would-be great powers?' (2006) 82(1) *International Affairs* 1; A. Narlikar, 'Peculiar chauvinism or strategic calculation? Explaining the negotiating strategy of a rising India', (2006) 82(1) *International Affairs* 59.

⁶⁶ J. Goldstein and L.L. Martin, 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note', (2000) 54(3) *International Organization* 603.

⁶⁷ R.E. Hudec, *Enforcing international trade law: the evolution of the modern GATT legal system* (1993).

international trading system has allowed American trade policy elites to respond to domestic political pressures in new ways: for example, responding to widespread concern about the US trade deficit by waging an aggressive campaign to open foreign markets, rather than the more traditional response of raising barriers to imports.⁶⁸

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

3. *Multi-directionality and indirect impacts*

A third criticism of the legal centralist frame is that it tends to focus our attention on the *direct* and *immediate* impacts of WTO law in the context of individual disputes. We are encouraged to understand the impact of WTO obligations solely in terms of the degree of constraint they impose on, or freedom they provide to, domestic authorities. Significantly less attention is paid, however, to the longer-term and more indirect social impacts of the WTO legal system as its legal norms embed themselves into particular socio-political contexts. Attention to these deeper effects yields a vastly richer and more complex picture of the social effects of the WTO legal system: in which the impact of international legal norms is acknowledged to be unpredictable and often unintended⁶⁹, dynamic, highly context-dependent, and multidirectional.

⁶⁸ I.M. Destler, *American trade politics* (2005).

⁶⁹ Martin and Simmons have noted the tendency of ‘secondary’ rules in particular (concerning how substantive rules are made) to have significant unanticipated effects: L.L. Martin and B. Simmons, ‘Theories and Empirical Studies of International Institutions’, (1998) 52(4) *International Organization* 729, 750.

Take the impact of the GATT/WTO system on patterns of protectionism. We are accustomed to thinking of the GATT/WTO as constraining protectionism, putting in place an expanding collection of prohibitive rules which gradually tend to eliminate protectionist policies. And, of course, this is a large part of the story. But in addition to these direct and most visible effects, the prohibitions set out in the GATT/WTO legal framework have generated a variety of often surprising *indirect* effects, which have ultimately played a crucial role in shaping the contemporary international trading order. For example, while the GATT/WTO system has certainly reduced the incidence of protectionist policies, it has also tended to shift the focus of protectionist efforts onto those measures which remain permissible under that law. Thus Hughes and Waelbroeck tell the story of the a simultaneous decrease in tariff restrictions and an increased use of export subsidies and production subsidies during the 1960s and 1970s, both by industrialized country governments, and (partly as a consequence) by the developing country counterparts.⁷⁰ This reconfiguration of the instruments of trade policy, they argue, in some cases served to entrench and even facilitate protectionist pressures, primarily because it provided new – often less transparent and less easily reversible – avenues for the expression of these pressures. In fact, one can plausibly tell the story of the postwar trading system as a complex game, in which Members agreed to certain restrictions on their trade policy options – while leaving certain other options conspicuously open – then over time developed new strategies for responding to protectionist pressures while still remaining (more or less⁷¹) within the boundaries imposed by the GATT/WTO, which in turn prompted further periodic revision of the rules in response to these broad reconfigurations of trade policy tools.⁷² From this perspective, mapping the effects of the GATT/WTO system is not just a question of the extent to which it has been effective in reducing trade barriers, but also a question of how it has helped to restructure and reorganize protectionist pressures. It is a system which, even as it has helped to exclude protectionist pressures from particular loci of trade

⁷⁰ H. Hughes and J. Waelbroeck, 'Can Developing Country Exports Keep Growing in the 1980s?' (1981) 9 *World Economy* 127.

⁷¹ The history of Voluntary Export Restraints tends to be understood on the contrary as an example of GATT Members acquiescing in a breach of the rules.

⁷² The increased use of anti-dumping duties, and trade remedies more generally, over the last few decades, has been explained in this way: I.M. Destler, *American trade politics* (2005).

policy-making, has actually in practice facilitated the insertion of protectionist forces into others.⁷³ The point of this is a general one: the story of the impacts of the GATT regime on the political economy of protectionism is much more complex and multi-layered than a typical analysis of the GATT texts would suggest. It raises the possibility – indeed the near certainty – that these impacts will look fundamentally different in different social and political contexts, and even have diametrically opposed results across different countries.

A similarly complex and contradictory story can be sketched out in respect of the impact of the WTO system on democratic control of trade policy decisions. Because we focus on the direct and immediate impacts of WTO obligations, and think of them in terms of constraints and prohibitions on policy choices, it is customary to understand the WTO as reducing the democratic controls of national polities over the trade policies that their governments pursue. The line of cases in which the WTO dispute settlement system has purported to decide the permissibility under WTO law of particular national health- and environment-related regulatory measures has been the subject of a great deal of critique along these lines.⁷⁴ Of course there is a degree of truth to this claim, but again it tells only part of the story. It is also true that this line of cases has – inadvertently and unpredictably – given rise to an unprecedented level of public scrutiny of WTO decisions, and has facilitated the engagement of a huge variety of social actors into trade policy debates. It is clear that, partly as a response to the perceived excesses of WTO law, the degree of public interest in, levels of information on, and general engagement with international economic issues, has significantly increased. Similarly, at a more specific level, the

⁷³ For example, there is a strong argument that the international trade regime has actually legitimated and perpetuated patterns of protectionism in the context of agricultural trade, in part by redirecting pressures in favour of liberalization, as well as building a consensus that agriculture was different from other sectors.

⁷⁴ The line of case to which I am referring, and which will be very familiar to readers include *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I, 135, Panel Report, WT/DS26/R/USA, DSR 1998:III, 699, adopted 13 February 1998; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, DSR 2000:VII, 3243; Panel Report, WT/DS135/R, DSR 2000:VIII, 3305, adopted 5 April 2001; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2755; Panel Report, WT/DS58/R, DSR 1998:VII, 2821, adopted 6 November 1998; *United States – Restrictions on Imports of Tuna*, Panel Report, 3 September 1991, unadopted, BISD 39S/155; *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes ('Dominican Republic – Cigarettes')*, Panel Report, WT/DS302/R, circulated 26 November 2004, among others.

reference in the SPS agreement to standards developed by some international standards-setting bodies⁷⁵ has given rise to critiques concerning the rising influence of relatively non-transparent and unaccountable international administrative bodies. But these very critiques have actually led to some institutional changes in these bodies, in the direction of *greater* democratization.⁷⁶ This point is not a complex one, and has been made before in the context of studies of globalization⁷⁷: it is simply that, like most processes associated with globalization, trade liberalization and institutions of trade governance tend to generate their own resistance, and their own counter-pressures. Whether these counterforces actually overpower those primary institutional influences, and the ways in which the two contradictory impulses interact, is in all cases an empirical question, the answer to which cannot be presumed, or determined in advance.

A particular tendency of the legal centralist frame is to encourage to focus on the *harmonizing* or *homogenizing* impulse of the international trade regime. Put simply: to the extent that its Members are subject to the same constraints, and are forced to abide by the same rules, we might expect the trade regime to produce a degree of uniformity of trade policy choices across its membership. But once we pay closer attention to the indirect social effects of WTO rules, it becomes apparent that even uniform rules can be productive of diversity and variation.⁷⁸ An interesting example is provided by the provisions of the SPS agreement mentioned above, which deal with the use of international standards and with the scientific basis for SPS measures. These provisions are typically understood as embedding a tendency towards regulatory harmonization into the agreement, as well as a tendency towards the reduction of regulatory diversity across Member states. To a large extent this is unsurprising: the presumption that SPS measures in conformity with international standards comply with the SPS agreement clearly

⁷⁵ See the *Agreement on the Application of Sanitary and Phytosanitary measures*, Article 3 (referring to Codex Alimentarius, the International Office of Epizootics, and the International Plant Protection Convention).

⁷⁶ See, for example, M. Echols, 'Institutional Cooperation and Norm Creation in International Organizations: The FAO-WHO Codex Alimentarius' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 192 at 194 and surrounding.

⁷⁷ See, for example, D. Held and A.G. McGrew, *The global transformations reader: an introduction to the globalization debate* (2003).

⁷⁸ See L.L. Martin and B. Simmons, 'Theories and Empirical Studies of International Institutions', (1998) 52(4) *International Organization* 729, 752.

encourages harmonization to some extent, while the science-based disciplines raise at least the possibility of regulatory convergence to the extent that scientific knowledge becomes more unified (on any particular question) over time. But, as Atik has perceptively noted, over the longer term, precisely the opposite is also perfectly plausible.⁷⁹ Since the science on which SPS measures are based typically deals with questions of immense complexity, it can have a tendency towards variegation over time and in different contexts. This tendency may, Atik suggests, be reinforced by the SPS agreement itself, which by its operation encourages the multiplication of scientific agencies with input into the regulatory processes of WTO Members, and thus the multiplication of distinct scientific communities and scientific knowledges. This in turn can lead to greater regulatory diversity:

As scientific activity is dispersed across a greater number of societies, a multiplicity of scientific views can be expected. More and more regulatory positions will be defensible by colourable claims of a scientific basis.⁸⁰

Of course, such indirect long-term effects are still speculative. The precise manner in which the SPS agreement interacts with and helps to reconstitute the geography of scientific knowledge is, again, an empirical question, even if it is one that is not amenable to easy measurement. It will depend, for example, on the extent to which the production of the relevant scientific knowledge remains centralized, and the precise mechanisms by which such knowledge is transmitted globally and reformulated in local contexts. The point is that it is not possible to say definitively in advance to what extent and in what circumstances the SPS agreement encourages regulatory convergence or regulatory diversity – and, more importantly, that studying the SPS text, and the decisions of the Appellate Body which deal with that text, can of necessity yield only a small and partial insight into that question.

⁷⁹ J. Atik, 'Science and International Regulatory Convergence', (1997) 17(2/3) *Northwestern Journal of International Law and Business* 736.

⁸⁰ *Ibid.*, 750.

4. *Sources and nature of WTO normativity*

This fourth and final criticism is that the legal centralist frame can give a misleading impression of the impact of the WTO because it focusses attention on the formal sources of WTO law – texts of the agreements and dispute settlement reports – to the exclusion of a wide variety of informal or semi-formal norms and norm-generating processes which also form part of the broader WTO legal system. Before the creation of the WTO in 1995, observers of the international trade regime were acutely aware that the formal texts of the GATT and related agreements provided only a partial window onto the normative system that the regime embodied. It was well understood that, despite their formally binding, ‘hard’ legal status, the legal obligations imposed under these agreements were heavily mediated by shared social understandings and political consensuses among participants in the trading regime.⁸¹ Such understandings consisted of shared perceptions as to the intended meaning and coverage of these provisions, as well as tacit agreements designating certain disputed areas as off-limits (whatever the formal wording of the agreements).

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

⁸¹ See generally J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats-Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', (2001) 35(2) *Journal of World Trade* 191.

informal norms interact with – modify, reconstitute, express and give meaning to – those formal rules in various complex ways, and at a variety of stages in their operation.⁸²

For one thing, they influence the kinds of social situations in which legal norms are typically operative. Take for example, the prohibition on discrimination in respect of domestic regulation, contained in GATT Article III and GATS Article XVII. While the formal scope of application of these provisions is very wide, in principle covering virtually the universe of internal regulatory measures which affect trade, in practice their operation has been considerably more limited. This is, in part, because of the existence of a variety of informal norms and tacit understandings which tell us what sorts of regulation can properly be thought of as an impediment to trade, and what sorts simply have nothing to do with trade. Of course, these informal norms are not always well-defined, and certainly vary over time. Before the 1980s, for example, internal regulations of any sort were rarely the subject of trade dispute. Since then, however, particular regulatory fields have come to be perceived as potential sources of trade barriers, and as legitimate targets of trade disputes: health and safety regulation, consumer protection regulation, and industrial policy are examples. Other fields – such as public interest regulation of essential service suppliers, affirmative action policies in respect of marginalized groups, social labelling schemes, or even renewable energy policy⁸³ – are arguably in the early stages of the same process. It is important to make clear that here I am not referring to the changes to the formal scope of application of WTO disciplines on domestic regulation. Rather, I am referring the evolution of the broader social and normative framework regulating which domestic regulatory interventions typically come to the attention of trade policy-makers, and, conversely, and determining whether private traders tend to think of trade law as a possible remedy when they are confronted by particular regulatory difficulties.

⁸² M. Finnemore and S.J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', (2001) 55(3) *International Organization* 743.

⁸³ For some attention to some of these issues in terms of their character as potential trade barriers, and their WTO consistency, see for example OHCHR, 'An analytical study on the fundamental principle of non-discrimination in the context of globalization', E/CN.4/2004/40, 15 January 2004; and the report by the Renewable Energy and International Law Project (REIL) entitled "World Trade and Renewable Energy: The Case of Non-Tariff Measures", May 5 2005, available at http://www.yale.edu/envirocenter/renewableenergy/REIL_WTO_paper.pdf.

Similarly, informal or tacit normative understandings regulate which disputes are ultimately brought before the WTO dispute resolution machinery. A decision whether or not to bring WTO proceedings is not just a matter of strategic calculation, it is also partly determined by social norms – particularly norms which tell participations the kinds of situations which the provisions were originally intended to cover, the purposes dispute settlement can legitimately be used for, and the kinds of questions dispute settlement bodies are capable of answering. Again, the non-discrimination norms can be used as an example, and in particular the application of those norms to sub-federal measures. There is a genuine question whether differential treatment across state jurisdictions within a federal state can in some circumstances constitute discriminatory treatment under GATS Articles II and XVII: authority on the question is thin, but some comments within both GATT and WTO jurisprudence seem to suggest that cross-jurisdictional differential treatment may constitute discrimination.⁸⁴ Discussions on the question in the context of the Negotiating Group on Services revealed a widespread consensus that (whatever the precise wording of the GATS) the non-discrimination norm was never intended to catch differential treatment of this sort, though Members could not agree on an appropriate way forward on the issue.⁸⁵ Documents from those meetings evidence an informal agreement that dispute settlement proceedings will not be brought in respect of such matters – an understanding which appears to have been relatively effective in the period since.⁸⁶ Few

⁸⁴ See GATT Document, Negotiating Group on Services, *Chairman's Statement: Informal GNS Meeting – 10 December 1993*, MTN.GNS/49, 11 December 1993; GATT Document, Preparatory Committee for World Trade Organization, Sub-Committee on Services, *Subsidies and Taxes at the Sub-Federal Level: Communication from the United States*, PC/SCS/W/4, 30 June 1994, at para A.1; WTO Document, Preparatory Committee for the World Trade Organization, Sub-Committee on Services, *Report of the Meeting Held on 16 December 1994: Note by the Secretariat*, PC/SCS/M/6, 22 February 1995; WTO Document, Council for Trade in Services, *Interim Report on the Status of Consultations on Taxes and Subsidies at the Sub-Central Level*, S/C/W/13, 30 January 1996. The United States believed it necessary to inscribe a wide variety of sub-federal taxes as limitations to Article II and XVII in its GATS Schedule of Commitments, on the grounds that state tax authorities would otherwise be required to provide foreign service suppliers with the most favourable treatment to be found in any other state. See also *United States – Measures Affecting Alcoholic and Malt Beverages*, Panel Report, adopted 19 June 1992, BISD 39S/206 for an example which some offer of when differences across different jurisdictions gave rise to a finding of discrimination.

⁸⁵ *Ibid.*

⁸⁶ See GATT Document, Negotiating Group on Services, *Chairman's Statement: Informal GNS Meeting – 10 December 1993*, MTN.GNS/49, 11 December 1993, under Heading 4: "I wish to re-emphasise, perhaps more strongly than in my earlier statement, that pending further clarification of this and other questions relating to the scope of the Agreement, that it is assumed that participants would refrain from taking issues

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

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Taken together, these four critiques add up to the core claim that the trade and human rights literature – like most literature on the trade regime generally – has so far proceeded on the basis of a partial and somewhat misleading picture of the impact of the trade regime on the enjoyment of human rights. But why does this matter? It matters because our knowledge of the impacts of the trade regime fundamentally shapes our reformative efforts: it helps us to determine which are the most important issues to address (and which are not), it informs our ideas of what kind of change is possible and desirable (and those kinds that are not), and it deeply structures the way we imagine the range of potential futures for the trade regime. In the trade and human rights debate, the legal centralist framework within which it operates has tended to generate a reformative agenda focussed predominantly on changes to the formal legal rules contained in WTO agreements, and to the processes by which these rules are generated, interpreted, and applied.⁸⁷ Sometimes, this may mean imposing stricter liberalization commitments: stronger disciplines on domestic agricultural subsidy programs, rules ensuring enhanced market access for developing country exports, and so on. More often, however, it takes the form of advocacy for a relaxation the constraints imposed by trade law, on the basis that the policies required (or prohibited) by trade law can undermine (or enhance) the enjoyment of human rights. It is notable that human rights language has most often and

arising in this area to dispute settlement but would try to settle them through bilateral consultations. However, participants must assume their own responsibilities in deciding whether any measures of this sort which they maintain should be scheduled or made the subject of MFN exemptions - though in this respect also it is hoped that restraint will be shown.”

⁸⁷ Often, in fact, this is coupled with a claim that incorporating human rights into these processes in some sense will contribute to that agenda. I explore the claim that human rights have something to offer trade policy-making processes in Part 3 below.

most forcefully been deployed to advance the concept of ‘policy space’.⁸⁸ For example, human rights considerations have been advanced to argue in favour of: new general exceptions to GATT disciplines; less restrictive interpretations of GATT non-discrimination obligations; an exemption from certain AoA obligations in respect of development measures; increased flexibilities for developing countries in respect of both the level and timing of liberalization commitments; interpretations of the SPS agreement which allow greater scope for precautionary regulation, among many others.⁸⁹ The influence of legal centralism here is clear: since the WTO is conceptualized as a constraint on behaviour, remedial proposals tend to focus on removing those constraints, and creating greater ‘policy autonomy’.

My main concern with agenda is what it does *not* do. I explained above how the trade regime does much more than simply act as a constraint on state behaviour, and is much more than simply a set of binding legal obligations. It is an environment in which, among many other things, the liberal trade project is constituted and given meaning, in which states are taught what it means to be a liberal trading nation, in which norms of legitimate and appropriate trade policy are generated and disseminating, and in which authorized knowledge about the trading system and how it operates is generated and deployed by

⁸⁸ For clarity, the notion of ‘policy space’ refers to at least three distinct claims: that WTO Members should not be required to put in place liberalizing policies where such policies have a negative impact on the enjoyment of human rights; that Members should not be prohibited from pursuing policy options which have (or could have) a beneficial impact on the enjoyment of human rights; and that individuals and communities should as far as possible be free to choose their own goals and make their own choices without undue external constraint or impediment.

⁸⁹ The work of the High Commissioner, for example, has strongly emphasized the need for further ‘flexibility’ in WTO agreements, as well as the need to use existing flexibilities: see, ‘The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights’, E/CN.4/Sub.2/2001/13, 27 June 2001, at para 28; ‘Globalization and its impact on the full enjoyment of human rights’, E/CN.4/2002/54, 15 January 2002, at paras 34, 48, 53; ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at paras 51-67. See also generally CIEL, Going with the Flow: How International Trade, Finance and Investment Regimes Affect the Provision of Water to the Poor, Center for International Environmental Law (2003); M. Krajewski, *National regulation and trade liberalization in services: the legal impact of the General Agreement on Trade in Services (GATS) on national regulatory autonomy* (2003); T. Cottier, E. Bürgi and J. Pauwelyn, ‘Linking Trade Regulation and Human Rights in International Law: An Overview’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 1 at 23 (“[t]rade regulation should be shaped in a manner that permits Members of the WTO to pursue appropriate domestic human rights policies ...”); C. Dommen, ‘Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 199 at 200; K. Gallagher, *Putting development first: the importance of policy space in the WTO and IFIs* (2005).

states in the formulation of their interests. Far from simply permitting or prohibiting specific trade policies, it helps to constitute the fundamental ideational and political context in which trade policies are imagined and implemented – and which in many respects determines their ultimate effects. The point is that an agenda which focusses on modifying the obligations imposed in WTO agreements simply does not engage with these broader processes, and has little to say to them. More than that, it tends to divert attention away from these processes, and make them less visible. By equating the absence of overt legal disciplines on states' policy choices with 'policy autonomy', the trade and human rights literature encourages us to see the preferences and choices of WTO Members as pre-existing their interaction with the WTO, and as a given part of the landscape in which the international trade regime operates.

This is problematic from two perspectives. First, there is I believe an urgent need for the critical energies of human rights (and other) commentators to be directed toward these more diffuse mechanisms by which the trade regime determines the nature and effects of the present international trading system. It is important to understand the precise processes by which these mechanisms work, and to build a picture of their impacts, in order to appreciate in what ways they are (and are not) complicit in producing some of the less beneficial aspects and outcomes of the international trading system. This would then enable engagement with, and transformation of, those processes as appropriate. If I am right, and these more diffuse mechanisms are in the long run more significant determinants of the character of the international trading system than the specific obligations imposed in WTO agreements, then failure to critically engage with them means that the trade and human rights debate is to a significant extent simply missing the point. Second, attending to the variety of modes of influence that the WTO yields can help us to imagine productive ways in which the trade regime can be involved in the pursuit of a range of desirable social projects – such as development, or the protection of human rights, and so on. When we think of the WTO as essentially a set of constraining rules, then the kinds of things it can offer these projects is relatively limited. Primarily, the task is to ensure that it does not interfere with their pursuit. But once we realise that, for example, the WTO plays a *teaching* function, the possibility is raised that it might be

harnessed as a site of policy learning, a venue for the production and exchange of innovative policy knowledge.⁹⁰ Similarly, once we realise that it also plays a *normative* role – disseminating ideas of legitimate and desirable trade policy, and constructing the values and purposes associated with the liberal trade project – then it becomes clear that the WTO could function as a valuable space for the deliberative and discursive renewal of the liberal trade project, and provide tools and a venue for the collective re-imagining of that project. And finally, if it is true that the WTO acts in part to mobilize particular constituencies and facilitate their insertion into trade policy-making processes, then it might be fruitful to ask how these spaces and mobilizing forces might be exploited to generate yet broader and more active public participation in respect of trade policy questions.⁹¹

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

⁹⁰ On the potential of the WTO as a site of learning, see, eg B. Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment', (2005) 8 *Journal of International Economic Law* 405; Cooney and Lang, "Taking uncertainty seriously: Adaptive governance, alien invasive species and the WTO" (forthcoming).

⁹¹ This last possibility, it should be noted, is to some extent already happening within the broader literature connecting the WTO with principles of democratic governance.

or apparent effects, and far less attention to the socio-legal questions of how particular changes to the rules play themselves out over time in different contexts.

We also learnt above that GATT/WTO legal disciplines, while clearly important, are not as important or salient a factor in regulatory decision-making as is often assumed. Is it reasonable, then, to pursue a strategy of achieving transformative change to the trading order primarily through a modification of WTO rules? Current efforts to achieve dramatic increases in market access for developing country goods through the negotiation of significantly stricter legal commitments on the part of the industrialized world seem based on an overestimation of the centrality of international legal obligations in the formulation of trade policy, as well as a misreading of the way the GATT/WTO system has operated over its history. There is a strong case to be made that the success of that system in presiding over a dramatic period of liberalization owes much more to its ability to generate and sustain among policy elites a shared normative commitment in favour of liberalization, and to teach them to think about the trading system in ways which make liberalization appear rational and desirable to them. Similarly, much advocacy in favour of greater ‘policy flexibility’ under WTO law seems equally to be based on an overestimation of the central role that WTO law plays in directing and constraining policy-making. As argued above, the reality is that WTO law is often only one relatively minor constraint in a sea of pressures facing regulators, and most domestic regulation of direct concern to human rights advocates is determined only at the margin by WTO legal constraints. Policy-makers in developing countries, for example, are subject to acute constraints emanating from other international organizations, from the demands of capital markets, bilaterally from trading partners, from local industry groups, and so on.⁹² There is therefore no guarantee that, were Members’ to be accorded greater flexibility under WTO law, they would necessarily be either willing or able to exploit it. (Indeed, it is interesting to note to date no country has exploited the system put in place by the Doha

⁹² The point I make here, about the existence of multiple and interrelated causes, is related to a point made by other commentators that the human rights movement tends to focus on the responsibility of individual actors (or organizations), with the result that it is less able to recognise and adequately address structural causes of injustice and poverty: eg, T. Evans and J. Hancock, 'Doing Something Without Doing Anything: International Human Rights Law and the Challenge of Globalisation', (1998) 2 *International Journal of Human Rights* 1.

accord.⁹³) Arguably, therefore, there might be more productive directions for the energy of the human rights movement than ensuring sufficient regulatory ‘autonomy’ from the strictures of trade law.⁹⁴

It is important not to overstate my case. My claim is emphatically not that the present reformative agenda which has arisen out of the trade and human rights debate is necessarily ineffective, nor that changes to WTO obligations are unimportant. Rather, I am arguing for a more realistic assessment of their importance, and therefore a more open and explicit consideration of what is the most important use of critical energies. I am suggesting that a much more fine-grained analysis is needed of the trade-offs implicit in advocating for legal change at the WTO. What are the opportunity costs of pursuing an agenda of legal change to (say) TRIPs Article 31(f)? What is not on the WTO agenda because this issue is? How much political capital is being spent which could have been spent on other issues? What issues and venues escape notice because our attention is focussed on the WTO? In part because of the legal centralist frame within which the debate is carried out, many human rights critiques of the WTO too often simply assume the central importance of WTO law on the relevant issues. They too rarely include a detailed and explicit comparison of the most pressing needs facing WTO Members in particular areas of concern to human rights actors, and an evaluation of the best allocation of scarce political, institutional, financial and advocacy resources. A more accurate and fine-grained representation of the varied impacts of the trade regime would help to make the arguments of human rights advocates more responsive to the realities of decision-making practices on the ground.

⁹³ That is to say, there have no formal notifications as of August 2006, though there have been suggestions of an increase in the use of compulsory licenses other than through this mechanism, see for example, <http://www.twinside.org.sg/title2/twninfohealth004.htm>.

⁹⁴ It may be argued, that, far from taking energy and resources away from other issues, major public campaigns critical of the WTO have in fact *energized* support for related initiatives. Matthews, for example, has argued that probably the most important role of the TRIPs and public health campaign was its role in raising the profile of the issue of particular epidemics in developing countries, and thus generating a momentum for other (non-WTO) mechanisms to address them: D. Matthews, 'WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the Trips Agreement and Public Health: a Solution to the Access to Essential Medicines Problem?' (2004) 7(1) *Journal of International Economic Law* 73.

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

At this point in my argument, I want to shift the focus from the trade regime to the human rights movement. If one of the core claims of the trade and human rights literature is that the trading system can have negative effects on the enjoyment of human rights, the other is that human rights can in some sense help to produce a better trading system.

“Achieving fair and equitable trade liberalization by adopting human rights approaches to WTO rules”, the UN Human Rights Commissioner has argued, “will be an important step in establishing a just international and social order”.⁹⁵ In this section I interrogate this notion of a ‘human rights approach’ to trade liberalization. What role can the human rights movement play in re-making the trading system? What precisely do human rights have to offer trade policy debates?⁹⁶ My aim is not to analyse and evaluate competing proposals for reform of the WTO, nor to argue for or against particular trade policy changes. Rather, it is to reflect, and to encourage further reflection, on what role – if any – human rights actors and institutions can constructively play in debates about these questions.

There is one point I should make about the perspective from which I approach this task. I am most interested in what human rights have to offer at the level of ideas and knowledge about what kind of trade policy is desirable and legitimate. My starting point for thinking about this more specific issue is to draw a distinction between two different sets of ideas.

⁹⁵ OHCHR, ‘Globalization and its impact on the full enjoyment of human rights’, E/CN.4/2002/54, 15 January 2002; at para 9. See also, C. Dommen, ‘Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 199 at 198, suggesting that collaboration between trade and human rights professionals “can really contribute to ensuring that trade rules are developed and applied in ways that promote an equitable economy”.

⁹⁶ A somewhat similar set of questions has been asked in relation to human rights and development. For an excellent critical discussion, see Alston, “A Human Rights Perspective on the Millennium Development Goals”, Paper presented as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, and references cited therein. See also ‘Study on policies for development in a globalizing world: what can the human rights approach contribute?’, Note by the Secretariat, E/CN.4/Sub.2/2004/18, 7 June 2004.

The first set are made up of ‘primary’ ideas about what trade policy ought to be, and what the trading system ought to look like. Such ideas are obviously continually evolving, and subject to contestation, but at any point in time there is an identifiable set of beliefs which can be characterised as orthodox, and which is widely shared among policy elites. These ideas themselves are founded upon a body of technical knowledge of the causal dynamics of the trading system, and what the effects of particular trade policy interventions are likely to be. The second set of ideas consists of ‘secondary’ ideas about *how ‘primary’ ideas ought to be produced* – a set of beliefs about how societies ought properly to go about finding solutions to the problems thrown up by international trade. In trade policy as in many other policy areas, these beliefs are currently shaped by a normative framework of technical rationality. They include the beliefs that international trade forms a relatively independent policy domain, and that questions arising in this domain ought to be decided by trained experts deploying socially sanctioned forms of rational knowledge. They also include a set of ideas about who counts as an expert, how experts act, and what counts as relevant knowledge for these experts to use. The result of these secondary norms is that the production and evaluation of ideas and knowledge about what trade policy ought to be tends to involve particular kinds of people, particular kinds of vocabularies and arguments, and particular kinds of cognitive and conceptual frameworks.

These observations are hardly new⁹⁷, but they have a twofold significance in the trade and human rights debate. On the one hand, they suggest that the human rights movement *must* engage at the level of ideas and knowledge if it is to fulfil its promise of helping to re-make the international economic order. Whatever else shapes trade policy, it is clear that prevailing technical ideas about what kind of trade policy is rational and desirable deeply influence the shape of the international trading system.⁹⁸ Without some change in

⁹⁷ For an excellent treatment of international organizations as ‘bureaucracies’, drawing on a long Weberian tradition of research into rational bureaucratic governance structures, see M.N. Barnett and M. Finnemore, ‘The Politics, Power, and Pathologies of International Organizations’, (1999) 53(4) *International Organization* 699; M.N. Barnett and M. Finnemore, *Rules for the world: international organizations in global politics* (2004).

⁹⁸ On the role of ‘ideas’ in the formulation of trade policy, see generally J. Goldstein, ‘Ideas, institutions, and American trade policy’, (1988) 42(1) *International Organization* 179; J. Goldstein, *Ideas, interests, and*

these ideas, a genuine transformation of the international trading order is considerably less likely. On the other hand, this same commitment to technical rationality makes it *more* difficult for human rights actors to engage substantively in trade policy debates, and therefore to influence the evolution of policy knowledge. After all, human rights actors – at least in their capacity as human rights actors – are not trade policy experts. What, then, can they tell us about what trade policy ought to be which those experts do not already know? It is not just a question of expertise, but also a linguistic question. The technical idiom of technical trade policy debates tends to exclude from the start the kind of ‘values talk’ characteristic of human rights language. It is a presupposition of such debates that the kinds of questions that they deal with are not amenable to resolution through moral language – by definition, they call for the application of technical expertise. Furthermore, as is commonly observed, it is fundamental to experts’ identity and ongoing legitimacy that they present themselves as apolitical, in the sense of rationally implementing a social goals defined elsewhere.⁹⁹ Values talk does not easily fit within that culture. As will become clear below, my thinking about the role of the human rights movement in producing a new international trade order is deeply informed by both prongs of this dilemma – the crucial need to engage in the domain of trade policy knowledge, and the considerable obstacles to doing so.

Under the first three headings which follow, I set out and interrogate what I see as the three most common conceptions of what ‘human rights’ bring to trade policy debates.¹⁰⁰

American trade policy (1993); J. Goldstein and R.O. Keohane, *Ideas and foreign policy: beliefs, institutions, and political change* (1993).

⁹⁹ See, for example, M.N. Barnett and M. Finnemore, *Rules for the world: international organizations in global politics* (2004).

¹⁰⁰ Because of the way that I have framed this dilemma, there is at least one model which I do not address in this paper. This model see human rights protection – conceived in traditional terms as the protection of freedom of expression and other democratic freedoms, some guarantees of distributive justice, and so on – as in many respects complementary to, and supportive of, well-functioning markets and international trade. To simplify: human rights law, in this model, provides a set of ‘flanking policies’ which ought to accompany trade liberalization, in order to ensure that trade liberalization brings its promised benefits. See generally, T. Cottier, ‘Trade and Human Rights: A Relationship to Discover’, (2002) 5(1) *Journal of International Economic Law* 111; T. Cottier and S. Khorana, ‘Linkages between Freedom of Expression and Unfair Competition Rules in International Trade: The Hertel Case and Beyond’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 245, as well as the work of Petersmann, eg, E.U. Petersmann, ‘The WTO Constitution and Human Rights’, (2000) 3(1) *Journal of International Economic Law* 19; E.U. Petersmann, ‘Human Rights and International Economic Law in the 21st Century: The Need to Clarify their Interrelationships’, (2001) 4 *Journal of International Economic*

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

Law 3; E.U. Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13(3) *European Journal of International Law* 621; E.U. Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', (2002) 13(4) *European Journal of International Law* 845; E.U. Petersmann, 'Human Rights and the Law of the World Trade Organization', (2003) 37(2) *Journal of World Trade* 241; E.U. Petersmann, 'The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization', (2004) 7(3) *Journal of International Economic Law* 605; E.U. Petersmann, 'Human Rights and International Trade Law: Defining and Connecting the Two Fields' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 29. Furthermore, I do not address (increasingly rare) arguments that the WTO system can be used ‘positively’ to enforce human rights norms, as in the debates on human rights conditionality. On the distinction between the ‘positive’ and ‘negative’ aspects of the trade and human rights debate see E.U. Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13(3) *European Journal of International Law* 621; M. Green, 'Integrating Enforcement of Human Rights Laws with Enforcement of Trade Laws: Some Baseline Issues' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 236 at 237; J. Pauwelyn, 'Human Rights in WTO Dispute Settlement' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 205 at 206.

human rights actors are already doing. But they are also more than that, to the extent that clearer understandings of what it is that human rights actors can and do offer can lead to more targeted and more productive interventions into trade policy debates.

1. *Fragmentation and coherence*

For many commentators, the trade and human rights debate is fundamentally concerned with balancing competing social values. As desirable and legitimate as the liberal trade project is, many argue, it is still only one among a huge variety of social projects which states and their populations value. Alternative values – such as consumer protection, economic stability, environmental protection, and so on – at times need to be balanced against the demands of trade liberalization. At the national level, complex institutional, legal and political mechanisms typically exist to resolve such policy trade-offs. But (so this argument runs) no such mechanisms exist at the international level: international political and institutional life is characterized primarily by *fragmentation*, by a relative absence of mechanisms of coordination, collaboration and coherence across policy fields. The crucial task, therefore, is to design precisely those kinds of mechanisms, “in an attempt to provide greater coherence to international ... policy-making and a more balanced international and social order”.¹⁰¹ This is particularly true for the trade regime: “[t]he relationship between trade values ... and other values”, writes Trachtman, “is a critical challenge [for] the WTO.”¹⁰²

Within what I will call the ‘coherence framework’, these normative conflicts between ‘trade values’ and ‘other values’ also have an institutional and legal dimension. Different categories of social preferences or values tend to be associated with different institutions: the WTO with a preference for trade liberalization (or the benefits that trade liberalization

¹⁰¹ OHCHR, ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at para 4

¹⁰² J.P. Trachtman, ‘The Constitutions of the WTO’, (2006) 17(3) *European Journal of International Law* 623, 634. For works which illustrate this coherence framework in a clear and sophisticated manner, see, for example: T. Cottier, ‘Trade and Human Rights: A Relationship to Discover’, (2002) 5(1) *Journal of International Economic Law* 111, the chapters by Mosoti, Breining-Kaufman, Dommen and Ranjan in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), and OHCHR, ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at para 4.

is thought to provide, however they are conceptualized); the ILO with the value of labour rights protection; environmental organizations with the value of environmental protection; and so on. Because institutions are seen in this way in functional terms – as created by way of response to a particular subset of social demands¹⁰³ – problems of normative coherence come to be seen as closely related to patterns of institutional isolation and collaboration. Similarly, as each international regime is associated with a particular sub-field of international law – international trade law; international environmental law; or international human rights law – formal conflicts between the rules of these different sub-fields of international law are understood as the “legal face” of the underlying normative conflicts described in the previous paragraph.¹⁰⁴

How are human rights said to fit into this framework? It is useful to distinguish between two different claims, which might be termed the ‘strong’ and ‘weak’ claim respectively. The strong claim is that human rights provide a normative framework within which to resolve value trade-offs.¹⁰⁵ Human rights, in other words, can help us to solve the problems thrown up by fragmentation in a legitimate and appropriate way. Different commentators have forwarded different reasons for why the language of human rights is particularly well-suited to the task of balancing of competing social values. First, and most obviously, human rights themselves can be understood as representing a set of values which ought to be given special weight in resolving value trade-offs. Arguably, the entire human rights edifice can be thought of as an attempt to define and categorize those values which are regarded as particularly fundamental, and as commanding special moral force and legitimacy. Second, human rights bodies have considerable experience with the task of balancing competing social values in particular contexts. As a result,

¹⁰³ For a seminal account of functionalism as it relates to various theoretical traditions on the role of institutions in political life, see P.A. Hall and R.C.R. Taylor, 'Political Science and the Three New Institutionalisms', (1996) 44(5) *Political Studies* 936.

¹⁰⁴ J.P. Trachtman, 'The Constitutions of the WTO', (2006) 17(3) *European Journal of International Law* 623, 635.

¹⁰⁵ Petersmann is a strong proponent of this kind of claim: see, for example, E.U. Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13(3) *European Journal of International Law* 621. See also C. Dommen, 'Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 199 at 202.

human rights law and discourse contain a wide variety of tools and mechanisms with which policy-makers and judicial bodies are familiar, which have proven to be operationally robust in a variety of different contexts.¹⁰⁶ Third, it is said that human rights is a sufficiently open discourse that many different kinds of values or social demands can be expressed within it. The ‘sensibility’ of human rights, that is to say, is peculiarly sensitive to a variety of competing social demands. Furthermore, within human rights discourse, different values (as ‘interdependent and indivisible’ rights) begin from a position of presumptively equal strength. Human rights therefore may offer a language which is less susceptible to claims of systematic bias than other languages. This claim, it should be noted, is typically made in the context of an analogous critique: that decisions involving trade-offs should not be left to the trade regime, as it is more likely to exhibit a systemic bias in favour of ‘trade values’, and to be less responsive to the full breadth of social demands.¹⁰⁷

How attractive is this as a way of thinking about what human rights offers trade policy debates? In my view, it is vulnerable to a number of compelling criticisms. For one thing, trade-off questions raise vitally important and highly contested political issues, of the kind that can never finally be resolved. It is therefore misleading to talk as if they can be conclusively settled simply by reference to set of human rights norms, as if the relative priority to be accorded to new and evolving international projects has already been

¹⁰⁶ Judicial interpretations in human rights law of such concepts as necessity, proportionality, legitimate public purpose, and non-discrimination are all of obvious utility in helping the system of trade law – which after all is the younger partner in the relationship – in its development of similar concepts and tools.

¹⁰⁷ S. Cho, 'Linkage of Free Trade and Social Regulation: Moving beyond the Entropic Dilemma', (2005) 5 *Chicago Journal of International Law* 625, 640 (“pro-trade bias”); M.C.E.J. Bronckers, 'More Power to the WTO?' (2001) 4 *Journal of International Economic Law* 41, 46 (“liberal trade bias”), G.C. Shaffer, 'The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters', (2001) 25(1) *Harvard Environmental Law Review* 1, 12, (“neoliberal bias”), G. Shaffer, 'WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future', (2000) 24(1/2) *Fordham International Law Journal* 608, 611 (“closed, trade-biased ... institution”), J.H. Knox, 'The Judicial Resolution of Conflicts Between Trade and the Environment', (2004) 28(1) *Harvard Environmental Law Review* 1, 1 (“biased”), A.T. Guzman, 'Global Governance and the WTO', (2004) 45(2) *Harvard International Law Journal* 303, 306 (“trade bias”), L.A. DiMatteo, et al., 'The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime', (2003) 36(1) *Vanderbilt Journal Of Transnational Law* 95, 133 (“free trade bias”), H.L. Schloemann and S. Ohlhoff, "'Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence', (1999) 93(2) *American Journal of International Law* 424, 451 (“protrade bias”).

determined in advance. Too often, this ‘strong’ claim seems to be deployed to close off debate about normative conflicts, rather than open it. Second, it is not self-evident that social projects and values which are expressed in rights terms need necessarily be given more weight than those which cannot.¹⁰⁸ It is important to remember that what constitutes a ‘human rights violation’ or ‘human rights issue’ at any particular point in time is in part socially and politically constructed, and that the processes by which particular injustices are produced as human rights issues are inevitably selective and partly arbitrary. Who decides which social projects are expressive of human rights values, and which are not? And why, indeed, should we accord less priority to those deeply held values which, for one reason or another, cannot or have not been expressed in the language of human rights? Third, there is the question of institutional competence. The claim that normative conflicts ought to be resolved by recourse to human rights principles does not necessarily imply the further claim that human rights institutions ought themselves to play a central role in the resolution of such conflicts. Nevertheless, that is a likely outcome of taking seriously the use of human rights in this way. It is not at all clear, however, that international human rights bodies as presently constituted are up to this task. At the very least, there is a need to make a stronger case that these institutions are well-placed – or at least are better suited than imaginable alternatives, including a reformed trade regime. Fourth and finally, although it is claimed that the use of a human rights framework can help to resolve trade-off questions, often the result is simply to defer or displace these questions. For example, even if we agree that social values expressed as human rights should be accorded a degree of priority, a question remains as to which values can and should in fact be expressed in human rights terms. Petersmann, for example, sees trade-offs between trade liberalization and (say) the protection of vulnerable minorities as involving a balancing of competing *rights*.¹⁰⁹ Others strongly disagree.¹¹⁰ While some contestation of the language of human rights is to be expected, and we should not too hastily conclude that human rights language is indeterminate, we do well to remember

¹⁰⁸ Howse makes a similar point: R. Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', (2002) 13(3) *European Journal of International Law* 651.

¹⁰⁹ See references in n100 above.

¹¹⁰ For example, P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', (2002) 13(4) *European Journal of International Law* 815.

that the content and meaning of human rights language is itself strongly contested, and may not always provide the substantial guidance that it promises.

Let me turn then to the ‘weak’ claim. This argument is that the protection of human rights is one normative project among the many needing to be balanced against the demands of trade liberalization. Greater coherence in international policy-making, on this view, means striking a better balance between the demands of trade liberalization and the protection of human rights. Different commentators have different views on what an appropriate balance is. Some suggest that human rights ought usually to take priority, others note simply that it is “difficult to say which in the abstract should prevail as a matter of principle”.¹¹¹ Observe that within this framework, it makes little sense to ask what human rights *offer* trade policy debates. Since the problem to be addressed is precisely the potential for conflict between the trade and human rights regimes – or the values they are taken to represent – the relevance of human rights language is assumed from the beginning. To the extent that the language of human rights has a role to play, it is simply to ensure that the goal of protecting human rights is given due weight in decisions affecting that goal. As noted above, it ought to be remembered that the debate about coherence takes place against the background of a concern that – because of the institutional strength of the WTO – ‘trade values’ tend in practice to be given priority over other values at the international level. The virtue of human rights, on this view, is that it provides a powerful institutional voice in which to articulate alternative social demands on the international level. Human rights, that is to say, can help to correct the perceived imbalance in the international system, according to which the liberal trade project tends in practice to undermine or override other legitimate social projects.¹¹²

This vision of how and why human rights are relevant in trade policy debates has proved very influential. As a result, many human rights commentators have concentrated much of their energy on identifying and evaluating those circumstances in which actors within the trade regime are required to balance the requirements of trade liberalization with the

¹¹¹ T. Cottier, 'Trade and Human Rights: A Relationship to Discover', (2002) 5(1) *Journal of International Economic Law* 111, 114.

¹¹² See above n107.

demands of those “non-trade values” associated with human rights.¹¹³ These circumstances typically involve trade-restrictive measures designed to achieve a ‘human rights purpose’. (The purpose of the relevant measure ranges widely, from consumer protection, to food safety, to public health protection, to protection of minorities.) The declared aim of much of this work is to design an institutional and normative framework to ensure that decisions involving such sensitive balancing are made in an appropriate, sensitive and legitimate manner. Thus, Cottier argues that we:

need a framework which allows equality of legitimate interests to be taken into account, brings about practical co-ordination of differing policy goals, and allows for balancing of the fundamental interests involved.¹¹⁴

Different commentators have proposed different means for ensuring that decision-making processes within the trade regime take due account of their impact on human rights. The UN High Commissioner argues for assessments of the human rights impacts of proposed trade rules before they are agreed, as well as direct participation by UN human rights bodies in some aspects of the WTO’s work.¹¹⁵ The Committee on Economic, Social and Cultural Rights (CESCR) has reminded WTO Members that they are bound by human rights obligations in multilateral trade negotiations.¹¹⁶ Abbott makes a case for the WTO to create “highly integrated relations with other multilateral institutions”¹¹⁷; while Dommen calls for better integration and the national level, between government departments.¹¹⁸ A complementary line of argument addresses questions of allocation of

¹¹³ The use of the term “non-trade values”, and analogous terms, is characteristic of the idiom of the coherence framework: see, for example, the references in n107 above.

¹¹⁴T. Cottier, 'Trade and Human Rights: A Relationship to Discover', (2002) 5(1) *Journal of International Economic Law* 111, 129.

¹¹⁵ See, for example, ‘Globalization and its impact on the full enjoyment of human rights’, E/CN.4/2002/54, 15 January 2002, at paragraph 46; ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at paragraph 72; ‘Human rights, trade and investment’, E/CN.4/Sub.2/2003/9, 2 July 2003, at paragraph 63.

¹¹⁶ For example, Committee on Economic, Social and Cultural Rights, General Comment No. 15, “The right to water”, E/C.12/2002/11, 20 January 2003, at paragraph 35.

¹¹⁷ F.M. Abbott, 'Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance', (2000) 3 *Journal of International Economic Law* 63, 63.

¹¹⁸ C. Dommen, 'Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 199 at 203.

decision-making power as between the trade and human rights regimes. Howse and Nicolaidis, for example, argue that the trade regime ought (at times) to show deference to other international institutions, including those comprising the human rights regime.¹¹⁹ Trachtman, too, argues that we need “rules that allocate authority” among different functional institutions.¹²⁰ Another important focus of attention has been research into the potential use of human rights law to guide decisions made by WTO quasi-judicial bodies, in those cases which implicate sensitive normative conflicts. This body of work has covered a range of issues: the rules of international law governing questions of priority where international legal obligations conflict; the potential uses of human rights law as an interpretive guide by WTO panels and the Appellate Body; as well as arguments relating to the use of human rights law as a substantive defence to violations of WTO law.¹²¹ In a similar vein, others have argued for the incorporation of a reference to human rights into the texts of WTO agreements, either as an objective of trade liberalization within the Preamble, or more specifically in the form of general human rights exception(s) to liberalization obligations.¹²² What is common to all of these mechanisms of co-ordination – whether legal, organization or normative – is that they are seen as a response to the same basic dilemma: namely, how to ensure that an appropriate balance is struck where the imperatives of the liberal trade project must be weighed against the need to protect human rights.

Is this, then, a useful and productive way of thinking about the role of human rights language in trade policy debates? There is no doubt that this literature on ‘coherence’

¹¹⁹ R. Howse and K. Nicolaidis, 'Legitimacy through "Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far' in T. Cottier and P.C. Mavroidis (eds.), *The role of the judge in international trade regulation: experience and lessons for the WTO* (2003), 307

¹²⁰ J.P. Trachtman, 'The Constitutions of the WTO', (2006) 17(3) *European Journal of International Law* 623, 634.

¹²¹ Some key references include, J.P. Trachtman, 'The Domain of WTO Dispute Resolution', (1999) 40(2) *Harvard International Law Journal* 333; G. Marceau, 'WTO Dispute Settlement and Human Rights', (2002) 13(4) *European Journal of International Law* 753; J. Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law* (2003); J. Pauwelyn, 'Human Rights in WTO Dispute Settlement' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 205.

¹²² OHCHR, 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights', E/CN.4/Sub.2/2001/13, 27 June 2001, at paragraph 68; A. Blackett, 'Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation', (1999) 31(1) *Columbia Human Rights Law Review* 1.

between the trade and human rights regimes has produced important insights and research. Nevertheless, I have one significant concern about this literature, the source of which lies in the premises on which the coherence framework is based.

As I have explained more fully elsewhere,¹²³ in my view contemporary public debates over the international trade regime are fundamentally about the social purpose of the liberal trade project. We commonly think of the purpose of the trade regime in stylized, functional terms as the liberalization of trade. But the reality is that the regime is informed by a much ‘thicker’ sense of purpose, deeply connected to the social and political context within which it operates. Over the course of its history, a variety of different overarching goals of the postwar trading regime have been given different emphases at different times. These include, among others, the reconstruction of postwar Europe, the maintenance of international and domestic economic stability, the reduction of tariffs (or, at different times, ‘trade barriers’ and ‘trade distortions’), the generation of a ‘global market’ in goods and services, and the effort to drive global economic growth.¹²⁴ This evolving sense of purpose plays a hidden but vital role in shaping the architecture of the trade regime, as well as specific trade policy decisions at all levels. It helps participants understand what they are doing and why, and it influences their attitudes to particular trade policies by determining the meaning that such policies have for them. To say that contemporary debates are about the ‘social purpose of the liberal trade project’, then, is to suggest that these debates represent political contestation over the definition and constitution of the trade regime itself, and an opportunity to re-think some of its most basic features and orientations.¹²⁵

¹²³ Lang, “Whose trade issues? What trade values? Cognitive and Institutional Change in the International Trading System” (forthcoming, copy on file with author).

¹²⁴ See generally, J.G. Ruggie, 'International regimes, transactions, and change: embedded liberalism and the postwar economic order' in S.D. Krasner (ed.), *International Regimes* (1983), 195; F. Trentmann, 'Political culture and political economy: interest ideology and free trade', (1998) 5(2) *Review of International Political Economy* 217; F. Trentmann, 'National identity and consumer politics: free trade and tariff reform' in D. Winch and P.K. O'Brien (eds.), *The Political Economy of British Historical Experience, 1688-1914* (2002), 215.

¹²⁵ Another way of putting this point is that these debates raise questions about the ‘meaning of free trade’, see M.N. Barnett and M. Finnemore, 'The Politics, Power, and Pathologies of International Organizations', (1999) 53(4) *International Organization* 699; D.M. Driesen, 'What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate', (2001) 41(2) *Virginia Journal of International Law* 279; M.N. Barnett and M. Finnemore, *Rules for the world: international organizations in global politics* (2004).

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

Through the language of coherence and fragmentation, however, such contestation over the goals, purposes and normative foundations of the liberal trade project is re-cast as a conflict between the liberal trade project and the protection of human rights. It is not common to see coherence discourse in this way as discursively re-characterizing normative conflicts, as in some sense ‘constructing’ the problem of inter-regime conflict. It is much more common to think of inter-regime conflicts as objectively existing – pre-existing problems demanding solutions. It is worth pausing briefly, therefore, to register that conflicts between the trade and human rights regimes are not given but *produced*, usually as a result of deliberate and strategic choices by political actors. Helfer’s notion of ‘regime-shifting’ provides a useful analytical lens to make this point clear.¹²⁶ Helfer’s

¹²⁶ See L.R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', (2004) 29(1) *Yale Journal of International Law* 1. See also L.R. Helfer, 'Mediating Interactions in an Expanding International Intellectual Property Regime' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 180.

primary concern is with the strategies which participants use when a regime – such as the trade regime – begins to evolve in ways which are contrary to their interests. One such strategy is that of ‘regime-shifting’. This involves taking particular issues which have traditionally fallen within the mandate of (say) the trade regime, and debating and discussing these issues in alternative international institutional forums. The purpose of this is to generate “counter-regime norms”, which “provide new opportunities for states and NGOs to contest established normative orthodoxies”.¹²⁷ One of the perceived benefits of this strategy is that it allows counter-hegemonic actors to reframe their arguments as claims for *coherence* between regimes (rather than as claims for different rules which suit their interests better).¹²⁸ This is seen to be advantageous: after all, it is hard not to agree that international organizations ought to work together, and ought not to undermine each other. It is particularly hard to disagree with the general principle that the trade regime ought not to undermine the human rights regime, and ought not to force its Members to violate their human rights obligations. Helfer’s analysis is rich with implications, but for present purposes the lesson I wish to draw is a simple one: that through the strategy of regime-shifting, normative conflicts over what the trade regime ought to be have been re-framed as raising questions about the *relationship between* the trade regime and “other organizations, other sources of international law, and non-trade values”, and in particular about the relationship between trade liberalization and the protection of human rights.¹²⁹ In this sense, incoherence between the trade and human rights regimes is a choice, not simply an historical fact.

Once this is understood, it becomes apparent that the real question we should be asking is not whether human rights language helps us to identify and address trade-off questions in a more appropriate or desirable manner. Rather, it is whether it is useful or constructive to frame normative conflicts over the trading system as essentially problems of incoherence – and as symptoms of the fragmentation of the international system. On

¹²⁷ L.R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', (2004) 29(1) *Yale Journal of International Law* 1, 14.

¹²⁸ See Ibid., Part II; L.R. Helfer, 'Mediating Interactions in an Expanding International Intellectual Property Regime' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 180 at 185.

¹²⁹ J.P. Trachtman, 'The Constitutions of the WTO', (2006) 17(3) *European Journal of International Law* 623, 634.

balance, my view is that it is not. Put simply, the reason is that re-framing the argument in this way actually undermines and limits the ability of human rights actors to generate real change to the trading order. This is counter-intuitive, but relatively easy to explain.

One consequence of deploying the discourse of coherence and fragmentation is that our attention is directed away from some of the most important questions that human rights actors should be asking of the trade regime. First, as already intimated, questions about the underlying value commitments, and social purpose, of the liberal trade project tend to be put to one side. In their place, we have constitutionalist discussions about how to ensure coherence between the trade project and the human rights project, as well as formal discussions about how to resolve legal conflicts between obligations imposed by the trade and human rights regimes. Through the language of coherence, critical arguments which suggest a need for the re-constitution or reconstruction of the liberal trade project have been redirected, so that they are now seen as raising questions which are relevant solely to the relation between the WTO and the human rights regime. The result is that the underlying purpose of the liberal trade project is neither discussed nor re-visited. Second, the coherence framework diverts our attention away from the value choices which are necessarily involved in *constituting* the liberal trade project. Instead, discussion is focussed on the normative conflicts between ‘human rights values’ and (pre-constituted) ‘trade values’. The result is that there is no indication or exploration of the ways in which the values associated with human rights – which of course change according to who is speaking, but often include such matters as equality, the protection of vulnerable groups and minorities, social welfare, consumer protection, poverty elimination, and so on – might be productively involved in contesting and reconstituting the liberal trade project in the first place. Within this framework, human rights therefore tend to appear in debates about trade policy solely as exceptions, adjuncts, or complements to trade policy prescriptions.¹³⁰ Third, the coherence framework discourages critical engagement with the processes by which the trade regime is

¹³⁰ This is very clearly seen in the fact that much of the trade and human rights literature – at least that which operates within the coherence framework – has focussed heavily on GATT Article XX and the jurisprudence under it. See, among many examples, OHCHR, *Human Rights and World Trade Agreements: Using general exceptions clauses to protect human rights*, (New York and Geneva: UN, 2005).

continually contested and redefined. This is because it reifies the trade regime: the trade regime appears to us in this framework unproblematically as an “avatar”¹³¹ of particular values or social demands. Its internal contradictions, its contingency, its indeterminacy are shielded from view. The “politics of regime definition”¹³² are made invisible, and human rights actors are thereby discouraged from contesting them.

Another consequence is that – paradoxically – the coherence framework tends to reinforce prevailing ideas about what the trade regime ought to look like. It does this in at least a couple of different ways. First of all, I said above that discussions of how to resolve conflicts between ‘trade values’ and ‘non-trade values’ tend to produce and disseminate shared ideas about what ‘trade values’ are. In the trade and human rights debate, the concept of ‘trade values’ – to the extent that it is defined at all – tends to be equated with the pursuit of “growth and prosperity”¹³³, the pursuit of material wealth, or “efficiency and money”.¹³⁴ Putting to one side questions about the historical accuracy of these characterizations, it is clear that speaking as if these are the values of the trade regime helps to make it so. Similarly, speaking as if such values as distributional equity, poverty elimination, protection of minorities, and economic and social stability are ‘non-trade’ or ‘human rights’ values clearly affects the way that the trade regime responds to such goals. It makes them marginal to its essential project. The essential point is that how we define the boundary between ‘trade’ and ‘human rights’ values affects our understanding of what the animating purpose of the trade regime is, and therefore profoundly shapes the deeper structure and operation of the trading system in the longer term. Secondly, and less obviously, the mere fact that the objectives, values and orientation of the trade regime are treated as pre-given also reinforces the *status quo*. I noted at the beginning of this Part that trade policy knowledge tends to be produced and evaluated by those with technical expertise, and that it is not clear what human rights

¹³¹ Trachtman, "The WTO Constitution: Tertiary Rules for Intertwined Elephants" (September 1, 2005). ExpressO Preprint Series. Working Paper 753.

¹³² I borrow this phrase from Koskenniemi in his Chorley Lecture, London School of Economics, June 2006.

¹³³ J.P. Trachtman, 'The Constitutions of the WTO', (2006) 17(3) *European Journal of International Law* 623, 634.

¹³⁴ E.M. Fox, 'Globalization and Human Rights: Looking out for the Welfare of the Worst Off', (2002) 35(1) *New York University Journal of International Law and Politics* 201, 203.

actors can add in that domain. The coherence framework essentially attempts to sidestep these difficulties: while we may look to technical experts to tell us what the international trading system ought to look like, these experts tell us nothing about how to resolve trade-offs between the demands of rational trade policy and other social demands – nor can they. Even within a framework of technical rationality, such trade-offs are inevitably a question of values, not a question of knowledge. The problem with this move is that it reinforces the sense that questions of ‘pure’ trade policy raise solely technical questions (not value trade-offs), and that these questions are not an appropriate domain of contestation for human rights actors. That is, the coherence framework helps to exclude human rights actors from debates about ‘pure’ trade policy – that is, about what trade policy and the trade regime ought ideally to look like – and to reinforce the claims that such questions are appropriately determined by traditional experts deploying prevailing trade policy knowledge.

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

Nevertheless, on present evidence the possibilities that this framework opens seem to me to be far less important than those which it forecloses. For example, I am somewhat sceptical that the use of human rights law as an interpretive guide to WTO law will often make a significant difference to how WTO agreements are ultimately interpreted. After all, a requirement to consider the content of (often ambiguous) human rights instruments will in my view have little effect unless the decision-makers are *already* sensitive to the values which such instruments are designed to protect, and predisposed to interpreting WTO law in a way which respects them. Conversely, if such sensitivity *is* present, it is not clear that the interpretive guidance provided by human rights instruments adds much other than a more legally sound justification for those decision-makers. Similarly, without wishing to downplay either the desirability or importance of inter-institutional collaboration, it is easy to see how most of the proposed mechanisms of inter-regime engagement – formal and informal collaborations, mutual observer status, systematic

consideration of mutual impact, and so on – might have little actual impact on the outcomes of the trading system, and in the end actually substitute for a more thoroughgoing, reconstitution from the ground up of the trade regime itself. It is for these reasons that I see the discourse on fragmentation and coherence as, in the end, *limiting, channelling and constraining* the potentially disruptive and destabilizing influence of critical human rights voices.

2. *Human rights as substantive policy guidance*

Not all interventions into the trade and human rights debate see the debate primarily in terms of inter-regime coherence. It is also very common to see human rights as offering a normative framework for substantively reorienting trade policy and the trade regime. The core claim is here that human rights norms, principles and rules can help to guide trade policy-makers as they re-design the international trading system, and as they make difficult trade policy choices. In a speech entitled “Shaping Globalization: the Role of Human Rights”, for example, Mary Robinson argues for the need to “bring the values of international human rights to the tables where decisions about the global economy are bring made”.¹³⁵ Howse and Mutua have similarly suggested that “the spirit of human rights law must frame the development of trade law”,¹³⁶ while Green refers to the need to “see [the] WTO and other trade mechanisms restrained by human rights standards”.¹³⁷ In this model, human rights values and rules define the boundaries of acceptable trade policy choices, and provide the substantive basis of an alternative vision for the international trading system.

There have been a number of attempts to flesh out a little what this might look like. One of the most influential of these attempts is that of the UN High Commissioner for Human

¹³⁵ M. Robinson, 'Shaping Globalization: The Role of Human Rights (Fifth Annual Grotius Lecture)' in *Proceedings of the American Society of International Law 2003* (2003), 1, available at <http://www.realizingrights.org/index.php?option=content&task=view&id=118>

¹³⁶ R. Howse and M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation*, International Centre for Human Rights and Democratic Development (2000).

¹³⁷ M. Green, 'Integrating Enforcement of Human Rights Laws with Enforcement of Trade Laws: Some Baseline Issues' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 236 at 237.

Rights, in the context of the series of reports referred to earlier.¹³⁸ Apart from procedural prescriptions (dealt with below), the Human Commissioner argues, for example, that a human rights approach to trade liberalization “sets the promotion and protection of human rights as objectives of trade liberalization, not as exceptions.”¹³⁹ At the level of general principle, the High Commissioner believes that a human rights approach is cautious about “relying [solely] on market forces to resolve problems concerning human welfare”, and instead “emphasises the role of the State in the process of liberalization”.¹⁴⁰ The High Commissioner also emphasizes the importance of international co-operation as a primary means of achieving a fairer and more equitable international order.¹⁴¹ At a normative level, a human rights approach to trade liberalization is said also to “focus on individuals, in particular vulnerable individuals and groups”.¹⁴² Thus trade policies which have an adverse impact on such groups tend not to be favoured by human rights. This last point has been picked up and developed by others. Dommen, for example, argues that the focus of human rights on “the most vulnerable and disadvantaged sectors of society” is the “yardstick” which enables them to provide substantive policy guidance. A human rights approach “will assess the effects of a particular policy on the most vulnerable people within a country and will rule against choices that involve discrimination”.¹⁴³

Notwithstanding the utility of these more general claims, it is clear that greater specificity is required if human rights norms are to provide genuinely meaningful guidance to trade policy-makers.¹⁴⁴ While of course it is not in the nature of human rights principles to be fully reducible to a universal set of policy prescriptions, nevertheless there would seem to

¹³⁸ See above n4.

¹³⁹ OHCHR, ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at para 7.

¹⁴⁰ Id., at para 10.

¹⁴¹ Id., at para 13.

¹⁴² Id., at para 9.

¹⁴³ C. Dommen, ‘Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 199 at 202.

¹⁴⁴ See, for example, F. Abbott, ‘The ‘Rule of Reason’ and the Right to Health: Integrating Human Rights and Competition Principles in the context of TRIPS’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 279 at 294; C. Breining-Kaufman, ‘The Right to Food and Trade in Agriculture’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 341 at 359. Alvarez has criticised the deployment of human rights law for this reason: J.E. Alvarez, ‘How Not to Link: Institutional Conundrums of an Expanded Trade Regime’, (2001) 7 *Widener Law Symposium Journal* 1.

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

How might this be done? The basic logic is clear: governments must not implement certain trade policies where to do so would lead to a violation of their human rights obligations; and they must conversely pursue those trade policies which, in their circumstances, facilitate the progressive enjoyment of human rights. As applied to the WTO, the basic claim is that WTO law must not require particular trade policies to the extent that they may undermine the enjoyment of human rights, nor is it permitted to prohibit policies to the extent that they enhance the enjoyment of human rights.¹⁴⁵ This in turn leads to a particular form of enquiry: elaboration of the normative and legal content of the relevant human right; analysis of different trade policies (and WTO rules) and their practical effects; a comparison of those effects to the kinds of outcomes envisaged or required by the relevant right; and set of proposals for changes to either trade policies or WTO rules to make them conform more closely to what human rights obligations require. In this way, general human rights norms can apparently be transformed into into concrete policy prescriptions.

An example will help to make the critique I advance below clearer. The High Commissioner's report on liberalization of trade in services is in a typical form. After an introduction to the notion of 'trade in services' and the basic framework of the *General*

¹⁴⁵ There are also two further logical implications, though they tend in practice to be emphasized less: (a) that WTO law ought to prohibit particular trade policies which clearly undermine human rights, and (b) that WTO law ought to require those trade policies which are clearly of benefit to the enjoyment of human rights.

Agreement on Trade in Services, the High Commissioner spends considerable time setting out in some detail the content of the rights to health, education and development, drawing on the General Comments of CESCR in doing so.¹⁴⁶ The Commissioner emphasises, among other things, that the right to health covers the availability, accessibility, acceptability and quality of health facilities, that states have an obligation to take the right into account when negotiating trade treaties, that states have a tripartite obligation to ‘respect, protect, and fulfil’ the right, and that the implementation of any retrogressive policy will usually constitute a violation.¹⁴⁷ In the next section, the High Commissioner analyzes the outcomes of particular forms of services liberalization, emphasizing the negative outcomes that can arise. For example, foreign direct investment in health services can result, it is argued, in a “two-tiered service supply with a corporate segment focussed on the healthy and wealthy and an underfinanced public sector focussing on the poor and the sick”. Similarly, “the introduction of user fees can reduce and even cut off service supply to the poor”.¹⁴⁸ In order to ensure that services liberalization works for human rights, the High Commissioner therefore observes, strict monitoring and strong regulatory oversight of private service supplies will often be essential.¹⁴⁹ In the next section, the High Commissioner analyzes the extent to which the disciplines in the GATS may actually impede the ability of governments to provide such regulatory oversight, and therefore their ability to protect human rights. The report therefore argues that WTO Members ought to take a cautious approach to making GATS commitments, that the GATS ought to be construed in various ways which allow greater policy space for social regulation, and that a mechanism should be put in place to ensure that Members can withdraw commitments where services liberalization ultimately undermines the enjoyment of human rights.¹⁵⁰

Of course, there are innumerable other examples I might have used. Precisely the same structure of argumentation has been used to claim that the right to health requires

¹⁴⁶ OHCHR, ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at paras 28-37.

¹⁴⁷ *Id.*, paras 29-32.

¹⁴⁸ *Id.*, para 44.

¹⁴⁹ *Id.*, para 50.

¹⁵⁰ *Id.*, paras 56-64.

amendments to Article 31(f) of the TRIPs agreement,¹⁵¹ that the right to food requires the reduction of domestic agricultural subsidies in industrialized countries,¹⁵² that the right to health requires WTO dispute settlement bodies to take a deferential attitude to precautionary food safety legislation,¹⁵³ and so on.

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

¹⁵¹ Clear and well-argued examples of this form of argumentation in the context of the TRIPs agreement and the right to health are F. Abbott, 'The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the context of TRIPS' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 279 and S.F. Musungu, 'The Right to Health, Intellectual Property, and Competition Principles' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 301. Others include: S. Edwardson, 'Reconciling TRIPS and the Right to Food' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 381; P. Ranjan, 'International Trade and Human Rights: Conflicting Obligations' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 311

¹⁵² For two excellent academic papers, see Simons, "Human Security, Corporate Accountability and the Regulation of Trade and Investment", CCHS, Human Security Fellowship Working Paper, March 2004 (copy on file with author), and C. Breining-Kaufman, 'The Right to Food and Trade in Agriculture' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 341. See also the important report of the OHCHR, 'Globalization and its impact on the full enjoyment of human rights', E/CN.4/2002/54, 15 January 2002.

¹⁵³ For example, A. Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights', (1998) 8(2) *Transnational Law and Contemporary Problems* 171; C. Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies', (2002) 24(1) *Human Rights Quarterly* 1.

language recedes into the background, and we are presented with a series of argumentative steps, sets of data, and ultimately policy prescriptions, which almost exactly reproduce those emanating from more traditional trade policy circles.

The point is that essentially all of the intellectual heavy lifting in these analyses is not done by human rights norms at all, but by precisely the kinds of technical argumentation which human rights purport to augment. After all, we don't need human rights to tell us that private providers of essential services need strict regulatory oversight. Nor do we need human rights to tell us that domestic agricultural subsidies ought to be reduced, nor that developing countries may at times need the flexibility to impose tariffs on agricultural imports. It is clear that what is actually happening in this kind of scholarship is that policy proposals and supporting arguments are being borrowed from contemporary trade policy discourse, and re-articulated in human rights terms. I am not suggesting that human rights commentators tend to reproduce *orthodox* opinion on these questions. In fact, the opposite is almost always the case: human rights have come to be seen as a language for articulating counter-orthodox critique of certain kinds of prevailing trade policy consensus. But, regardless of the substantive positions taken, the point is that the discussion of trade policy matters draws on precisely the same set of arguments, in essentially the same way, as have characterized trade policy discussions for some time. Any policy proposals which are put forward in these analyses therefore cannot meaningfully be said to be derived from human rights norms in any direct way, and in fact usually appear to have only an attenuated and relatively obscure connection to the human rights obligations set out at the start.

The result is that one can often be left wondering why it is necessary for these policy proposals to be framed in human rights terms.¹⁵⁴ There may even be positive disadvantages in doing so. First, and most simply, framing the argument in human rights

¹⁵⁴ Breining-Kaufman alludes to a similar difficulty in her study of the trade and the right to food: "What is the motivation for a rights-based approach to food? Would it not be sufficient hunger and malnutrition as a serious moral evil or violation of a basic need?": C. Breining-Kaufman, 'The Right to Food and Trade in Agriculture' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 341 at 359. Her response seems essentially to be the desirability of the strong moral and legal imperative associated with rights-based approaches.

terms seems merely to confuse matters, and to add an extra, unnecessary, layer of analysis. Would it not be better and simpler for policy-makers to engage directly with the pros and cons of policy proposals, without having these arguments mediated through the prism of human rights? Second, re-framing traditional trade policy arguments in human rights terms may unhelpfully mystify policy debates: to speak as if particular trade policy choices were somehow mandated by human rights rules risks obscuring their contestability, lending them a falsely inflated legitimacy, and stifling ongoing debate about desirable trade policy. After all, whether or not they are put forward by human rights actors, these proposals may be mistaken, or superseded by better or different knowledge, and ought always to be open to question. Third, there is the risk that this kind of intervention can undermine the legitimacy and effectiveness of human rights themselves, by promising more than can be delivered. Within this framework, human rights are offered as a means of determining right or wrong answers to trade policy questions, a means of conclusively determining better or worse trade policy. The more that human rights actors try to make good this promise – that is, the more that they attempt to turn human rights principles into concrete policy proposals – then the more the trade and human rights debate becomes just another debate about the optimality of particular trade policies, a subject on which human rights actors have no particularly special expertise. Within this frame, human rights actors find themselves simply playing the role of a conduit: passive recipients of technical knowledge produced elsewhere, re-articulating that knowledge in the language of human rights. As a result, the peculiar authority of human rights themselves can be dissipated, as it becomes equated with the persuasiveness of the technical knowledge on which it draws, and with the mastery by human rights actors of technical trade policy knowledge.

Let me finish this section with two clarifications. First, I am not suggesting that framing trade policy arguments in human rights terms performs no beneficial function. On the contrary, in the sections which follow I try to spell out a number of other very important functions that it performs very usefully. My basic claim is rather that we need to be clear about what kind of work human rights is doing in this kind of analysis, and what it is not. I do not think that human rights are providing substantive guidance for policy-makers,

and it seems to me counter-productive to claim that this is what is happening. Second, I also am not suggesting that human rights rules *cannot* be developed and used in a way which gives concrete direction to trade policy-makers. My claim is merely that present attempts to do that end up as not much more than a process of reflecting and re-articulating policy proposals and arguments already circulating in trade policy debates. We need to look elsewhere, and think harder, if we are to understand the role that human rights norms play in contemporary trade policy debates.

3. *Human rights as political technologies*

When one asks NGOs and other commentators why they use the language of human rights in their critiques of the trade regime, one of the most common responses is that human rights rhetoric can add weight to the policy arguments that they make. Even if we do not need human rights to tell us that domestic agricultural subsidies ought to be reduced, so this argument typically runs, it is helpful to be able to say authoritatively that this reduction is *required by human rights law*, because it endows that claim with a degree of moral legitimacy, the force of legal obligation, and a sense that they are somehow beyond the possibility of compromise or negotiation. In short, the deployment of human rights language is said to make policy/political claims more persuasive and ultimately more effective. The legal framework human rights provide is often said to be particularly important. There seems to be a perception that, through the trade regime, certain powerful interests have been able to entrench their trade policy preferences in binding legal form, and that human rights law provides a (satisfyingly symmetrical) means of contesting that political move in kind. Human rights, it is often said, are not just “aspirational moral principles”, they are “norms codified in international law”.¹⁵⁵ However these arguments are framed, the fundamental point is clear: that the human rights movement offers a variety of political technologies which may be used to achieve desirable trade policy outcomes, and that the use of human rights language makes available a variety of strategies which can be used to exert considerable political pressure.

¹⁵⁵ International Federation for Human Rights, “Understanding Global Trade and Human Rights”, July 2005, 3, available at www.fidh.org/IMG/pdf/wto423a.pdf.

The techniques typically used by human rights actors to achieve political outcomes can take a number of forms.¹⁵⁶ First, the characterization of particular aspects of trade policy as ‘human rights issues’ can help to mobilize transnational human rights advocacy networks. These networks have proved to be effective mechanisms for raising public awareness, shaping public opinion, uniting disparate political actors, and generating broad-based global consensus in favour of particular policy objectives. They can bring powerful pressures to bear on policy-makers through grassroots campaigning and direct lobbying efforts. In the context of trade policy, the TRIPS and public health campaign is an obvious example. The engagement of UN human rights bodies on this issue, and the consequent mobilization of the human rights movement more generally, in my view influenced the dynamic of that debate in powerful ways. Human rights institutions and actors added weight to the campaign for the modification of TRIPS commitments, by lending additional legitimacy, new constituencies, and an institutional voice for those groups pressuring for change. The deployment of human rights language also helped to frame the debate in terms of justice and fairness, and through the mobilization of moral outrage, helped to generate a widespread sense that the TRIPS agreement in its current form could not be justified. Experience with this campaign has had the result that many human rights actors in the field of international trade now see their primary role as working closely with activist or lobby groups – particular those with a developing country focus – demonstrating to them how human rights language and human rights law might be strategically deployed to help them achieve their policy agenda. Similarly, others work hard to get particular trade policy projects on the agenda of human rights institutions, and use any resulting resolutions or reports as a tool in ongoing advocacy and lobbying efforts.¹⁵⁷

¹⁵⁶ These and other techniques have been explained in studies of the role of the human rights regime in other substantive policy areas. See, for example, the various contributions to T. Risse-Kappen, C. Ropp Steve and K. Sikkink, *The power of human rights: international norms and domestic change* (1999), as well as R. Goodman and D. Jinks, 'How to Influence States: Socialization and International Human Rights Law', (2004) 54 *Duke Law Journal* 621.

¹⁵⁷ International Federation for Human Rights, “Understanding Global Trade and Human Rights”, July 2005, 11ff., as well as the mission statement of 3D (Human Rights, Trade, Equitable Economy), available at www.3Dthree.org.

Second, as Helfer has noted, the human rights regime can provide an institutional space for the development of norms about trade policy which are different from, and contrary to, those circulating within the trade regime.¹⁵⁸ Soft law instruments and declarations produced by consensus within a human rights framework can then feed back into the trade regime, as other countries seek to use such norms as a lever in trade negotiations, exploiting the “civilising force of hypocrisy” to extract concessions in the domain of trade politics.¹⁵⁹ A submission to the Committee on Agriculture by a number of developing countries, in the context of a review of how the *Agreement on Agriculture* might address ‘non-trade’ concerns, provides an interesting example of this process.¹⁶⁰ In this submission, these developing countries referred explicitly to the Universal Declaration of Human Rights and to the work of the CESCR on the right to food in support of their proposals for reform to the agreement. While it is hard to say how effective this strategy might be in any particular context, a number of commentators have drawn attention to this example as illustrative of the general potential of such strategies.¹⁶¹ Third, the elaboration of international human rights law relating to trade policy may provide an impetus for the use of domestic human rights enforcement mechanisms to influence governments’ trade policy positions. The most obvious example comes from South Africa, where proceedings were initiated on the basis of the constitutional right to health, in respect of health policies closely related to the TRIPS and public health campaign.¹⁶²

Fourth, international human rights treaty-monitoring bodies may help to generate pressure for policy change in a variety of ways. CESCR, for example, routinely examines

¹⁵⁸ See generally L.R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', (2004) 29(1) *Yale Journal of International Law* 1, 58; L.R. Helfer, 'Mediating Interactions in an Expanding International Intellectual Property Regime' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 180 at 184.

¹⁵⁹ Elster (ed), *Deliberative Democracy*, (1998).

¹⁶⁰ “Note on Non-Trade Concerns”, Committee on Agriculture Special Session, WTO Document G/AG/NG/W/36/Rev.1, 9 November 2000.

¹⁶¹ For example, C. Breining-Kaufman, 'The Right to Food and Trade in Agriculture' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 341 at 349.

¹⁶² *Minister of Health v Treatment Action Campaign*, Constitutional Court of South Africa, Case CCT 8/02, 5 July 2002. See generally F. Abbott, 'The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the context of TRIPS' in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 279 at 294.

certain aspects of countries' trade policies for their consistency with human rights norms. In a recent country review of Ecuador, the CESCR heard submissions from NGOs concerned about the potential impact of FTAA and US-Andean FTA negotiations on access to medicines in Ecuador, and expressed concern to the Ecuadorean representative.¹⁶³ It is true that such review processes are of varying effectiveness in achieving real policy change, and rely on softer processes of awareness-raising, persuasion and normative socialization to work. But while a degree of scepticism is useful, at the same time we should not write these processes too quickly as ineffective. There is evidence that the Ecuadorean representative in question at least forcefully transmitted CESCR's concern to those government departments involved in trade negotiations, and began a process of involving human rights norms in the crafting of negotiating positions.¹⁶⁴ It has been suggested that such processes are more effective in the case of smaller countries, simply because the same official represents the country in both the trade and human rights regimes.

This strategic deployment of human rights language, and human rights mechanisms, can be critiqued on a number of grounds. Some critique it on the basis of the desirability of the policy proposals advocated. I have previously said that the substantive merits of human rights claims are beyond the scope of this article, so I cannot engage in detail with these arguments here. Suffice to say that while it is true that the policy agenda advanced under the banner of human rights may in principle be mistaken, counter-productive or covertly deployed for the benefit of the powerful, it is also true that so far most aspects of this policy agenda – amendment of the TRIPS agreement, the reduction of domestic agricultural support, further special and differential treatment for developing countries – have enjoyed broad-based public support. Others critique this framework on the basis of its effectiveness. There are numerous commentators who are sceptical of the ability of the 'soft' mechanisms of the human rights regime to achieve real political change. In relation to the TRIPS and public health campaign, Picciotto suggests that

¹⁶³ See, Committee on Economic, Social and Cultural Rights, Concluding Observations of CESCR: Ecuador", E/C.12/1/Add.100, 7 June 2004, esp. para 55; "Trade-related intellectual property rights, access to medicines and the right to health", April 2004, report submitted to CESCR by 3D (Human Rights, Trade, Equitable Economy), available at http://www.citizen.org/documents/3D_IP_Ecuador_AFTA.pdf.

¹⁶⁴ Interview with NGO representative closely involved in process, June 2006.

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

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

My primary concern about this model is somewhat different. It is that in this model the human rights movement still is given no role in *policy* debates – that is, in generating new ideas about desirable and appropriate trade policy, or alternative visions of the international trading system. That is to say, in this model the human rights movement does not engage in the domain of policy ideas and policy knowledge. It is still figured as a passive recipient of policy knowledge, and is seen as being deployed in the service of a policy agenda still defined in the context of traditional trade policy debates. Trade policy elites, deploying traditional conceptual frameworks, still play the role of gatekeepers of policy ideas, monopolizing the production, evaluation and authorization of acceptable policy proposals. Thus, the human rights movement can be effective in achieving positive change only where the ‘problem’ is not lack of imagination but rather the lack of political will. It may be a useful tool, that is to say, where we *know* what policy ought to be pursued, but where mobilizing constituencies in favour of it, and overcoming political

obstacles to change, is difficult. The human rights movement can do nothing, however, to remedy those flaws in the international trading order which arise *as a consequence of prevailing policy knowledge* – or rather as a consequence of its flaws, blindspots and other inadequacies. The influence of human rights actors is most likely to be strong where they are advocating policies consistent with the prevailing technical knowledge, and necessarily weaker and less convincing where they choose to advocate policies supported only by unorthodox or non-mainstream experts. Put another way, to the extent that the international trading system is already structured and informed by orthodox knowledge – and in my view this is a very significant extent – the human rights movement has in this model no critical or transformative power at all.

4. *Human rights as a trigger for policy learning*

Let me turn, then, to confront this problem directly. I have said that the human rights movement must engage in the domain of knowledge, because transformative change to the international trading order cannot easily occur without the production of ‘new thinking’ about the kinds of trade policies which are desirable and legitimate, and the kinds of governance structures through which political power is constituted and exercised in the trading order. I have suggested that none of the three models considered in the previous section provide any solid basis for thinking about how the human rights movement may be involved in that production. While it is common to speak as if human rights norms may provide the substance of an alternative vision for the international trading order, in my view that promise is illusory. Furthermore, the discourse of fragmentation and coherence – propagated in part within the trade and human rights debate – may actually make such ‘new thinking’ *more* difficult, by reinforcing prevailing views and entrenching the hold of traditional experts over them. Does this mean that, in the end, the human rights movement has only a marginal role to play in the ongoing evolution of the trading system? The answer is still not clear, but I think not, and in this section my aim is to sketch, in preliminary form, a fourth model for the engagement of the human rights movement in trade policy debates to explain why. Put most simply, the claim I make is that the human rights movement can *facilitate* the production of new

forms of policy knowledge about the trading system. Even if human rights are not in themselves a source of new policy ideas, human rights interventions into trade policy debates perform the crucial function of providing a trigger for ‘policy learning’, and helping to create the conditions in which learning is more likely. That is to say, the engagement of human rights voices and actors in trade debates acts as an impetus for the evolution of ideas about what is rational and desirable trade policy.

The kind of ‘policy learning’ that I have in mind can take a number of different forms, and occur in a number of different ways.¹⁶⁵ First, it may involve a change in the nature of ‘causal beliefs’ held by policy-makers. Contemporary ideas about desirable trade policy rest on particular understandings about the economic dynamics of the trading system: the impact of trade flows on allocative and dynamic efficiency; the relationship between factor endowments and patterns of international trade; the causal determinants of the changing size, composition and direction of trade flows; and so on. They also rest on another set of causal understandings about the political dynamics of the trade system – such as the belief that the dynamics of domestic trade politics predispose governments towards protectionism, or the belief that retaliation is the likely result of a unilateral decision to raise trade barriers. One form of learning, then, consists of a modification or refinement of this kind of causal belief. Second, learning may involve changes to ‘policy beliefs’, that is, ideas about the kinds of policies which ought to be pursued in light of our best understanding of the causal dynamics of the trading system. These can themselves be broken down into a number of levels. At the lowest level, there can be an evolution in prevailing ideas about the best technical means of achieving policy goals. In the context of the WTO, this may involve changing ideas about what bargaining position to take within multilateral trade negotiations. At the national level, it may involve fine-tuning ideas about which sectors to liberalize, in what order, and what kinds of flanking policies are needed to make a program of liberalization successful. At a somewhat deeper level,

¹⁶⁵ See generally, J.S. Levy, 'Learning and foreign policy: sweeping a conceptual minefield', (1994) 48(2) *International Organization* 279.

learning can involve a change to 'strategic policy beliefs'.¹⁶⁶ In the international context, prevailing strategic beliefs may include: the belief that liberalization is most effectively achieved through the exchange of reciprocal trade concessions; the belief that questions related to the distributive and equity effects of the international trading system ought to be addressed at the national level; or the belief that the international trade regime ought ideally to strive for universality in its membership and coverage. Finally, at the deepest level, learning can involve a change in nature of the overarching goals towards which trade policy-making is directed (or the relative weight given to different goals). I noted above some of the different goals which have informed the operation of the postwar trading system at different periods in its history.¹⁶⁷

Policy learning – at any level – is not an automatic or natural process: certain conditions and policy-making environments are conducive to learning, while others are not; and certain organizations are better at learning than others.¹⁶⁸ Without more detailed study, it is hard to speak in general terms about the extent to which the international trade regime helps to generate a policy-making environment which is conducive to learning. Certainly it is not hard to point to at least one or two periods in the history of the postwar order in which policy learning of a profound kind appears to have occurred.¹⁶⁹ At the same time, it is also possible to point to a number of features of the trade regime which inhibit learning – and it is these obstacles which the activity of the human rights movement helps to overcome.

¹⁶⁶ This term is taken from P. Tetlock, 'Learning in U.S. and Soviet foreign policy: In search of an elusive concept' in G.W. Breslauer and P. Tetlock (eds.), *Learning in U.S. and Soviet foreign policy* (1991), xiv at 27.

¹⁶⁷ See above text accompanying n124.

¹⁶⁸ For some of the conditions which make some organizations better learners than others, see B. Hedberg, 'How Organizations Learn and Unlearn' in P.C. Nystrom and W.H. Starbuck (eds.), *Handbook of organizational design* (1981), xxii and generally B. Levitt and J. March, 'Organizational Learning', (1988) *14 Annual Review of Sociology* 319; C. Argyris and D.A. Schön, *Organizational learning II: theory, method and practice* (1996).

¹⁶⁹ The period from the beginning of the Tokyo Round, through the Uruguay Round, until the creation of WTO is the clearest example.

Firstly, and most simply, the work of a variety of organizational theorists reminds us of the importance of feedback loops in the facilitation of organizational learning.¹⁷⁰ Causal and policy beliefs change through response to environmental stimuli – in other words, through the process of continuously monitoring the outcomes of policy choices, and by systematically incorporating the lessons learnt into processes of policy formation and re-formation. The international trade regime, however, has always lacked a systematic, institutionalized system of monitoring the impact of decisions taken within it, and feeding back lessons learnt into new decision-making processes.¹⁷¹ It is true that the committee system established with the WTO in 1995 to some degree began to reflexively monitor the activity of the WTO. However, these monitoring activities are focussed primarily on questions of compliance and implementation, rather than on reflexively evaluating the effects and outcomes of the WTO agreements itself. By contrast, over the past decade or so, human rights actors – and indeed transnational civil society networks more generally – have helped to perform precisely this function. A very large proportion of the work undertaken by human rights actors consists of collecting and collating information on the outcomes produced by the international trading system, formulating it into a relatively coherent and systematic body of knowledge, and repeatedly bringing it to the attention of trade policy-making elites. In doing so, they have helped to provide the impetus for learning by these policy-makers – that is, for a rethinking of beliefs which these policy-makers hold concerning how the trading system operates, and what the outcomes of their interventions are likely to be.

Of course, there are certainly ways in which human rights might more effectively be used to perform this function. The UN High Commissioner for Human Rights has very strongly advocated integrating a human-rights based feedback function more closely into trade policy-making processes, at both the national and international levels. The High Commissioner suggests the need for a “a constant examination of trade law and policy”,

¹⁷⁰ See generally B. Hedberg, 'How Organizations Learn and Unlearn' in P.C. Nystrom and W.H. Starbuck (eds.), *Handbook of organizational design* (1981), xxii.

¹⁷¹ It is true that the Committee system set up with the WTO in 1995 to some degree performs the reflexive function of monitoring the activity of the WTO. However, these monitoring activities are focussed primarily on questions of compliance and implementation, rather than on reflexively evaluating the effects and outcomes of the WTO agreements itself. Hoekman makes this observation in relation to the TPRM: B. Hoekman, 'Making the WTO More Supportive of Development', (2005) 42 *Finance and Development* 14.

arguing that “assessing the potential and real impact of trade policy law and policy is perhaps the principal means of avoiding implementation of any retrogressive measure”.¹⁷² The High Commissioner therefore repeatedly calls for systematic ‘human rights impact assessments’ both before and after decision are made.¹⁷³ Taking up this challenge, a number of preliminary attempts have been made to set out methodologies for carrying out such assessments.¹⁷⁴ In my view, this work represents a valuable attempt to use human rights to drive policy learning in more effective ways – that is, to use human rights law to institutionalize and routinize practices of monitoring and feedback within trade policy-making processes.

Secondly, the human rights movement can help initiate reflection on the broader goals and values which the trading system is designed to achieve, and the responsibilities which trade policy-makers see themselves as bearing. Commentators such as Barnett and Finnemore have noted that there can be a tendency in international organizations for the broader goals associated with an institutional project to fade from view over time, and institutional actors to focus on institutionalized rules, routines, practices and procedures in themselves and for their own sake.¹⁷⁵ The result can be a lack of any critical reflection on those original goals and the broader project which gives the institution its direction, to determine whether they need to be updated as circumstances change. There are certainly indications of this dynamic in the context of the trade regime. It is reflected not only in the relative lack of discussion of the issue, but also in the fact that, to the extent that the purpose of the trading system *is* discussed, commentators generally settle for ‘thin’ and stylized versions – such as the liberalization of international trade, or the reduction of trade barriers – which say nothing meaningful about the social purpose of the regime.

¹⁷² OHCHR, ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at para 12.

¹⁷³ See above n115.

¹⁷⁴ See, for example, S. Walker, ‘Human Rights Impact Assessments of Trade-Related Policies’ in M. Gehring and M.-C. Cordonnier-Segger (eds.), *Sustainable Development in World Trade Law and Jurisprudence* (2005), 217; Humanist Committee on Human Rights, *Matching Practice With Principles: Human Rights Impact Assessment: EU Opportunities* (2002), available at www.hom.nl/publicaties/Matching_practice_with_principles.pdf; Radstaake and de Vries, *Reinvigorating human rights in the Barcelona Process: using Human Rights Impact Assessment to enhance mainstreaming of human rights* (Mar. 2004), available at www.hom.nl/publicaties/Morocco_paper_and_bibliography.pdf.

¹⁷⁵ M.N. Barnett and M. Finnemore, *Rules for the world: international organizations in global politics* (2004), Chapter 2.

Again, it is clear that the human rights movement has at least the potential to counter-act these tendencies, and to help create an environment in which reflection on the trade policy goals is facilitated and encouraged. One of the most obvious characteristics of human rights interventions into trade debates is their preoccupation with the ultimate ends to which the international trading system is directed, and in particular the claim that trade liberalization ought not be pursued as if it were ‘an end in itself’. While I have made it clear that I do not think ‘human rights’ themselves necessarily provide a vision of the most appropriate ends towards which the trade regime ought to be striving¹⁷⁶, human right actors have nevertheless been instrumental in generating something of a renewed critical debate about the social purposes of the international trading system. By forcing the trade regime to justify its activities and policies according to ethical criteria, it has helped to prompt reflexive questioning of both the means and ends of trade policy, and thereby to facilitate policy learning at the deepest level.

Third, and perhaps most important, human rights networks can help to overcome *cognitive* obstacles to trade policy learning.¹⁷⁷ Institutionalized processes of monitoring environmental feedback, and encouraging critical reflection, are not always sufficient to generate learning. The production of new knowledge can still be impeded by the cognitive frameworks which trade policy-makers use to make sense of the world, and to draw lessons from past experience. These epistemological frameworks can be deeply embedded and highly resistant to change: even when faced with unexpected and seriously adverse policy outcomes, it has been shown that decision-makers often tend to draw

¹⁷⁶ A contrary point of view has been put forward by the OHCHR: ‘Human rights, trade and investment’, E/CN.4/Sub.2/2003/9, 2 July 2003, at paragraph 57. A subtler and perhaps more compelling variant of the same argument has been put forward by Frederick Abbott. In the context of a discussion of the relationship between human rights and competition law, he has argued that systems of competition law typically have at least three different basic objectives (consumer protection, protection of democracy, and protecting the integrity of the market), and that the emphasis given to each objectives changes across systems and over time. He suggests that ‘integrating human rights law’ with competition law may mean a greater emphasis on its consumer protection function. Whether or not we agree with the specifics of his analysis (and it has much to commend), his general point that human rights may work more indirectly by subtly reshaping constitutive ideas about the fundamental purposes of a regulatory system is a strong one, and one which may well have application in relation to trade law. See F. Abbott, ‘The ‘Rule of Reason’ and the Right to Health: Integrating Human Rights and Competition Principles in the context of TRIPS’ in T. Cottier, E. Bürgi and J. Pauwelyn (eds.), *Human Rights and International Trade* (2005), 279 at 289 and surrounding.

¹⁷⁷ See B. Hedberg, ‘How Organizations Learn and Unlearn’ in P.C. Nystrom and W.H. Starbuck (eds.), *Handbook of organizational design* (1981), xxii.

lessons which reinforce their pre-existing beliefs.¹⁷⁸ Institutions and organizations which are designed and rationalized on the basis of particular ways of seeing the world also tend to perpetuate and entrench such worldviews, and can impede vital cognitive change. For example, many of the ‘strategic policy beliefs’ mentioned earlier – that liberalization is best conducted reciprocally and progressively, or that the distributive outcomes of international trade ought not to be the business of the trade regime – are deeply engrained in the architecture of the trade regime. They are sustained, disseminated and given a ‘commonsense’ character through institutional practices and procedures; routines and habits; histories and narratives; and a variety of discursive and institutional processes at work within the trade regime. The institutional features of the trade regime, in other words, do not simply guide participants’ behaviour, but also teach them a particular way of understanding the trading system, and of how political power ought to be deployed within it.

The human rights movement can help to overcome these obstacles, by providing an alternative environment for the generation and dissemination of knowledge about the trading system, which is not subject to the same cognitive constraints. To take a simple example, I said above that our knowledge of the impacts of international trade has traditionally tended to focus on a limited set of questions – such as the impact of trade on growth, on resource allocation, on industrial competitiveness, or on relative factor returns. Since this kind of knowledge is relatively well-understood, authoritative, developed and familiar, these factors tend to figure prominently in decisions about what kind of trade policy to pursue, and are prominent feature in the policy evaluations which occur in and around international trade negotiations. In human rights discourse, however, different preoccupations tend to be given prominence. For example, the human rights movement tends focus on the impact of trade policy on access to food, on the livelihoods of the rural poor, on women and other vulnerable groups, on health, and so on. As the High Commissioner has observed, “a human rights approach tends to examine trade law and policy [differently], focussing not only on economic growth, markets or economic development but also on health systems, education, water supply, food security, labour,

¹⁷⁸ R. Jervis, *Perception and misperception in international politics* (1976), Chapter 4

political processes, and so on.”¹⁷⁹ Human rights, therefore, offers the possibility of influencing trade policy by reshaping the kinds of knowledge on which policy choices are based.

How might this work in practice? The International Federation for Human Rights (FIDH) has suggested that human rights actors “undertake empirical studies and evaluations” of the impact of trade liberalization on factors and indicators of particular relevance to their work.¹⁸⁰ This may mean that such actors generate original research and new data, based on the experience of “advocates working on the ground”. More commonly, however, it will involve collecting and collating available data, “collaborat[ing] with partners engaged in data analysis”, and exploring ways of integrating their work with other actors involved in knowledge production and dissemination.¹⁸¹ In this model, the human rights movement helps to re-shape the kind of knowledge which is produced about the trading system by engaging in collaborative work with traditional knowledge producers, asking new questions of these experts, providing a pre-existing network for the dissemination and circulation of new findings, as well as offering an institutional space in which new knowledge can be brought to the attention of policy-makers at the international level. For example, human rights actors have been at the forefront of collaborative efforts to produce new data on the impact of international trade policies on women and gender equality.¹⁸² This work has in turn helped to generate interest in the subject in more traditional venues of knowledge production, such as universities and think-tanks,¹⁸³ and thereby to redefine the domain of relevant knowledge which is deployed in trade policy debates. In this way, human rights actors are arguably helping to generate practices through which such knowledge is routinely taken into account in the kinds of strategic calculations which governments use to determine their trade policy interests.

¹⁷⁹ OHCHR, ‘Liberalization of trade in services and human rights’, E/CN.4/Sub.2/2002/9, 25 June 2002, at para 7.

¹⁸⁰ International Federation for Human Rights, “Understanding Global Trade and Human Rights”, July 2005, 14.

¹⁸¹ Ibid.

¹⁸² Among many examples, see the recent report by 3D, “Niger: Agricultural Trade Liberalization and Women’s Rights” (August 2006), available at www.3Dthree.org.

¹⁸³ An interesting recent example is Schultz, “Does the Liberalization of Trade Advance Gender Equity in Schooling and Health”, Yale University Economic Growth Center, Discussion Paper No. 935, May 2006, available at <http://ssrn.com/abstract=9055538>.

The human rights movement has influenced not only what information tends to be produced about the trading system, but also how that information is interpreted. In order to transform raw information about the outcomes of the trading system into usable policy knowledge, such information needs to be embedded within narratives and thick causal descriptions, which give meaning to this information, and suggest ways of responding to it. These processes are inescapably social: they involve the production of *collective* meanings and policy narratives, and the generation of broadly shared cognitive frameworks. Human rights can help in this collective processing of information into new knowledge by providing an repertoire of discursive and cognitive resources – habits of thought, concepts, images and principles – different from those available in traditional trade policy discourse. These alternative discursive resources help to generate different interpretive frameworks through which information about the trading system is processed. Such interpretive frameworks are of course highly contingent – what is produced does not, in other words, amount to a ‘human rights perspective’ on the trade regime in any simple sense.

While it is difficult to give examples without crude over-generalization, two illustrations might help to make the point clearer. First, much of the discussion in and around the trade regime is structured by an image of politics as a series of collective action dilemmas: in part as a result, the regime has defined its task as enabling the co-operative, mutual reduction of barriers to international trade. Human rights discourse, however, tends to see politics as a power struggle: the core problem posed by the international trading system, therefore, is to ensure that the benefits of the trading system accrue to the most vulnerable and marginalized groups. In this way, human rights discourse can help to generate new *problem definitions* for trade policy questions. Second, as mentioned earlier, traditional trade policy discourse tends to view resistance to liberal trade as the natural state of politics, protectionism as the outcome of pressure from ‘special interest’ groups, and consumers and exporters as the carriers of the ‘public interest’. By contrast, contemporary human rights discourse understands these political dynamics in different terms, tending to see those in favour of liberal trade as (predatory) special interest groups.

Various actors such as civil society groups, and certain kinds of producers, tend to be discursively constructed as carriers of the public interest. The result can be that trade and human rights discourse generate very different narratives to explain and give meaning to similar social phenomena. The point I am making is a general one: that human rights can help to provide a social space, and the cognitive resources, to aid in the restructuring of our knowledge about the trading system, and the reframing of trade policy questions. In doing so, it can help to overcome the cognitive rigidities which currently impede trade policy learning.

Though it is rarely made explicit, in my view the human rights movement is therefore very much in the game of knowledge production. When human rights actors produce their numerous commentaries on the ‘human rights impact’ of the trading system, and so on, one of the most important functions they are performing is facilitating the production of social knowledge: generating shared narratives; synthesizing some kind of consensus about how certain aspects of the trading system operate; and selecting, reframing and imparting new meaning to information produced by various kinds of trade policy experts. The knowledge thereby produced can, of course, influence policy-makers directly, helping them to reformulate their strategies and explicit policy preferences. Just as important, however, is the destabilizing role it plays in respect of traditional trade debates. It facilitates the reconsideration and renewal of such debates by highlighting their inevitable cognitive limitations, and by demonstrating that traditional trade experts have no monopoly on the truths which can be told about the trading system. As Jacobsen has noted in a different context, it is precisely the “public clashes” among different communities, and among different regimes of truth, that can often yield “the most valuable and self-critical input into policy decisions”.¹⁸⁴ It is in my view one of the most productive functions that the human rights movement has so far performed in trade policy debates, and one which, if made more explicit, may usefully guide their future interventions.

¹⁸⁴ J.K. Jacobsen, 'Much Ado about Ideas: The Cognitive Factor in Economic Policy', (1995) 47(2) *World Politics* 283, 303.

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

5. *Challenging technical rationality*

There is a fifth and final model about what human rights bring to trade policy debates which it is worth outlining briefly. I drew a distinction at the beginning of this Part between ‘primary’ trade policy ideas (beliefs about what kinds of trade policy are best), and ‘secondary’ trade policy ideas (beliefs about *how to judge* what kinds of trade policy are best). I suggested that, at the level of secondary ideas, trade policy-making is deeply structured by beliefs that trade policy is specialized technical field, and that the determination of the best trade policy is best left to trained experts. Arguably, however, contemporary controversies about the international trade regime are in part the result of a widespread loss of faith in technical expertise. We are less sure than we have ever been of the ability of experts to fully – or even adequately – understand the world, and are less convinced than we have ever been of the ‘rationality’ and desirability of their policy

prescriptions. The engagement of human rights into trade policy debates is arguably both an effect and a cause of this decline of faith in ‘expertise’ (and all that that word implies). It is an effect in the sense that it is part of a more general search for new actors and new languages to augment trade policy debates. It is a cause in the sense that human rights discourse provides us with a *different* set of ideas about ‘how to judge what kinds of trade policy are best’ – specifically, a set of ideas which prominently includes notions of procedural fairness, and distributive justice. Human rights, on this view, offer the possibility of transforming the governance of trade by prompting us to rethink the normative framework which tells us what represents an authoritative and legitimate intervention into questions of trade policy.

To a significant degree, we are accustomed to judging trade policy by how closely it conforms to substantive policy prescriptions established in the relevant economic literature. But human rights actors have been prominent among those making the claim that we ought not to judge trade policy (and the trade regime) solely by its substantive rationality, but also by its *procedural* rationality.¹⁸⁵ The UN High Commissioner for Human Rights, for example, sees an urgent need to increase the breadth and depth of public participation in trade policy-making processes, including in the WTO itself.¹⁸⁶ This may involve giving civil society actors “direct access to WTO meetings and decision-making processes”, potentially developing “mechanisms of redress” for individuals affected by decisions taken in the international trade regime, or being more willing to take the content of *amicus curiae* briefs into account in dispute settlement, as “a means of strengthening civil society’s participation in the multilateral trading system”.¹⁸⁷ Moreover, the High Commissioner argues, international institutions such as the WTO must see it as part of their mission to encourage participation in policy-making

¹⁸⁵ See generally, J. Atik, 'Democratizing the WTO', (2001) 33 *George Washington International Law Review* 451; R. Howse, 'How to Begin to Think About the 'Democratic Deficit' at the WTO' in S. Griller (ed.) *International Economic Governance and Non-Economic Concerns* (2003), 79; K. Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', (2003) 6 *Journal of International Economic Law* 841; S. Charnovitz, 'The WTO and Cosmopolitics', (2004) 7(3) *Journal of International Economic Law* 675; OHCHR, ‘Analytical study of the HCHR on the fundamental principle of participation and its application in the context of globalization’, E/CN.4/2005/41, 23 December 2004.

¹⁸⁶ OHCHR, ‘Analytical study of the HCHR on the fundamental principle of participation and its application in the context of globalization’, E/CN.4/2005/41, 23 December 2004.

¹⁸⁷ *Id.*, at paras 42-43.

at the national level.¹⁸⁸ Recent calls for WTO dispute settlement panels to concentrate on procedural review of national trade policy measures reflect a similar turn.¹⁸⁹ The High Commissioner has also emphasized the need for transparency in the WTO, “so that the outcomes of ... negotiation processes are open to public scrutiny”.¹⁹⁰ The point here is that human rights norms are being deployed to challenge our ideas about how trade policy proposals ought to be judged, and by whom. Within this human rights framework, what matters is not so much whether international trade policies are right or wrong, according to certain technical criteria, but rather who made them, and how. Human rights are, in other words, helping to reconstitute our ideas of what is a valuable and worthwhile contribution to trade policy-making processes, and who is in a position to provide such a contribution.

Human rights discourse also focusses our attention on questions of distributive justice. Bureaucratic international organizations, particularly those like the WTO which rely heavily on technical expertise as an important source of their legitimacy, tend to structure their activity so that questions of distributive justice appear irrelevant to their tasks. This is because their continuing authority depends crucially on an appearance of apolitical neutrality.¹⁹¹ One implication has been that explicit evaluation of trade policy from the perspective of distributive justice concerns has been discouraged, and notions of fairness have therefore played a relatively minor role in shaping the activity and operation of the international trade regime.¹⁹² Human rights discourse can help to counteract this trend.

¹⁸⁸ Id., at para 22.

¹⁸⁹ See, for example, in the context of discussion of the SPS agreement: D.A. Wirth, 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines', (1994) 27(3) *Cornell International Law Journal* 817, 855 and generally; O. Perez, *Ecological sensitivity and global legal pluralism: rethinking the trade and environment debate* (2003), 152; J. Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO', (2004) 15(2) *European Journal of International Law* 307; D. Winickoff, et al., 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law', (2005) 30 *Yale Journal of International Law* 81, 109 and generally.

¹⁹⁰ OHCHR, 'Liberalization of trade in services and human rights', E/CN.4/Sub.2/2002/9, 25 June 2002, at para 12.

¹⁹¹ M.N. Barnett and M. Finnemore, 'The Politics, Power, and Pathologies of International Organizations', (1999) 53(4) *International Organization* 699.

¹⁹² I should not be misunderstood as suggesting that questions of fairness and justice are entirely new to the trade regime, nor that they can fully supplant norms of technical rationality. A variety of normative frameworks are almost always in play in all fields of policy, co-existing and often interacting in complex ways. This is just as true of international trade as any other area. For example, although a variety of different explanations exist for the centrality of the MFN principle in the GATT/WTO system, the best is

Human rights have over the last decade or so provided a language and an institutional space in which concerns about justice and about the fairness of the international trading order have been articulated, and brought to the forefront of our attention. Human rights actors have drawn attention in particular to what they call the unfair treatment of developing countries in the trade regime: the stricter level of obligations imposed in practice on developing countries; the disproportionately small share of the benefits of international trade that they receive; and the difficulties they face in implementing their obligations (and in convincing developed countries to fulfil theirs). Human rights actors have also been instrumental in developing and disseminating knowledge about the distributive impact of international trade within countries. In the present context, the importance of this work is that it has helped to generate a consensus that we ought to judge the international trading order primarily by its *fairness* (not solely its rationality), and that desirable trade policy is above all *just* trade policy. And this consensus in turn has contributed to a change in trade policy debates, so that we have begun once more to discuss and debate what ‘fairness’ means in international economic relations¹⁹³, what different forms fairness may take, how a more equitable international economic order might realistically be achieved.

4. CONCLUSION

This paper began with a conviction that the time had come for a critical appraisal of the foundation, shape and direction of the present trade and human rights literature. It will be clear by now that the purpose of this exercise is intended to be constructive. While there is no doubt that engagement between trade and human rights scholars is to be desired,

that it is the expression of shared beliefs about what constitutes a ‘fair’ global trading system: Narlikar, ‘Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO’ (forthcoming, *World Economy*, Summer 2006). Similarly, analyses of the processes by which Part IV of the GATT 1947 – as well as the variety of SDT provisions of that agreement pre-1994 – suggest that these provisions are best understood as the result of a temporary consensus that developing countries ought in fairness to be given special treatment: R.E. Hudec, *Developing countries in the GATT legal system* (1987).¹⁹³ See generally, F.J. Garcia, ‘Trade and Justice: Linking the Trade Linkage Debates’, (1998) 19(2) *University of Pennsylvania Journal of International Economic Law* 391; F.J. Garcia, ‘Trade and Inequality: Economic Justice and the Developing World’, (2000) 21(4) *Michigan Journal of International Law* 975.

and similarly no doubt that the trade and human rights literature has to date produced some important and highly productive work, there are in my view still some significant gaps and flaws in the assumptions and modes of argumentation characteristic of the contemporary debate. The critiques I make are intended to help put that literature on a surer conceptual footing going forward, so as to facilitate a more sustained, direct and productive engagement between trade and human rights institutions, languages, scholars and communities.

Although my argument is divided into two distinct halves, both fundamentally stem from my interest in the way that international law and international regimes shape the way we *think*. The first half of my argument, then, is that insufficient attention is paid to the ways in which the trade regime shapes the way trade policy-makers think (and therefore act). We almost exclusively think of the trade regime in one-dimensional terms as a set of formally binding rules constraining the behaviour of its Members. In the trade and human rights literature, this translates into a preoccupation with the ways in which trade law constrains the ability of governments to pursue human rights policies and fulfil their human rights obligations. Criticism and proposals for change therefore focus on ‘getting the rules right’, and in particular on removing excessive constraints and opening up sufficient ‘policy space’ for WTO Members. But the trade regime is much more than a set of binding rules. It is a social environment in which ideas about the best and most appropriate trade policies are generated, legitimated and disseminated. It is a cognitive environment in which states are taught states how to interpret the international economic order, and how to calculate their interests in it. And it is also an institutional environment which re-shapes the mix of actors involved in trade policy-making, and the avenues of influence available to them. The reason that recognizing these different functions of the trade regime is important only partly because they too ‘affect human rights’, and the critical eye of human rights scholars should therefore be trained on them. It is also important because they represent some of the most significant mechanisms by which the trade regime might be engaged in re-building a different and better international economic order. They represent the means by which the trade regime can help us to

rethink our ideas about what constitutes a desirable international trading order, and help us to imagine a new future for it.

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