Richmond Journal of Global Law & Business

Volume 8 | Issue 3 Article 5

2009

Rethinking the Relationship Between the WTO and International Human Rights

GAO Pengcheng
City University of Hong Kong

RETHINKING THE RELATIONSHIP BETWEEN THE WTO AND INTERNATIONAL HUMAN RIGHTS

*GAO, Pengcheng**

I. BACKGROUND AND INTRODUCTION

A heated discussion about the relationship between the World Trade Organization (WTO) and international human rights[1] has lasted for a long period.[2] The content covered under this topic is rich

---

* GAO, Pengcheng, MPhil Candidate in International Economic Law, City University of Hong Kong; LL.M in International and Comparative Law (Honors), Chicago-Kent College of Law, IIT; LL.B, China University of Political Science and Law, Beijing, China. Admitted to practice in China.

[1] The term "international human rights" as used herein generally refers to rights embedded in international agreements and documents, which come from regional or purely domestic human rights issues and form a regime at a higher level, though human rights ultimately is a profound national issue rather than international one. For an elaboration of international human rights law, *see generally* Jack Donnelly, *International Human Rights: A Regime Analysis*, 40(3) INT'L ORG. 599, 605–13, 616–17 (1986), *available at* https://www.classes.maxwell.syr.edu/intlmgt/readings/donnellyhr.PDF.

[2] The dispute exists not only in academia, but also among relevant international organizations which are trying to clarify the relationship between the two. *See generally* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, E/CN.4/Sub.2/2001/13 (June 27, 2001), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/$FILE/G0114345.pdf; U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights, E/CN.4/2002/54* (Jan. 15, 2002), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/271bf943bbd7596fc1256b98004f2950/$FILE/G0210108.pdf; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, *Liberalization of Trade In Services and Human Rights*, E/CN.4/Sub.2/2002/9 (June 25, 2002), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/32f8a4ad6cc5f9b9c1256c05002a87f8/$FILE/G0214114.pdf; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, *Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9 (July 2, 2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b2b4fed82c88ee2c1256d7b002e47da/$FILE/G0314847.pdf. Various states also take different positions on the issue regarding the incorporation of international human rights into the WTO. Even the same State might have expressed contradictory views on this difficult issue over the years. For instance, developing countries argue that the WTO regime should put more energy into the development of the third world's human rights, while they also

and comprehensive, but I believe it is rational to sum up the core issues as follows for reaching the essence: (i) whether an intimate relationship can be established between the WTO rules and international human rights (the "Possibility" Issue); (ii) if so, whether those human rights considerations should be taken into account when analyzing and interpreting the rules concerning trade under the WTO regime (the "Ought to" Issue); (iii) how human rights will be legitimately taken into consideration, and accordingly how they will affect the WTO decision-making process or rule-establishment (the "How" Issue)?

As is evident, the above introduction first involves the WTO as the specific subject matter as it will be of primary significance. This is because, theoretically, the WTO is the most ideal candidate to analyze economic globalization and perhaps international rule of law in general. Indeed, in practice the WTO has achieved great success and played a predominant role in the international economic arena as well.[3] Second, this proposition is based on the ability of the WTO to probe into situations where international human rights rules may appear with the potential to affect the WTO decision making or rule-making. Such an arrangement was devised based on the belief that international economic institutions such as the WTO have contributed heavily to economic globalization of the international community in a more fundamental way than international human rights considerations alone.[4]

Generally speaking, freedom and equality operate as the fundamental principles of the WTO. Specifically, the direct objective of the WTO, the promotion of free trade and equal transactions among Members, was erected upon these tenets. This is immediately apparent in the rules regarding the National Treatment (NT) and the most-favored-nation treatment (MFN), which collectively demonstrate a

---

worry about the WTO's wide openness to human rights, since human rights currently are often utilized by developed countries as an excuse for intervention with developing countries' economic or political affairs, a phenomena called 'politicizing the WTO regime.' *See* Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations Versus Private Rights and Obligations, in* HUM. RTS. & INT'L TRADE 95 (Thomas Cottier et al. eds., Oxford Univ. Express 2005) (offering a brief introduction about proliferation and core issues of this heated debate).

[3] *See generally* Guiguo Wang, *Globalising the Rule of Law,* 48 INDIAN J. INT'L L. 21–45 (2008) (elucidating two prerequisites for economic globalization and centering on the WTO to show its fitness for this mission).

[4] *See generally* B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 6–14 (2004) (proving the emergency of a so-called "transnational capital" class and advocating the propriety of economic needs).

spirit of non-discrimination. The importance of these two principles, once located at the core of the General Agreement on Tariffs and Trade of 1947 (GATT 1947), is emphasized repeatedly throughout the entire WTO regime, extending from the current Annex 1A (Multilateral Agreements on Trade in Goods) of the Marrakesh Agreement Establishing the World Trade Organization ("the WTO Agreement") to Annex 1B (the General Agreement on Trade in Services, "GATS") and Annex 1C (the Agreement on Trade-Related Aspects of International Property Rights, "TRIPS Agreement").[5] Also as a generally accepted view, freedom and equality are vital principles embedded in the foundation of international human rights law.[6] In this sense, we can reach a preliminary conclusion that the WTO is based on principles which, to some extent, provide the platform necessary for the human rights way of thinking.

Concentrating on the academia, scholars are far from identical in their approaches and attitudes.[7] A large number of scholars seemingly favor a view that the WTO regime has a basis of human rights values,[8] especially economic human rights values.[9] However, opponents consider such opinions imaginations and resist the comparison

---

[5] The concept of MFN is included in the founding agreements of GATT, GATS, and the WTO. *See* General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT]; General Agreement on Trade in Services art. II, Apr. 15, 1994, 33 I.L.M. 1125, *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1C, 33 I.L.M. 81, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS Agreement]. On the other hand, NT is included in Article II of GATT, Article XVII of GATS, and Article 3 of the TRIPS Agreement.

[6] *See, e.g.*, U.N. Charter, preamble, arts. 55(c), 76(c)–76(d) *available at* http://www.un.org/aboutun/charter/pdf/uncharter.pdf (last visited Jan. 28, 2009) [hereinafter UN Charter]; International Covenant on Civil and Political Rights arts. 2(1), 26, Dec. 16, 1966, 999 U.N.T.S. 171 *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 2(2) Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm [hereinafter ICESCR]; Universal Declaration of Human Rights, G.A. Res. 217A, at arts 1, 2, 7, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *available at* http://www.un.org/Overview/rights.html [hereinafter UDHR].

[7] For full-fledged literature review categorized by subject matter, *see generally* WTO/HUMAN RIGHTS LITERATURE REVIEW (2005), *available at* http://www.law.monash.edu.au/castancentre/projects/wto/wto-lit-review-05.pdf (last visited Jan. 28, 2009).

[8] Ernst-Ulrich Petersmann, *Conceptual Questions: Defining and Connecting the Two Fields*, *in* HUM. RTS. & INT'L TRADE, at 31–34 (offering an all-around descrip-

to international human rights elements.[10] In practice, countries are involved in heated debates as well, each holding its own attitude respectively, subject to the defense of national interests.[11]

The necessity discussion of the aforementioned type could be endless and uncertain, especially considering the variety of viewpoints and the existence of legitimate cons and pros. From my perspective, neither simple support nor opposition to relative-establishment is rational. A comprehensive and systematic reexamination of this topic is essential from both an theoretical and empirical point of view.[12] In any event, the acceptance of international human rights elements is not purely theoretical, or even imaginary. The relationship already exists.

The crucial point, as I perceive it, is to find legitimate channels for such kind of practices. Only in this can we prevent disguised activities on the one side and ensure a virtuous developing route on the

---

tion about human rights values and principles in international trade to show some similarities).

[9] For concluding remarks upon how WTO law reflects economic human rights values, *see* MO, Shi-jian, *shi lun WTO he ren quan de ke xie tiao xing [Preliminary Discussion on WTO and the Harmonization of Human Rights]*, 22 TRIB. POL. SCI. & L. 22, 24–25 (2004). In addition, economic human rights values are argued to be rational enough as part of human rights, though traditionally human rights are often used in settings of political and civil freedoms. *See* Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19, 22–23 (2000).

[10] *See, e.g.*, ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000), *available at* http://lic.law.ufl.edu/~hernandez/Trade/Howse.pdf (last visited Jan. 28, 2009); GLOBAL EXCHANGE, THE WTO ERODES HUMAN RIGHTS PROTECTIONS: THREE CASE STUDIES (1999), *available at* http://www.globalexchange.org/campaigns/wto/CaseStudies.html (last visited Jan. 28, 2009); *WTO Violates International Convention*, MEIKLEJOHN CIVIL LIBERTIES INST., Dec. 2, 1999, *available at* http://www.converge.org.nz/pma/apviol.htm (last visited Jan. 28, 2009); Press Release from Alan R. Adaschik, *The WTO versus Our Constitution and Fundamental Human Rights*, http://www.cephasministry.com/nwo_wto_gatt_letter_to_bush.html (last visited Jan. 28, 2009).

[11] For an exhibition of the struggle between rich and poor countries on this very subject matter, *see* Padideh Ala'I, Symposium, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT'L L. REV. 537, 537–42 (2001).

[12] No matter whether or not one supports the idea that the WTO regime and international human rights should be considered together, there have been several cases that perfectly illustrate the relationship between the WTO regime and international human rights, although most are merely indirectly relevant and only partly reflect the issue. Thus for practical reasons, a formal and mature system should be established to tackle problems.

other. Technical issues remain to achieve the goal of correct usage, which is pertinent to furthering the WTO or rule of law in international economic globalization, even the whole global order.

Bearing in mind these considerations, this article will first explore the potential hurdles for considering human rights elements within the WTO. Such a succinct and overall generalization is not intended to block the relationship between the two, but rather to exhibit that the two ideas are distinguished in nature. This intends to pitch a cautious key for the following, which coincides with the main idea of this article: that developing such a relationship should be confined to clear rules. In fact, the article will show in the following section that the taking of international human rights into consideration under the WTO is not meaningless. Indeed, existing hurdles already have been partially removed so that possibilities exist for performing such kind of activities. Consequently, the 'ought to' issue is somehow naturally addressed when the 'possibility' issue is no longer a problem. Further, for the purpose of normative and reasonable operation, this article will conduct an in-depth examination of possible measures that might facilitate the establishment of a relationship between the WTO and international human rights values. Finally, this article expresses a sincere desire to utilize the rule of law principle within the context of globalization to standardize the use of international human rights considerations under the WTO regime.

II. POTENTIAL HURDLES FOR CONSIDERING HUMAN RIGHTS ELEMENTS UNDER THE WTO

A. Difference between Objects under Adjustment: Goods versus People

Strictly speaking, the WTO does not incorporate genuinely classic human rights, as scholars commonly interpret. Human rights, according to the literal meaning, are rights which a human being is entitled to; the regulations prescribed in the GATT 1994 are the promises that Members guarantee to offer foreign goods. It is the very reflection of the theory that trade is no more than an instrument, without direct connections to ethnicity or human rights.[13] In other words, the WTO regime is merely a warranty on equal treatment to merchandise from various sources, on whose platform each nation enjoys equal opportunities to fair competition. In conclusion, the principles of non-

[13] JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 73–74 (Cambridge Univ. Press 2003) (stating his opinion that the function of trade liberalization or WTO rules is to increase the economic welfare of all States, while social and other benefits are the results when States or private operators decide to grabble their economic welfare).

discrimination, freer trade, promotion of fair trade, and predictability for the sake of stability,[14] all of which constitute the supporting pillars of the WTO, are heading for the similar destination concerning the treatment of goods.

B. Difference between Guiding Values: Equality of Opportunity versus Fairness in Result

Human rights are always privileges that can only be truly obtained by a specific person or a group (e.g. collective human rights). They are benefits afforded to people. Consider a type of economic human rights, for instance the right to education, which is available and enjoyed when education is free, at least at the elementary and fundamental stages.[15] Also, the right to work is partially achieved when one has the right to just and favorable conditions of work, to protection against unemployment, and to equal pay for equal work.[16] In a word, human rights are concerning fairness in result.

However, what is included under the WTO regime is more akin to equality of opportunity, which ensures that products transported and exchanged can share the opportunity to be treated equally, such as the amount of expenses and tariffs levied; the measures of implementation; applicable regulations and procedures; and any other benefits, preferences, privileges, and exemptions.

More obviously, at the post-transaction stage, namely the distribution course, the result is out of arrangement with the WTO rules. In reality, the WTO regime is limited in capacity to predict what consequences it could bring to consumers or local people in the importing countries and therefore avoid negative implications.[17] There is no mathematic equation or device under the WTO regime that would ensure a certain outcome given certain circumstances where the conditions are satisfied. The fact that one country booms as a result does not indicate or promise that other Members can also benefit respectively. On the contrary, sometimes the higher degree of international economic integration brought about by the WTO may act to undermine a States' economy. Consider, for example, the situation in which imports sweep into a country and consequently cause the local workers of the relevant industry to be laid-off. Finally, the WTO regime sets only a bottom line and merely cares about whether the goods could be ex-

---

[14] *See generally*, WORLD TRADE ORGANIZATION, TRADING INTO THE FUTURE: INTRODUCTION TO THE WTO (2d ed. 2001), *available at www.wto.org/english/res_e/doload_e/tif.pdf*.

[15] UDHR, *supra* note 6, art. 26(1).

[16] *Id.* art. 23(1)–23(2).

[17] Generally speaking, the WTO regime is a rule-oriented or fixed-rule trading regime, but not a result-oriented or fixed-quantity trading regime.

changed in free circumstances. However, it leaves alone the kind of life an individual may ultimately live.

C. *Difference between Beneficiaries: Humans versus Corporation*

Human rights literally refer to economic, political, and cultural rights enjoyed by human beings. Human beings here of course are natural persons,[18] the definition of which excludes legal persons.[19]

However, regarding international trade, multinational corporations may indirectly taste the fruit the WTO regime generates and distributes to various goods. To be specific, transnational corporations possess more properties and strength compared with individuals. Such companies are able to claim rights, such as the right to effective trade relief measures, when their products are unfairly treated or when the collective interests of their industry are impaired. Since it is transactional corporations that play a pivotal and active role as 'surfers' in the intense competitions at the pre-transaction phase, i.e. the production phase, the benefits coming from free trade do not amount to human rights that an individual can actually enjoy. The transactional companies, practically conducting business affairs as international legal persons, might even not fulfill the basic living requirements of workers through just payment proportional to the volume of work they supply, not to mention the favorable work conditions or unemployment protection.[20] In conclusion, the issue of real beneficiaries places a big question mark on the possibility of incorporating international human rights elements into the WTO regime.

---

[18] Before World War II, and especially prior to World War I, human rights were "almost universally viewed as the exclusive preserve of *the State*" (emphasis added). After the War, with the emergence of the moral ground of international human rights, a government's own citizens came to be viewed as the immediate victims, who should be treated as the primary beneficiaries. *See* Donnelly, *supra* note 1, at 614, 619. Additionally, "people" here include both individuals (pertinent to individual rights) and a collective of persons (relevant to collective human rights).

[19] *See generally* UDHR, *supra* note 6 (alternatively using "human beings" and "people").

[20] This is why corporate responsibility is highlighted at the current time. *See, e.g.*, Karin Lucke, *States and Private Actors' Human Rights Obligations*, HUM. RTS. & INT'L TRADE 149–50, 157–62 (Thomas Cottier et al. eds., 2005); Larry Catá Backer, *Multinational Corporations, Transnational Law: the United Nations' Norms on the Responsibility of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2005).

III. AN 'OUGHT TO' ISSUE AND DEVELOPMENT OF PRACTICE FOR POSSIBILITIES

A. Failure of Comparative Advantage Theory: A Call for Human Rights Supplementation

Economic hypothesis of comparative advantage once was, and maybe is still, employed as a major justification to liberalize international trade.[21] In accordance with the theory, if free trade is realized there will be a win-win consequence because every country can profit from its own comparative advantages, even one that is absolutely disadvantageous.[22] This belief strongly affects the WTO regime, acting as rationale for its building and development.[23]

However, the theoretical hypothesis may be far from reality since the trading environment may not be as ideal as the numerical model presumes.[24] Situations vary from case to case.[25] Evidence

---

[21] The history of comparative advantage is really a long story. From 'absolute advantage' in the Adam Smith's famous book THE WEALTH OF NATIONS to David Ricardo's theory in his book THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, the theory has been gradually perfecting itself and developing into other new relevant theories (like Factor Proportions Theory by Bertil Gotthard Ohlin in INTERREGIONAL AND INTERNATIONAL TRADE, Technological-gap Theory and Product Life Circle Theory by R. Vernon in INTERNATIONAL INVESTMENT AND INTERNATIONAL TRADE IN THE PRODUCT CYCLE). For a brief introduction see Steven Suranovic, *International Trade Theory and Policy: the Theory of Comparative Advantage – Overview*, *available at* http://internationalecon.com/v1.0/ch40/40c000.html (last visited Mar. 14, 2009).

[22] Benefits from specialization and free trade can be gained since nations can engage in activists that maximize their advantages and minimize their disadvantages. This is well reflected in David Ricardo's numerical example on trade among England and Portugal. A brief mathematical analysis is available at *id.* and http://www.netmba.com/econ/micro/comparative-advantage/ (last visited Mar. 14, 2009).

[23] *See, e.g.*, Understanding the WTO: Basics, *The Case for Open Trade*, *available at* http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact3_e.htm (last visited Mar. 14, 2009) (emphasizing benefits from free trade and the principle of comparative advantage as the ground).

[24] Problems will arise from so many aspects. Although governments declare in their announcements or put in their treaties the will for liberalism, their actions may, at the end, deviate from that. The true intentions may vary from one state to another and differ in manifestation so that we cannot tell accurately. However, E.U. Petersmann gave his view, which can at least be regarded as a facial reflection of the purpose. *See* Ernst-Ulrich Petersmann, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAW AND FOREIGN TRADE AND FOREIGN TRADE POLICY IN THE UNITED STATES, THE EUROPEAN COMMUNITY AND SWITZERLAND 112–20 (Univ. Press, Fribourg Switz. 1991).

[25] Some have questioned current implementation of the theory of comparative advantages, especially in the world agricultural trade arena. *See generally* Carmen

shows that the least-developed countries (LDCs) and the developing countries do not catch up with the developing speed of developed countries.[26] Accordingly, the majority of wealth arising from international economic exchanges goes into the pockets of the developed countries. Comparatively, developing countries do not make substantial progress economically but rather lag behind. The situation is essentially parallel to the exploitation of developing countries by developed ones.

In this sense, it is doubtful that operation of the theoretic hypothesis will lead to the expected result. The theoretically appealing principle may be practically discouraging. This means the sound and perfect blueprint planned by the WTO is not a guaranteed result. The so-called equal opportunities ultimately are not equally available to every individual country for the sake of differentiation in their grasping capacity. Therefore, there is a strong justification for taking international human rights into consideration for the WTO adjustment.

B. Development of Practice: Urgency for Rational Usage

The question regarding the necessity to build and maintain the relationship between international human rights elements and the

---

G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 BERKELEY LA RAZA L.J. 65 (2006) (employing "insights from neoclassical and heterodox economics to critique the theory of comparative advantage as applied to the agricultural sector by certain proponents of the neoliberal economic model"). Even, concerning low labor standards, it has long been blamed as one of those few comparative advantages achieved by developing countries. Though generally acknowledging that core labor standards can affect comparative advantage in unskilled labor-intensive goods, the author also discovers that it may be empirically true for forced and child labor but not exact in situations regarding discrimination against females and strong union rights. *See generally* Matthias Busse, *Do Labor Standards Affect Comparative Advantage in Developing Countries?* 30 WORLD DEV. 11, 1921–32 (2002).

[26] One major reason why LDCs and developing countries cannot boom through the WTO is that their capacity restrains their participation and their access to the WTO mechanism. No matter how deliberately the blueprint is designed and modified, it is inadequate. *See, e.g.*, Aileen Kwa, *WTO and Developing Countries*, 3 Foreign Pol'y in Focus 37, 37 (1998), *available at* http://www.fpif.org/pdf/vol3/37ifwto.pdf (last visited Mar. 14, 2009) (numerating reasons why developing countries have little power within the WTO framework). In addition, though developing countries overall achieved an increase in market share regarding agricultural exports (actually 2.3% in 5years is impressive), the WTO has to admit that some individual countries even see their agricultural trade balance deteriorate. World Trade Organization, *Developing Countries*, *available at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd14_devopcount_e.htm (last visited Mar. 14, 2009). Moreover, by continuously broadening the adjusting scope of the WTO regime, those few comparative advantages of developing countries are offset by their disadvantages in new areas like IPRs.

WTO way of thinking could certainly attract an array of distinct arguments. Some may deem international human rights consideration as a fresh breeze into the longstanding WTO framework. Moreover, the warm caring for human rights has the capacity to alleviate the cold blooded nature of capitalism. For example, members of the WTO once discussed abandoning threats of sanctions against countries trying to obtain medicines for health emergencies such as HIV/AIDS, mainly by allowing them exceptions to patent rules as regulated by the TRIPS Agreement for cases involving a national emergency or where a product will have non-commercial uses.[27]

On the other side, human rights are, time and again, employed by developed countries as excuses for new protectionism in various manners[28]or intervening political powers to escape the obligations under the WTO.[29] Additionally, there are doubts about making the WTO a backbone or juncture and the suitableness of the WTO to act as an all-round persona. No matter if a country prefers it or not, non-trade elements are gradually infiltrating the WTO regime. Members are aware of the emerging influence of international human rights. In this sense, the conundrum has already shifted from the question whether we should incorporate human rights thinking into the WTO regime to what are correct and appropriate ways of incorporating so as to avoid new protectionism.

Considering that remaining a pure international trade regime is impossible, it is urgent to answer the question of under what circumstances should we utilize human rights values and how much further should we carry out the incorporation of human rights. Human rights values should be an effective measure to alleviate and adjust the negative result of incomplete and distorted performance of liberal trade in form.

C. Emergence of Possibility: Achievements Already Gained

Theoretically, whether the WTO's approach is human-rights based may still be a controversial issue.[30] However, development of WTO regulations and international trade practices, to some degree,

---

[27] *Statement of the Joint United Nations Programme on HIV/AIDS (UNAIDS) at the Third WTO Ministerial Conference*, at 2 (Seattle, Nov. 30 – Dec. 3, 1999).

[28] Petersmann, *supra* note 24, at 100–12 (offering the characteristics of the new protectionism).

[29] Breining-Kaufmann, *supra* note 2, at 234 (stating that WTO members are reluctant to embrace a human rights approach to trade issues generally and then giving an example of China to illustrate human rights approaches' nature of superpower hegemony to third world countries).

[30] *See generally*, Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002).

overcomes technical problems concerning the possibility of carrying out human rights reasoning under the WTO and hence places the 'ought to' issue in a more insignificant position.

1. Changing of Beneficiaries and Objects under Adjustment

There are individuals who jointly participate in the transactional trade,[31] such as international service supply and international licensing trade. Accordingly, individuals indirectly share free trade profits.

More importantly, individuals even become direct beneficiaries of personal rights under the WTO regime. Illustratively, personal rights find its place in the TRIPS Agreement[32] and the GATS expresses concerns for individuals in some circumstances.[33] With regard to protection of intellectual property rights (IPRs), the TRIPS Agreement stipulates that any advantage, favor, privilege or immunity granted by a Member to its citizens shall be accorded immediately and unconditionally to those citizens of other Members.[34] In the GATS, besides services *per se*, service suppliers are granted rights as well.[35] Compared with GATT 1947, the areas concerning IPRs, trade in services and trade-related investment measures are all new to the WTO framework. Therefore, we can say that the WTO has already made progress by striving to secure tenure of properties and therefore show-

---

[31] In the author's opinion, compared to the participation of transactional corporations, the portion of individual actors in the international trade market is still restrained. The WTO regime is originally made for economic benefits of *each and every state* (emphasis added). Hardly can individuals truly and directly taste the fruit of international human rights' care. As there are only a minority of individuals in international goods dealings (c.f. GATT 1947, which centers on goods, is more concerned about goods' flowing and merely affords indirectly rights to merchants). And also, a host of companies take part in areas like intellectual property rights (IPRs) and service dealings. For instance, transactional corporations have a great deal of money and labor in exploiting new products with IPRs, like drugs to cure diseases and agricultural implements necessary for farming. Also, service companies play a major role in the service market. Accordingly, step by step, individuals lost their independent status in the whole international trade market, and gradually become members in the transactional corporations. As a majority of them come from developed countries, the question is turned into one regarding the competition between the North and South.

[32] The reason to say so is because IPRs are deemed as private rights. *See* TRIPS Agreement, *supra* note 5, preamble. From my perspective, the TRIPS Agreement is special for the sake that it actually concerns more about private rights, unlike the goods-focusing attitude of the GATT 1947.

[33] *See, e.g.* GATS, *supra* note 5, Art. XIV (c)(ii).

[34] TRIPS Agreement, *supra* note 5, Art. 3.1.

[35] GATS, *supra* note 5, Art. 2.1.

ing care for human rights and respect for dignity of IPRs owners, service suppliers and investors.

2. Devices Established concerning Caring for Fairness in Result

A set of principles has been established and made available for each and every Member to achieve fairness. In the preamble of the WTO Agreement, it explicitly sets the objective to "raise standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand," which remains identical with GATT 1947 in literature.[36] More importantly, to ensure 'sustainable development' the WTO adds, "*in a manner consistent with their respective needs and concerns at different levels of economic development* (emphasis added)."[37] It is a manifestation of the respective necessity of development of each state under the WTO regime. In this sense, the principles above respectively may have a international human rights base, such as the enjoyment of an adequate standard of living and just and favorable working conditions.

Compared with the preamble of GATT 1947, nearly all the statements in the WTO preamble remain exactly the same. There is one exception. The WTO preamble saves a whole paragraph declaring promotion of economic development of developing countries, especially including caring for LDCs.[38] Actually, concerns for developing countries are deliberately complemented and underscored throughout the whole WTO regime: not only in the preamble of the WTO Agreement but also in preambles of other covered agreements and even in special arrangements.[39] Since the WTO regime is formed on bilateral negotiations among states and therefore more state-centered than individual-

---

[36] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, pmbl, Apr. 15, 1994, 33 I.L.M. 1125, 1144 (1994) [hereinafter Final Act].

[37] *Id.*

[38] The preamble states: "Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." Final Act, *supra* note 36, preamble. On the other side, economic development is another major difference between GATT 1947 and the WTO, which is not within the subject of this paper. It is about protection for sustainable development and optimal use of resources in manners consistent with concerns at different levels.

[39] For instance, the preamble of the TRIPS Agreement states: "Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base". TRIPS Agreement, *supra* note 5, pmbl.

centered, it is suitable to view this principle as a reflection of human rights development.[40]

On one side, we cannot overestimate the function of preambles under the WTO regime. It is agreed that the general meaning of terms in the treaty should be interpreted in context and in accordance with the objective and purpose;[41] preambles and annexes are included in the context,[42] which in turn mirror the objective and purpose as elements to determine the ordinary meaning of a treaty.[43] Although the objective way of interpretation is excessively and improperly utilized once in the international adjudicating practice,[44] the purpose has never been an element in the first place to be taken into account by WTO panels and the Appellate Body (AB).[45] Considering the WTO adjudicating bodies' rule-oriented attitude, we have to regretfully admit that most of the time the preamble only serves as a goal to realize and a guideline for future negotiations and endeavors.

On the other side, since a majority of third world countries won their independence and withdrew their support by the 1990s, they, in union, represent a strong force to claim and fight for their national rights. Generally, they have collective desire both in politics and economics as a majority of Members in the WTO are developing countries. Accordingly, the strong voice for development and complete participation in multilateral liberalization of trade and globalization has been active. Further, although the WTO is sometimes blamed by some commentators for bringing along nothing but poverty and exploitation to developing countries, the WTO has truly paid increasing attention to developmental issues. It realizes that developing countries and LDCs

---

[40] Robert D. Anderson & Hannu Wager, *Human Rights, Development and the WTO: the Cases of Intellectual Property and Competition Policy*, 9 J. INT'L ECON. L. 707, 708 (2006) (arguing that rules of multilateral trading system are "a necessary response to the dilemmas of globalization and contribute to, rather than hinder, the fulfillment of human rights" and play an important role as "tools of development and, therefore, instruments for the advancement of human rights"). At the same time, I also recognize the existence of human rights concerns for individuals in the TRIPS Agreement. *See* TRIPS Agreement, *supra* note 5.

[41] Vienna Convention on the Law of Treaties [hereinafter VCLT] (May 23, 1969), art. 31.1, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited Mar. 14, 2009).

[42] *Id.* art. 31.2.

[43] *Id.* art. 31.1.

[44] GYÖRGY HARASZTI, SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES 113–15 (Akadémiai Kiadó Budapest, 1973).

[45] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 11 n.20 (Oct. 4, 1996) (stating that "the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation").

are more vulnerable to the negative effect of globalization,[46] and in various scenarios it emphasizes time and again that the issue of developing countries has and will still be one of the apparent characteristics in the WTO arena.[47] In conclusion, we should admit that the WTO regime is keeping an eye on the remainder of haunting poverty and diseases in developing countries, stepping much deeper into human rights than its antecedent, the GATT.

IV. MEASURES TO TAKE HUMAN RIGHTS INTO CONSIDERATION

It is generally accepted that the WTO regime is part of the corpus of international public law, though it mainly deals with issues arising from international business.[48] Therefore, the WTO regime should be put into the system of international laws as a whole.[49] In this sense, it seems that establishing the relationship between the WTO and international human rights is hopeful.

Centering on the WTO regime, the current international human rights rules can be related to the WTO in two measures: one is through indication from clauses or terms or standards in the WTO on the basis of interpretation by WTO adjudicating bodies or the Dispute Settlement Body (DSB); the other way is derived from the situation where the same country assumes conflicting responsibilities and rights. Each channel should be explored in a cautious manner.

A. Linkage Indicators and Interpretation Issues

The WTO regime is not an isolated or enclosed system, but one that reaches out to the whole of international public law. In this

---

[46] World Trade Organization, Ministerial Declaration of 14 Nov. 2001 WT/MIN(01)/DEC/1, 41 I.L.M. 746 ¶ 3 (2002), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf (recognizing the particular vulnerability of LDCs).

[47] *Id.* (expressly declaring its commitment to address "the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system [especially to] secure beneficial and meaningful integration into the multilateral trading system and the global economy").

[48] Actually, the word 'public' is not a synonym of politics; and the traditional scope of international law focusing on national affairs has been amended and extended to a broader arena such as transactional trade here.

[49] *See e.g.*, *The Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, [2006] U.N. Doc. A/61/10, *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf. Since International Law Commission (ILC) documents are often quoted by WTO's adjudicating bodies in their reports, their importance is beyond doubt.

sense, the relationship between the WTO and international human rights is not imaginative or artificially created, but realistically rooted in agreements. To be specific, one should find the 'linkage indicators' to establish the relationship with international human rights. The indicators may be a term, a rule, or any clause in WTO agreements that refers to or directs to international human rights rules or values.

By means of interpretation, those ambiguous norms and standards in the WTO can in this way be clarified to form a stable and concrete platform for taking international human rights into consideration. The indicators accordingly provide clues to specific international human rights rules or to considerations of general international human rights values. The human rights rules and principles referred to are not part of the WTO regime but something outside of it. Viewed from another way, international human rights rules and standards containing value considerations are *de facto* employed to assist the interpretation of those general and ambiguous regulations in the WTO. Therefore, the issue can finally be transformed into a matter of interpretation under the WTO regime.

1. Conceptual Indicators and International Human Rights Rules

Conceptual indicators refer to exceptional rules under the WTO regime. The exceptional rules exist throughout WTO agreements, including 'generally exceptions,' and a multitude of other categories of exceptional rules that may also take human rights into consideration.[50]

---

[50] These exceptions may or may not use the word "exception" in their description. In substance they are indeed exceptions to certain obligations under the WTO regime. For example, as to Article XI: 2(a) ("General Elimination of Quantitative Restrictions") of GATT 1947, export prohibitions or restrictions temporarily are permitted to "prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party", GATT, *supra* note 5 art. 2(a), which may be in indirect relationship with the article 11.1 ICESCR as to rights of "an adequate standard of living for himself and his family, including adequate food". ICESCR, *supra* note 6, art. 11.1. Also, Article 27.2 ("Patentable Subject Matter") excludes inventions from patentability as long as such exclusion is "necessary to protect *ordre public* or morality, including to protect Human . . . life or health." GATT, *supra* note 5, art. 27.2. In addition, some scholars also acknowledge the uncertainty for connections through exceptions. *See* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 789 n.115 (2002) (stating, "[c]an the interpretation of GATT Article XXI(b)(iii) 'emergency in international relations' remain impermeable to the evolution of the concept of 'threat to peace and security' in general international law authorizing the use of force and other Chapter VII measures by the Security Council and individual states when faced with a crisis and massive violations of human rights taking place entirely in another state?").

The conceptual indicators are shown as follows:[51] (i) necessary to protect public morals or to maintain public order;[52] and (ii) necessary to protect human life or health.[53] Generally speaking, to establish the relationship with international human rights is to determine the meaning of these indicators at first and to find out which kind of international human rights norms can subsequently be employed for interpreting these indicators. As we will see below, the relationship established on account of these indicators still requires examination and there is an array of issues.

Above all, reflected from numerations above, WTO provisions use terms with ambiguous meanings. If the meaning of those indicators cannot be accurately determined, any suspicious international human rights rules can arguably or even arbitrarily be included or excluded. Take the *US - Gambling and Betting* case for instance (the

---

[51] Numeration of general exceptions is not definite, since there are certainly other specific links to human rights concerns, whose meaning does not require much discussion. *See* High Commission for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, HR/PUB/05/5, at 4 (2005), *available at* http://www.ohchr.org/Documents/Publications/WTOen.pdf (last visited Mar. 14, 2009) (stating that "[t]hree of the general exceptions could be applicable to a broader range of human rights concerns," while "others are so closely linked to specific human rights that there is little reason to discuss their content in detail"); *see generally, id.* at 4 n.21 (discussing various other human rights documents).

[52] Article XIV (b) of the GATS, GATS, *supra* note 5, art. 14(b), is similar to clause (a) of Article XX of the GATT, GATT, *supra* note 5, art. 20, titled 'General Exceptions', in spite of adding the exception to maintain public order. Public morals are not clearly referred to as human rights in ICCPR, but seemingly as another different consideration restricting certain types of human rights. *See* Larry Ogalthorpe Gostin & Zita Lazzarini, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 6 (Oxford Univ. Press 1997). Even so, considering the general meaning of two terms, an abundance of scholars argue that "internationally recognized human rights articulate elements of international public morality and come within the ordinary meaning of 'public morals'" and therefore "conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept." *See* Robert Howse, *Back to Court after Shrimp/Turtle? Almost But Not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences*, 18 AM. U. INT'L L. REV. 1333, 1368 (2003); *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, *supra* note 51, at n. 24. This same logic can be applied to "public order".

[53] GATT, *supra* note 5, art. XX(b); GATS, *supra* note 5, art. XIV(b) (the former two have exactly the same expressions).

first case regarding interpretation of 'public moral or public order').[54] The panel found the notion of "public moral and public order" in the Shorter Oxford English Dictionary 2002,[55] together with reading footnote 5 clarified by the drafters of the GATS,[56] which were finally confirmed by the appellate body.[57] Depending on the panel's reliance on the supplementary means of interpretation,[58] we could draw a conclusion that public moral or/and public order is/are unspecified still.[59] Even worse, "public moral" is not deemed as an established concept in international law.[60] In conclusion, the meaning of general exceptions in the WTO is far away from definite and stable, which leaves space for evolution. It should be gradually specified and clarified by WTO adjudicating bodies and the DSB. Otherwise, related international human rights norms will stay uncertain depending on the expanded or limited content of the indicators.

Furthermore, setting aside the meaning of indicators, the question about which types of international human rights rules are legitimately available in the waiting list is also under heated dispute. Can international human rights rules coming into existence long after the WTO establishment be employed as an interpreting device or meaning-determiner of those indicators? Can international human rights rules involving limited or different parties be utilized to interpret WTO agreements that have a much wider scope of memberships?

The first question actually concerns whether there are temporal requirements as to applicable rules outside the WTO regime for interpretation of WTO rules. To be specific, some may doubt whether it is suitable to employ *lex posterior* as a supportive interpretation of *lex prior*, since it could be detrimental to legislative intentions of *lex prior* established before. Article 31(3)(c) of the VCLT does not provide any restriction concerning the temporal element of applicable rules

---

[54] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* [hereinafter US-Gambling and Betting], Appellate Body Report, WT/DS285/AB/R (Apr. 7, 2005).

[55] *US-Gambling and Betting*, Panel Report, WT/DS285/R, at 237 n. 906 & 907 (Nov. 10, 2004). It could be deemed as a reference to the evolutionary meaning in the current file (2002).

[56] *Id.* at ¶ 6.467.

[57] US-Gambling and Betting, Appellate Body Report, *supra* note 54, ¶ 296–99.

[58] *US-Gambling and Betting*, Panel Report, *supra* note 55, ¶ 6.470–6.473.

[59] It should be read with VCLT 32: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:(a) leaves the meaning ambiguous or obscure;. . ." *See* VCLT, *supra* note 41, art. 32.

[60] Breining-Kaufmann, *supra* note 2, at 107.

outside the WTO law for interpretation.[61] However, its original text mentioned "rules of international law in force at the time of conclusion of the treaty."[62] That means, as it was drafted, the provision only allowed for reference to rules of the international law that existed at the time of conclusion.[63] On the other side, the International Court of Justice (ICJ) itself has changed its attitude in its 1966 draft[64] and also makes some evolutionary interpretations when confronting specific cases.[65] As for the WTO practice, in *US - Shrimp* case, the appellate body perceived the generic term "natural resources" as "by definition, evolutionary" rather than "'static' in its content or reference."[66] All the above examples clearly show conflicts between the contemporaneous principle and evolutionary approach when conducting treaty interpretation. Then, the question will arise as to which will be the most suitable methodology for interpretation of the specific WTO provision that may lead to connection with human right norms. From my perspective, there is no explicit inhibition of abandoning the temporal rule. Availability of *lex posterior* is normally indicated by the general principle as to interpret the term in good faith.[67] In other words, rele-

---

[61] *See* VCLT, supra *note* 41, art. 31(3)(c) (stating "any relevant rules of international law applicable in the relations between the parties").

[62] *See* Waldock Report III, art. 70.1(b) *quoted in* CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW, *supra* note 13, at 264 n.76.

[63] Paragraph 1 of the text provisionally adopted in 1964 stated that the ordinary meaning given to terms of a treaty is to be determined "in the light of the general rules of international law in force at the time of its conclusion." *See Commentary on 27(16), section 3: Interpretation of treaties, Draft Articles on the Law of Treaties with commentaries* 1966 Y.B. INT'L LAW 222 (1966).

[64] Paragraph 3(c) of the 1966 draft, which is same with current VCLT, reads: "any relevant rules of international law applicable in the relations between the parties." VCLT, *supra* note 41, art. 3(c). Actually in the preparation of VCLT itself, it was realized that "the content of a word, e.g. 'bay' or 'territorial waters,' may change with the evolution of law if the parties used it in the treaty as a general concept and not as a word of fixed content." PAUWELYN, *supra* note 13, at 266.

[65] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276,* ICJ Advisory Opinion, at 31 (June 21, 1971) (stating that where concepts embodied in a treaty are "by definition evolutionary," their "interpretation cannot remain unaffected by the subsequent development of law . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.") *See also Aegean Sea Continental Shelf Case (Greece v. Turkey)*, ICJ Judgment, at 3 (Dec. 19, 1978).

[66] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* [hereinafter *U.S. - Shrimp*], Appellate Body Report, WT/DS58/AB/R, ¶ 130 (Oct. 12, 1998).

[67] *See Commentary*, *supra* note 63.

vance of rules of international law for interpretation of treaties in any given case was ultimately dependent on the intention of the parties.[68] Specifically, some norms of the WTO were "actually crafted more than 50 years ago", which "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations" about the protection and conservation of human rights.[69] It is, therefore, even rational to assume these terms are originally intended by the drafters to be open and general in meanings. Interpreting WTO rules thus seemingly should not be too restrained by temporal requirements.

As for the second question, it is about whether there are membership requirements as to applicable rules outside the WTO regime for interpretation of WTO rules. Some may oppugn the appropriateness to employ the rules drafted by parties other than members of the WTO to interpret WTO rules, since it could be seemingly absurd to invoke intentions of say nation A, B and C to speculate intentions of nation A, D, E and F. However, the VCLT Article 31(3)(c) does not settle down the specific scope of the parties, between whom relevant rules could be applicable in interpretation. From my perspective, the strict interpretation of the treaty among all Members of the WTO seems unfavorable. Actually, few international treaties have exactly the same or even identical membership, let alone the WTO, considering the expanding tendency of WTO's Member numbers accompanying the trend of globalization.[70] In addition, the WTO even accepts non-sovereignty members.[71] The issue of membership is a crucial point to interpretation, since it is closely pertinent to the central issue of to what extent international human rights norms could be utilized as supportive instruments for WTO interpretation (i.e. refreshing WTO norms via human rights concerns). However, practices of WTO adjudicating bodies seem not to coincide on this matter.[72] In conclusion, it may still be uncertain exactly how intimate international human rights relate to WTO rules.

In sum, since a host of terms under the WTO regime are often ambiguous and unspecified, and there is still no case regarding human rights consideration through interpretation of exceptions, it is really

---

[68] *Id.*

[69] *U.S. - Shrimp*, *supra* note 66, ¶ 129.

[70] When Cape Verde joined the WTO on July 23, 2008, the organization's membership rose to 153. WTO.org, 2008 News Items, http://www.wto.org/english/news_e/news08_e/acc_capverde_july08_e.htm (last visited Mar. 15, 2009).

[71] *See* Marceau, *supra* note 50, at 783–84.

[72] In *U.S. - Shrimp*, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and other multilateral environmental agreements which did not have the same membership as WTO were employed as means for interpreting the term "exhaustible natural resources". *U.S.-Shrimp*, *supra* note 66, at 8, 19, & 37.

tough to tell exactly how much leeway is left for international human rights to be considered in the WTO regime. Some scholars and commentators hold rather optimistic views.[73] According to them, since exceptions evolve with time proceeding and no contrasting evidences in practice show repellence to international human rights invasion, we can gradually introduce human rights in a flexible way.

2. *Standard Indicators and International Human Rights Values*

There are also standard indicators under the WTO regime, specifically in the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures Agreement (SPS Agreement).[74] Standard indicators exist since rules of the WTO prescribe that the sanitary, phytosanitary and technical measures of Members will be examined for compliance with standards made by other international organizations. Though international standards may not be part of international human rights law,[75] the WTO's relationship with international human rights can still objectively exist. In fact, the SPS and TBT Agreement underscore obeying international standards, which accord-

---

[73] *See generally, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, *supra* note 51, at 9 (stating that, "[T]he term 'public morals' could arguably include human rights (recognized in international human rights treaties with broad membership and reflecting fundamental values) within its scope.").

[74] *See, e.g.*, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A, ¶ 3, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement] (explicitly referring to food safety, standards, guidelines and recommendations established by the Codex Alimentarius Commission (CAC), that of animal health by the International Office of Epizootics (IOE) and that of plant health by the International Plant Protection Convention (IPPC)); *see also* Panel Report, *European Communities - Trade Description of Sardines*, ¶ 7.63, WT/DS231/R (May 29, 2002) [hereinafter *EC - Sardines*] ("[I]nternational standards are standards that are developed by international bodies."). The TBT Agreement has a wider range of standards to refer to than the SPS Agreement.

[75] Agreement on Technical Barriers to Trade, Annex 1:2, 33 I.L.M. 1125 (1994) [hereinafter TBT Agreement] *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf. The standards denote to some documents with which compliance is not mandatory. However, most of international human rights existing and followed by are compulsory in the treaty form and usually legally binding (though some exceptions exist, as UDHR is more like declaration or gentleman agreement without compulsory effect). Factually, the WTO regime has in the end turned standards into legally binding in force since the TBT agreement conformity is presumed once compliance with international standards is achieved. *Id.* at art. 2.5.

ingly serves to protect human health and other important values.[76] In this way, the adoption of standards indirectly involves human rights consideration and determination of standard level concerns with balance between human rights protection and free trade.[77] Indeed, human rights considerations appear to have already been utilized as legitimacy for higher standards of protection in the SPS and TBT agreement.[78]

Conceptual indicators refer to international human rights which will exempt trade responsibilities of a country. In this sense, international human rights and trade responsibilities rules play reversed roles. However, in the situation regarding standard indicators, specific standards applied are legitimatized by international human rights considerations. That is to say, the stronger the desire for international human rights values is, the more severe trade obligations will be. In this way, international human rights values and trade responsibilities rules function in the same direction.

At this circumstance, because of financial difficulties and backward techniques, the higher standards and accompanying human rights legitimacy are always proclaimed by developed countries against developing ones.[79] Therefore, the international community is

---

[76] *See* SPS Agreement, *supra* note 74, at art. 2.2 ("Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health . . . ."); *see also* Alan O. Sykes, *Regulatory Competition or Regulatory Harmonization? A Silly Question?* 3 J. INT'L ECON. L. 257, 257–64 (2000) (discussing avoidance of rent-seeking behavior from domestic law lobbies to guarantee a certain degree of cooperation).

[77] Robert Howse & Makau Mutua, *Protecting Human Rights In A Global Economy: Challenges For The World Trade Organization*, RTS. & DEMOCRACY, Jan. 2000, at 20, *available at* http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html (last visited Mar. 15, 2009) (narrating opinions by some trade experts that there is a balancing or proportionality test under the SPS and TBT Agreements and additionally purports that WTO adjudicating bodies seem to "prefer an interpretative approach which recognizes that the social responsibilities of governments should not be lightly interfered with by trade law").

[78] For instance, the Hormones case seems to support the view that "threshold should not be set in a way that frustrates the ability of governments to meet their responsibilities to protect their citizens." *Id.* It allows for a higher level of protection based on divergent view of scientific opinion; and such views are especially supported if "where the risk involved is life threatening in character and is perceived to constitute a clear and imminent threat to public health and safety." *See* Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 194, WT/DS26/AB/R, WT/DS48/AB/R (Jan.16, 1998).

[79] *See e.g.*, Pengcheng GAO, *China, the U.S., and the Food Safety under the WTO Regime*, 17 INT'L TRADE L.J. 13–30 (2008) (showing that the U.S. as a developed country racks its brains to find a legitimate stand under the WTO to accuse lower

more concerned about whether human rights considerations are abused, since human rights level cannot be arbitrarily lifted. Otherwise, it will finally undermine free trade and therefore harm economic rights of developing countries.

Since there is a legal presumption on the function of international standards against any claim for deviation from WTO obligations and WTO adjudicating bodies refuse to give any consideration of transparency, due process and other procedure qualities of international standards,[80] the WTO's heavy reliance on international standards is quite worrisome. Actually, we cannot really tell how a non-governmental body makes standards.[81] Compared with the WTO, other international organizations may consist of fewer members or even be dominated by one or a minority of nations. There is reasonable doubt as to whether standards will or will not turn out to be voices of only a few states.

Further, it seems unreasonable considering that WTO members may not be parties of those non-governmental bodies but they can or must follow international standards. Although in some circumstances international standards in the SPS Agreement may not be the only enforceable standards and the last resort,[82] one still cannot deny that reliance on the non-governmental bodies is too heavy. In conclusion, standard indicators may be dangerous conductions under the slogan of international human rights consideration and are inclined to become a disguise for hegemony, since bars of standards could be raised to an unforeseeable level and impose excessively harsh restrictions under the WTO regime.

---

standards; while China as a developing country notices its lag in food science and technology and strives to resolve the problem).

[80] *Human Rights in the WTO Dispute Settlement*, in HUM. RTS. & INT'L TRADE, *supra* note 2, at 227.

[81] *Compare* TBT Agreement, *supra* note 75, at Annex 1:4 (defining "international body or system" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members", which includes inter-governmental or semi-private bodies), *with* TBT Agreement, supra note 75, at Annex 1:8 (defining "non-governmental body" as a "[b]ody other than a central government body or a local government body, including a nongovernmental body which has legal power to enforce a technical regulation.").

[82] *See* SPS Agreement, *supra* note 74, art. 3.1 ("Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, *except as otherwise provided for in this Agreement, and in particular in paragraph 3.*" (emphasis added)); *see also* MISUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 507–08 (Oxford Univ. Press 2006).

3. Incorporation of International Human Rights Considerations and Interpretation by the DSB

As seen from aforementioned analyses, indicators are either ambiguous as conceptual indicators or general as standard ones. The process to incorporate international human rights considerations is to apply rules or values in this realm to assist understanding WTO rules. Deep down, this is about interpreting WTO rules and it should be carried out by the authoritative and entitled organs other than individual countries.

Since "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system",[83] and it serves to "clarify the existing provisions of those agreements in accordance with *customary rules of interpretation of public international law*",[84] WTO adjudicating bodies therefore should take responsibilities and are therefore entitled to interpret. And because the VCLT presents itself as the most effective, authoritative methodology, containing binding norms concerning relevant treaty issues,[85] it could be deemed as matching the standard regarding "customary rules of interpretation of public international law," and used as a major tool for interpretation.

As for interpretation, not only adjudicating bodies and the DSB, but also the Ministerial Conference and the General Council of the WTO should have the exclusive authority to interpret. However, adopting interpretations of the WTO Agreement and the Multilateral Trade Agreements requires a three-fourths majority of Members,[86] rendering it difficult to adopt an interpretation. Interpretation by the

---

[83] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uraguay Round, 33 I.L.M. 1125, at art. 3.2 (1994) [hereinafter DSU], *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

[84] *Id.* (emphasis added). This is always deemed as manifestation of openness of the WTO regime or of being a part of the international public law. *See Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, *supra* note 51 (even deeming it as "mandated"); *see also* Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *U.S. – Gasoline*] (stating that the WTO law cannot be read in "clinical isolation from public international law").

[85] *See* VCLT, *supra* note 41. The VCLT is the codification of international customary in the form of treaty law, it is commonly accepted by the whole international community, and it is universally followed in the practice of various international actors, including the dispute settlement procedure of the DSB.

[86] *See* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, art. IX:2 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf; *see also* THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND

DSB is more time wise and could satisfy practical needs. Therefore, most interpretive work falls on shoulders of the DSB.

In the scenarios of interpretation, the DSB can determine what exactly is contained in the agreement, but cannot add or diminish rights and obligations provided in covered agreements.[87] That means the relationship between the WTO and international human rights is not imaginative or artificially created, but should be realistically rooted in the agreements.

It is taken for granted that the DSB should clarify the norms in accordance with its general meaning and context. Yet we cannot draw a conclusion that the meaning of WTO norms in the WTO is fixed and settled. Although the DSB has to conform to the norms and "cannot add to or diminish the rights and obligations provided in the covered agreements," all states, whether under common or civil law systems, exercise the same discretion as under the WTO regime.[88] Justice is not a zero-sum game. Since norms themselves inevitably and inherently may have weaknesses like ambiguity, limited scope and outdated regulations, such situations offer the DSB space to expand. Accordingly, the relationship with international law needs to be examined and adjusted, time and again, in order to reach a point of balance.

B. The WTO and International Human Rights Rules in Conflict

Even though there is no indication in the WTO regime, international human rights rules and principles may still have a relationship with WTO rules. This is often apparent when examining conflicts of norms.[89]

Strictly speaking, normative conflicts over when norms are "both valid and applicable point to incompatible decisions so that a choice must be made between them."[90] Considering this, even if there is no indicator under the WTO regime pointing to international human rights elements, there can be situations where both international

---

POLICY, *supra* note 82, at 13–14 (providing a brief introduction to the procedure of amendments).

[87] DSU, *supra* note 83, art. 3.2, 19.2.

[88] *Id.* at 3.2.

[89] For instance, developing countries' policies are confined by their commitments under the Agreement on Agriculture (AoA) in order to reduce production and trade distorting while it may conflict with human rights advocated by human rights treaties as to the right to food. *See* Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUM. RTS. Q. 1, 30–32 (2002) (declaring that the AoA leads to poverty underlined by human rights treaties like ICESCR).

[90] *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra* note 49, at 1.

human rights and WTO rules impose rights and obligations on the same country, leading to incompatibility or even contradictions so that one country has to choose how to perform. This is different from a situation where the DSB refers to human rights obligations. In that case, where the DSB is interpreted with assistance from international human rights regulations and values, there is no real conflicts between the WTO and international human rights since the two will always be deemed and treated as harmonious and coherent.

In scenarios where the WTO and international human rights rules are in conflict, norms in the two areas await application. As stated by Professor Pauwelyn, there are no explicit conflict clauses in the WTO regime clarifying the mutual relationship between the WTO and international human rights.[91] The maxims *lex specialis derogat legi generali* (a superior law suppresses an inferior law) and *lex posterior derograt legi prior* (a later law overrules an earlier law) point to application of the prior law.[92] Correspondingly, these maxims have been enacted by Article 30 and 56 of the VCLT.[93]

Several questions may be set forth. First and foremost, will international human rights trump WTO rules most of the time? Because of their fundamental nature, international human rights norms seem to be easier to be regarded as *jus cogens*. *Jus cogens* are peremptory norms of general international law: legal force that can prevail over all other norms in the international legal system.[94] If international human rights norms are treated as *jus cogens*, they will become pervasive within the WTO regime and supersede WTO rules without having on other WTO provisions, the normative hierarchy determined by the guidance of the VCLT, or other rules addressing conflicts of norms.[95] At the same time, there is a risk of abusing international human rights. As the UN Charter is given priority over other agree-

---

[91] *See generally* PAUWELYN, *supra* note 13, at 327–439 (discussing the various conflicts which arise between different legal regimes).

[92] *See also* Michael Akehurst, *The Hierarchy of Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273 (1974–75).

[93] VCLT, *supra* note 41, arts. 30, 50. Article 30 of the VCLT is titled "Application of successive treaties relating to the same subject matter" and Article 59 is titled "Termination or suspension of the operation of a treaty implied by conclusion of a later treaty."

[94] VCLT, supra note 41, art. 53 (defining *jus cogens* as an "accepted and recognized by the international community of States as a whole" and its effect as "no derogation is permitted" and "can be modified only by a subsequent norm of general international law having the same character."); VCLT, *supra* note 41, art. 64 (contemplating the emergence of a new peremptory norm); *see also*, Robert Jennings & Arthur Watts, OPPENHEIM'S INTERNATIONAL LAW 8–9 (9th ed.1996).

[95] The underlying reason is because there is no customary practice in the WTO regime. For debates on this issue, *see* PAUWELYN, *supra* note 13, at 47–50.

ments in case of conflicts, human rights norms can be deemed as *jus cogens* as part of the UN Charter.[96] There may also be rules that are universally admitted but whose content the whole international community may not be able to reach a consensus on. No matter what standards are to determine *jus cogens* as international human rights principles, they must be specific and it would be better for the international community to establish some authoritative institutions other than the DSB to take charge of the issue.[97] Only in this way can the relationship between the WTO and human rights principles be well addressed to avoid the collapse of the rule of law under the WTO regime.

Secondly, countries today give preference to regional trade agreements (RTAs) or bilateral trade agreements (BTAs).[98] Because political forces are more influential on a bilateral or regional basis, in these situations, international human rights clauses are more likely to be included as preconditions for performance of trade obligations. At the same time, there are more possibilities that economic sanctions are used as punishment for failure to protect human rights. Since the WTO has recently pushed to liberalize RTAs and BTAs as part of the negotiations process, the number of such arrangements will increase. How are conflicts between these rules appropriately addressed? RTAs and BTAs practices may be legitimized by both the WTO and international human rights institutions. At the same time, express authorization may function as a façade for intervention with the other party's interior affairs or deliberate deviation from WTO obligations. Consequently, such authorization could be destructive to the rule-oriented WTO framework. On its face, the law may offend the parties' intent, being hard to determine, and substantially fall short of the "consent" element of a valid agreement. Accordingly, the party probably ought not follow the spirit requested by *pacta sunt servanda* (agreements must be kept) and *pacta dant legem contractui* (stipulations of parties constitute the law of the contract). In sum, these situations call for the DSB to adopt cautious methods in order to suitably cope with the relationship between the WTO and international human rights.

---

[96] U.N. Charter, *supra* note 6, art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

[97] Ruiz-Fabri, *Commentaire sur l'article 66 de la Convention de Vienne*, in Corten and Klein (eds), LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS DE 1969 ET 1986: COMMENTAIRE ARTICLE PAR ARTICLE (forthcoming); Cosnard, *Commentaires sur l'article 65 de la Convention de Vienne*, *id.* (quoted by Marceau, *supra* note 50, at 800–01).

[98] *See generally* Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39 (2006).

V. REFLECTION UPON THE ISSUE OF THE RELATIONSHIP AND GLOBALIZATION

A. *Jurisdictions of International Institutions and Their Cooperation*

Because of the sensitive nature of economic issues and the growing intrusiveness of trade rules, the relationship with international human rights is increasingly discussed under the WTO regime. Emphasizing the priority of human rights obligations can be legitimately useful to alleviate the adverse influence by the *ex parte* trade considerations. On the other hand, there is a risk that international human rights may be taken advantage of by trade protectionists.

From the perspective of the WTO, if a state attempts to defend international human rights obligations or benefits, the appropriate way is to leave the final deciding power in hands of the DSB. Because the DSB has compulsory jurisdictions upon issues relevant to the rights and responsibilities under the WTO regime, any disputes pertinent to the WTO rules should be under its control.[99] It acts as a quasi-judicative organ in the WTO framework, which distinguishes the WTO from a lot of other international institutions and guarantees the rule of law. In this forum, the issue concerning the relationship with international human rights values or rules can be objectively examined and its factual decision-making function can even expand the WTO rules if it finds necessary.[100]

However, from another perspective, most international human rights treaties respectively or collectively have tribunals and courts.[101]

---

[99] DSU, *supra* note 83, art. 23.1 (providing that "[w]hen members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreement or an impediment to the attainment of any objective of the covered agreements, they *shall* have recourse to, and abide by, the rules of procedures of this Understanding."); *see also* DSU, *supra* note 83, art. 23.2(a) ("[Members shall] not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreement has been impeded, *except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding . . ..*" (emphasis added)); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND INTERNATIONAL ECONOMIC RELATIONS 313 (2d ed. 1997); *United States - Section 301–303 of the Trade Act of 1947*, Panel Report, WT/DS152/R, 313 (Dec. 22, 1999).

[100] *See generally* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753 (2002) (analyzing how reconcilable and irreconcilable conflicts between a WTO provision and human rights law should be resolved by WTO adjudicating bodies and the DSB).

[101] Examples that could be named: United Human Rights Committee (HRC) which handles alleged violation of the ICCPR; the Convention on the Elimination of All Forms of Racial Discrimination Committees (CERD Committees) on the basis of CERD, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment Committees (CAT Committees) on the basis of CAT,

The jurisdictions of international or regional institutions are always explicit, because members often agree to bring their cases relevant to tribunals when signing agreements before real disputes occur. However, as opposed to the WTO, international or regional human rights tribunals commonly have non-exclusive jurisdictions.[102] Therefore, in these circumstances, members can still file their cases with the WTO. Interpretation of international human rights norms by a special human rights institution may not coincide with the WTO's interpretation in each instance and conflicts are likely to emerge.

Since effective rules for jurisdictional distribution and coordination have not been well established, it is imperative for concerned organizations or states to cooperate. Only in this way can consensus on the customary practices of jurisdictional coordination be gradually formed in the international community.

B. Handling the Relationship with the Rule of Law

As demonstrated by the analysis above, the relationship between international human rights and the WTO is not imaginary. Most situations stem from WTO's normative basis. Similarly, any incorporation of international human rights rules into the WTO regime or even conflicts between them should and could be addressed by strictly following general rules of public international law.[103]

However, we cannot deny that in the practice there are cases where one state *unilaterally* breaches an agreement for human rights' reasons. For example, a Member may refuse to perform its obligations under the WTO regime, although the excuse regarding international human rights duties is determined to be unreasonable by the DSB.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committees) on the basis of CEDAW, and Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC) on the basis of more specialized UN human rights procedures.

[102] Yuval Shany, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 195–200 (2003). *But see id.* at 188–91 (identifying the European Convention on Human Rights (ECHR) as an exception).

[103] The rule of law at the very beginning is a stern concept that is supposed to be carried out by people against governmental arbitrariness and irrationality. When first created, it was to mean that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land," which emphasizes the guarding role of the court. *See* A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 117 (1st ed. 1885). For a more specific discussion about proliferation of the rule of law on the international plane, *see* Simon Chesterman, *An International Rule of Law?* New York University Public Law and Legal Theory Working Papers (2008), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1070&context=nyu/plltwp (last visited Mar. 15, 2009).

These are abnormal situations, which reflect one traditional way of thinking, one that underlines the inviolability of state sovereignty.

There are an abundant number of cases under the WTO showing that one party may prefer to receive retaliation upon breach, because it may benefit more from breach of agreements than from the implementation of unfavorable decisions by the WTO panels, especially where the economic strength of the breaching party is far beyond that of its rivals.[104] For this reason, quelling hegemony can be difficult. Reforming the WTO and other international organizations has far to go.

Admittedly, the frequency of occurrence of unilateral activities has decreased. Represented by the WTO, international law, especially in the economic area, is regularly modified. With international organizations constantly reforming their rules, international law has been gradually supplemented and reinforced. We can no longer blame international law as useless "soft" law.

VI. CONCLUSION

Through in-depth analysis of the relationship between international human rights and the WTO, we find that seemingly disparate areas actually have manifold links. The connection could be explicitly rooted in and indicated by WTO rules. It can also arise because of conflict between the responsibilities and rights assumed by contracting parties. In the process of globalization, various matters are more likely to be intertwined.

Through establishment of international organizations, international rules have gradually become more binding. The theory of constitutionalism promoted recently by international institutions expedites the inclusion of international laws in domestic ones.[105] This is mirrored in the ascending status of judicial organs and their importance. Considering all the elements above, the belief in the rule of law

---

[104] Hu Wei, Editorial, *The Reconstruction of A Retaliation System Under WTO*, 9 INT. TRADE L. & REG. 31, 31–32 (2003).

[105] On the European Continent, earlier scholars like Hermann Mosler, Wilhelm Wengler and Christian Tomuschat lay the theoretical foundation for constitutionalism discussion. *See* Armin Von Bangdandy, *Law and Politics in the WTO: Strategy to Copy with a Deficient Relationship*, 5 Max Planck Yearbook of United Nations Law 609, 613 (2001). Later, students such as Armin Von Bangdady and Ernst-Ulrich Petersmann elaborate further on this topic and raise some more constructive ideas. Among them, Professor Petersmann believes in Multilevel Constitutionalism, which requires the constitutionalism both in international organizations (treaty constitutionalism) and in each country. *See* Ernst-Ulrich Petersmann, *The Change Structure of International Economic law*, Address at the Xiamen Academy of International Law (Sept. 2006) (on file with author).

is formed on the international plane. The relationship between WTO norms and international human rights values or rules should be rationally shaped by the rule of law and can only be soundly addressed in accordance with the rule of law in the context of globalization.