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THE GLOBAL MARKET AND HUMAN RIGHTS: TRADING AWAY THE HUMAN RIGHTS PRINCIPLE

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I. INTRODUCTION

The task set for this Article is to consider the impact which the globalization of markets may have on the effectiveness of international human rights law. But what is globalization? By comparison, the term "international human rights" is relatively easier to categorize,¹ and in this Article shall be used principally in the positive sense to denote the basic legal rights enumerated in the first twenty articles of the Universal

* Associate Professor, Florida State University College of Law. This Article is based on a paper delivered at Brooklyn Law School as part of a symposium entitled "The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets," November 5, 1998. The author would like to thank Sam Murumba for his invitation to participate in the symposium and for his enthusiastic support, and fellow panelists Mark Warner, Steve Charnovitz, and Jeffrey L. Dunoff for their helpful comments. The author also wishes to thank Paolo Annino for his thoughtful critique of the manuscript, as well as participants in the Florida State University Faculty Workshop Series and members of his International Legal Theory Seminar for their many contributions. The author gratefully acknowledges the excellent research assistance of Ani Majuni and Sandra Upegui. Research for this Article was supported by a grant from the Florida State University College of Law.

1. In saying this, I do not mean to suggest that the concept of international human rights is simple, uncontroversial, and has precise limits—that is far from the case. See generally Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOK. J. INT'L L. 689 (1998) (reviewing the concept, and asserting its oddness, political history and inconsistency); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982). Commentators have objected to the uncertain boundaries of the concept, as well as to inherent gender and culture biases. See, e.g., Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 607 (1984) (criticizing the "haphazard" expansion of the term); Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 88 (1993) (arguing that the concept of human rights rests on discredited public/private distinction); Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 305 (1987) (discussing European bias of basic human rights instruments). I mean only that it is relatively easier to have some assurance that we know what the term is referring to in discourse, at least when employed in a positive sense, in comparison to the term "globalization," as I discuss below. See *infra* note 4 and accompanying text.

Declaration of Human Rights.² Such rights include the right to life, liberty and the security of one's person; the right to freedom from slavery or servitude; the right to freedom from torture or cruel, inhuman or degrading treatment; the right to equality before the law; and the right to own property.³ But globalization? As many commentators have pointed out, "globalization" is a rather vague, "loose and overstretched" term which can be used to mean many things or, perhaps, nothing at all.⁴ And why think about the impact of *globalization*, in particular the globalization of *markets*, on human rights law, rather than the impact of some other international trend? Is it

2. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. I, 183d plen. mtg., U.N. Doc. A/810 (1948) [hereinafter UDHR]. An alternative list of "core" rights might consist, for example, of the rights listed in Section 702 of the Restatement. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986) (customary international law recognizes prohibitions against, *inter alia*, genocide, slavery, murder or disappearance of individuals, torture, prolonged arbitrary detention, and systematic racial discrimination). International human rights includes other rights, of course, such as those enumerated in the two U.N. covenants, often referred to as "second-generation" rights. These are set forth in and enforced through other instruments and mechanisms, such as regional human rights conventions, specialized tribunals, national courts, and state initiatives such as international diplomacy, and economic coercion.

The term "international human rights" can also be used in a normative sense to refer to the bundle of related concepts in moral and political theory used to justify positive legal rights, such as natural law, natural rights and moral rights. This Article shall endeavor in its use of the term to distinguish the positive law from its normative justification. *See infra* notes 74-82 and accompanying text. The term can also be used in a historical or sociological sense with reference to the post-war human rights movement, and in an aspirational sense as representing an ideal of human dignity protected through law. *See generally* Burns Weston, *Human Rights*, in 20 NEW ENCYCLOPAEDIA BRITANNICA (15th ed. 1993).

3. UDHR, *supra* note 2, arts. 3-5, 7, 17.

4. Rudolph Dolzer, *Global Environmental Issues: The Genuine Area of Globalization*, 7 J. TRANSNAT'L L. & POL'Y 157, 157 (1998) ("Behind the loose and overstretched notion of globalization are both quantitatively and qualitatively different phenomena in economic, cultural, and environmental international relations."). *See also* Alfred C. Aman, Jr., *Introduction*, 1 IND. J. GLOBAL LEGAL STUD. 1, 1 (1993); S. Tamer Cavusgil, *Globalization of Markets and its Impact on Domestic Institutions*, 1 IND. J. GLOBAL LEGAL STUD. 83, 84 (1993); Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 9-10 (1993); Miguel de la Madrid H., *National Sovereignty and Globalization*, 19 HOUS. J. INT'L L. 553, 555-60 (1997); Alberto Tita, *Globalization: A New Political and Economic Space Requiring Supranational Governance*, 32 J. WORLD TRADE 47 (1998). For a thorough review of the history and uses of the term, see Tahirih V. Lee, *Swallowing the Dragon? Some Directions for Research on Globalization Theory and Legal and Economic Restructuring in East Asia*, AM. J. COMP. L. (forthcoming 1999).

simply because we presume that "human rights," being in some non-trivial way about "human beings," are therefore likely to be influenced by any important change in human self-understanding and social activity, such as market globalization may represent? Or do we intuit that there is something particular about market globalization which leads us to suspect that it will have a unique and important impact on the effectiveness of human rights law, one that is worth examining carefully?

Taking the last question first, this Article begins with the premise that something unique and important with respect to human rights *is* in fact going on in the process of globalization, in particular when one distinguishes between the economic facts of market globalization and its regulatory infrastructure.⁵ While market globalization may represent in some aspects a unique opportunity for human rights law, the globalization of the market economy may also pose a threat to the continued effectiveness of human rights law, just as the rise of the market economy itself has been blamed for leading to conditions requiring the formal development of human rights law.⁶ The regulatory framework which international economic law provides for globalization operates according to a view of human nature, human values and moral decision-making fundamentally at odds with the view of human nature, human values and moral decision-making which underlies international human rights law. The human rights movement could thus find in market globalization the ultimate victory of a regulatory system that, by nature and operation, cannot properly take into account what the human rights movement holds most dear: that underlying positive human rights laws are moral

5. See *infra* notes 22-25 and accompanying text.

6. "Modern markets also created a whole new range of threats to human dignity and thus were one of the principal sources of the need and demand for human rights." JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 64 (1989). It may be, for example, that the globalization of markets erodes the social and normative preconditions for human rights protection, as well as for the market itself. Hausman & McPherson point out that core trade and economic values such as economic efficiency depend upon ethical values which paradoxically may be undermined by market economies. See Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671 (1993). Hausman & McPherson list honesty, trust and goodwill as three values critical to the efficient function of markets, which may in fact be undermined by appeals to rational self-interest, at least in certain forms. *Id.* at 673.

entitlements that ground moral, political, and legal claims of special force,⁷ claims which must be morally and legally prior to society and the state.⁸ They are "[u]nalienable."⁹ It is this inalienability and priority of human rights which this Article refers to as the "human rights principle" justifying international human rights law, and it is this principle which is at risk of being "traded away," if you will, when human rights laws and the claims and values they presuppose, come into conflict with trade law and trade values in the new tribunals of globalization, in particular the World Trade Organization's (WTO) dispute settlement mechanism.¹⁰

In proposing that the effects of market globalization on human rights law be analyzed as a normative conflict in WTO dispute resolution, I am suggesting that this sort of problem is in fact a problem of justice.¹¹ In other words, the legal and institutional mechanisms created to facilitate and respond to market globalization, and the legal and institutional mechanisms created to define and protect human rights, both involve

7. DONNELLY, *supra* note 6, at 9.

8. *Id.* at 70.

9. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

10. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 112 (1994) [hereinafter DSU]; See generally Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157 (1994) (reviewing the structure and function of the WTO dispute settlement process).

11. Globalization has a recognized normative aspect. See Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 431 (1997) ("globalization is an important source of common economic and political values for humanity"); Delbrück, *supra* note 4, at 11 (the term globalization itself is often used as a normative term, in that it presupposes a value judgement "that the common good is to be served by measures that are to be subsumed under the notion of globalization"). In particular, the conflicts which globalization can engender between trade law and other bodies of law, such as environmental law and labor law are inescapably normative. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 672-73, 680 (1996). On the applicability of normative theory to international relations, see CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 5 (1979); STANLEY HOFFMANN, *DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS* 1 (1981); Anthony D'Amato, *International Law and Rawls' Theory of Justice*, 5 DENV. J. INT'L L. & POL'Y 525, 525 (1975); Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT'L ECON. L. 391, 395-406 (1998); Alfred P. Rubin, *Political Theory and International Relations*, 47 U. CHI. L. REV. 403 (1980) (review of BEITZ 1979).

public order decisions as to the allocation of social benefits and burdens, and the correction of improper gain.¹² The fundamental normative goal of every such public order decision is justice, which is to say that such decisions are to be made in accordance with, and their outcomes must reflect, our basic moral and political principles.¹³

Considered broadly, globalization has the potential to promote broad, if not universal, international consensus on the basic principles of Western liberalism: free markets, democratic government, and human rights.¹⁴ However, within this broadly framed liberalism the various components can themselves come into conflict through the very process of globalization which brings them into the ascendant.¹⁵ Moreover, international problems of justice such as the market-globalization/human rights conflict present unique difficulties, in that they reflect a central feature, if not defect, of the international governance system, namely that the pursuit of global justice is splintered into a myriad of treaties and institutions, in this case into two distinct regimes, one concerned with economic justice and one with human dignity. Therefore, the inquiry into the effects of market globalization on human rights law becomes an inquiry into how the economic facts and regulatory infrastructure of globalization enhance, or interfere with, the contributions which international human rights law seeks to

12. This² is Aristotle's classic subdivision of Plato's general concept of justice as Right Order into its main constituent parts, which distinction continues in influence to the present day. See ARISTOTLE, *NICHOMACHEAN ETHICS*, bk. V., chs. 2, 4, in *INTRODUCTION TO ARISTOTLE* 400, 404-07 (Richard McKeon ed., 1947); Alan Ryan, *Introduction*, in *JUSTICE* 1, 9 (Alan Ryan ed., 1993) (citing the continuing influence of this categorization).

13. See Garcia, *supra* note 11, at 395-96.

14. See Seita, *supra* note 11, at 431.

15. Commentators recognize the inevitability of conflict between the various elements of a globalized liberalism, such as free markets and human rights. See, e.g., Seita, *supra* note 11, at 470 ("[T]he basic values that globalization spreads can sometimes be at odds with each other and with other important values."); Nichols, *supra* note 11, at 672-73 ("At any given point in time a society will possess more than one value. These values may, in fact, conflict with one another. Thus, it is possible for a country to hold a value of enhancing wealth through international trade and at the same time hold values that conflict with the precepts of free trade.") (footnotes omitted). Moreover, where a market is dominated by ethnic minorities, globalization may lead an anti-democratic and anti-market backlash by impoverished ethnic majorities, with disastrous human rights consequences. See generally Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *YALE L.J.* 1 (1998).

make towards the attainment of justice. The conflicts engendered by this bifurcation, particularly in view of the preeminence of international economic law,¹⁶ must be addressed in order that we may avoid undoing with the tools of economic liberal justice what we have accomplished with the tools of rights-based liberal justice.

After a brief discussion of globalization introducing a distinction between "transactional" and "regulatory" globalization and their differing impact on human rights, this Article turns in Part III to a discussion of the normative conflict underlying globalization/human rights disputes, which this Article characterizes as reflecting the conflict between consequentialist and deontological forms of moral decision-making and justification. This Article then turns to an analysis of the disposition of globalization/human rights disputes in the WTO, illustrating how the trade-oriented nature of such an institution, coupled with the underlying normative conflict in such disputes, work to disadvantage laws based on human rights claims in that forum. Finally, this Article offers some suggestions as to how WTO doctrine could be amended or interpreted so as to resolve trade-human rights disputes in a manner more in keeping with the human rights principle.

II. GLOBALIZATION

As was indicated above, the term "globalization" can have many meanings.¹⁷ Taken most broadly, globalization represents the sum total of political, social, economic, legal and symbolic processes rendering the division of the globe into national boundaries increasingly less important for the purpose of individual meaning and social decision.¹⁸ "Globalization" thus in fact contains many smaller "globalizations," which

16. See, e.g., Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 35-36 (1996).

17. See *supra* note 4 and works cited therein.

18. See, e.g., Seita, *supra* note 11, at 429 ("Globalization . . . is a multifaceted concept encompassing a wide range of seemingly disparate processes, activities, and conditions . . . connected together by one common theme: what is geographically meaningful now transcends national boundaries and is expanding to cover the entire planet. Globalization has led to an awareness that international issues, not just domestic ones, matter."); Aman, *supra* note 4, at 1-2 ("In our view, 'globalization' refers to complex, dynamic legal and social processes . . . Today, the line between domestic and international is largely illusory.").

can both “reinforce *and clash with* one another.”¹⁹

Globalization is often defined principally in economic terms, namely as the globalization of markets.²⁰ Since we are also concerned in this context with the globalization of markets, a good starting point is to begin with the idea of a market. In this Article, the term “market” shall be used in the rather traditional sense of a series or system of private interactions involving voluntary exchanges of goods, services, labor and capital, the four basic economic factors of production.²¹ What we are concerned with, then, is to understand what is meant by the “globalization” of mechanisms for the private exchange of the factors of production, and the effects of this globalization on human rights.

In considering the globalization of the market, one can distinguish between the geographic facts of globalization, and the regulatory predicates and consequences of such globalization. One definition of market globalization, which this Article terms “transactional globalization,” views the globalization of markets as an increase in the number of transactions involving goods, services, labor and capital which cross national boundaries, such that they come to resemble in operation a single market spanning the globe.²² This definition assumes that there has always been a certain amount of transboundary economic activity, but that such activity is increasing both in scope and scale such as to warrant the tag “globalization,” thus saying in essence that globalization is a quantitative rather than a qualitative change.²³

19. Seita, *supra* note 11, at 429 (emphasis added).

20. See Seita, *supra* note 11, at 429-30. However, other commentators point out that globalization involves significant non-economic processes, and Seita himself points out that “[d]emocracy and human rights are, for example, as much a part of globalization as are free market principles.” Aman, *supra* note 4, at 1; Delbrück, *supra* note 4, at 9-10; Seita, *supra* note 11, at 429.

21. I will not be addressing “markets” in the specialized or analogic sense, as the term is employed in analyzing such phenomena as the “market for control” in private firms, or the “regulatory market.”

22. See, e.g., Seita, *supra* note 11, at 439 (discussing economic globalization as the “expansion of markets for goods, services, financial capital, and intellectual property”); Cavusgil, *supra* note 4, at 83 (“Globalization of markets involves the growing interdependency among the economies of the world; multinational nature of sourcing, manufacturing, trading, and investment activities; increasing frequency of cross-border transactions and financing; and heightened intensity of competition among a larger number of players.”).

23. See Dolzer, *supra* note 4, at 157 (stating that “[i]n the economic sphere,

This common approach to defining economic globalization, however, represents only one aspect of economic globalization. Another definition, which shall be termed "regulatory globalization," includes the quantitative changes identified in transactional globalization, but emphasizes a qualitative change in the nature of our regulation of markets. In particular, regulatory globalization focuses on the complex social processes which have led to the regulation of markets for goods, labor, capital and services at new levels, levels which require formalized interstate cooperation through new and powerful institutions like the WTO, and which may, in certain cases, transcend nation-state control to a significant degree, as in the case of the European Community.²⁴

The question before us, then, can be framed as an inquiry into the ways in which each of these "market globalizations" affects the vitality and effectiveness of human rights law. Before turning to the possible adverse effects of regulatory globalization on human rights law, which is the principal focus of this Article, a few words about the effects of transactional globalization, and the *positive* effects of regulatory globalization, are in order. To begin with, globalization of both types may in certain respects represent an unparalleled opportunity for enhancing the exercise and protection of human rights. For example, transactional globalization can contribute directly to the enjoyment of economic rights, due to the relationship between economic activity and the human freedom and dignity we express in our decisions as producers and consumers.²⁵ Indirectly, transactional globalization may enhance the effectiveness of human rights law by contributing to the attainment of the economic preconditions for socioeconomic rights through

globalization is not a novel phenomenon, but relates to the *pace* of change that has increased dramatically") (emphasis added).

24. See Trachtman, *supra* note 16, at 46-55 (reviewing history of regulatory changes in international economic law); Delbrück, *supra* note 4, at 10-11, 17 (explaining globalization as signifying changes in the locus of regulation); Aman, *supra* note 4, at 2 (emphasizing change in dynamics of law formation wrought by globalization).

25. As the trade liberalization attendant to globalization reduces governmental barriers to private economic decision-making, individuals have an increased scope for realizing such economic rights. See Robert W. McGee, *The Fatal Flaw in NAFTA, GATT and All Other Trade Agreements*, 14 NW. J. INT'L L. & BUS. 549, 560-61 (1994) (criticizing protectionist unfair-trade remedies as impermissibly restricting consumer rights).

the significant increases in global welfare which trade theory predicts should follow such globalization.²⁶ Furthermore, transactional globalization can contribute to the enforcement of human rights, through the effects which increased contact between the citizens of oppressive regimes and the citizens and products of rights-protective regimes may have on the continuing viability of oppressive regimes.²⁷ Participation in the market itself may increase domestic pressure for increased political and social rights.²⁸ Finally, there is the possibility, at least, that the significant economic power unleashed through transactional globalization and the interdependent economies it encourages, might be marshaled in the form of economic sanctions against human rights violations.²⁹

26. Transactional globalization represents at least an apparent vindication on a global level of basic free trade principles. This should mean that, as imperfections in the market are worked out and the regulatory system strengthened, we should be poised to witness significant improvements in global welfare, as individuals gain in economic liberty and material prosperity as a result of the operation of free trade principles globally. See Nichols, *supra* note 11, at 661-67 (summarizing the contributions which free trade can make to human well-being). Such improvements enhance the conditions for the attainment of socioeconomic rights, such as the right to employment and the right to a decent standard of living, and the conditions for human rights protection generally. See UDHR, *supra* note 2, art. 22 ("Everyone, as a member of society, . . . is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity . . .").

27. The revolution in information and communications technologies involved in globalization has brought people in rights-protective regimes face to face with human rights crises thousands of miles away. See Seita, *supra* note 11, at 455-60 (surveying links between communication technology and democracy and human rights). Globalization can thus make it more difficult for persistent violators to maintain the cloak of secrecy and deniability. Also, oppressive regimes are finding it increasingly difficult to control the access to and spread of "subversive" information and ideas in the information age. See, e.g., Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 125, 160-61 (citing the use of "cyberspace solidarity").

28. Liberalization in economics may lead to liberalization in politics as well, as the economic liberalization required by globalization has a favorable spillover effect on liberalization of domestic policies on speech, democratic participation, etc. See Seita, *supra* note 11, at 453-54 (reviewing indirect impact of transactional globalization on democratic and human rights values).

29. See Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 HUM. RTS. Q. 155, 168-70 (1982); Robert W. McGee, *Trade Embargoes, Sanctions and Blockades: Some Overlooked Human Rights Issues*, 32 J. WORLD TRADE 139, 142 (1998); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 42-45 (1996). On the

Regulatory globalization can also have several positive effects on human rights. First, there is the fact that globalization has been facilitated and managed by an increase in the rule of law in international economic relations.³⁰ Therefore, since a commitment to the rule of law is integral to human rights law as well as the international economic law system, regulatory globalization has contributed in a significant way towards establishing a key regulatory goal of human rights law as well.

Second, there has been some recognition at the regulatory level of the importance of considering human rights in connection with the operation of trade and integration rules and systems. At the multilateral level, for example, both GATT 1947 and GATT 1994³¹ contain an exception to the most-favored-nation (MFN) and national treatment principles³² recognizing a state's right to ban the importation of products of prison labor.³³ The WTO has publicly, albeit weakly, affirmed the importance of observance of international labor standards, while pushing the onus of the development of appropriate standards to the ILO.³⁴ Regionally, one can point to the formation of the NAFTA Labor Commission, charged with monitoring the national enforcement of state labor laws.³⁵

use of economic sanctions generally, see Raj K. Bhala, *MRS. WATU: Seven Steps to Trade Sanctions Analysis*, MICH. J. INT'L L. (forthcoming 1999) (proposing eponymous algorithm for evaluating sanctions measures).

30. See Seita, *supra* note 11, at 430 (stating that "[l]aw has been important in managing economic globalization and may become as important with respect to political globalization"); John H. Jackson, *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 AM. U. J. INT'L L. & POL'Y 595, 596 (1995) (stating that "it is plausible to suggest that ninety percent of international law work is in reality international economic law in some form or another").

31. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194; General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) (GATT 1947 was incorporated into the WTO as GATT 1994 in Annex IA to the WTO Agreement) [hereinafter GATT].

32. GATT, arts. I, III. See *infra* notes 109-10 and accompanying text.

33. *Id.* art. XX(e). See *infra* notes 116-18 and accompanying text.

34. See World Trade Organization, *Singapore Ministerial Declaration*, WTO Doc. WT/MIN(96)/DEC/W, Dec. 13, 1996, 36 I.L.M. 218 (1996) (WTO affirms commitment to international labor standards but considers ILO to be appropriate forum for trade and labor issues) [hereinafter *Singapore Declaration*].

35. North American Agreement on Labor Cooperation, Sept. 8, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (entered into force Jan. 1, 1994); see, e.g., Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the*

Finally, there has been some recognition at the regulatory level of the powerful leverage which transactional globalization places at the service of human rights reform and enforcement, at least at the level of conditions on entry into regional trading systems. For example, participation in the European Community is contingent upon membership in and observance of treaty-based human rights norms.³⁶ This link has also been observed, at least at the rhetorical level, in this hemisphere, in the fact that the agreements launching the Free Trade Area of the Americas cite the importance of democratic values and human rights for hemispheric integration.³⁷

For these reasons, human rights advocates could view both transactional and regulatory globalization as unreservedly advancing the cause of human rights on a global level. However, due to the bifurcated nature of the international governance system into separate trade and human rights regimes, and the fact that trade law and institutions are increasingly called upon to resolve disputes involving areas outside of trade law, the globalization of markets, at least in its regulatory form, may in fact retard the effectiveness of human rights law. Disputes between trade law and other bodies of law such as human rights law which come before the institutions of regulatory globalization involve normative conflicts, in that they represent disputes between trade values and non-trade values, such as those values underlying human rights law.³⁸ The degree to which the law and institutions of regulatory globalization can or cannot effectively take into account these non-trade values, such as those values at stake in human rights claims and enforcement measures, is therefore going to determine to a

Linkage Debates, 28 U. MIAMI INTER-AM. L. REV. 361, 369-71 (1997) (briefly describing treaty structure and shortcomings).

36. The link between European Community membership and participation in the European Convention on Human Rights and Fundamental Freedoms is an historic and effective example. See James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 793, 817-23 (1994). This form of conditionality is a part of EC expansion doctrine as well. *Id.*; Frank J. Garcia, "Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas, 35 COLUM. J. TRANSNAT'L L. 63, 63, 92-93, 102-03 (1997).

37. Garcia, *supra* note 36, at 103. However, in our hemisphere the dominant economic unit, the United States, has exerted a restraining rather than an activist impulse in this regard. See Smith, *supra* note 36, at 806-17.

38. See Nichols, *supra* note 11, at 671-89 (analyzing linkage conflicts as value conflicts).

large extent the degree to which globalization is a friend or foe to human rights.

III. REGULATORY GLOBALIZATION: UTILITY OVER RIGHTS

Understanding the adverse effects which market globalization may have on human rights requires an understanding of the changes in the way trade is now regulated through law. An increasingly globalized economy has brought many new aspects of global economic life into the ambit of trade law and trade institutions, which in turn has facilitated the further globalization of the marketplace.

A. *Changes in the Global Regulation of Markets*

The globalization of markets in transactional terms has been facilitated by, and has in turn facilitated, a significant change in the nature of the international regulation of economic activity. From its imperfect beginnings in the GATT 1947 to its current apotheosis in the WTO, the revolution in international economic law means that more aspects of the international economy are regulated through treaty-based rules than at any previous time, rules with less room for state discretion and unilateral action than at any prior time, and under the adjudicative supervision of stronger institutions than at any other time.³⁹

One might at first, therefore, think that globalization has been an unmitigated boon for international economic law. After all, what regulatory system would not want to see the scope of its jurisdiction vastly enlarged, and the effectiveness of its norms enhanced? Because of this globalization, however, trade law is now a more complicated business. In practice, the revolution in international economic law has meant that institutions created to adjudicate trade disputes are increasingly being asked to resolve policy issues which involve not only trade law, but other issues and values as well. There have always been so-called trade linkage problems, which in practice raise questions about appropriate conditions under which states may pursue non-trade domestic policy goals such as

39. See generally John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 21-23 (1996) (assessing Uruguay Round as "watershed shift" in international economic regulation).

national security and economic development, despite their short or long-term adverse effects on trade.⁴⁰ Now, however, trade law and trade institutions are impacting more and more areas of traditional domestic concern, such as environmental protection,⁴¹ labor and employment standards,⁴² and cultural identity.⁴³

In the absence of an effective global legislative forum, trade law and institutions will, for the time being and by default, be charged with resolving difficult linkage issues involving trade values and other values, and resolving them in an adjudicative setting. The degree to which trade law and institutions are capable of adequately taking into account other non-trade interests and values at the point of conflict, will serve as the determining factor in the effect regulatory globalization has on the viability and vigor of human rights law in a global market.

B. The Normative Conflict Between International Economic Law and Human Rights Law

International human rights law and international economic law each have an important role in the implementation of a just global order, and yet the principal normative foundations of each regime are, if not incompatible, then at least in fundamental tension. The primary discipline for the analysis of international economic relations, economics, and the dominant

40. See Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons From the Past*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 213 (Anne O. Krueger ed., 1998), reprinted in 19 U. PA. J. INT'L ECON. L. 513 (1998) (discussing antecedents of current linkage issue).

41. See, e.g., World Trade Organization Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, available in 1998 WL 720123 [hereinafter *Shrimp Case*]; Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32 J. WORLD TRADE 73 (1998).

42. See *Singapore Declaration*, supra note 34 (reviewing WTO position on trade and international labor standards); Virginia Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE? 175 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

43. See World Trade Organization Appellate Body Report on Canada—Certain Measures Concerning Periodicals, WT/DS31/AB/R, available in 1997 WL 398913; W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 105 (1995).

model of international economic relations law, the Efficiency Model, are based on a set of values and an approach to normative issues which are in conflict with the values and normative approach underlying contemporary human rights law.

1. The Normative Underpinnings of Trade Law

Trade law is not simply about the exchange of goods. As is the case with all human interaction which is structured by law, trade law embodies a particular vision of justice, a theory of what constitutes the Right Order as it applies within the scope of economic law.⁴⁴ Therefore, as with any particular account of justice, a normative account of trade law presupposes a certain view of human nature, and favors a particular approach to moral reasoning.

The dominant normative account of trade law is an economic one, which Jeffrey Dunoff has termed the "Efficiency Model." In the Efficiency Model, trade law is exclusively concerned with the twin values of economic efficiency and welfare.⁴⁵ The goal of trade law is to improve the economic well-being of human beings through the facilitation of efficient exchanges.⁴⁶ This approach has several important implications for the viability of human rights law within a trade-based regulatory regime.

44. I have elsewhere outlined the arguments in favor of this view, in an essay drawn from a larger work in progress on the problem of justice in contemporary international economic law. See Garcia, *supra* note 11.

45. See Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347, 349-50 (1998). See also G. Richard Shell, *Trade Legalism and International Relations Theory*, 44 DUKE L.J. 829, 877-85 (1995) (discussing what Shell calls the "Efficient Market Model" of trade law).

46. See, e.g., DAVID RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 93 (3d ed. 1996).

Under a system of perfectly free commerce, each country naturally devotes its capital and labor to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labor most effectively and most economically: while by increasing the general mass of productions, it diffuses general benefit and binds together, by common ties of interest and intercourse, the universal society of nations throughout the civilized world.

Id.; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 8-9 (2d ed. 1989) (efficiency-based increases in general welfare are the preeminent goal of trade law).

First, there is a marked tendency for other values besides efficiency and welfare to be viewed as outside the scope of trade law, and even inimical to its purposes.⁴⁷ From the viewpoint of Efficiency Model adherents, advocates of non-trade values and issues are seen as trying to complicate the trade law system with what are at best extraneous concerns such as human rights or environmental protection,⁴⁸ and what may be at worst simply disguised protectionism.⁴⁹ In adopting this stance, Efficiency Model adherents fail to recognize that, while efficiency and welfare are undeniably important values in trade, their pursuit is necessarily part of an overarching effort to establish a just global order, an order in which other values are also central, values which are implicated and quite properly considered in trade law decisions.⁵⁰ In other words, there is no such thing as a pure trade issue.

Second, economic analysis and methodology will exert a dominant, if not overweening, influence on trade and non-trade policy formed or implemented within trade institutions operating on an Efficiency Model. In noting this consequence, I do not mean to question the relevance of economics for the purposes of trade and trade law and policy. Economics will play a critical role in trade law under *any* model, since economics involves the study of resource decision-making, and trade law

47. See Nichols, *supra* note 11, at 700 ("That the trade regime gives primacy to trade is evidenced throughout the history of GATT dispute settlement, as well as in the writings of officials and scholars closely allied with the General Agreement and the nascent World Trade Organization.").

48. See Steve Charnovitz, *The World Trade Organization and Social Issues*, 28 J. WORLD TRADE 17, 23 (1994) [hereinafter Charnovitz, *Social Issues*] (citing objection by GATT and WTO members to efforts in 1991 and 1994 to begin work on labor and environment issues on the basis that such issues were not trade issues); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE?, 95, 108 (arguing that GATT has a good reason to be skeptical of linkage claims).

49. See Charnovitz, *Social Issues*, *supra* note 48, at 32 ("Simplistic demands for drastic trade remedies against so-called eco-dumping or social dumping sometimes bear a striking similarity to more conventional forms of protectionist rhetoric . . .") (quoting then-GATT Director General, Peter Sutherland).

50. See Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor and the Environment*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997) (observing that "[a] visceral distrust of any or all demands for trade restrictions has impeded a careful analysis of the kinds of normative claims at issue and has allowed fair traders to characterize free traders as moral philistines").

is a powerful engine for resource allocation. However, due to the range of interests and values affected by the contemporary international economic law system, other disciplines and models are unquestionably relevant to trade policy analysis and formulation.

Moreover, in order to properly evaluate trade law's impact on human rights and other non-trade areas, it is important to remember that economics is not a value-free method of analysis.⁵¹ Trade arguments are generally founded on some form of welfare economics, and standard welfare economics rests on strong and contestable moral presuppositions.⁵² To begin with, economics employs, both descriptively and prescriptively, models and concepts which adopt a position on the nature of human beings, i.e., *homo economicus*,⁵³ and the appropriate ends of moral decision-making, preference satisfaction,⁵⁴ which calls into question the suitability of economics for the definitive evaluation of non-economic values.⁵⁵

51. In the discussion which follows, I rely heavily on Hausman & McPherson, *supra* note 6, for their analysis of the metaethics of economics.

52. Welfare economics typically translates normative questions into questions of efficiency and equity. The traditional emphasis in welfare economics on efficiency over equity may in fact reflect the perceived intractability of evaluating distributive fairness economically, rather than a clear analysis of the moral priority of efficiency over equity. Moreover, the moral implications of analysis of welfare questions into equity and efficiency issues need to be addressed from a normative perspective. *Id.* at 675.

53. Economics presupposes a model of human beings as *homo economicus*, as rational self-interest maximizers. *Id.* at 688. In the words of John Stuart Mill, political economy "is concerned with [man] solely as a being who desires to possess wealth It makes entire abstraction of every other human passion or motive." John Stuart Mill, *On the Definition of Political Economy; and On the Method of Investigation Proper to It*, 26 LONDON & WESTMINSTER REV. 1 (1836), cited in DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 180 n.1 (1996). On this view, trade is about maximizing self-interest through economic exchange, and trade law is about facilitating conditions which lead to the maximization of self-interest, by eliminating state-imposed barriers to efficient exchanges.

54. In terms of the ends of moral decision-making, economists speak in terms of individual well-being, and tend to equate well-being with preference satisfaction, and therefore the morality of an act is equated with its ability to satisfy individual preferences. See Hausman & McPherson, *supra* note 6, at 689.

55. However useful as an economic construct, the *homo economicus* model of human behavior is troubling when viewed as an account of moral behavior, in that it most closely resembles egoism, a much-criticized moral theory. *Id.* at 686-88. Moreover, this model does not provide a rich enough picture of individual choice to fully analyze moral behavior, for the reason that such a model precludes true altruistic reasoning and tends to assimilate moral choice into preference satisfac-

Perhaps most importantly for the purposes of this Article, the *method* of moral reasoning which normative economics adopts is a type that is fundamentally at odds with the dominant mode of moral reasoning underlying human rights law. Economic moral reasoning is consequentialist in nature, in that it focuses on outcomes, and not on procedures or acts on their own terms.⁵⁶ Consequentialism is the term for ethical theories which evaluate the rightness or wrongness of an act solely in terms of its consequences.⁵⁷ On this view, an act will be morally right if its consequences are better than those of any alternative acts.⁵⁸ Different types of consequentialist theory differ on what precisely better consequences consist of.⁵⁹

The dominant normative account of trade law and policy is utilitarian in nature.⁶⁰ Utilitarianism is a particular form of consequentialism, which in its classical form determines the morality of an act according to its consequences for the aggregate of individual utility.⁶¹ Forms of utilitarian ethics can be distinguished according to whether they focus on the justification of acts, which is classical or act-utilitarianism,⁶² or the justification of rules which in turn justify or constrain acts,

tion. See *id.* at 687.

56. As Hausman and McPherson put it, "[t]he standard definition of a social optimum compares social alternatives exclusively in terms of the goodness of their outcomes (rather than the rightness of their procedures), and identifies the goodness of outcomes with satisfaction of individual preferences." *Id.* In defining positive outcomes with individual preferences, it is therefore also liberal, and not communitarian. *Id.* at 675.

57. For a good introduction to consequentialism in general, see G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958); Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21 (1978).

58. See ALAN DONAGAN, *THE THEORY OF MORALITY* 52 (1977).

59. For example, welfarist moral theories take the view that consequences for aggregate individual well-being matter, with other notions such as rights or virtues serving as means to promoting welfare. See Hausman & McPherson, *supra* note 6, at 704. Egoism is a form of consequentialism, focusing on the outcome for the individual decision-maker. See R.G. Frey, *Introduction: Utilitarianism and Persons*, in *UTILITY AND RIGHTS* 3, 5 (R.G. Frey ed., 1984).

60. See RAJ BHALA, *INTERNATIONAL TRADE LAW* 36 (1996) (economic foundation of trade law furnishes utilitarian justifications for free trade regime); McGee, *supra* note 25, at 549 ("vast majority" of trade scholarship analyzes trade from a utilitarian perspective).

61. Put in economic terms, utilitarianism takes morality as the maximizing of some function of the welfare of individual members of society. See Hausman & McPherson, *supra* note 6, at 689.

62. Act utilitarianism is the classical utilitarianism of Bentham and Mills. See sources cited *infra* note 65.

which is rule-utilitarianism.⁶³ For the purposes of this article, both forms shall be taken together, and generally referred to as utilitarianism.⁶⁴ Utilitarianisms can also be distinguished on the basis of their particular theory of value, or utility. Historically, utility was defined in hedonic terms involving individual pleasure.⁶⁵ Modern utilitarianism and the economists who deploy it are more likely to define utility in terms of preference satisfaction,⁶⁶ or more generally as a form of welfarism, in which the sum or average of resulting individual welfare levels determines the correctness of an act, principle or policy.⁶⁷

Thus from a normative perspective, the Efficiency Model of trade law asserts, explicitly or implicitly, the utilitarian argument that free trade is good *because of its consequences*, namely the maximization of aggregate individual welfare from effi-

63. Under rule utilitarianism, a particular rule is justified along utilitarian lines, which rule must then be followed with regard to individual acts without undertaking a further utilitarian calculation for each act, unless and until the utilitarian calculus underlying the rule itself changes. See DONAGAN, *supra* note 58, at 193, 196-99.

64. While an oversimplification for many purposes, such treatment is defensible with regard to the subject of this article, which focuses on the effects of either utilitarianism's inherent consequentialism for human rights. See Frey, *supra* note 59, at 5 and *infra* note 96-97 and accompanying text.

65. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 791, 792 (Edwin A. Burt ed., 1967) ("By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or oppose that happiness."); JOHN STUART MILL, UTILITARIANISM 10 (Oskar Piest ed., 1957) ("The creed which accepts as the foundation of morals 'utility' or the 'greatest happiness principle' holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure.").

66. See Frey, *supra* note 59, at 5 ("In recent years, however, numerous writers have moved away from a mental-state view of utility and value, on the ground that it is too confining to restrict utility to a concern with states of mind, to an interest-satisfaction view, in which 'interests' is a generic term covering a multiplicity of desires or preferences. Thus, construed as I have done here, preference-utilitarianism is classical utilitarianism with an expanded value theory."); Hausman & McPherson, *supra* note 6, at 705 ("[N]o prominent theorist now defends a hedonistic conception of utility. All of the other specifically utilitarian theorists . . . join economists in taking utility not as an object of reference, but as an index of preference satisfaction.").

67. See Hausman & McPherson, *supra* note 6, at 704.

ciency gains and the operation of comparative advantage.⁶⁸ Trade maximizes welfare for many reasons, including lower prices, increased consumer choice, increased employment, enhanced economies of scale, specialization, increased competition and the accelerated diffusion of the fruits of innovation.⁶⁹

In the case of conflicts between trade-liberalizing rules and trade-restrictive measures advocated on non-trade grounds, one will find arguments in favor of free trade expressed in utilitarian consequentialist terms. For example, embargoes based on moral or national security grounds may be attacked on the utilitarian ground that it may be in a nation's best interest to trade with its enemies, because doing so will have more good effects than bad in the economic sense.⁷⁰ Trade restrictions justified on environmental grounds may encounter arguments in favor of a utilitarian evaluation of their merits, leading to a preference for market-oriented compromises with trade values.⁷¹ In each case, the relative trade costs and regulatory benefits of a particular law or policy are weighed, and the best policy is determined to be that which, on balance, has the least trade cost or promises the greatest trade benefit.

2. The Normative Underpinnings of Human Rights Law

In contrast, human rights law is built on a fundamentally different approach to human nature and moral reasoning, which puts it in tension with the normative underpinnings of trade law. The human rights movement has undertaken to establish through human rights law a different aspect of a just global order than that undertaken in trade law, namely the protection of human dignity.⁷²

The dominant contemporary discipline for the critical analysis and justification of human rights law is moral and political philosophy. While human rights in positive law can be

68. See *supra* notes 45-46 and works cited therein.

69. See, e.g., JACKSON, *supra* note 46, at 10-13; McGee, *supra* note 25, at 552-54.

70. See McGee, *supra* note 25.

71. Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1332, 1371 (1992).

72. "Human rights represent a social choice of a particular moral vision of human potentiality, which rests on a particular substantive account of the minimum requirements of a life of dignity." DONNELLY, *supra* note 6, at 17.

derived from and justified by a variety of theological and philosophical moral theories of human nature,⁷³ at the core of the concept of human rights is the notion of a transcendental standard of justice by which particular acts of the state can be judged.⁷⁴ The dominant contemporary normative justification of human rights law is some variety of Western liberalism.⁷⁵ International human rights law is essentially rooted in the liberal commitment to the equal moral worth of each individual, regardless of their utility,⁷⁶ and human rights themselves embody the minimum standards of treatment necessary in view of this equal moral worth. Moreover, human rights, the very concept of a right, and the closely associated natural rights tradition,⁷⁷ are all linked to a particular strand of liberalism, the

73. Traditionally, there have been three approaches to establishing the existence and basis of human rights: they can be derived from God; they can be grounded in human nature and what is necessary for human beings to attain their natural end through perfection of their nature; and they can be argued to be self-evident, i.e., they can be discerned through reflection on the nature of human beings and the concept of a moral right. The latter, the so-called natural rights approach, has emerged as the most promising and widely-accepted rationale of the three, and is the rationale attributed to the UN Declaration of Human Rights and credited with their widespread acceptance. See H.J. McCloskey, *Respect for Human Moral Rights Versus Maximizing Good*, in *UTILITY AND RIGHTS* 121, 126 (R.G. Frey ed., 1984).

74. Gordon, *supra* note 1, at 694.

75. Despite this foundation, human rights advocates generally claim some form of universalism for human rights. Henkin and others claim a form of positivist universalism on the grounds that human rights instruments have been ratified by the vast majority of the states of the world. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* ix (1990); Pieter van Dijk, *A Common Standard of Achievement: About Universal Validity and Uniform Interpretation of International Human Rights Norms*, 2 NETH. HUM. RTS. Q. 105, 109-10 (1995). Others claim a normative universalism for some or all human rights, either on philosophical or empirical grounds. See Fernando Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 873 (1985) (arguing that the liberal theory of justice underlying human rights is demonstrably correct across cultural lines); Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, 20 CAL. W. INT'L L.J. 275, 297 (1990) (positing that universalism is assertable where it can be empirically shown that cultural practice does not in fact vary with respect to a given principle, such as the prohibition against arbitrary killing and violence).

76. DONNELLY, *supra* note 6, at 68 (following Dworkin).

77. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 198 (1980) ("Almost everything in this book is about human rights ('human rights' being a contemporary idiom for 'natural rights': I use the terms synonymously)."); but see S. Prakash Sinha, *Freeing Human Rights From Natural Rights*, 70 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 342, 343 (1984) (disputing necessity or adequacy of natural rights as basis for human rights).

non-utilitarian liberalism⁷⁸ of Locke⁷⁹ and Kant,⁸⁰ which provides the normative basis for the rights set out in the various UN instruments.⁸¹

This model inevitably affects the human rights approach to human nature and moral decision-making, and distinguishes it from a utilitarian economic approach. The *Homo Economicus* Model of human beings presupposed in trade law places little emphasis on the precise end of human activity, assuming it to be individual well-being through the satisfaction of individually determined preferences.⁸² In contrast, the Human Rights Model of human nature is obsessed with ends, in particular with the status of the human person as an end in themselves.⁸³ What is central about human beings is not their ability or tendency to rationally maximize their self-interest, but their intrinsic human dignity and worth. Human dignity and worth are not matters of individual preference or utility, but matters of moral duty and principle.⁸⁴ The normative arguments advanced for the protection of human rights are deontological in nature, in that they focus on principles about

78. Millsian utilitarianism, though it is a liberal theory, is a problematic theory for human rights because it is consequentialist in nature. While such a theory can illuminate the moral importance of the consequences of an act for human dignity, the theory is an inadequate justification for human rights in that it countenances consequential approaches to rights questions themselves. See *infra* notes 94-104 and accompanying text.

79. For an overview of Locke's contribution and the Enlightenment roots of contemporary international human rights law generally, see Gordon, *supra* note 1, at 711-20.

80. On the Kantian basis for international human rights, see Fernando Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 60-70 (1992).

81. McCloskey, *supra* note 73, at 121.

82. Instead, the inquiry concerning *homo economicus* focuses on the range of means available towards attainment of this end, and the effects of particular choices on the conditions for the satisfaction of preferences.

83. See Tesón, *supra* note 80, at 64 (observing that the Kantian view of international law is based on our duty to treat human beings as ends in themselves, which requires that the state incorporate respect for human rights); Baxi, *supra* note 27, at 166 (stating that "[t]he diverse bodies of human rights found their highest summation with the Declaration on the Right to Development, insisting that the individual is a *subject* of development, not its *object*." (footnotes omitted) (emphasis added)).

84. Frey notes that while the preservation of human life can be advocated on utilitarian grounds, there is no absolute bar to a change in circumstances such that killing could subsequently be justifiable on the same utilitarian calculus, thus demonstrating the unfitness of utilitarian theory as a grounds for human worth and dignity. See Frey, *supra* note 59, at 8-9.

how people are and are not to be treated, regardless of the consequences.⁸⁵ Deontological moral reasoning determines the rightness or wrongness of an act by the nature of the act itself, specifically whether it is in accord with or violation of certain moral principles, and regardless of the personally favorable or unfavorable consequences of the act itself. Rights are things that are valued chiefly in themselves, and not for their consequences.⁸⁶ For example, the widely-recognized international prohibition against torture⁸⁷ is justified on the ground that torture is wrong as a direct violation of human dignity, *despite* its utility, despite the fact that it might lead to information of value to the state, or deter conduct which threatens the state.⁸⁸ This is in direct contrast to the consequential form of moral reasoning which predominates in trade and in economics generally, and which at least in theory could determine torture, slavery and other human rights violations to be economically advantageous or justifiable, and hence appropriate.

The deontological nature of human rights principles also has important implications for situations in which different competing claims or values are at stake. Human dignity and moral worth, which are at the core of human rights, are expressed in absolute terms: human beings have a dignity and worth which are not subject to compromise on the basis of consequential justifications. Human rights claims "ordinarily

85. See Tesón, *supra* note 80, at 71 ("Kant's international ethics follow from the categorical imperative. Just as individuals may not use human beings as mere means to an end, so foreigners, and specially foreign governments, may not use the persons that form another state . . .").

The deontological approach is reflected in the nature of human rights themselves, and in the language of human rights instruments. For example, the Universal Declaration of Human Rights states these rights are based on the "inherent" dignity of the human person. See UDHR, *supra* note 2. Our constitutional tradition also echoes the sense that these rights are inalienable, that is, they cannot be separated from the human person. Regarding the U.S. approach to human rights as constitutional rights, see HENKIN, *supra* note 75, at 83-108.

86. Hausman & McPherson, *supra* note 6, at 694.

87. See UDHR, *supra* note 2, art. 5; Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (entered into force June 26, 1987) [hereinafter Convention Against Torture]; *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (torture prohibited by "law of nations").

88. Convention Against Torture, *supra* note 87, art. 2.2 ("No exceptional *circumstances* whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a *justification* of torture.") (emphasis added).

trump utility, social policy, and other moral or political grounds for action.⁸⁹ A human rights-based claim should therefore take priority over counterclaims based in utility, and other consequentialist appeals.⁹⁰ Where human rights claims are in conflict with other sorts of claims, human rights theory dictates that human rights claims receive a very high, if not trumping, value in such processes.

3. International Economic Law and Human Rights: Normative Approaches in Conflict

What we find, then, when we examine international economic law and international human rights law, are two attempts to identify and implement the obligations which a broadly liberal theory of justice place on us in international relationships. We find the international economic law system attempting to establish a liberal view of the Right Order with regard to economic well-being, along utilitarian lines. We find the international human rights system attempting to establish a liberal view of the Right Order with regard to human dignity and worth, along deontological lines. And we find that, due to two salient facts of contemporary international life, namely globalization and a defective international governance system, these two powerful mechanisms for global justice are brought into conflict.

At the practical level, the conflict between trade law and human rights law is not, at first glance, an obvious one. Short of a trade treaty providing directly for trade in the products of prison or slave labor,⁹¹ it is hard to imagine a direct conflict between trade law and core human rights, for example rights involving life, liberty and the security of one's person.⁹² If one

89. DONNELLY, *supra* note 6, at 10 (citing Dworkin TRS 90).

90. As Donnelly puts it, "[a]s the highest moral rights, [human rights] regulate the fundamental structures and practices of political life, and in ordinary circumstances they take priority over other moral, legal and political claims." *Id.* at 1.

91. Unfortunately, history reveals that such international economic arrangements are quite possible, and theory suggests they are fully justifiable on an Efficiency Model of trade, however reprehensible they are on other terms. See Nichols, *supra* note 11, at 703 (referring to trade in human beings).

92. In fact, the GATT contains a provision explicitly permitting bans on trade in the products of prison labor, thus arguably reducing an incentive for the exploitation of prisoners. See *infra* notes 116, 118 and accompanying text. Of course,

considers human rights more broadly to include property rights and the rule of law,⁹³ it would appear that in many cases trade law is in fact working in favor of human rights, as for example when investment and intellectual property protection and increased transparency are negotiated as part of a trade agreement.

Rather, one is more likely to encounter a conflict between international trade law and measures taken at the *national* level to protect human rights, usually by imposing some form of economic sanction on a state engaged in rights-violating practices. When instituted between parties to a trade-liberalizing treaty such as the GATT, such measures are likely to be challenged as unlawful trade restrictions. Given the ascendancy of international economic law and its institutions, this challenge is most likely going to be brought in a trade forum, such as the WTO dispute settlement process. This interaction between regulatory globalization and the normative conflict outlined above therefore results in the prospect of a deontologically justified human rights law being challenged in, and perhaps declared invalid by, utilitarian-oriented international trade institutions.

At the meta-ethical level, there is reason for concern that in the contest suggested above, it is the human rights law which will lose. The deontological morality underlying human rights law has traditionally been recognized as difficult to reconcile with the utilitarian and other consequentialist forms of moral reasoning predominating in trade law.⁹⁴ The deontological nature of human rights render it difficult for human rights law to operate successfully within a system like the trade law system that is consequentialist in nature, because in the hypothetical conflict identified above, the trade institution will follow a normative approach committed to the possibility of sacrificing human rights protection on the basis

here there is a strong economic rationale as well, in that it is difficult for firms employing free, compensated labor to compete with the products of unpaid prisoners.

93. See UDHR, *supra* note 2, arts. 6-8, 17.

94. See Frey, *supra* note 59, at 10 (stating that "[classical utilitarianism] is, without refinement, inimical to some claim that there are incommensurable values (such as human life)"). While preference-satisfaction utilitarianism ameliorates some of the unpleasant effects of classical utilitarianism, it is subject to the same basic criticisms. *Id.* at 13.

of the human rights measure's adverse *effects* on trade. Utilitarian theory in fact *presupposes* that determinations of human worth will involve the trading-off of one life against another.⁹⁵ To a pure act-utilitarian, the fact that a particular trade policy or trade decision violates or undercuts the effectiveness of a human right is of no consequence in itself,⁹⁶ and rule-utilitarianism is not an improvement in this respect.⁹⁷ Even if human rights are justified on rule-utilitarian grounds as useful for increasing utility, there is always the possibility that human rights as a utilitarian-based set of rules will be cast off if the utility calculus changes.⁹⁸ This must be so because utilitarianism is committed to denying the possibility of natural human rights, which people hold simply by virtue of their status as persons.⁹⁹

In contrast, human rights law resists such tradeoffs, because the concept of a right functions to privilege certain claims against other competing claims, claims which in other contexts might overcome rights claims. It is in fact a distinctive feature of a right that it can be pressed this way.¹⁰⁰ Human rights by their very nature and justification are not subject to compromise in the pursuit of good consequences, and it is precisely such compromises that international economic law excels in. For this reason,¹⁰¹ a utilitarian approach to trade

95. *Id.* at 8.

96. Rights violations are of no concern to a pure act utilitarian. *Id.* at 11.

97. Though consequentialist arguments can be framed for rights, such as rule-utilitarian arguments, there remains a core content to rights that is not exhausted by their usefulness. See Hausman & McPherson, *supra* note 6, at 695-96. Moreover, the criticisms which apply in this regard to act utilitarianism also apply to more sophisticated forms of rule-utilitarianism. See McCloskey, *supra* note 73, at 124; Frey, *supra* note 59, at 4.

98. Frey, *supra* note 59, at 11 ("[F]ar from providing a persuasive case over the wrongness of killing, classical utilitarianism . . . seems perpetually to place persons and their vital interests at risk, a risk that will be realized if the contingencies fall out one way rather than another."); see also McCloskey, *supra* note 73, at 124 (incorporation of a rights-principle into a rule-utilitarian system, while normatively more attractive, does not insulate it from criticism). There is reason to fear that the human rights principle reaches that cast-off point precisely when enforcement would interfere with the powerful economic benefits at stake in trade decisions, when human rights are at their most vulnerable.

99. McCloskey, *supra* note 73, at 121.

100. DONNELLY, *supra* note 6, at 11-12.

101. Other critiques include the concern that utility theory is inadequate to measure gains and losses. See McGee, *supra* note 25, at 555, as well as the libertarian argument that there is no public interest or public good, only individuals.

cannot adequately incorporate human rights concerns based on deontologically justified rights.¹⁰² Consequentialist, trade-off based approaches to the evaluation of trade and human rights conflicts are, in their very method of analysis, biased against human rights and place human rights at risk, in the fact that they are unwilling to accord human rights claims the sort of privilege which human rights advocates consider essential.¹⁰³ Hausman and McPherson point out that strictly deontological approaches to rights are disturbing to contemporary economists,¹⁰⁴ precisely because such approaches view rights as absolutely not to be violated, essentially foreclosing the sort of analysis which economists engage in when evaluating a policy or course of conduct. Yet this absolute quality which economists find disturbing about rights, is the absolute quality which human rights advocates find essential in the human rights principle.

C. *Trade-based Decisions on Trade/Human Rights Conflicts: Doctrinal Approaches to Normative Conflicts*

The theoretical risk posed to human rights law from the differing approaches to moral decision-making adopted by trade law and human rights law is borne out at the doctrinal level when one examines the approach the WTO dispute settle-

Id. at 559.

102. See Frey, *supra* note 59, at 11.

Since utilitarian reasoning can justify trade-offs . . . whenever contingencies so dictate, and since there are no person-relative principles that bar utilitarian sacrifice of persons and their vital interests within the unconstrained theory, there seems no way to deflect the risk to persons. And constraints that might deflect the risk, for example, *that a life is of inherent worth irrespective of its pleasure or capacity for pleasure, that life is an incommensurable value and so beyond the compass of utilitarian trade-offs, that this or that person-relative principle could secure persons and their vital interests from such trade-offs*, do not obviously form part of the classical theory.

Id. (emphasis added). The same basic criticism holds true for preference-satisfaction forms of utilitarianism. *Id.* at 15.

103. *Id.* at 17 (questioning whether any consequential theory can adequately account for the wrongness of fundamental rights violations such as killing).

104. Historically, arguments for capitalism were often rights-based, in that they lauded capitalism less for its efficiency-enhancing capability than for the protection of individual freedom offered by the separation of economic and political power. See Hausman & McPherson, *supra* note 6, at 693. However, with respect to modern economics, rights-oriented moral theories are more difficult to link to traditional forms of economic analysis. *Id.* at 672.

ment system would actually take to conflicts involving trade and non-trade values, including trade-human rights conflicts. Returning to the example first posed above of domestic trade-restrictive measures adopted at the national level against an egregious rights-violating state, this Article now assumes that such a measure has in fact been enacted. Examples of such measures might include a national-level decision to suspend GATT-obligated MFN treatment as a response to particular human rights violations,¹⁰⁵ the imposition by a sub-federal unit of a government procurement ban as a response to human rights violations,¹⁰⁶ or the imposition of a trade ban on the products of indentured child labor, either unilaterally¹⁰⁷ or perhaps in response to a future ILO convention prohibiting such practices.¹⁰⁸ The common denominator here is state action imposing a trade sanction on human rights violators, as a mechanism to both punish the state and to encourage compliance with international human rights law.

105. For example, the much-debated Helms-Burton legislation, Title I of which is aimed at trade in goods. For a recent overview of the arguments concerning the legality of the Helms-Burton legislation under WTO law, including citations to the extensive literature on the matter, see John A. Spanogle, Jr., *Can Helms-Burton Be Challenged Under WTO?*, 27 STETSON L. REV. 1313, 1313 & n.1 (1998). For a review of the history of U.S. sanctions against Cuba, see Andreas F. Lowenfeld, *The Cuban Liberty and Democratic Solidarity (Libertad) Act*, 90 AM. J. INT'L L. 419 (1996). For an interesting analysis of the Helms-Burton legislation and its furor from an international relations perspective, see David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997).

106. The Massachusetts government procurement statute sanctioning Myanmar (formerly Burma) was recently declared unconstitutional as an impermissible infringement on the federal government's power to regulate foreign affairs. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 1998 U.S. Dist. LEXIS 17789 (D. Mass. 1998). Massachusetts plans a similar law against Indonesia. See David R. Schmahmann et al., *Off the Precipice: Massachusetts Expands Its Foreign Policy Expedition from Burma to Indonesia*, 30 VAND. J. TRANSNAT'L L. 1021 (1997). On the matter of federal and sub-federal relations in trade law generally, see Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 CAN.-U.S. L.J. 441 (1997).

107. The United States enacted such a ban in 1997, forbidding the importation of products "mined, produced or manufactured by forced or indentured child labor." Treasury, Postal Service, and General Government Appropriations Act of 1998, § 634, Pub. L. No. 105-61, 111 Stat. 1272, 1316 (1997).

108. The United States, among others, has been calling for such a convention. See President William Jefferson Clinton, State of the Union Address (Jan. 19, 1999).

1. Human Rights Trade Sanctions in the WTO

In any of these cases, the target state would challenge such actions in a WTO dispute settlement proceeding, assuming all states-parties are WTO Member States. The most likely basis for such a challenge would be that the measure violates the most-favored-nation and national treatment rules contained in GATT Articles I and III. The challenged measure would be determined a *prima facie* Article I violation, because the like products from other WTO Member States which are not targets are not subject to the trade restriction.¹⁰⁹ The measure is also likely to be determined a *prima facie* Article III violation, because like domestic products are also not subject to the same trade restriction.¹¹⁰ Therefore, the sanctioning state is going to have to find a GATT-authorized exception applicable in such cases, or face a judgement that the measure nullifies or impairs the target state's expected trade benefits, and the likelihood of being itself subject to WTO-authorized sanctions if it fails to amend or withdraw the measure.

As the GATT treaty stands today, there is no single clearly applicable exception for such a human rights-oriented measure. There are, however, several exceptions which might apply if interpreted with human rights concerns in mind. One possible avenue is that the sanctioning state would seek the shelter of the national security exception in Article XXI. Article XXI permits states to unilaterally enact trade-restrictive measures when the state judges such measures to be "necessary for the protection of its essential security interests" during a time of "emergency in international relations."¹¹¹ However, this is a controversial provision much disliked and distrusted by the majority of WTO Member States, in that it is not justiciable as it has been interpreted.¹¹² Therefore, states would be reluc-

109. See Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 437 & nn.333-35, panel proceedings cited therein and accompanying text (discussing elaboration and application of most-favored-nation test).

110. See *id.* at 436 nn.327, 332, the panel proceedings cited therein and accompanying text (discussing elaboration and application of national treatment test). In certain cases, the product may be so closely linked to the human rights violation that the same products are prohibited domestically. This may be the case, for example, with trade involving body parts or organs of prisoners. In such cases, there may be no underlying national treatment violation.

111. See GATT, *supra* note 31, art. XXI(b)(iii).

112. See Raj K. Bhala, *Fighting Bad Guys with International Trade Law*, 31

tant to invoke this provision absent at least a plausible national security risk, and the WTO would be very likely to oppose any effort to read that exception broadly enough to include general human rights-based trade sanctions.

A more likely candidate is Article XX, whose exceptions are intended to permit GATT violations, including Articles I and III violations, in pursuit of several categories of non-trade policy goals.¹¹³ Three Article XX exceptions in particular, the public morals, human life and health, and prison labor exceptions, may be relevant in connection with human rights measures. Article XX(a) permits measures “*necessary* to protect human morals.”¹¹⁴ Article XX(b) permits measures “*necessary* to protect human, animal or plant life or health.”¹¹⁵ Finally, Article XX(e) permits measures “relating to the products of prison labour.”¹¹⁶

The availability of these exceptions turns on two sorts of interpretive problems. First, each presents at the outset a similar textual issue, namely whether the scope of the exemption can be interpreted to accommodate human rights-based measures.¹¹⁷ The prison labor exception is least likely to

U.C. DAVIS L. REV. 1, 6-20 (1997) (critically assessing Article XXI); Spanogle, *supra* note 105, at 1328-35 (reviewing problems raised by invoking Article XXI exception).

113. As a preliminary matter, it should be noted that the availability of any of the Article XX exceptions is limited by the *chapeau* test prohibiting that measures otherwise justifiable under that article be applied so as to be “a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.” GATT, *supra* note 31, art. XX; Shrimp Case, *supra* note 41 (interpreting and applying the *chapeau* test).

114. GATT, *supra*, note 31, art. XX(a) (emphasis added) (highlighting the “necessity” test). See *infra* notes 125-26 and accompanying text. See generally Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689 (1998) [hereinafter Charnovitz, *Moral Exception*] (discussing the legislative history and policy issues of this provision).

115. GATT, *supra* note 31, art. XX(b) (emphasis added) (highlighting the “necessity” test); *infra* notes 125-26 and accompanying text. Much has been written about the Article XX(b) exception in connection with trade/environment linkage problems. See, e.g., DANIEL C. ESTY, *GREENING THE GATT* (1994); Steve Charnovitz, *Free Trade, Fair Trade Green Trade: Defogging the Debate*, 27 CORNELL INT’L L.J. 459 (1994) [hereinafter Charnovitz, *Green Trade*] (reviewing the history of trade and environmental issues).

116. GATT, *supra* note 31, art. XX(e). See Christopher S. Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. INT’L L. & POL. 19 (1975) (reviewing legislative history and policy issues relating to this exception).

117. In approaching an issue of textual interpretation, the WTO Appellate Body

serve in this case, despite the fact that arguably it is the clearest case of a human rights exception in the GATT, for the very reason that it is so clearly drafted to refer to a single category of products, namely those produced by prison labor.¹¹⁸ The public morality exception should apply in at least a subset of human rights-related claims,¹¹⁹ but its broader applicability turns on whether the provision can be interpreted to encompass a wide range of human rights concerns beyond traditional "public morals" issues.¹²⁰ Finally, interpreting Article XX(b) to include human rights violations as threats to "human . . . life or health," would run counter to existing, albeit limited, GATT jurisprudence on this issue.¹²¹ Second, availability of both the public morals and human life and health exceptions depends upon whether Articles XX(a) and XX(b) would be in-

will follow the "customary rules of interpretation of public international law," DSU, *supra* note 10, art. 3.2, which the Appellate Body has determined are set out in Articles 31 and 32 of the Vienna Convention. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 311 (entered into force Jan. 27, 1988); World Trade Organization Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, *available in* 1996 WL 227476; World Trade Organization Appellate Body Report on Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R, *available in* 1996 WL 738800. This strategy promises to improve upon the uneven pattern of interpretive approaches taken by GATT panels historically. *See* Nichols, *supra* note 11, at 422-30 (reviewing panel approaches). However, the Appellate Body has itself been criticized for its uneven application of this approach. *See* Rambod Behboodi, *Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO*, 32 J. WORLD TRADE 55, 77-78, 92 (1998).

118. GATT, *supra* note 31, art. XX(e); *but see* Stirling, *supra* note 29, at 33-39 (arguing it would be a "logical extension" of Article XX(e) to apply it to a broad range of human rights violations).

119. *See* Charnovitz, *Moral Exception*, *supra* note 114, at 729-30 (suggesting claims involving slavery, trade in weapons, narcotics, liquor and pornographic materials, religion, and compulsory labor).

120. *Id.* at 742-43 (suggesting that international human rights law be used to interpret the vague scope of the exception).

121. This author is not aware of any GATT panel in which the issue is directly raised. However, the approach taken by the panel in the Thai Cigarettes case, for example, would suggest that the provision only exempts measures aimed at products which *themselves* pose a threat to human life or health, such as cigarettes. Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991) [hereinafter Thai Cigarettes case]. This is consistent with the approach taken by the first Tuna panel regarding the "process/product" distinction in Article III violations, in which a measure aimed at the *process* by which a product was made would not be eligible for consideration under more favorable GATT provisions involving measures aimed at the product itself. GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 1594 (1991) [hereinafter Tuna I].

interpreted as available for "outward-oriented" measures designed to influence the human rights policies of another jurisdiction,¹²² which existing GATT jurisprudence calls into question.¹²³

If none of these exceptions are available on scope or territoriality grounds, then the hypothetical human rights measure proposed above would be ruled a GATT violation. If, however, these scope issues could be resolved so as to bring human rights-based domestic measures within the ambit of either Article XX (a) or (b), then adjudication of the GATT claim would ultimately rest on the application of the "necessity" test required by the language of both articles.¹²⁴ As the test is applied, the WTO panel would rule that the disputed measure was not in fact necessary, and therefore a GATT violation, if it were to find that another less trade-restrictive measure was "reasonably available."¹²⁵

In conditioning the availability of these Article XX exceptions, and therefore any human rights-favorable resolution of this conflict, on the necessity test, the WTO is applying what has been called a trade-off device, a term encompassing various legal techniques used in trade institutions to relate the trade burden of a given measure against its intended non-trade regulatory benefit.¹²⁶ It is in the utilization of trade-off device-

122. The exception for the products of prison labor does not raise this issue, as by its terms it is drafted to permit importing states to take into account the prison labor practices of other jurisdictions in deciding whether to permit or block the importation of certain products. See GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, ¶ 5.16 (1994) [hereinafter *Tuna III*].

123. See Charnovitz, *Green Trade*, *supra* note 115, at 718-24 (discussing the distinction between "inward" and "outward" oriented measures, and disfavor towards outward-oriented measures expressed in the *Tuna* cases).

124. See *supra* notes 114, 115 and accompanying text. The exception for the products of prison labor does not impose a "necessity" test, requiring merely that the measure in question be one "relating to the products of prison labour," thereby incorporating the more lenient "rationality" test. See *infra* notes 161-62 and accompanying text.

125. See *Thai Cigarettes case*, *supra* note 121, ¶ 75 (stating that the measure is not "necessary" if there exists a less trade-restrictive alternative a state could "reasonably be expected to employ" in pursuit of its non-trade objectives); *Tuna I*, *supra* note 121, ¶ 5.18; *Tuna II*, *supra* note 122, ¶ 3.72.

126. Joel Trachtman, in his pioneering study of trade-off devices, identifies as potential trade-off devices national treatment rules, simple means-end rationality tests, necessity/least trade restrictive alternative tests, proportionality, balancing, and cost-benefit analysis. Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit*

es, and in the choice and application of a particular device, that the WTO dispute resolution system embodies the utilitarian approach to normative conflicts in trade, and in so doing raises issues about its compatibility with human rights law.

2. Trade-off Mechanisms in Trade Linkage Disputes

As a preliminary matter, it should be noted that trade-off devices have as a defining feature the willingness to juxtapose, and in many cases to commensurate between, trade values on the one hand and non-trade values on the other. Such an approach is consistent with the consequentialist approach taken by most economists and economically-minded analysts to trade matters.¹²⁷ It has in fact been said that utilitarianism is preeminently "a theory about trade-offs."¹²⁸ It should not be surprising to find such a market-oriented measure in a trade-based dispute settlement mechanism.¹²⁹

In contrast, the very notion of trade-off devices runs counter to the deontological approach to human rights. Normatively, human rights rest on the *incommensurability* of rights, which is alien to utilitarian theories.¹³⁰ In human rights terms, one cannot morally trade a certain amount of human rights violation in exchange for a greater amount of trade welfare benefit, even if the latter is seen as enhancing or embodying other human rights. While it is foreseeable that a trade-based forum may be legally required to engage in some sort of balancing analysis, weighing the trade costs of protection against the human rights costs of acquiescence, such an analysis might be objected to by human rights advocates at the outset as simply inadequate in view of the absolute moral obligation to enforce human rights regardless of the consequences.¹³¹ On this view, the preeminent mechanism for re-

Analysis and Subsidiarity, 9 EUR. J. INT'L L. 32, 32 (1998).

127. Trachtman accepts as a general proposition that trade-offs must be made between trade values and other social values. *Id.*; accord Hausman & McPherson, *supra* note 6, at 696 (discussing Nozick).

128. Frey, *supra* note 59, at 16.

129. Indeed, Delbrück notes a preference for market-oriented strategies and mechanisms for globalization problems, where "the globalization of trade as a means of maximizing economic welfare for the greatest number constitutes the policy goal." Delbrück, *supra* note 4, at 19.

130. *Id.*

131. See Hausman & McPherson, *supra* note 6, at 696 (child torture example).

solving policy disputes in trade institutions by its very nature defeats the fundamental tenet of human rights law.

In thus failing to distinguish a subset of values the trade-off of which is not permitted, some may view any trade analysis as already skewed in favor of trade values over human rights values. However, it may nevertheless be inevitable that a trade-off type of analysis will be carried out in the event of regulatory conflicts, at least under the current international governance regime. Some form of balancing is often involved in policy formation: one compares two options in terms of their mutual effects on identified values, and one decides. In particular, where the dispute is not directly between trade law and human rights law, but trade law and domestic measures enacted to *enforce* human rights, it is conceivable that balancing be used in determining the appropriate or most effective *means* towards achieving the human rights goals when there is a trade cost. Any such approach, however, and in particular the trade-off device actually employed, must be carefully examined and carefully utilized in policy decisions where rights are involved, or the very nature and principle of rights can be violated at the outset. Therefore, it becomes important to evaluate each trade-off device in terms of the degree to which it discriminates against human rights. Trachtman concludes that from a trade perspective certain measures are to be preferred over others, citing in particular the necessity test.¹³² It is not surprising, therefore, that from a human rights perspective, a different set of preferences emerges, in fact the opposite one.

3. The WTO Necessity Test as a Trade-off Device

Notwithstanding the argument that some sort of balancing is required in policy-formulation where competing values are at stake, the necessity test is clearly objectionable in human-rights terms as a trade-off device on the ground that it is biased in favor of trade values.¹³³ In other words, the test evaluates measures favorably precisely insofar as their impact on trade is the least possible, despite the fact that more trade-impacting measures might be more effective in realizing the non-trade value. Not only does this trade-off mechanism fail to

132. Trachtman, *supra* note 126, at 81-82.

133. See Nichols, *supra* note 11, at 699-700.

recognize the high priority which rights must hold in any policy determination, but in fact the necessity test turns this on its head, and privileges trade values over all other competing values.¹³⁴

To a limited extent the "reasonably available" qualification invites some consideration of the effectiveness of the disputed measure in accomplishing its non-trade regulatory purpose, since any less trade-restrictive measure, which forms the basis for an invalidation of the chosen measure, must be "reasonably available" in view of the state's non-trade regulatory objectives. The extent of such consideration, however, depends entirely on the interpretation of such language, and the application of the qualification, by the GATT panel. In particular, the language clearly does not require specific consideration of the *effectiveness* of alternative measures in achieving their non-trade goals, in the way that similar language in the Sanitary and Phytosanitary Agreement does refer to the level of protection achievable by the alternative measure.¹³⁵

Therefore, it would be consistent with the language of the necessity test as currently interpreted for a GATT panel to find that a measure significantly less effective in achieving the non-trade purpose would nonetheless be identified by the panel as "reasonably available," and therefore serve as the basis for invalidating the chosen measure. This is disturbing in that, since such a measure was in fact *not* chosen by the sanctioning state, this language would have the effect of substituting the trade forum's opinion of the rationality of alternatives for the opinion of the legislating forum.¹³⁶ If one considers that do-

134. Thomas J. Schoenbaum has argued that the current GATT/WTO interpretation of the Article XX(b) necessity test turns the provision "on its head" in a literal sense, in that "necessary" refers syntactically to the need for protection of life and health, and not to the trade effects of the measure, and is thus wrong on textual grounds. Thomas J. Schoenbaum, *International Trade and Protection of the Environment: the Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 276 (1997).

135. "[A] measure is *not* more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade." Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 9, art. 5 n.3 (1994) (emphasis added). See *infra* notes 168-69 and accompanying text.

136. Also, if the test is interpreted, as it has been, to require justification not of the entire regulatory scheme but of each specific trade restrictive component,

mestic legislatures may, in principle and at least in certain cases, produce legislative outcomes "on the merits," then it is clear that the language of Article XX(a) and (b) invites the questionable substitution by a panel of trade experts, with a built-in bias favoring trade values, of a less effective human rights measure in the place of a more effective, democratically-selected, human rights measure on the basis of the measure's effects on trade.¹³⁷

IV. PROTECTING HUMAN RIGHTS IN THE INSTITUTIONS OF THE GLOBAL MARKET: DOCTRINAL SOLUTIONS FOR NORMATIVE CONFLICTS

As a matter of justice, our society is committed to both markets and rights. Therefore, it is inevitable that there will be conflict between the rationality of markets and the rationality of rights. In many respects, the challenge facing the global community is akin to the challenge facing any society based on both markets and rights—how to carve out the respective spheres for rights and for free market choices, and how to regulate or limit the range of market choices when they threaten fundamental rights. This comes down to institutional decisions, of both a norm-creating and adjudicative nature. In other words, how do we incorporate both trade values and human rights values in comprehensive policies respecting both markets and rights, and what rules do we apply when these values, and the laws incorporating these values, conflict?¹³⁸

The resolution of globalization/human rights conflicts in a manner which enhances the effectiveness of human rights law is going to require a mechanism for the recognition within

then the burden is much more difficult to meet. Trachtman in fact concedes that the alternative would be much more favorable to non-trade values. Trachtman, *supra* note 126, at 69.

137. Accord Schoenbaum, *supra* note 134, at 277 ("this interpretation of 'necessity' constitutes too great an infringement on the sovereign powers of states to take decisions (one hopes) by democratic means so as to solve problems and satisfy their constituents"). Trachtman concedes that in this approach the characterization of the measure to be evaluated introduces "a certain degree of outcome-determinative discretion." Trachtman, *supra* note 126, at 69. This discretion is, of course, in the hands of trade policy experts.

138. The importance of mechanisms to balance the conflicts which can occur between fundamental normative elements of a globalized liberalism, such as the conflict between free markets and human rights, is recognized as one of the central challenges of globalization. See Seita, *supra* note 11, at 484-85.

international economic law of the priority, which at least certain fundamental human rights must enjoy. In other words, there must be some mechanism for a constitutional level of deference within international economic law toward at least certain elements of the International Bill of Human Rights, such as the core rights involving life, freedom, security and bodily integrity, and the recognition within international economic law of rights-enforcement techniques such as trade sanctions, which make such rights effective, and which cannot be balanced or traded off in international economic law dispute resolution decisions. Where some sort of trade-off is inevitable, there must be clear recognition of the priority which human rights claims must have in any value conflict.

A. *Pre-empting Conflicts Among Different Sets of Rules*

At the global level, resolution of the trade/human rights conflict is complicated by the defects, from a constitutional viewpoint, of international governance.¹³⁹ It is a fundamental feature of the landscape of global social policy in the late 20th century that no one institution has the effective jurisdiction to create and adjudicate norms in all aspects of global social concern.¹⁴⁰ Instead, we find separate treaty regimes and separate institutions, built and justified according to conflicting normative principles, yet both ultimately reflecting critical aspects of a liberal vision for global social life.

As a result, it is likely that norms affecting both human rights and trade will continue to be negotiated in the context of a treaty or treaty-making conference predominantly oriented towards one or the other of these areas of social concern. And it is likely that disputes involving both human rights and trade law will, absent modification of the existing governance mechanism, continue to be resolved in dispute resolution fora which will be constrained by treaty law and institutional paradigm to give priority to one set of concerns over another. Therefore, a natural question to consider first would be whether one solu-

139. In fact, national measures are more likely to be used in absence of international government. See Charnovitz, *Social Issues*, *supra* note 48, at 19.

140. For an excellent discussion of the problems which this institutional fragmentation creates in the trade/environment area, see Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994).

tion might be some mechanism to either expand the scope of the WTO to include human rights norms themselves, thus bridging the regulatory chasm, or concede the institutional disjunction and limit the jurisdiction of trade institutions over human rights measures.

1. Include Human Rights Rules in Trade Agreements

It has been suggested that one approach would be the incorporation of certain human rights norms into the WTO agreements.¹⁴¹ Modifying the WTO to include human rights concern is of course more attractive than the reverse, namely adding trade issues to the scope of existing human rights treaties and institutions, since the WTO is the preeminent global economic institution, with a newly strengthened enforcement system and immense international prestige. Moreover, the GATT treaty does recognize to a certain extent certain important social policy concerns based in values other than trade.¹⁴² This approach would add to that foundation by interpreting Article XX(e) as a broad human rights exception,¹⁴³ modifying the WTO agreements to add a core list of recognized human rights,¹⁴⁴ and creating a specialized human rights body within the structural framework of the WTO, with authority to hear human rights related complaints and to impose trade sanctions.¹⁴⁵

This approach has the benefit of reversing the current trend of institutional specialization which complicates the trade-human rights and other trade linkage issues. However, it is precisely for this reason that such an approach is unlikely to succeed, in that there does not appear to be the requisite degree of political support that such a sweeping overhaul would require. In fact, the trend seems in the opposite direction, as the majority of the world's trading nations have decided that

141. See Stirling, *supra* note 29, at 33.

142. However, the adequacy of the measures adopted can be questioned, as can the extent to which such concerns are recognized. Moreover, the underlying normative source of the conflict is not recognized explicitly, principally because the GATT adopts a trade values-based regulatory system. See Charnovitz, *Social Issues*, *supra* note 48, at 23-24.

143. See *supra* notes 117-19 (discussing the Article XX(e) exception).

144. See Stirling, *supra* note 29, at 39-40.

145. *Id.* at 40-45.

the WTO is not the appropriate institution to articulate human rights norms, leaving that to other specialized agencies such as the ILO.¹⁴⁶

2. Limiting Trade Jurisdiction Over Human Rights Measures

Alternatively, the jurisdiction of the WTO could be limited such that the legitimacy of any human rights-related trade actions would not be adjudicated in the WTO.¹⁴⁷ The broadest across-the-board restriction on the WTO's jurisdiction over human rights measures would be a general exception added to either the GATT, the WTO Charter or the WTO Dispute Settlement Understanding, excluding national measures taken in response to violations of treaty-based or customary human rights from WTO review.¹⁴⁸ However, contrary to existing Article XX exceptions, which incorporate some form of trade-off mechanism presupposing panel review, such an exception would have to be drafted more along the lines of the national security exception in Article XXI, vesting in the sanctioning state some form of unilateral discretion in the face of human rights violations. Otherwise, human rights-based measures are not really excluded from WTO review, but privileged according to some form of trade off mechanism.¹⁴⁹

An alternative approach, more limited in scope, would only apply to human rights treaties involving products which themselves embody or are the fruits of human rights violations, such as pornography and the products of indentured child labor; or to any human rights treaties negotiated in the future to expressly provide for the use of economic sanctions in response to human rights violations.¹⁵⁰ In such cases, the WTO

146. See *Singapore Declaration*, *supra* note 34.

147. This is the approach Philip Nichols advocates for linkage issues in general. See Nichols, *supra* note 11, at 709-12.

148. Cf. Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185, 204 (1994) (arguing that amending GATT to draft new environmental exception is the best approach to the trade/environment linkage problems).

149. Nichols seems to blur this point, in that the operation of his exemption would still require an investigation by a dispute settlement panel into the measure's purpose. Nichols, *supra* note 11, at 709-12 (positing implementation of human rights measures through modification or interpretation of the DSU).

150. This might resemble the practice under certain environmental treaties to provide for trade-restrictive measures to be taken with regard to delineated products which harm the environment. See Protocol on Substances that Deplete the

should be required to recognize the legitimacy of sanctions imposed within the constraints of such a treaty, and such measures should not have to undergo the necessity test as applied through the Article XX exceptions.¹⁵¹ Such recognition could take the form of a pure hierarchy of norms provision, ensuring that in the event of a conflict between a trade measure and a measure taken pursuant to an obligation under such an enumerated treaty, the obligations of that treaty should prevail.¹⁵²

There are several benefits to adopting either of these variants. First, this approach would represent the decision by the international community at the *political* or legislative level¹⁵³ that trade-related human rights measures are appropriate despite their potentially adverse trade effects. Second, either amendment eliminates the interpretive problems attendant to including human rights measures within the scope of existing exceptions.¹⁵⁴ Third, in its Article XXI-like form, such an exception would grant the broadest possible scope for state action, including both economic measures taken pursuant to a

Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550, art. 4 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, arts. III-V, VIII 12 I.L.M. 1085 (entered into force July 1, 1975) [hereinafter Wild Fauna Convention] (both providing for the total ban of unlawful trade in covered substances, even with non-parties to the agreement). Of course, in the case of these treaties, the restrictions apply to products which themselves produce the harm.

151. The GATT already recognizes this principle in its exception for economic sanctions implemented in response to a U.N. Security Council Resolution. GATT, *supra* note 31, art. XXI(c). Particularly when one considers that such a measure would still be subject to multilateral review and constraint within its own system, such an exclusion may not be too broad for advocates of the trade system.

152. The "purity" of this proposed hierarchy of norms lies in the fact that it does not incorporate a trade-off mechanism requiring panel review, in contrast to the actual NAFTA hierarchy of norms provision, which in the case of environmental treaties imposes a necessity test on measures taken pursuant to the listed treaties. Article 104 of NAFTA states that, where there is an inconsistency between NAFTA obligations and the obligations imposed by certain listed treaties, including the Montreal Convention and the Wild Fauna Convention, *supra* note 150, the obligations under the listed treaties shall prevail to the extent of the inconsistency, provided that the Party has chosen the least inconsistent means of complying with the conflicting obligation, where the party in fact has a choice among "equally effective and reasonably available" means of compliance. North American Free Trade Agreement, Dec. 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993).

153. On the distinction between legislative and adjudicatory approaches to the problem, see Nichols, *supra* note 11, at 691-99.

154. See *supra* notes 118-24 and accompanying text.

human rights treaty authorizing sanction, and economic measures taken unilaterally by a state in response to violations of rights which, while they are the subject of binding international custom or treaty law, are not expressly contained within instruments authorizing economic sanctions. In its narrower, hierarchy-of-norms form, such an amendment would still grant a very high level of deference to at least treaty-based human rights measures.

In granting to human rights measures an automatic exclusion from review according to trade values and trade principles, such a general exception would be quite congenial to the philosophic approach of the human rights movement, which seeks recognition of the priority of human rights claims.¹⁵⁵ However, the very breadth of such an approach, coupled with its preference for human rights over trade values, would make such an amendment difficult to enact in the face of concerted opposition from WTO Member States committed to a higher priority for trade values. Moreover, an Article XXI approach, or a pure hierarchy of norms, would be unpopular for its very nonjusticiability, already a concern with the existing Article XXI exception. This nonjusticiability would be resisted on formal grounds, in view of the strong preference in the WTO for rule-based adjudicative dispute resolution, and by Member States reluctant to open themselves to such broad unreviewable use of economic sanctions. Finally, such an approach would raise quite legitimate concerns over the invitation to protectionist abuse that such a blanket exception would invite.¹⁵⁶

155. Moreover, the conflict at the norm-creation stage remains less constraining, in that states are free to reach negotiated compromises between different sets of values in the creation of a treaty, in a way that treaty-based dispute settlement mechanisms are not.

156. Such an exception could still be conditioned on the *chapeau* test for arbitrary discrimination or disguised restrictions on trade, and thus would not be a blanket invitation to protectionist legislation. Adding a *chapeau*-style test would change the nature of the exception from a limitation of jurisdiction to an amendment altering the nature of the trade-off device. It may also be possible to determine a rule or metric for distinguishing "authentic" from "protectionist" invocations of such a human rights exception, as Jeffrey Atik has proposed regarding linkage issues generally. See Jeffrey Atik, *Identifying Anti-democratic Outcomes*, 19 U. PA. J. INT'L ECON. L. 229 (1998).

B. Rights-deferential Trade-off Mechanisms Where Conflicts Must Arise

Absent the implementation of a preclusionary approach such as those discussed above, one must then face the existing problem of how to adjudicate trade disputes involving human rights, where measures based on the obligations of customary or treaty-based human rights norms are at issue within trade fora which are treaty-bound to consider only trade-based factors. Therefore, the remainder of this section will focus on ways to avoid or minimize such conflicts as they might arise in trade dispute settlement fora, attempting to reconcile trade and human rights claims in a way that more accurately reflects the preeminent status which human rights claims must be afforded in policy disputes.

1. Amending the GATT to Apply a Different Trade-off Mechanism

To the extent that trade-human rights conflicts are going to be adjudicated within trade institutions, it becomes critical to revise the trade-off mechanisms which will be applied in trade dispute resolution mechanisms to better take into account human rights law and principles, while permitting the trade panel to identify and rule against disguised protectionism.

a. National Treatment

The principle of national treatment is a basic tradeoff mechanism employed by most trade agreements, including the WTO. The national treatment rule is not inherently objectionable for human rights, since it merely requires a level of consistency between foreign and domestic treatment of goods or producers with regard to any legislation, including one addressing human rights violations.¹⁵⁷ To begin with, in appropriate cases national treatment may be the only requirement,

157. Interestingly enough, however, Trachtman characterizes national treatment as in fact biased in favor of non-trade values and is critical on this basis. See Trachtman, *supra* note 126, at 72. However, from the perspective of human rights, one would expect that any trade-off mechanism employed *should* be biased in favor of human rights.

as in a ban on trade in obscene materials, in which the product itself embodies the violation. If such products are banned domestically as well, then there is no national treatment violation, and the inquiry should stop there. However, in the hypothetical case we are considering involving trade sanctions, national treatment would not be an appropriate mechanism. The measure in question would almost certainly be a *prima facie* violation of the national treatment rule, since the measure is addressed at a rights-oppressive practice that in many cases will not even be connected to the process, let alone the product, targeted by the sanction.¹⁵⁸ For the same reason, domestic products will not be subject to any analogous restriction. In this case, if national treatment alone were the dispositive test, then it would in fact operate as a complete rejection of non-trade values, contrary to Trachtman. Thus, while a national treatment test may be friendly or even biased in favor of non-trade values where an aspect of the product or process is in question, this rule would not work so favorably towards non-trade values in a general sanctions situation, which is likely to be more common.

In such cases, a modified form of national treatment may be indicated, focusing on the sanctioned conduct and not on the products which are the targets of the sanctions.¹⁵⁹ In such a case, one would want to know if the conduct which forms the basis of the sanction is also prohibited domestically.¹⁶⁰ For sanctions which are applied pursuant to a human rights treaty, or which have been approved by a multilateral human rights treaty-based organ, this should be enough from a trade point of view. The legitimacy of the sanction itself, if challenged, should be challenged in the applicable human rights

158. In the child labor example, however, there is a link between the embargoed product and the suspect process. Nevertheless, the product/process distinction, if carried forward into WTO jurisprudence, would be fatal to measures addressing human rights violations which arise in the production of certain products. See Tuna I, *supra* note 121; Tuna II, *supra* note 122.

159. The panel report in Tuna I may not be an insurmountable obstacle in this regard, in that it has been much-criticized and, in any event, was not adopted. See Tuna I, *supra* note 121; Charnovitz, *Green Trade*, *supra* note 115, at 723.

160. This approach would be consistent with an early draft of the predecessor to Article XX in the Draft ITO Charter, as noted by the panel in Tuna I: "exception (b) read: For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country." (emphasis added). Tuna I, *supra* note 121, ¶ 5.26.

forum, not the trade forum.

b. Rationality

Assuming human rights can come under Article XX (a) or (b) or Article XX is amended to create an additional, express human rights exception, the nature of human rights will require a more rights-deferential test than the necessity test. In the case of unilateral sanctions that are not aimed at specific products tied to the human rights abuse, it may be appropriate at the trade level to apply a simple rationality test, as a safeguard against blatantly protectionist measures.¹⁶¹ Thus if there is a rational, means-end relationship between the sanction and the targeted conduct, the inquiry should stop there.¹⁶² A trade sanction imposed against a vital export of the abusive country, with conditions for its removal clearly tied to changes in human rights practices, should satisfy such a test. A trade sanction imposed against a less significant export, but one which has a powerful domestic producer lobby, or where the conditions for removal cannot be met or have been met without the lifting of the sanction, should not meet this test.

c. Proportionality

It may be that the trade community would consider a mere rationality test inadequate, because of the omnipresent danger of disguised discrimination, and would press for a still-more trade deferential form of trade-off device such as proportionality. The proportionality test requires that the trade cost be proportionate with reference to the non-trade benefits. Trachtman cites this as deferential to a degree to non-trade values, in that it requires only that the burden be proportionate.¹⁶³ But this test seems quite biased in favor of trade values, at least in the case of conflicting human rights values, in that human rights law places a supreme value on human

161. This would be consistent to the approach taken to measures restricting trade in the products of prison labor, which face only a rationality test.

162. This would bring the language of Article XX(b) into line with the existing language of Article XX(e), which merely imposes a rationality test. *See supra* note 124 and accompanying text.

163. Trachtman, *supra* note 126, at 81.

rights, which might in fact *require* a "disproportionate" level of deference or protection. At least, it could easily appear disproportionate to trade policy experts charged with applying these rules, particularly given the bias in trade fora against deontological forms of moral reasoning. The very inalienability of human rights might suggest a disproportionality to some.¹⁶⁴

2. Modifying the Necessity Test Through Judicial Interpretation

For the reasons discussed above, the necessity test as applied fails to take into account the priority which human rights-related claims must be accorded, and in fact is biased against non-trade values including human rights. However, the political factors attendant to WTO amendment and the strong, if not overwhelming, pro-trade bias of the institution and its dominant Member States, may preclude any sort of amendment substituting a potentially more human-rights deferential trade-off mechanism, leaving the necessity test in place. Therefore, if some sort of necessity test must perforce be utilized, it should be modified to grant increased deference to human rights values.

One approach would be to simply introduce such modifications into the jurisprudence of Article XX through a decision by the WTO Appellate Body. This is less formally protective than an explicit amendment of the language, but is certainly procedurally more readily attainable.¹⁶⁵ A logical place to consider

164. Ultimately, such measures would not be ruled disproportionate if the forum recognizes the priority of human rights to a sufficient degree that the resulting trade burden would be considered appropriate. But this depends entirely on the trade forum's characterization of the importance of the value being protected by the legislation in conflict. Is it appropriate for democratically-enacted human rights laws to be subject to this sort of evaluation by an independent body of trade policy experts? See generally Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994) (presenting a critique of the anti-democratic nature of trade institutions).

165. The effectiveness of these approaches would, of course, depend on the precedential effect of WTO appellate body rulings. To the extent that the emerging doctrine of *stare decisis* in WTO decisions continues to evolve, such approaches may be equally as effective as formal amendments, and more readily attainable. See Raj K. Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. J. INT'L L. & POL. (forthcoming 1999); Raj K. Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. TRANSNAT'L L. & POL'Y (forth-

an interpretive amendment would be in the application of the existing "reasonably available" qualification. The most rights-protective interpretation would stipulate that, in order for the existence of a less trade restrictive alternative to invalidate a human rights measure, it must be shown that the less restrictive alternative is *equally effective* in terms of its impact on the human rights abuse in question. So interpreted, the WTO necessity test would resemble the necessity test embodied in the NAFTA's hierarchy of norms provision.¹⁶⁶

A somewhat less rights-protective approach would be to interpret the necessity test in Article XX to conform to the necessity test as established in the Sanitary and Phytosanitary Agreement, which requires that a less restrictive measure be both "significantly" less restrictive, and disqualify the challenged measure only if it meets the "appropriate" level of protection.¹⁶⁷ This is clearly not as strong as the NAFTA test, since an "appropriate" level may be somewhat less than the "equally effective" level. However, it is still an improvement over the necessity test as currently interpreted, and should be the minimum standard applied to any less effective but more trade-friendly human rights measure at the panel level, since to find such a measure reasonably available without any consideration of such effects would be to utterly subvert both the judgement and the regulatory aim of the state. If coupled with procedural reforms allowing amicus briefs, panelists with non-trade expertise, or other forms of participation by the human rights community,¹⁶⁸ such an amendment would put non-trade values more on a par with trade values in any Article XX (a) or (b)-based proceeding.

V. CONCLUSION

The linkage debates currently underway in trade law and policy reveal to us that international economic law is funda-

coming 1999); Rutsel Silvestre J. Martha, *Precedent in World Trade Law*, 64 NETH. INT'L L. REV. 346 (1997).

166. See *supra* note 152.

167. See *supra* note 135 and accompanying text.

168. See *Shrimp Case*, *supra* note 41, ¶¶ 89-91; Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 328-29 (1996) (arguing that panel composition should be changed to include appropriate non-trade experts).

mentally about justice, as are human rights law and other linkage issues. Therefore, conflicts between the regulatory infrastructures of globalization and international human rights must be analyzed and approached as justice questions. In practice this means paying attention to the decision-making process employed in such conflicts, in that it reflects a process of moral reasoning about issues of justice, and is not simply an exercise in identifying trade-liberalizing and trade-restrictive practices.

Ultimately, the effect of globalization on the recognition, protection and enforcement of human rights is going to depend on the relationship between international economic law, which provides the institutional and regulatory framework for globalization, and the international law of human rights. The issue is complicated by the overlapping jurisdiction of both international economic law and international human rights law over the same geographic and social space. Each regulatory system has been built according to, and operates on, fundamentally different, even conflicting, normative assumptions. Thus the institutional mechanisms developed to establish norms and resolve disputes in the context of overlapping jurisdictions and conflicting values will in practice determine whether globalization proves to be a friend or foe to human rights. From the above it is evident that absent significant reforms, trade law, and the forms of economic analysis underlying it, are inadequate for the just resolution of conflicts involving human rights law in a global market, at least if one considers human rights to hold a privileged position in law and policy. The changes suggested above, while they undeniably reflect a social decision in favor of the human rights principle over, or at least on a par with, conflicting trade interests, are in line with our domestic stance on such issues. If we have taken a position in our domestic constitutional orders that fundamental rights are not subject to unfettered balancing and compromise, then there is no principled reason to reach a different conclusion in the international arena. Of course, one can still differ as to the best means towards this end, and consequential forms of analysis are useful in identifying favorable approaches. However, the end must be clear, and not open to accommodation.

It has been suggested that, paradoxically, the greater the potential threat to human beings and their vital interests posed by utilitarian reasoning, the greater the perceived need

for rights-based theories.¹⁶⁹ If so, this might lead one to be optimistic that some version or combination of the reforms outlined above might be adopted in the next stage of WTO evolution. Absent such changes, market globalization, in its institutional and regulatory form as the international economic law of today, could mean the triumph of utilitarian approaches to values over deontological ones, and therefore the triumph of trade over human rights. The trade system as it is now constituted is normatively incapable of properly evaluating linkage decisions because its very approach signals a defeat of fundamental non-trade values. At a minimum, this means that to the extent that trade institutions are called upon to resolve issues involving trade values and other values such as those underlying human rights law, the utilitarian approach underlying trade values will lead to decisions which are fundamentally skewed in favor of trade over other values at stake. This is not a victory for trade, but a defeat for our efforts to establish a just global order.

169. Frey, *supra* note 59, at 18.

GLOBALIZATION AND HUMAN RIGHTS: AN ECONOMIC MODEL

*Mark A. A. Warner**

I. INTRODUCTION

The relationship of the development of human rights law and international economic law to globalization is a very important subject. I would like to begin my comments with my definition of globalization. We heard about globalization from Professor Henkin and also from Professor Garcia. My perspective will focus on the building blocks of globalization, because I think that will show what globalization is and what it is not, what it does and what it does not do.

I will also talk about what human rights are. I think we need to decide first exactly what we mean by human rights before we discuss the utilitarian calculus and the relationship between globalization and human rights. Professor Henkin spoke about important events in the life of the Universal Declaration of Human Rights:¹ the birth of the Universal Declaration, its marriage certificate, and its significance as a death certificate for certain legal principles. Despite the birthday celebration, I intend to criticize the Universal Declaration today because I do not think it ultimately makes much sense. In fact, I believe it leaves a lot of uncertainty about what human rights are.

I also want to focus on a very good economic study done by Jeffrey Sachs several years ago. The study will allow us to look at the relationship between human rights, broadly defined, and globalization and see what we can learn from that examination. Further, I want to examine these issues critically to see whether the conflicts are real or imaginary. Finally, I want to discuss on a practical day-to-day level how we instrumentalize

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1. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. I, 183d plen. mtg., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

or operationalize a discussion about human rights in an international forum.

II. DISCUSSION

Globalization is a very basic phenomenon.² It is a function of the simultaneous rise of significant amounts of trade and significant amounts of investment. Not too long ago, perhaps ten or twenty years ago, economists thought that investment and trade were substitutes, but as the multilateral rounds of trade negotiation have progressed we have found that by reducing barriers to trade, contrary to the prior belief, we have seen investment rise. It used to be that countries would erect barriers to trade, tariffs, as a means of attracting foreign investment. Some countries, for example, Australia and Canada, had a completely schizophrenic approach. Having erected trade barriers to encourage investment, these countries would then set up elaborate investment screening regimes to ensure that McDonald's franchises or Gap stores were not on every street corner.³ Notwithstanding such contradictions, globalization is really about the rise of trade and investment. Investment flows are pushed through the rise of multinational enterprises.⁴

The rise of multinational enterprises is key because we have found that most trade and investment that takes place in the world takes place within the framework of a multinational enterprise.⁵ It is called intra-firm trade or intra-industry trade. Thus, the engine of trade and investment in the world is really driven by multinational corporations. I happen to think that this is a good thing.

Why do multinational corporations want to spread all over the world? Why do they want to respond to tariff barriers go-

2. For a good review of the economic trends that underpin "globalization", see Alex Y. Seita, *Globalization and the Convergence of Values* 30 CORNELL INT'L L.J. 429, 469 (1997).

3. Mark A. A. Warner, *A History of United States-Canada Trade and Investment Relations*, in *MULTINATIONALS AND CANADA-UNITED STATES FREE TRADE* 16 (Alan M. Rugman ed., 1990).

4. For a very good summary of the trends and determinants of foreign direct investment, see UNCTAD, *World Investment Report 1998: Trends and Determinants* (1998).

5. See generally RICHARD E. CAVES, *MULTINATIONAL ENTERPRISE AND ECONOMIC ANALYSIS* (1982); Alan M. Rugman & Mark A. A. Warner, *Strategies for the Canadian Multinationals*, in *INTERNATIONAL BUSINESS IN CANADA: STRATEGIES FOR MANAGEMENT* 200 (Alan M. Rugman ed., 1989).

ing down? They want to take advantage of certain production and distribution efficiencies, by, for example, making a product in Mexico by bringing a part in from Canada and another part in from Malaysia. Why do they do this? Just because it is nice to bring in parts from other parts of the world? No. They do it so that you and I can walk down the street and buy a cheaper car. We can talk about other social preferences and we can use fancy Latin words describing why we do it. But each and every one of us goes and buys the cheapest car. This pushes the multinationals' actions, because they are in the business to sell cars and to make money and to make a profit. We are, each of us, the agents of globalization because we are the consumers. When we talk about globalization we cannot forget our role.

Productive efficiency and distributive efficiency are not merely abstract concepts. These concepts allow us to achieve increases in global welfare, not just in individual welfare. The gains from trade (using trade in the broadest sense to include trade between nations, trade between firms, and trade between consumers), by having things produced where they can be produced most cheaply and by allocating them to the people who want them more, result in an increase in global welfare. That means there is more money available for us to buy more things and if we don't want to buy things, then we can buy leisure, because leisure is also a good. We can choose not to buy a car, we can choose to spend more time in a cab, or if we really want to avoid cars, we can choose to give our money to a charity.

Of course, there are other supportive and mutually reinforcing technological developments in transportation and communication that have facilitated the globalization process. The globalization process is also driven by revolutions; revolutions in communication and in transportation. The revolution in transportation makes it possible for people to move the products around the world; the revolution in communication makes it possible for capital to flow back and forth. As a result, not only is capital highly mobile today, so too are highly-skilled labor, and in some places, highly-unskilled labor. Before turning to defining the scope of human rights, it is worth considering that there are two relevant forms of increased investment flows. Investment that is of a long-term nature, or foreign direct investment, has arguably been spurred by the combination of the revolution in transportation and the trade liberal-

ization process discussed above. However, developments in communications, and the liberalization of certain trade in services, arguably has facilitated a significant rise in foreign indirect investment or short-term portfolio capital investment. In practice, it is not always simple to distinguish between foreign direct investment and indirect investment in a particular period. The distinction is, nonetheless, crucial because some of the recent concerns about the effects of globalization are rooted in concerns about short-term, highly volatile capital movements. In considering the linkage between human rights and globalization, and potential policy options, it will be important to bear this distinction in mind. This is globalization. It is not a monster; it is not something strange; it really is about increasing societal welfare.

What do we mean by human rights? I thought that I would take the Universal Declaration of Human Rights as a definition of natural rights. We should be looking at the Declaration to try and decipher definitions of human rights because the Declaration itself is hopelessly incoherent. It is hopelessly incoherent because it tries to do too many things. Professor Henkin noted that it merges notions of welfare economics, rooted in the 1940s economics (I would add, largely discredited today), with a much older tradition of natural rights. The problem is that these things don't always fit together very well. Let's start with natural rights, namely the basic human rights that one finds in the Universal Declaration, i.e., the right to life,⁶ the right against arbitrary arrest,⁷ and the prohibition of slavery.⁸ These rights make sense to me. It gets more complicated, though, when you start to wed these rights to welfare state rights.

Let's explore some of the more difficult to understand rights found in the Universal Declaration. First, let's start with cultural rights, because I live in France, where people think that culture is important. The right to speak the French language is important, of course, but it is also important to line up to watch the latest Madonna movie or to go to a McDonald's restaurant on the Champs-Élysées. Article 15 of

6. Universal Declaration, *supra* note 1, art. 3.

7. *Id.* art. 9.

8. *Id.* art. 4.

the Universal Declaration refers to cultural rights,⁹ but what does that mean? Does it mean that there should be no McDonald's restaurants on the Champs-Élysées? Remember, the French just stopped a multilateral agreement on investment, in part, because they thought their cultural sovereignty was at risk.¹⁰ Is that the kind of right that the Universal Declaration enshrines and do we want to have it trump the values of global welfare?

Article 27 refers to the right to participate in the cultural life of a community.¹¹ Does that mean that I have a right to go to the opera? You know in France, in fact, a recent hot political debate after the Socialists came to power in 1997 was over whether people should have a right, if they are on welfare, to get a free opera ticket. Does this proposition, seriously debated in Paris, flow from the Universal Declaration? Similarly, let me ask what is a right to nationality, or a right not to be deprived of nationality, or the right to change nationality?

The Universal Declaration talks about the right to property in Article 17.¹² How do we weigh the right to property in Article 17 against the right to Social Security in Article 22, or against the right to an adequate standard of living in Article 25? Can I be deprived of my property in order that others can realize their economic, social and cultural rights to go to the opera, which they, of course, see as indispensable for their dignity and the free development of their personality? If, yes, then how will I know when or whether that deprivation was arbitrary? Will the arbitrator's decision relate to the resources of the state or the extent of international cooperation? This is from the language in Article 22.¹³

What is meant by a right to work? Or free choice of employment in Article 23?¹⁴ Will that right be satisfied by governments pursuing framework economic policies that discipline inflation and stimulate investment and global economic welfare? Or is there something more fundamental intended here? What is the right to just and favorable remuneration? I don't

9. *Id.* art. 15.

10. Pierre Gonzales, *L'exception culturelle confrontée*, LE FIGARO Oct. 15, 1998.

11. Universal Declaration, *supra* note 1, art. 27.

12. *Id.* art. 17.

13. *Id.* art. 22.

14. *Id.* art. 23.

think I make enough money in Paris. Have my rights under the Universal Declaration been violated?

Article 13(1) proclaims a right to labor market mobility, but only within a state, which is very interesting.¹⁵ Article 13(2) describes a narrower right to leave and return for tourist purposes between states.¹⁶ Reflecting on the right to labor market mobility, the Indian government, with a huge number of unemployed people, would like very much to send people to work in the United States, which has a very low unemployment rate. The Indian government actually makes this argument in the WTO, and states it as an expression of rights, citing the Universal Declaration. These are some of the rights that are difficult to understand, or make sense of, that one finds in the Universal Declaration.

We need a fuller view of what we mean by human rights. It is not just a matter of slave labor or child labor. Even with child labor we need a fuller view. Again, we can learn from Indian and also from Indonesian perspectives on child labor. They may ask if we find something morally offensive about a twelve year-old working in a factory, whether we would rather have him or her work on a street corner as a prostitute. That's the choice for many large families that are destitute. It would be nice to say that the Indian government has a responsibility to construct schools and send these children to schools rather than to work in the factories. The Indian government doesn't have the money to construct the schools, however. In order to do that, they have to pursue framework economic policies that promote investment and trade for faster development of global economic welfare, including Indian welfare.

Countries have to pursue policies that will lead to an efficient form of production and distribution that will enable to them to build the schools and the hospitals they need to give meaning to the economic rights of this Universal Declaration. They were given meaning, I suppose, in the welfare context of the post-war era. I must confess, though, that the economic rights have always struck me as particularly difficult to take seriously since the countries that listed these economic rights all had colonies from whom they were stealing at the time they

15. *Id.* art. 13(1).

16. *Id.* art. 13(2).

were writing the Universal Declaration. That is how they funded the social welfare system in so many of these countries.

However, it is not my purpose here to belittle the Universal Declaration which, I acknowledge, has been an important rhetorical anchor in the struggle for freedom for many people throughout the world. Rather, I want to underscore some of the complexities of beginning to conceptualize a linkage between globalization and human rights. I want to suggest that, at best, human rights can be thought of as bundles of rights and that individuals and societies may choose to include and to emphasize different elements at different times in response to different circumstances. Admittedly, there is something deeply unsettling about a conceptual reading of something so fundamental as a human right. At times there may be a certain clear international consensus of what elements should be in the human rights bundle, what elements cannot be taken out of the bundle. In those circumstances, it would be easier to talk about the linkage between globalization and human rights.

The international consensus is, to me, crucial in bringing together globalization and human rights. As someone who once fought very hard for economic sanctions against South Africa, I would point out that there was an international consensus, reflected in resolutions passed in the General Assembly of the United Nations, that, in fact, apartheid was a crime: Where that international consensus exists, I believe that we all, as intelligent and fully informed human beings, can make the choice to have a lesser degree of global welfare, a lesser degree of the productive and distributive efficiency that gives rise to that global welfare, because there are certain higher values to which we all agree. Without that international consensus, I would suggest that we really shouldn't interfere with globalization in the name of selective violations of human rights.

In the last section, I suggested that judging from the experience under the Universal Declaration, it may be easier to delineate the scope of political rights than economic rights. This gives rise to a series of questions relating to globalization. First, does the open national or multilateral trade and investment rule-making at the heart of globalization support or undermine the political rights described above? Second, does the open national or multilateral rule-making at the heart of globalization support or undermine the economic rights described

above?

I have found the work of Jeffrey Sachs and Andrew Warner of the Harvard Institute of International Development to be a very powerful resource in answering both these questions.¹⁷ In the mid-1990s, Sachs and Warner waded into a ten year-old debate in development economics about whether there is a tendency for poorer countries to grow more rapidly than richer countries. Until the mid-1980s, that model—the “Solow Growth Model”—which assumed the traditional neoclassical constant returns to scale was widely accepted in the development economics literature. Then, growth models which incorporated increasing returns to scale, tended to predict that rich countries would maintain or increase their advantage over poorer countries.¹⁸ Subsequent research has shown that convergence holds among the richest countries, namely the OECD countries, but not among the richest and poorest.¹⁹ Some of this literature suggests, at best, rather pessimistically (if not euphemistically), that only countries with an adequate initial level of human capital endowments can take advantage of modern technology to lead to convergent growth.

Sachs and Warner offer a more optimistic take on convergence. They argue that countries with appropriate political rights and open economies can join the “convergence club.” They demonstrate that poor countries that have followed standard market-based economic policies, including respect for private property rights and open international trade, tend overwhelmingly towards convergence. This holds true even for countries that start with extremely low levels of human capital endowments and extremely low levels of initial per capita income. An “inappropriate” property rights policy was assumed to be one of the following: a socialist economy; prolonged civil or foreign conflict; or extreme deprivation of civil or political rights. A closed economy was assumed to be any one of the following: a very high proportion of imports covered by quota restrictions; a high proportion of exports covered by state mo-

17. See JEFFREY D. SACHS & ANDREW M. WARNER, ECONOMIC CONVERGENCE AND ECONOMIC POLICIES (National Bureau of Econ. Research Working Paper No. 5039, 1995).

18. See Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002 (1986).

19. See CONVERGENCE OF PRODUCTIVITY (William J. Baumol, Richard R. Nelson et al. eds., 1994).

nopolies and state-set prices; a socialist economic structure; or a black market premium over the official exchange rate.

With a sample of 117 countries, Sachs and Warner then grouped countries into groups: qualifying countries and non-qualifying countries. Qualifying countries had to satisfy both the appropriate political and economic tests. Those that failed one of the tests were classified as non-qualifying countries. Three conclusions are of interest here. First, qualifying countries experienced significantly higher growth rates than non-qualifying countries. Second, the economic openness test proved to be the main determinant of whether a country was a non-qualifier. With all but two discrete examples, all countries that failed the political test, also failed the economic test. Third, cross-sectional analysis demonstrated that the political variables do significantly influence the rate of growth. Sachs and Warner suggest, therefore, that adoption of appropriate political and economic policies is a *sufficient* condition to produce economic growth and development. However, their study suggests that the adoption of these policies is not a *necessary* condition for economic growth and development because several non-qualifying countries, notably China, achieved similar rates of growth to those achieved by qualifying countries.

Let me now return to the questions that I posed at the beginning of this section of this Paper. Do the open economic policies that underpin globalization promote economic development, and therefore, economic rights? The answer, according to Sachs and Warner, is certainly affirmative. And, also there is an important corollary—political rights in combination with open economic policies reinforce economic development, and therefore economic rights. Do open economic policies necessarily lead to political rights? Here the answer appears to be negative because of the performance of countries like China. However, there is no indication that open economic policies diminish political rights. In fact, from a dynamic point of view, the cross-sectional work suggests that over-time, in most cases open economic policies would support the evolution of political rights.

Before concluding this section of the Paper, let me also address a possible objection to my line of argument here. The Non-Governmental Organizations (NGOs) that have mobilized against recent multilateral trade and investment liberalization citing a concern for human rights have focused on the issue of

increasing inequality between and within countries.²⁰ The Sachs and Warner data refutes strongly the assertion that open economies or globalization are responsible for growth disparities among countries. It is the absence of globalization, if anything, that contributes to the maintenance or increase in these disparities between countries. The other issue, however, is about the income disparities within countries. It is apparent that these disparities are increasing both within developed and developing countries. However, it is important to distinguish between absolute and relative economic progress. In both cases, putting the non-qualifying countries to one-side (which by definition have not participated in globalization to a great degree) the living standards of people have increased dramatically.²¹ The question, therefore, is whether it is possible to address the issue of relative income inequality within countries within the framework of economic liberalization. If not, should the process of liberalization be arrested if that also means arresting the absolute progress with respect to living standards? Recent OECD work has shown that the source of these income disparities is rooted in the gap between highly-skilled labor and unskilled labor.²² Accordingly, since basic education and training expenditures are not countervailable subsidies within the framework of the WTO Agreement on Subsidies and Countervailing Duties, how can countries organize so as to narrow the skills gap? For my purposes here, all that I want to establish is that a retreat from globalization is not necessary to accomplish those objectives.

I think that there are two points that emerge from this discussion so far. First, globalization is, by and large, a good thing. It is good because it promotes allocative and productive efficiency, which in turn increase overall economic welfare.

20. See International NGO Committee on Human Rights in Trade and Investment Press Release (Sept. 1 1998).

21. This is a distinction that has not been considered fully, if at all, in some of the more recent studies that purport to address the issue of globalization, inequality, and economic growth. See generally DAVID WOODWARD, GLOBALIZATION, UNEVEN DEVELOPMENT AND POVERTY: RECENT TRENDS AND POLICY IMPLICATIONS (U.N. Development Programme Working Paper Series No. 4, 1998).

22. See generally OECD, KEY EMPLOYMENT POLICY CHALLENGES FACED BY OECD COUNTRIES: LABOUR MARKET AND SOCIAL POLICY OCCASIONAL PAPER No. 31 DEELSA/ELSA/WD(98) 2 (1998); OECD, LABOUR MARKET POLICIES: NEW POLICY CHALLENGES FOR LOW PAID WORKERS AND UNSKILLED JOB SEEKERS, OECD/GD(97) 160 (1997).

Human rights are also good things because they reinforce the essential worth and dignity of human beings. However, human rights break down into further categories of rights: economic, social/cultural, and political rights. Achieving these goals may sometimes be in conflict with each other, and with the economic goals of globalization. It is perhaps easiest to reconcile the goals of economic rights with the goals of globalization—development and growth.

Are there different institutional choices that could be made to achieve these goals? Perhaps so, but there must be a common means of analyzing whether a given institutional approach is better-suited to achieving the common goals. The economic evidence that I reviewed in the last section of this Paper strongly suggests a model for achieving the goal of growth and development. That model builds on trade and investment liberalization, and political freedom broadly measured. The recognition of the second component is key because it provides a way to address the other perspectives of human rights while achieving the economic goals. This is admittedly a very utilitarian approach to thinking about these issues, but it is one that follows from the economic evidence that tends towards the presumption in favor of globalization as supportive of human rights. One could argue about other institutional choices, but in a sense, the evidence is in.²³ The politics-driven or nation-based approach to these issues has not secured better results in achieving its goals than market-based international approaches.

I don't mean to reject all further role for theorizing about institutional choice. Once the presumption in favor of open-market solutions is accepted, there is still scope to argue about particular cases. For instance, let's take the case of trade and labor standards. Some trade unionists in the developed world

23. Here I am using the terms "goal choice" and "institutional choice" as developed by Neil Komesar in his work on comparative institutional analysis. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994). My argument is that the institutional choice of market economics has been revealed to be the best available alternative to achieve the chosen goals of economic growth and political freedom. Although, I would agree that his "participation-centered approach" to institutional analysis might help explain some of the relative successes among both the "qualifying" and the "non-qualifying" countries identified in the Sachs/Warner research discussed above.

may sincerely believe that banning child labor will enshrine a greater dignity and worth of the children in developing countries. However, many governments and workers' organizations from those countries disagree. Thus, two opportunities for discussion and evaluation of institutional choices emerge. First, we could ask whether binding or voluntary multilateral rules would best achieve the human rights goals whether defined along a political or economic dimension. Second, if we accept the utility of such rules, we could ask whether they are better placed in the context of the multilateral trading system and its institutions, or in some other specialized institution. Would placing them squarely within the WTO rules-based system further those rights more than they would detract from the liberalizing goals of the WTO? In a sense, this is the discussion that led to the WTO Singapore Ministerial Declaration leaving these issues largely to the International Labor Organization (ILO), and led in June of this year to the compromise ILO Declaration on Fundamental Principles and Rights at Work.²⁴

In short, what I am arguing for is a general presumption in favor of free markets, that can be trumped by other values if the objectives of the other values can not demonstrably be served better by market-based solutions subject to a principle of least trade/competition restrictiveness. I readily concede, however, that an exception to this rule is needed to address a very narrow class of egregious human rights violations, e.g. genocide and apartheid which the international community has rejected in accordance with principles of international law evidenced by U.N. Resolutions, perhaps, and other sources of customary international law, perhaps, as well. In these cases, the presumption in favor of markets, and the implicit utilitarian goal choice and institutional choice is lifted because of the multilateral consensus (Interestingly, the GATT has long taken this approach to dealing with security exceptions, although not with the general exceptions that might implicate issues of environmental rights, for instance.)²⁵ I would not lift the pre-

24. See generally Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659 (1998); Ignacio A. Donoso Rubio, *Economic Limits on International Regulation: A Case Study of ILO Standard-Setting*, 24 QUEEN'S L.J. 189 (1998).

25. See generally World Trade Organization Appellate Body Report on United

sumption on the basis of unilateral decisions by individual states because it seems to me that the risk posed to the overriding economic objectives—whether expressed in terms of globalization or economic rights—is simply too great.

III. CONCLUSION

In concluding, I want to address the issue of whose voice matters, or should matter, in discussions about globalization and human rights. Clearly, those affected directly by globalization through trade or investment ought to have a voice. So the industrial worker in India or Indonesia should have a voice in the discussion of labor standards for instance. The workers in the developed countries who may lose their jobs through industrial reorganization should also have a voice about the impact of trade and investment decisions that affect their life. The governments and the firms also have an obvious interest in this issue. The difficult question, as always, is how to, and who should resolve any conflicts among the participants.

To the extent that my suggested framework were embraced, then we would have a general idea how to resolve the conflict because the presumption, by and large would apply. In a particular case, the issue of who would decide could be left to further discussion of institutional choice. What needs more exploration, however, is the role of the NGOs in this process. What should their role be in advancing these issues? How should we determine who is a representative voice, with a stake in the issue at hand? Who should listen to them? How much transparency and democratic accountability should be required of those who seek to influence these issues? In particular, how should their voice be integrated into negotiations, and dispute settlement proceedings? I don't have answers to those questions today, but I think that answers are particularly important as the NGOs begin to play a more active role in the great debates about globalization and human rights.

Let me give you an example. There are nongovernmental groups, such as the International NGO Committee on Human Rights and Trade and Investment, that come to international organizations. They talk about human rights and about the

States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, *available in* 1998 WL 720123.

disparities between poor countries and rich countries, and so on. Whose interests are these NGOs serving? There is a moral high ground that people often take when they talk about human rights, but I am not more impressed with missionaries of the left than I am with missionaries on the right. Moreover, there is very little transparency; no one knows who funded them; there is no question of democratic accountability. I think we have to ask why we should listen to these NGOs instead of to the democratically-elected governments of the countries.

These are important issues. We need to think seriously about how we talk about integrating concerns of human rights into the debate. We need to begin with the first article of the Universal Declaration, and acknowledge the dignity and worth of all human beings, which includes the leaders and the people of the third world countries who are trying to develop their economies.

We need to have a little bit more humility when we look to questions of economics and compare them with issues of human rights. We need to find a way to listen to a wide range of voices. The voices of workers in North America, who would rather make inefficient color TVs than allow color TVs to be manufactured where they can be made more cheaply, are not the only ones we should hear. We should be in favor of structures that make global welfare higher for all of us.

In closing, I am quite prepared to emphasize the economic rights of the Universal Declaration of Human Rights, as well as the political rights. To defend those economic rights, I am going to use an economic model that has proven to work. There is no other model that has worked. Anyone who advocates another model must convince us it will work. Otherwise, the model that has brought us trade and development must continue, and there must be a presumption in favor of this model. Although this view of the linkage between globalization and human rights may not be very popular, I had to bring you some hard truths from the old continent.

THE GLOBALIZATION OF ECONOMIC HUMAN RIGHTS

*Steve Charnovitz**

I. INTRODUCTION

We have just heard two very interesting presentations by Frank Garcia and Mark Warner. I have been asked to offer comments on both papers and on the issues before us at this conference. The conference organizers succeeded in arranging for two very different perspectives to be presented on the first panel. Professor Garcia is worried about globalization and sees inherent tension between international trade law and international human rights law. Mr. Warner is worried more about the political response to globalization. He would agree that there is tension between trade law and social values, but would resolve this tension by relying upon the market.

Garcia does a good job of framing the important issues. Globalization is a problem because it makes it harder for the State to regulate (he calls this "regulatory impotence"). This occurs both because the market influences governments (e.g., capital mobility) and because globalization spurs international agencies to impose more restrictions on national governments. Yet, in other ways, Garcia perceives that globalization presents new opportunities. Globalization can help reorient the international regulatory system toward more liberal and less statist lines. In this scenario, the market would come to be regulated according to the principles of individual dignity and rights as "defined by a transnational polity itself." Garcia puts it well when he says "insofar as globalization involves the elimination of governmental interference with private economic decision making, then globalization can itself be seen as a direct enhancement of human rights."

Garcia seems to lean over backward to be fair to the market-centered perspective before he criticizes it. He notes that a globalized market spreads ideas and values and may strength-

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en domestic pressure for increased political and social rights. He credits international trade law with bequeathing a respect for the rule of law, and points out that such respect serves as a core principle of international human rights law.

Having made these points, Garcia then aims his cannon at international economic law and international trade law. He says that international economic law and international human rights law "are, if not incompatible, then at least in fundamental tension." This "conflict" exists because international economic law "is based on a set of values which are fundamentally antithetical to the values on which the modern human rights movement is based." Garcia explains that economic law is utilitarian while human rights law is deontological. Economic law is based on a process of exchange and preference satisfaction, while human rights law embodies minimum standards of treatment that recognize the equal moral worth of each individual. Because of the deontological nature of human rights, Garcia claims, human rights law is resistant to trade-offs.

Warner does not agree that international economic law and human rights law are in constant tension. He sees economic globalization as benign and declares that these two bodies of law run in the same direction. In Warner's view, the market and human rights can coexist. Indeed, he believes that they reinforce each other.

Warner could have rested the defense there, but in his usual provocative way, he tries to stimulate our thinking. He brings his skeptical eye to the text of the Universal Declaration of Human Rights¹ and finds it "hopelessly incoherent." He explains that child labor can be defensible because working in a factory may be better for a child than working in the underground economy.

Although he does not directly address Garcia on this point, Warner does not share the vision of a "transnational polity." Warner is troubled by the growing role of non-governmental organizations (NGOs) in international policymaking. He gives an example of the International NGO Committee on Human Rights in Trade and Investment and wonders why this group objects to new treaties. He has heard the International NGO

1. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

Committee call for greater transparency and democratic accountability in intergovernmental organizations, and that leads Warner to wonder who is financing this NGO and how democratic its procedures are.

II. ECONOMIC VERSUS HUMAN RIGHTS LAW

Let me first address the tension between international economic/trade law and human rights law.² I think Garcia lays out the issues fairly, but I agree with Warner that there is more to the story. There is greater synergy between international trade law and international human rights law than is generally recognized. When I look at international human rights law, which Garcia characterizes as deontological, I perceive that it is also efficiency oriented. (For example, Warner alludes to research by Jeff Sachs showing that democratic government can promote economic growth.) When I look at international trade law, which Garcia characterizes as utilitarian, I perceive that it can also be deontological in affirming the rights of individuals to conduct transborder transactions.

This year we celebrate the fiftieth anniversary of the Universal Declaration of Human Rights. But we also celebrate fifty years of another legal landmark, the General Agreement on Tariffs and Trade (GATT). Is this mere coincidence? Or is there something deeper to be noticed—that the postwar United Nations made it a high priority to launch better regimes for both human rights and world trade. Indeed, the relationship looks even stronger when one recalls that new trade law was to be embodied in the International Trade Organization (ITO),³ which contained provisions relating to full employ-

2. There is a lot of good recent scholarship on these issues. See, e.g., Raj Bhala, *Clarifying the Trade-Labor Link*, 37 COLUM. J. TRANSNAT'L L. 11 (1998); Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357 (1998); C. O'Neal Taylor, *Linkage and Rule-Making: Observations on Trade and Investment and Trade and Labor*, 19 U. PA. J. INT'L ECON. L. 639 (1998). See also David Weissbrodt & Marci Hoffman, *The Global Economy and Human Rights: A Selective Bibliography*, 6 MINN. J. GLOBAL TRADE 189 (1997) (tracing the development and the relationship between human rights, trade, labor, business, foreign investment, and the global economy).

3. See *Havana Charter for an International Trade Organization*, U.N. Conference on Trade and Employment, ch. II, U.N. Doc. E/CONF. 2/78 (1948).

ment,⁴ fair labor standards,⁵ and economic development.⁶ Unfortunately, the ITO never came into being.

When they are viewed in a stylized way, international trade law and international human rights law can look different. International trade law focuses on the market while international human rights law focuses on the individual. International trade law is utilitarian while international human rights law is deontological. International trade law centers on values of wealth and well-being, while international human rights law centers on affection and respect. International trade law looks at cross-border transactions while international human rights law looks at intra-border transactions.

But when they are viewed more abstractly, international trade law and international human rights law grow in resemblance. Indeed, I would argue that they are topologically similar. Both international trade law and international human rights law are largely *deregulatory*—they declare what the State should not do. In each regime, the problem to be solved is the overbearing State which wants to control voluntary activity (e.g., buying, selling, associating, or protesting) that may be beneficial for the individuals involved, but is construed as being bad for the State. This problem is solved with international rules that seek to prevent States from making the wrong utilitarian judgment about the value of human freedom. In both regimes, States agree to international norms that inspire them to give more space to the individual. International trade law and international human rights law are also similar in being *non-dependent* regimes. That is, the operation of the regime does not really depend on the degree of combined governmental participation.⁷ Contrast that with other policy goals, like protecting the ozone layer, conserving fisheries,

4. *Id.* arts. 2, 3.

5. *Id.* Article 7 states that member States "recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each member shall take whatever action may be feasible and appropriate to eliminate such conditions within its territory." *Id.* art. 7.

6. *Id.* arts. 8-11. Some of these concerns are mirrored in the Universal Declaration. See Universal Declaration, *supra* note 1, art. 23.1 (the right to work and protection against unemployment), art. 20.1 (freedom of association), art. 23.1 (just and favorable conditions of work), art. 23.4 (the right to form and join trade unions), and art. 24 (the right to rest).

7. In other words, Country A can permit free trade and respect human rights even though Country B does not.

controlling epidemics, avoiding the proliferation of weapons, and maintaining peace, in which the essence of the regime is to prevent defection and encourage cooperation.

Of course, neither international trade law nor international human rights law is exclusively deregulatory. In the Uruguay Round, governments agreed to require that each member of the World Trade Organization (WTO) provide legal protection for intellectual property to foreign applicants. In the human rights regime, there are many provisions that suggest more government intervention. For example, the Universal Declaration of Human Rights states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care . . ."⁸ But I would suggest that such aspirational provisions are not what gives international human rights law its authority.

The problem with propounding such "positive" rights is not just that they are vague and hard to operationalize. The deeper problem is that such "rights" will always conflict with other rights. Although Garcia states that international human rights law is resistant to trade-offs, once the regime goes beyond negative rights (that is, leaving individuals alone) and moves to positive rights (that is, guaranteeing outcomes), there will always be trade-offs. There will be trade-offs between outcomes—for example, housing versus medical care. And there will be trade-offs between the right of the individual to keep the income he earns and the power of the State to redistribute it to others.

It should also be noted that international trade law has traditionally not been articulated as upholding the rights of the individual. Technically, it is one step removed. In other words, the *raison d'être* of the GATT was not to allow individuals in different countries to carry out mutually beneficial transactions. Rather, it was to help governments enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."⁹ This is not the same thing as saying

8. Universal Declaration, *supra* note 1, art. 25.1.

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11,

that people have a right to trade. But if we peel off the mercantilism from international trade law, which looks at States as trading entities, we discern that the true beneficiaries of GATT are the individual traders.

Our debate on this panel points to the need for more thinking about achieving synthesis between international trade law and international human rights law. It probably goes too far to suggest that they are fundamentally the same law. But we should be more aware of their commonalities and potential synergies. International trade law needs to become more like international human rights law in establishing norms for what a State owes its own citizens. International human rights law needs to become more like international trade law in enforcing norms through mandatory dispute settlement and potential penalties for non-compliance.

Let me illustrate this theoretical presentation with a consideration of some points of interface between international trade law and international human rights law. Consider the issue of how States treat aliens. This issue has been a long-time concern of both bodies of law, and logically so, because aliens are more vulnerable to oppression than members of a community.¹⁰ The first norm that evolved was *national treatment* (i.e., treating the alien no worse than the national). For example, in the treaty of 1836 between the United States and the Peru-Bolivian Confederation, the two parties agreed to give judicial recourse to citizens of the other party

on the same terms as are usual and customary with the natives or citizens of the country in which they may be; for which purpose they may employ, in defence of their rights, such advocates, solicitors, notaries, agents, and factors, as they may judge proper¹¹

Analogously, in the treaty of 1926 between the United States and El Salvador, the parties agreed that the nationals and merchandise of one party would receive the same treatment

T.I.A.S. 1700, 55 U.N.T.S. 194, pmbl. [hereinafter GATT].

10. The concern can be traced back to early ecclesiastic law. For example, in *Leviticus* 24:22, it is said: "Ye shall have one manner of law, as well for the stranger, as for one of your own country: for I am the Lord your God."

11. Convention on Peace, Friendship, Commerce, and Navigation, Nov. 30, 1836, U.S.-Peru-Bol. Confederation, art. IX, 2 Malloy 1375, 1378.

within the territory of the other party as nationals and merchandise of the other party, with regard to internal taxes.¹² Another norm that evolved was a *minimum standard of treatment* for the alien. For example, we see this in the Red Cross treaty of 1906 (human rights) and in the Customs Simplification Convention of 1923 (economic law).¹³

While the paradigm concern for international trade law remains the treatment of the alien, international human rights law is more concerned about the way that a State treats its own citizens. But these respective concerns inform each other. There have been episodes in which guarantees to aliens on human rights have led to an upgrading of the treatment granted to citizens. For example in 1864, Switzerland and France concluded a treaty that provided for rights of establishment by French traders (irrespective of religion). Following this treaty, Switzerland decided that it made little sense for it to continue denying such rights to its own Jewish citizens, and so it changed its Constitution.¹⁴ Although international trade law norms have not generally been applied internally within a State, the new intellectual property provisions in the WTO will lead to such osmosis because the baseline intellectual property protection required for foreign inventors and authors is also being granted to domestic inventors and authors.

Our limited progress in integrating international trade law and international human rights law can be seen in the attempt to negotiate the Multilateral Agreement on Investment (MAI),¹⁵ within the Organization for Economic Co-operation and Development (OECD). The negotiators viewed MAI as a part of international trade law. They did not view it as international human rights law. Although the human rights regime is not embarrassed to discuss how a State treats its own citi-

12. Treaty of Friendship, Commerce and Consular Rights, Feb. 22, 1926, U.S.-El Sal., art. VIII, 7 Bevans 521, 525.

13. See Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, July 6, 1906, art. 1, 2 Malloy 2183 (providing that the sick and wounded would be cared for without distinction of nationality); International Convention Relating to the Simplification of Customs Formalities, Nov. 3, 1923, art. 4, 30 L.N.T.S. 372 (providing that no customs regulation shall be enforced before such regulations have been published and providing an exception thereto).

14. See Jean Baneth, *Comment*, in THE WTO AS AN INTERNATIONAL ORGANIZATION 271, 274 (Anne O. Krueger ed., 1998).

15. See *Multilateral Agreement on Investment* (as of 24 April 1998) (visited Feb. 11, 1999) <<http://www.oecd.org/DAF/CMIS/MAI/NEGTEXT.htm>>.

zens, the international trade law framework views that as too intrusive of "sovereignty." Thus, the MAI talks sought to protect only foreign investors. But in seeking to upgrade international disciplines on the expropriation of property, the MAI negotiators ran into the buzzsaw of giving greater protection to foreign investors than domestic investors. This alarmed various interest groups who feared that if the MAI agreement gave greater rights against "regulatory takings," there would be pressure to protect domestic investors against indirect expropriation too.

It is not surprising that environmentalists opposed to the concept of regulatory takings would oppose the MAI for that reason. But what was surprising is that this concern drew some sympathy from the trade policy community. For example, Monty Graham of the Institute for International Economics wrote that:

[T]he critics [of MAI] are right in this regard: it would unacceptably encroach on governments' sovereignty to impose, via a multilateral agreement, a doctrine of compensation for regulatory taking that is not generally accepted in domestic law. Whether or not such compensation should be awarded is not the issue. Rather, that is a matter that should be decided at the level of national (or even subnational) governments, not in a multilateral negotiation. And while a multilateral agreement on investment should provide for strong investor protection, this protection should not exceed that which would be afforded similar domestic investments under established and accepted principles of law.¹⁶

This statement demonstrates how immature international trade law is in comparison to international human rights law. Whereas international human rights law aims to transmit norms from international law to domestic law (e.g., ILO treaties, the Genocide Convention, and so on), international trade law takes as a given that the responsibilities of a government towards citizen property owners is a matter to be determined by each government, not by the international community. Indeed, there is a recoiling from the idea that the established

16. Edward M. Graham, *Trade and Investment at the WTO: Just Do It!*, in *LAUNCHING NEW GLOBAL TRADE TALKS: AN ACTION AGENDA* 151, 163 (Jeffrey J. Schott ed., 1998).

principles of domestic economic law might be improved through multilateral talks. By using the international trade law style, rather than the international human rights law style, the MAI negotiators backed themselves into a corner of being unable to upgrade international norms against measures tantamount to expropriation. Regulatory takings is obviously a difficult issue and I am not suggesting that there is any simple solution to it. But if the MAI negotiation had been conducted as a matter of both international trade law and international human rights law, then it might have been easier to debate the central issues.

III. PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY

The issues before this conference have received a lot of attention this year. A few weeks ago, President Clinton told the Joint IMF/World Bank Annual Meeting that "[w]e must put a human face on the world economy."¹⁷ Garcia suggests that "[t]he WTO should recognize the legitimacy of trade sanctions for egregious human rights violations either unilaterally applied, or under the jurisdiction of an international human rights body." I agree with Garcia on that point, and believe that more attention by the trade regime to human rights would strengthen the WTO.¹⁸ It has been little noted that the WTO Agreement on Agriculture gives attention to a human rights concern—food security. Article 12 states that in instituting new export controls on foodstuffs, a government "shall give due consideration to the effects of such prohibition or restriction on importing Members' food security."¹⁹

17. Pres. William Jefferson Clinton, Remarks to IMF/World Bank Annual Meeting (Oct. 6, 1998), available in LEXIS, News Library, Curnws File (critics feared that the President had his own face in mind).

18. See, e.g., Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998); Steve Charnovitz, *The World Trade Organization and Social Issues*, 28 J. WORLD TRADE 17 (Oct. 1994).

19. Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act]. The Final Act establishing the World Trade Organization contains a series of annexed additional agreements and legal instruments dealing with trade in goods and services. The most important of these being the annexed "Multilateral Agreement on Trade in Goods," which includes six Understandings concerning the interpretation of its articles, and 12 substantive agreements, including the Agreement on Agriculture. *Id.* at Annex IA, WTO Agreement on Agriculture, art. 12.1(a).

Warner is cautious about deepening human rights. Indeed, he is skeptical of many of the rights already included in the Universal Declaration of Human Rights. For example, he points out his puzzlement regarding cultural rights and wonders what they were. I would respond that perhaps they are a little puzzling at times, but the notion of cultural rights is not something that was invented in 1948 in the Universal Declaration. It goes back at least as early as the Minorities Treaties under the League of Nations in 1919, a series of treaties that establish rights of communities and cultures and linguistic minorities.²⁰ So it is an older tradition than the Universal Declaration and one that I think is quite fundamental to our appreciation of human rights in the twentieth Century.

Perhaps Warner would agree with me on this point; I think the Universal Declaration does not go far enough in some areas. It is particularly weak on the topic of economic rights important to helping individuals realize their full potential in a global economy. For example, I would like to enshrine the right of individuals to export, to import, to invest, and to divest.

On the other hand, it should be noted that the Universal Declaration is strong on at least one transborder issue. Article 19 states that everyone has a right to "receive and impart information and ideas through any media and regardless of frontiers." The issue of e-trade and the transmission of data is a very active one in trade policy today. The U.S. government forbids the export of high-level encryption software. The European Commission is trying to ban the export of data about individuals to countries that do not ensure an adequate level of privacy protection.²¹ These issues have been characterized in trade talks as commerce versus security or as commerce versus privacy. But so far they have not been perceived as issues of human rights.

As noted above, Warner expresses concern about the increasing role of NGO coalitions at the OECD and the WTO. He

20. The fascinating history of international human rights is told in a new book. See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS—VISIONS SEEN* (1998).

21. See Council Directive No. 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 2(c), O.J. L 281/31, at 38 (1995).

wonders what legitimacy international NGOs have to speak at meetings with governments. Let me try to answer that. Although I disagreed with how the NGO networks attacked the MAI, I believe that organizations of like-minded people have a right to make their views known to global agencies. A transnational NGO gets its legitimacy at the WTO in the same way that a citizen gets legitimacy to petition a government. Article 6 of the Universal Declaration provides the answer in stating that "[e]veryone has the right of recognition everywhere as a person before the law." I think the growth of transnational civil society is a very positive development that can improve international trade law in the same way that it has improved international human rights law.²²

Let me call your attention to a recent decision by the WTO Appellate Body that has important implications for NGOs. In the Turtle-Shrimp case, the Appellate Body ruled that WTO procedures permit dispute panels to consider unsolicited amicus curiae briefs from NGOs.²³ This will allow NGOs to present observations about the legal and factual issues in a dispute. Although few international trade cases in the past have implicated human rights, there will surely be more such cases in the future. Soon, there will be a WTO panel reviewing the dispute between the European Commission and the U.S. government over a Massachusetts state procurement law that seeks to steer business away from vendors who do business with Myanmar (Burma).²⁴ The Appellate Body ruling provides an opportunity for a law school human rights clinic to find a client NGO that wants to support Massachusetts, and then to submit an amicus brief for this client to the WTO panel. The brief could explain why WTO law (international trade law) ought to tolerate procurement penalties against companies that seek to profit from transactions with pariah governments like Myanmar that require forced labor.

22. See generally WILLIAM KOREY, *NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS "A CURIOUS GRAPEVINE"* (1998).

23. WTO Report of the Appellate Body, *United States-Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 108-10 (Oct. 12, 1998).

24. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 289 (D. Mass. 1998) (discussing facts of the so-called "Massachusetts Burma Law").

IV. CONCLUSION

Our conference asks the question: Is the global market a friend or a foe of human rights? Certainly, global markets have the potential to interfere with the attainment of human rights. Since all markets are composed of voluntary, mutually beneficial transactions, one might wonder how a transaction that makes two people better off can interfere with anyone's rights. The answer is that this can occur because of the spillover impact on individuals external to the transaction. For example, a purchase of a chlorofluorocarbon (CFC) can engender production of the CFC which can deplete the ozone layer. A series of currency transactions can destabilize an economy and cause unemployment. The hiring of a child for factory work can lead to future health costs that are socialized upon the community. Competition between governments to attract investment can lead to a retrenchment on worker rights. For any transaction, these and similar possibilities need to be considered in order to reach conclusions about whether markets are raising or lowering human rights.

When markets are found to be a foe of human rights, then it would be appropriate to take collective action to improve that aspect of the way the market operates. This could be done by governments through changes in international economic and human rights law and by NGOs through social labels and publicity. Our two presenters would probably disagree on particular changes in international law, but would probably agree that economic globalization will continue and that it may require greater inter-governmental oversight.

DOES GLOBALIZATION ADVANCE HUMAN RIGHTS?[†]

*Jeffrey L. Dunoff**

I. INTRODUCTION

Louis Henkin famously proclaimed that ours is the Age of Rights.¹ But it is certainly also the Age of Globalization. Surprisingly, the relationships between these two phenomena have received little scholarly attention. This Symposium offers a superb opportunity to initiate an overdue examination of these issues.

In this short essay, I will address many of the issues my co-panelists raised from a slightly different perspective. In particular, I will develop three different arguments. First, I will show why the two dominant stories about globalization and rights—one in which they are mutually supportive and one in which they are deeply antagonistic—are misleading. Second, I will present a more nuanced, and more ambiguous, story about the relationship between globalization and rights. And finally, I will outline the challenge ahead and identify strategies for ensuring that globalization is more friend than foe to human rights. While I cannot fully develop any of these arguments in this brief commentary, I hope to contribute to a richer debate over the relationship between globalization and enhanced human rights.

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1. LOUIS HENKIN, *THE AGE OF RIGHTS* ix (1990).

II. GLOBALIZATION AND RIGHTS: FRIENDS OR FOES?

There are two dominant stories about globalization and rights. At the risk of oversimplification, the first story teaches that economic liberalization and expanded international markets are a vehicle for increasing economic wealth and, indirectly, human rights. The theoretical premise here is that long-term growth depends largely on increased productivity and innovation, and that the incentives for both depend on the size of the relevant markets.² Expanded markets thus create both greater incentives for innovators, and permit fixed production costs to be spread over larger production runs. Moreover, the globalized economy permits a "highly refined division of labor, in which final goods . . . are produced in multi[state] operations, with the labor-intensive parts of the production process reserved for the developing countries."³ Thus globalization creates a "win-win" situation, where developed nations benefit by selling new innovations to larger markets, and developing nations enjoy the fruits of these innovations and participate in the production of manufactured goods.

This economic theory is buttressed by the empirical claim that nations with open economies typically enjoy greater rates of growth than nations with closed economies.⁴ The wealth that increased trade and investment make possible permits the funding of social and economic welfare programs, and the satisfaction of economic and social rights. Moreover, for many nations, economic openness—and the resulting trade in ideas—creates pressures for political openness and the satisfaction of civil and political rights.⁵

This story does not purport to be merely descriptive. It is also normative. In this story, the institutions supporting the

2. See Jeffrey Sachs, *International Economics: Unlocking the Mysteries of Globalization*, 110 FOREIGN POL'Y 97, 100 (1998).

3. *Id.*

4. See Jeffrey D. Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1 (William C. Brainard & George L. Perry eds., 1995); JEFFREY D. SACHS & ANDREW WARNER, ECONOMIC CONVERGENCE AND ECONOMIC POLICIES (National Bureau of Econ. Research Working Paper No. 5039, 1995). More recent and more sophisticated studies reach similar conclusions. See, e.g., Sebastian Edwards, *Openness, Productivity and Growth: What Do We Really Know?*, 108 ECON. J. 447 (Mar. 1998).

5. See Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 57 (1999).

globalized economy, such as the GATT/WTO, and the international human rights regime rest on similar conceptions of human freedom and autonomy. Both regimes restrain state actions that would impede this freedom. These normative claims, I think, underlie much of Mark Warner's paper.⁶ In short, this is a happy story of synergy, as globalization produces wealth and human rights maximization.

From a quite different perspective comes a darker and competing counterstory. By focusing primarily on social and economic rights, and on globalization's distributional effects, this counterstory is a tale of Globalization as Exploitation. In this story, a primary effect of globalization is the exacerbation of gaps between the "haves" and the "have nots." This counterstory rests on empirical studies showing that globalization has been marked by an increasing divergence between the per capita incomes of the richer and poorer nations.⁷ Moreover, the increasing divergence between rich and poor occurs not only *among* nations, but also *within* nations. As summarized in a recent United Nations Development Program Working Paper:

- In LATIN AMERICA, inequality increased substantially between the 1970s and 1980s, and the income share of the poorest 40 percent generally fell during the latter decade, with only a limited recovery subsequently;
- In SUB-SAHARAN AFRICA, the limited data could suggest a negative relationship between growth and distribution and/or a marked shift toward accelerating deterioration, while rural inequality appears to have increased markedly;
- In SOUTH ASIA, the income share of the poorest 40 percent has been generally stable, except for a serious deterioration in Sri Lanka;

6. See generally Mark A.A. Warner, *Globalization and Human Rights: An Economic Model*, 25 BROOK. J. INT'L L. 99 (1999).

7. See David Woodward, *Globalization, Uneven Development and Poverty: Recent Trends and Policy Implications* (United Nations Dev. Programme Working Paper No. 4, 1998) (visited Mar. 18, 1999) <<http://www.undp.org/poverty/workingpapers/wp.woodward/wp-woodward.html>>.

- In EASTERN EUROPE AND THE FORMER SOVIET UNION, there appears to have been a dramatic and continuing deterioration in income distribution;
- In EAST AND SOUTHEAST ASIA, changes in the income share of the poorest 40 percent have been gradual and evenly balanced, except in Korea (where a stronger decline in the 1970s was reversed in the first half of the 1980s). The chronic decline in Thailand since the early 1960s is noteworthy.⁸

More recent figures tell a similar story. For example, wage gaps between skilled and unskilled workers have increased in this decade by more than 30% in Peru, 20% in Colombia, and nearly 25% in Mexico.⁹ From this perspective, globalization produces, in Judge Weeramantry's evocative phrase, an international version of *The Grapes of Wrath*.

I believe that there are actually three subplots in this counterstory. The most prominent draws on the Asian financial crises. This is a tale of globalization producing defenseless exposure to external shocks and shifts in global markets. The lesson here is that unfettered financial flows from advanced to emerging markets can create, at best, vulnerability and, at worst, ruinous destabilization.¹⁰ The second variation focuses on the least developed nations. They come under increasing pressure from international economic institutions to pursue "sound" domestic policies, which appear to cause, or at least contribute to, the increasing gaps between the richest and poorest surveyed above. This is a story of globalization as marginalization. The third variation focuses on the developed nations. Here, globalization creates job insecurity, downward pressure on wages and benefits, and fears of a regulatory race to the bottom. In short, the counterstory teaches that, while economic liberalization may produce greater growth, this growth is highly uneven and is purchased at the price of high-

8. *Id.*

9. Nancy Birdsall, *Life is Unfair: Inequality in the World*, 111 FOREIGN POL'Y 76, 78 (1998).

10. For more on the lessons to be drawn from developments in Asia, see Jeffrey L. Dunoff, *Understanding Asia's Economic and Environmental Crisis*, 37 COLUM. J. TRANSNAT'L L. 265 (1998).

er levels of income disparities and rates of poverty.¹¹

III. A TWICE TOLD TALE: THE RETREAT OF THE STATE

Both stories have strong, if implicit, points of view, and particular political valences. But for present purposes I am more interested in a central assumption that both stories share. The assumption is that we can understand both the international human rights and economic regimes as mechanisms for constraining state authority and power.¹² Thus, on the human rights side, the Nuremberg trials represent the beginning of a movement that restricts what was formerly state autonomy vis-à-vis its own citizens. And the various specialized human rights treaties that follow provide further limits on how states may treat their own citizens. On the economic side, a similar phenomena is observed. Expanded WTO disciplines, increasingly footloose capital, and the world-wide turn to markets and privatization all appear to have diminished the autonomy and authority of the state.

But this twice told tale seriously misunderstands the relationship between the state and both human rights and international markets. Contrary to what advocates of the first story may wish, and what advocates of the counterstory may fear, neither the human rights regime nor the international economic regime is premised upon the withering of the state. To the contrary, both regimes presuppose an activist state.

Consider, first, the human rights regime. Civil and political rights are often considered to be "negative" rights, that governments respect by abstention and by inaction. But in fact these so-called negative rights often require the state to provide relevant institutions, such as a legislature or an independent judiciary.¹³ Moreover, the state may be required to take positive steps to ensure that a right is enjoyed or protected against infringement by private parties. More importantly,

11. See Zaki Eusufzai, *Do More Open Countries Have a Higher Growth Rate But More Inequality?*, 26 ATLANTIC ECON. J. 32, 33 (1998). See generally TARIQ BANURI, *ECONOMIC LIBERALIZATION: NO PANACEA* (1991).

12. See, e.g., Garcia, *supra* note 5, at n.25 ("As the trade liberalization attendant to globalization reduces governmental barriers to private economic decision-making, individuals have an increased scope for realizing such economic rights.").

13. For an extended discussion of this claim, see STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS* (1999).

international human rights law treats as fundamental not only political and civil liberties but also rights to the satisfaction of basic human needs and well-being.¹⁴ So international human rights—codified after the welfare state was nearly universal—imply a much broader and interventionist vision of government than that suggested by the dominant story. As Professor Henkin and others have properly emphasized, the underlying vision is that of an activist state, not a hands-off night watchman.

Perhaps surprisingly, much the same is true on the economic side. The Bretton Woods architects, including Keynes, wanted to avoid the problems of the interwar period: destabilizing capital flows, volatile currencies and rampant protectionism. But they valued international economic stability over maximizing capital and goods flows. So they fixed exchange rates and left nations free to regulate capital flows.¹⁵

Similarly, the GATT's drafters were far from doctrinaire advocates of unfettered markets. As one U.S. negotiator later stated: "No one was committed to 'free trade,' no one expected anything like it: and the term does not appear in the GATT."¹⁶ A contemporaneous account by the lead U.S. negotiator elaborates the point:

There is no hope that a multilateral trading system can be maintained in the face of widespread and protracted unemployment. Where the objectives of domestic stability and international freedom come into conflict, the former will be

14. As encapsulated in Article 22 of the Universal Declaration: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Universal Declaration of Human Rights, art. 22, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948). The Declaration goes on to proclaim, *inter alia*, the right to work, the right to just remuneration and to equal pay for equal work, the right to join a trade union, the right to an adequate standard of living, and the right to education. *Id.* arts. 23, 25-26.

15. Thus, for example, the IMF Articles of Incorporation called for the "avoidance of restrictions on payments for current transactions" only, and did not embrace capital account convertibility as an obligation or even a goal. See Articles of Agreement of the International Monetary Fund, art. VI, § 3, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39.

16. William Diebold, Jr., *From the ITO to GATT—And Back?*, in THE BRETTON WOODS—GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS 152, 158 (Orin Kirshner ed., 1996).

given priority It would be futile to insist that stability must always give way to freedom. The best that can be hoped for is a workable compromise.¹⁷

Instead, while seeking to reduce barriers to trade, the GATT was also designed to promote domestic stability. Thus, the world trading system actually rests upon a complex political compromise: governments would provide unemployment compensation, adjustment assistance and other domestic safety nets in exchange for public support for liberalized trade.¹⁸ So while the GATT reduced tariffs and other barriers, it included a diverse set of exceptions designed to protect a variety of domestic social policies.¹⁹ Indeed, as the GATT's drafters might have predicted—and contrary to the teachings of the two dominant stories—empirical studies repeatedly confirm that the nations most open to international trade generally have the highest rates of social spending.²⁰

In short, the founders of the Bretton Woods institutions and the GATT were not committed to *laissez-faire* or market fundamentalism. Rather, they were economic liberals committed to international markets, but this commitment was “embedded” within a larger commitment to interventionist domestic policies.²¹ They recognized that “[s]ocieties that benefit the

17. CLAIR WILCOX, A CHARTER FOR WORLD TRADE 131 (1949). See also Jacob Viner, *Conflicts of Principle in Drafting a Trade Charter*, 25 FOREIGN AFF. 612, 613 (1947) (noting that “[t]here are few free traders in the present-day world, no one pays any attention to their views, and no person in authority anywhere advocates free trade.”).

18. For more on this grand political compromise, see Jeffrey L. Dunoff, *The Death of the Trade Regime* (forthcoming).

19. For example, while art. XI of the GATT generally prohibits quantitative restrictions, they are expressly permitted for balance of payments difficulties “result[ing] from domestic policies designed to secure full employment.” General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. More recent trade liberalization efforts are often accompanied by similar efforts to cushion the domestic impacts of liberalized trade. A good recent example of this is the NAFTA Transitional Adjustment Assistance Program, which is designed to mitigate any negative impact the NAFTA might have on U.S. workers. See NAFTA Transitional Adjustment Assistance Program, 19 U.S.C. § 2331 (1996).

20. See generally PETER J. KATZENSTEIN, SMALL STATES IN WORLD MARKETS: INDUSTRIAL POLICY IN EUROPE (1985); DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? (1997).

21. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 393

most from integration with the world economy are those that have the complementary institutions at home that manage and contain the conflicts that economic interdependence triggers.²²

To summarize, contrary to the implicit assumption underlying the two dominant stories, at their inception neither the human rights nor the international economic regime sought a minimalist state in the name of freedom. Rather, both presupposed activist, interventionist states.

IV. THE UNEASY RELATIONSHIP BETWEEN GLOBALIZED MARKETS AND HUMAN RIGHTS

If the two leading stories are misleading, is there another way to understand the relationship of globalization and rights? Let me suggest a third story, one that is more textured and, ultimately, more ambiguous.

We might analogize the situation to a series of geometrical relationships. In the first story, globalization and human rights are like parallel lines. They are mutually supportive. Progress on one front produces progress on the other. In the counterstory, globalization and human rights have an inverse relationship, and are analogous to lines that move in opposite directions. Increased globalization means increased exploitation and instability, and decreased satisfaction of human rights. But these two linear tales are historically inaccurate and therefore misleading. Rather, I believe, it is more helpful to understand the relationship between globalization and human rights as analogous to a double helix. That is, while the two regimes started at the same time and with many common political commitments, they quickly assumed different trajectories. At times they have moved promisingly in the same direction. At other times, they have intersected at cross purposes. So, unlike the two dominant accounts, this is a story of historical and political contingency, of important but tentative gains and missed opportunities. As I cannot detail all of this complex story here, I will simply outline some of the main plot lines.

I have argued that the Post-War economic and human

(1982).

22. Dani Rodrik, *Globalisation, Social Conflict and Economic Growth*, 21 WORLD ECON. 143 (1998).

rights regimes presupposed an activist state. Indeed, the social welfare goals that governments promised to satisfy in exchange for support of liberalized trade overlap with many of the social and economic rights guaranteed in the Universal Declaration. So one might have imagined that the economic and human rights regimes would be mutually supportive. But soon thereafter, these two regimes began to move in different directions. Let me illustrate by focusing on the United States, and in particular shifting U.S. positions regarding economic rights, as this issue has been particularly controversial.²³

This nation has not always been hostile to social and economic rights. President Roosevelt included "freedom from want" among the four freedoms, and in his 1944 State of the Union message, urged adoption of an "Economic Bill of Rights," stating:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not freemen.' People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

23. While my focus here is on the United States, similar policy oscillations occurred in other nations. See, e.g., Sally Morphet, *Economic, Social and Cultural Rights: The Development of Governments' Views, 1941-88*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT* (Ralph Beddard & Dilys M. Hill eds., 1992); A.J. Hobbins, *Eleanor Roosevelt, John Humphrey, and Canadian Opposition to the Universal Declaration of Human Rights*, 53 *INT'L J.* 325 (1998).

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

. . . .

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won, we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being. America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.²⁴

At the dawn of the Age of Rights, the Truman Administration voted to adopt the Universal Declaration of Human Rights, which is premised upon the equality and the indivisibility of political and economic rights.²⁵ In addition to the familiar political and civil rights, the Universal Declaration includes rights to, *inter alia*, a free public education, a standard of living adequate to health and well-being, social security during sickness, disability and old age, and equal pay for equal work.²⁶

24. 90 CONG. REC. 55, 57 (1944).

25. The U.S. role in articulating the economic rights included in the Universal Declaration has long been underappreciated. For a more detailed account, see Louis B. Sohn, *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM. J. INT'L L. 540 (1995).

26. That different nations agreed to an article in the Universal Declaration did not, of course, mean that they shared a common understanding of that article's meaning. Article 23, for example, provides for a right to work. For the United States, this meant the right to choose one's work (or, perhaps, not to work); the state was obliged not to interfere with this right. To the Soviet Union, the right to work meant that the state had a duty to provide employment and to prevent unemployment.

But U.S. policy soon moved in a different direction. As Cold War tensions heightened, the United States began to attack the very idea of social and economic rights. They were said to be socialistic, or aspirational, or incapable of judicial enforcement. They were, in short, not really rights at all.

But, as a helix twists and turns, so has U.S. policy on economic and social rights. The 1970s saw a sharp turn in U.S. attitudes, first in Congress and then, upon Jimmy Carter's election, in the executive branch. Secretary of State Cyrus Vance defined human rights to include the right to fulfillment of such vital needs as shelter, food, health care and education. In late 1977, President Carter signed the Covenant on Economic, Social and Cultural Rights.

The Reagan years marked yet another shift in this trajectory. Again, the U.S. human rights policy was based upon "the unqualified rejection of economic, social and cultural 'rights' as rights,"²⁷ in part as an element of larger Cold War strategies.²⁸ A "highpoint" of this movement was a speech by a State Department official seeking to dispel a number of "myths" regarding human rights, the first of which was that "economic and social rights' constitute human rights."²⁹

With the collapse of the Soviet Union and Eastern bloc, came the promise of a "new world order." Many hoped that the United States would no longer reject economic and social rights in the name of Cold War values. So, again, one might have expected the two regimes would move in the same direction.

But instead of embracing economic and social rights, U.S. policy moved in yet another direction. It endorsed the goal of democratization, arguing that democratic institutions were the most solid bulwarks of human rights.³⁰ In short, on the

27. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 372 (1990).

28. I recognize that this account is overly simplified, and that there were always counter trends. For example, as the United States was explicitly repudiating these social and economic rights in the context of the Covenant, it was unilaterally insisting that other nations honor them in its trade legislation. But this was a subplot in the larger story of cold war ideologies.

29. Paula Dobriansky, Deputy Assistant Secretary for Human Rights and Humanitarian Affairs, Address Before the American Council of Young Political Leaders, Washington, D.C. (June 3, 1988), reprinted in DEPT. STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT POLY, No. 1091, 1988, at 2 (quoted in Alston, *supra* note 27, at 374).

30. For a detailed account of the human rights community's ambivalent re-

human rights side, the story is one of shifting U.S. commitments to economic rights over time.

The other helix, the international economic helix, also had a series of twists and turns. I'll mention only the most relevant for our purposes, a turn away from the complex political bargain that produced the Bretton Woods and GATT international economic order, and toward globalization. Globalization is characterized by widespread economic liberalization and tremendous surges in international trade and investment.³¹ At some point over the last 15 years, the vastly increased integration of international markets through new patterns of trade, finance, production and capital flows—along with an increasingly dense web of treaties and international institutions—produced a qualitatively different world economy. As footloose capital became less willing to fund the welfare state, and threatened to flee to more inviting jurisdictions, nations increasingly began to withdraw the safety nets that had allowed workers to tolerate the dislocations of globalization.³² Moreover, as a result of expanding International Monetary Fund (IMF) and World Bank mandates and ever more intrusive GATT disciplines, governments discovered that they had inadvertently subverted their ability to manage the dislocations caused by economic liberalization.³³ The political result, as Multilateral Agreement on Investment proponents discovered, has been an unraveling of the social bargain that supported formation of the postwar international economy.³⁴

So, on the economic side of the helix, globalization's rise threatens to invert the embedded liberalism compromise.

sponse to this push for democracy, see Thomas Carothers, *Democracy and Human Rights: Policy Allies or Rivals*, WASH. Q., Summer 1994, at 109.

31. See, e.g., Garcia, *supra* note 5; Warner, *supra* note 6.

32. For example, while many studies suggest a high correlation between openness and government expenditures, see Rodrik, *supra* note 22, a time series analysis by Professor Rodrik reveals that, at some point, government expenditures on social insurance goes down as openness, particularly openness to capital, goes up. Some might interpret this as evidence of a game of global bait and switch. See Paul B. Stephan, Book Review, 18 NW. J. INT'L L. & BUS. 246 (1997) (reviewing DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* (1997)).

33. See, Dunoff, *supra* note 18.

34. The "defeat" of the MAI at the OECD may lead to a transfer of negotiations to the WTO. Ironically, this change of venue may actually decrease the ability to negotiate an investment treaty that protects non-economic interests. See, e.g., *Environmentalists Claim Victory as Talks on Multilateral Investment Pact Founder*, 21 INT'L ENVTL. REPTR. 1053, 1054 (1998).

Where the international economy used to be embedded within, and hence limited by, a larger commitment to the activist state, it increasingly appears that the state is now limited by a larger, globalized economy.³⁵

These twists and turns regarding the status of economic and social rights and the embedded liberalism compromise are fundamental to a historically sensitive account of the unfolding relationship between international markets and international human rights. Unlike the two dominant stories, the story I wish to outline is marked by a series of shifting commitments that have ebbed and flowed over time. But these shifting commitments, both within and among nations, suggest that the simple linear relationships between international markets and human rights contained in the two dominant stories are misleading.

V. A WAY AHEAD

Where does this leave us? Stories are supposed to have a message, or a moral. But the messages here are neither simple nor straightforward. Let me mention a few. As the current East Asian financial crises confirms, it is a mistake to think that the state is now irrelevant. Through the policies they enact, the practices they adopt and the safety nets they provide, states still have a major role in determining whether globalization will, in the end, turn out to be more friend than foe of human rights. At the same time, as Professor Henkin correctly emphasized, non-state actors play increasingly important roles in these areas.³⁶ Rights can be enjoyed in the private sphere,³⁷ and non-state actors can violate human rights.³⁸ Multinational businesses, in particular, can profoundly affect human rights through the adoption of codes of conduct, promotion of "best practices," and establishment of

35. See, Dunoff, *supra* note 18.

36. See, Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 22 (1999). See, e.g., Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153 (1997); Jennifer L. Johnson, *Public-Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOK. J. INT'L L. 291 (1998).

37. See generally ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993).

38. See, e.g., *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

benchmarks.³⁹

Stories are supposed to have a beginning, a middle and an end. However, the story I have offered is radically incomplete. But this, of course, is the larger point. The abbreviated history I have outlined is meant to suggest a contingency to globalization's effects that is missing from the other stories. While both the synergy story and the counterstory present a logic of inevitability, I would suggest that globalized markets are neither inherently a friend nor a foe of human rights. While increased economic openness is often associated with increased national wealth, and can promote progress on other measures of well being, such as nutrition or education, we simply cannot answer in the abstract the ultimate effects of markets and globalization on human rights and social justice for any particular society.

The critical issue is whether there is anything we can do to try to ensure that globalization is more friend than foe of human rights. This Symposium will, I expect, help spark an ongoing effort to address this issue in theoretic and strategic terms. Let me offer two suggestions.

First, consider how the concept of "development" has evolved in the past 10 or 20 years. In the 1970s, scholars began to argue that economic growth does not necessarily translate into improvements in non-income measures of well-being, such as literacy or life expectancy. This, in turn, sparked a vigorous critique of an overly narrow conception of "economic development." As a result, the World Bank and IMF now work with substantially enriched conceptions of development—and are considerably more sensitive to the human rights implications of economic development.⁴⁰ An interesting and somewhat similar debate is occurring over the traditional understanding of "rights," and an alternative vocabulary is being developed to describe people's basic entitlements.⁴¹ Unfortu-

39. See, e.g., Mary Robinson, Address Before the U.N. High Commissioner for Human Rights, *The Business Case for Human Rights*, (Nov. 11, 1997) available at <<http://www.unhchr.ch/>>.

40. To be sure, there is still ample room for improvement. For more on the Bank and the Fund in this context, see Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47 (1996).

41. See, e.g., Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997); Amartya Sen, *Capability and Well Being*, in THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993); MAHBUB UL

nately, no similar debate has occurred in the trade world. I fear that many trade officials and scholars start from the (false) premise that there is a deep opposition between "government intervention" and "free trade,"⁴² and have an overly narrow understanding of the effects of trade and market liberalization. But trade in various markets has different consequences for economic development, let alone human rights. International bodies have just started to gather data on these relationships,⁴³ and trade scholars could make few more important contributions than to initiate a significant dialogue over these issues.⁴⁴

Second, if we want to ensure that international markets are friends of human rights, we need to return to first principles. Here are a few: liberalized global markets are neither "natural" nor ends in themselves.⁴⁵ They are simply means to an end. And, as instruments, or tools, they should be evaluated by the effects they produce. Moreover, as the East Asian financial crisis demonstrates, unfettered markets pose unacceptable risks, and some level of state regulation of markets is necessary. Thus, the critical debate ought to be over how, in any particular instance, to make markets and government work as partners in development. Finally, and perhaps most importantly, the achievement of human rights and social justice is a higher value than the protection of free markets. With these principles in mind, we can help ensure that globalization will advance human rights.

HAQ, REFLECTIONS ON HUMAN DEVELOPMENT (1995). See also UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1993 (measuring quality of life in different nations by focusing on longevity (measured by life expectancy), knowledge (measured by mean years of schooling and literacy) and standard of living (measured by income relative to the poverty level)).

42. I've argued elsewhere that international markets presuppose government intervention. See, e.g., Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship—and Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1997).

43. For example, the Governing Body of the ILO created a Working Body on the Social Dimensions of Liberalization of International Trade in 1993. For a progress report on this body's work, see ILO Doc. GB.274/WP/SDL/2 (1999).

44. Paradoxically, the Asian collapse and Russian default open the space for these conversations because they undermine the notion that there is an inevitability about globalization and its effects.

45. See, Dunoff, *supra* note 18.

