

Trade Imbalance

The Struggle to Weigh Human Rights
Concerns in Trade Policymaking

Susan Ariel Aaronson and Jamie M. Zimmerman

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Trade Imbalance: The Struggle
to Weigh Human Rights
Concerns in Trade
Policymaking

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TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING

Trade is controversial; around the world many people believe that trade agreements, even trade per se, undermine particular human rights such as labor rights or access to affordable medicine (the right to health). But trade and trade agreements can also advance human rights, directly or indirectly. In fact, some countries use trade policies to advance specific human rights such as labor rights or property rights. But in almost every country policymakers struggle to achieve both goals. Trade and human rights are out of balance.

Although scholars, policymakers, and activists have long debated the relationship between trade and human rights, in truth we know very little about this relationship. This book aims to provide readers with greater insights into the relationship between human rights and trade. The authors use stories about AIDS, frogs, slavery, and other topics to discuss what policymakers do to promote human rights as they seek to expand trade. Second, the book includes the first study of how South Africa, Brazil, the United States, and the European Union coordinate trade and human rights objectives and resolve conflicts. It also looks at how human rights issues are seeping into the WTO. Finally, it provides suggestions to policymakers for making their trade and human rights policies more coherent and balanced.

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Abbreviations

| | |
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| ACP | Africa, Caribbean, and Pacific Countries (EU) |
| AFL—CIO | American Federation of Labor, Congress of Industrial Organizations |
| ANC | African National Congress (South Africa) |
| BEE | Black Economic Empowerment Act (South Africa) |
| CAP | Common Agricultural Policy (EU) |
| CBD | Convention on Biodiversity |
| COSATU | Congress of South African Trade Unions |
| CIRI | Cingranelli—Richards Human Rights Data Set |
| CSR | Corporate Social Responsibility |
| DR-CAFTA | Dominican Republic/Central American Free Trade Agreement (also known as CAFTA-DR) |
| EC | European Community |
| EPZ | Export processing zones |
| EU | European Union |
| FTA | Free Trade Agreement |
| FTAA | Free Trade Agreement of the Americas |
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross domestic product |
| GSP | Generalized System of Preferences |
| IPR | Intellectual property rights |
| ITO | International Trade Organization |
| LDC | Least developed country |
| MERCOSUR | Common Market of the South; a trade agreement among Argentina, Brazil, Paraguay, Uruguay, and Venezuela |
| MFN | Most favored nation (also known as normal trade relations in the United States) |
| NAFTA | North American Free Trade Agreement (Canada, Mexico, and the United States) |
| NEDLAC | National Economic Development and Labor Council (South Africa) |
| NGO | Nongovernmental organization |

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|---------|--|
| SACU | Southern African Customs Union (South Africa, Botswana, Lesotho, Namibia, and Swaziland) |
| TEPAC | Trade and Environment Policy Advisory Committee (US) |
| TPA | Trade Promotion Authority (also known as fast track – US) |
| TRIPS | Trade-Related Intellectual Property Agreement of the WTO |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNESCR | International Covenant on Economic, Social, and Cultural Rights |
| UNICCPR | International Covenant on Civil and Political Rights |
| USTR | U.S. Trade Representative |
| WIPO | World Intellectual Property Organization |
| WTO | World Trade Organization |

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Introduction

The Struggle to Weigh Human Rights in Trade Policymaking

Overview

If birth and geography are destiny, the citizens of Cochabamba, Bolivia, were determined to change their fate.¹ Although the city lies in a fertile valley near the Rocha River and the Alalay Lagoon, Cochabamba has long had a chronic water shortage.² For many years, the people of Cochabamba struggled to obtain enough water to meet their basic needs. The local water utility was poorly managed and barely provided adequate services for the city proper. Moreover, the city was ringed by slums where the government did not provide such basic services as electricity or water.

In 1994, citizens in some of the slums surrounding the city decided to solve their chronic water problem on their own. They dug a well and organized a cooperative that provided clean, plentiful water at a reasonable price to many of the citizens living outside the city proper. Soon, other groups inside and outside the city were emulating this approach.

But, in 1999, the Bolivian government auctioned off the city's water utility as part of a broad-based effort to privatize the state utilities and transportation infrastructure. The government opened up the bidding to all investors, foreign and domestic. A U.S./Italian consortium (controlled by the U.S. company Bechtel) acquired the utility. That utility was granted the rights to neighborhood wells and water cooperatives, even though the cooperatives were not part of the original utility's purview. Moreover, the new water services provider decided the company must invest in a more effective water infrastructure. To pay for these costs, the company raised prices some 35%. But many of Cochabamba's citizens could not afford these prices, including those citizens who had created the cooperatives. Thus, they organized to defend the cooperatives they had set up. In January 2000, they took to the streets in protest, claiming that water would become less affordable.³ Citizens

battled police and soldiers in what journalists called “*la Guerra del Agua*” – the Water War.

The protests provided a preview of a problem surfacing around the world. Water is essential to survival, sanitation, public health, and numerous activities that sustain human life and ensure human dignity.⁴ Yet the global supply of water is declining at the same time that the demand for and competition for water are rising.⁵

Water became the “poster child” – an archetype for public concern that trade policies and trade in general could undermine access to resources and in so doing, human rights. Under the Universal Declaration of Human Rights (UDHR), the basic code of human rights outlined by the members of the United Nations, there is no “right to water.” However, as no one can survive without access to water, human rights bodies as well as the World Health Organization have delineated what governments should do to ensure that all of their people can enjoy sufficient, safe, acceptable, accessible, and affordable water without discrimination.⁶ Alas, in many countries, government officials do not have the skill, expertise, or funds to regulate the provision of water. In the belief that outside companies may more efficiently provide access to safe, affordable drinking water, some policymakers have privatized water services, often permitting foreign companies to operate and manage water delivery systems.⁷ In these instances, water services are traded.

Fairly or unfairly, many people perceived that trade in water services had undermined the right to water of the people of Cochabamba. Trade policies and trade agreements did not directly *cause* Cochabamba’s water problem. Nonetheless, trade in water services (opening up the water supplier to foreign investment) *contributed* to making water less accessible and affordable.

The Bolivian experience has convinced some officials in other governments that they should neither open their water services to trade nor treat water as a commodity for trade.⁸ For example, in May 2005, the Australian government made a public commitment to exclude water for human use from its World Trade Organization (WTO) trade negotiations agenda.⁹ The government of Canada has banned bulk exports of water.¹⁰ Members of the WTO have become so concerned about trade in water issues that they waded into the debate with a fact sheet – “The WTO is not after Your Water.”¹¹

But trade in water and water services can also *improve* peoples’ access to water. For example, foreign investment in water services may lead to a more efficient and cheaper supply of water. Thus, trade may indeed promote access to clean, affordable water.¹² Clearly, the effect of trade on the public’s right to water is not black-and-white.¹³

In many countries, citizens and policymakers have alleged that trade policies and agreements can undermine specific rights such as the right to food, labor rights, the right to education, or the right to health (through access to affordable medicines). To some degree, the perception that trade and human rights may conflict stems from an imbalance in the international rule-based system. The WTO stipulates a set of rules that limit how and when nations may apply protectionist tools. It is also a forum for negotiating trade and has an effective and enforceable dispute settlement body. If any of the WTO's 150 members believes that another member nation's trade policies impede trade in violation of WTO rules, that nation can challenge those policies under the WTO's binding system of dispute resolution.¹⁴

However, there is no equally influential and binding international system to promote human rights globally. The United Nation's International Bill of Human Rights, (which includes the UDHR and its subsequent covenants), global public support, and governmental and civil society activism demonstrate an international commitment to fulfilling human rights obligations. Yet nations have not agreed on an effective universal mechanism to ensure the implementation of human rights norms and principles, to assess violations, or to punish violators. Moreover, because countries act differently at the intersection of trade and human rights, there is also an imbalance in behavior among countries. When confronted with a potential conflict between their human rights and trade objectives, some countries develop long-term strategies and mechanisms, other countries respond in an *ad hoc* manner, and still other countries do nothing.

Although scholars, policymakers, and activists have long debated the relationship between trade and human rights, in fact we still know very little about that relationship. Scholars are only beginning to study empirically the effects of trade or particular trade agreements on individual rights, and they have just started to examine which rights (such as property rights or the right to equality before the law) must be protected by governments for trade to flourish. Nonetheless, current studies seem to indicate that, over time, trade policies and agreements – and the trade they stimulate – could (even simultaneously) undermine some rights and enhance others.

Policymakers may find it difficult to evaluate the impact of a particular trade agreement or policy on each one of thirty-some rights delineated in the UDHR. Moreover, the effect of trade policies upon a particular human right may change over time. There is no one set way that trade affects a basket of rights or a particular human right.¹⁵

Despite this lack of insight into the relationship between trade and human rights, policymakers around the world frequently use their trade policies to achieve human rights objectives. Sometimes they use incentives, such as

increasing market access for countries that improve human rights. But government officials must be careful that when they use such incentives they do not violate international trade rules. At other times, government officials use disincentives, such as trade sanctions, to get other states to change their human rights behavior.¹⁶ But a sanctions-based approach cannot build the capacity of state actors to protect internationally accepted human rights standards, such as those delineated by the International Labor Organization (ILO) or the UDHR. Some governments have tried to link trade and human rights by obtaining a waiver from their trade obligations. And, finally, some governments have tried to address specific areas where trade and human rights may conflict outside of the WTO system. For example, under the aegis of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris, a wide range of nations agreed to a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expression. France and Canada led a bloc of countries that argued that cultural rights (and industries) should be shielded from international trade rules under the WTO.¹⁷

The WTO, the international system of rules governing trade, provides very little guidance to its member governments on what they should do if a fellow member undermines particular human rights. Nor does it provide guidance as to how WTO members can promote human rights without distorting trade. The WTO system stipulates what governments *cannot* do, not what they can do. Yet, when policymakers fail to coordinate trade and human rights objectives, they risk perpetuating human rights problems both at home and abroad.

This book enters this murky territory with three goals. First, we aim to provide readers with greater insights into the relationship between human rights and trade. We will present readers with an overview of the international systems governing trade and human rights and background on some of the research on the relationship among trade, trade policies and agreements, and human rights. We believe that, with such background, policymakers will have additional tools and insights to help them develop more effective approaches to achieving expanded trade as well as to progressively realize human rights over time.

Second, we have prepared the first in-depth comparative analysis of how four case studies (South Africa, Brazil, the European Union [EU], and the United States) try to coordinate trade and human rights objectives and resolve conflicts at both the domestic and international levels. In an additional chapter, we also discuss how governments have introduced and discussed human rights concerns at the WTO. We hope these chapters will give our readers a better understanding of how these very different nations and the EU juggle the important goals of advancing human rights and expanding trade. We will show that none of our case studies have found a direct path or “right way” to protect and advance human rights as they seek to expand trade. We believe that greater

knowledge of what other countries are doing may help policymakers achieve a more coordinated approach to these important objectives.

Our third goal is to help policymakers do a better job of governing globalization. As noted previously, because trade and human rights exist in separate governance spheres, scholars, advocates, and officials working in these areas often rely on bureaucratic jargon, use different policy tools, and do not often work collaboratively. Thus, in each of our country chapters, we examine how policymakers make trade policy and discuss how and when human rights concerns can enter the discussion about trade. We will make suggestions to foster greater dialogue and coordination *within* governments, because we believe a more coordinated approach will help make policy more coherent and more effective. In addition, we will also make some suggestions on how to foster a dialogue *between* countries that seek to promote human rights abroad with trade policies.¹⁸

What Do We Know about the Relationships among Human Rights, Trade, and Development?

As long as men and women have traded, they have wrestled with questions of human rights. Archaeological evidence shows that ancient civilizations traded at great risk to their freedoms. According to economist Peter Temin, the ancients shipped a wide range of goods from wheat to wine.¹⁹ But these traders often lived in fear; when they engaged in trade they risked being captured, sold as slaves, or enslaved by pirates.²⁰ Not surprisingly, the ancients had a bifurcated view of trade. The sea could bring contact with strangers who could enhance national prosperity, but these same strangers might threaten the security of the nation and its people.²¹ The first trade sanction, the Pericles Megarian decree, was developed in 432 B.C. in response to the kidnapping of three Aspasian women.²²

Many years later, during the Age of Exploration, theologians, scholars, and royal advisors debated whether they had the right to exploit the land and wealth of indigenous populations. The economic historian Douglas Irwin notes that Vitoria, one of the “founders of international law,” contended that the right to trade is “derived from the law of nations. . . . Foreigners may carry on trade, provided they do no hurt to citizens.”²³

In the centuries that followed, policymakers around the globe developed a wide range of approaches to govern the behavior of states and citizens at the intersection of trade and human rights. Often one state would act and challenge (or inspire) others to follow. For example, after England banned the slave trade in 1807, it signed treaties with Portugal, Denmark, and Sweden to supplement its own ban. After the United States banned goods manufactured by

convict labor in the Tariff Act of 1890 (section 51), Great Britain, Australia, and Canada adopted similar bans. Ever so gradually, these national laws inspired international cooperation.²⁴

Recent Scholarship on Trade and Human Rights

Today, citizens and policymakers increasingly debate the relationship between trade and human rights. Many policymakers and scholars of trade argue that trade per se (and the agreements governing trade) inherently enhances human rights. They claim that trade stimulates an export-oriented middle class, which will use its increasing economic clout to demand political freedoms and to press for openness and good governance.²⁵ Thus, they are asserting that trade, in effect, may help to encourage guarantees of civil and political liberties. In this regard, law professor Joel Paul cites the example of Mexico, where greater trade with Canada and the United States helped Mexico mature into a “multi-party democracy.”²⁶ Policymakers and scholars also argue that trade improves human welfare. They note that, over time, the General Agreement on Tariffs and Trade (GATT) and the WTO (as well as bilateral trade agreements) have effectively stimulated and regulated trade. These agreements have thus contributed to economic activity, which, in turn, has helped more people improve their quality of life.²⁷

Other analysts acknowledge the benefits of trade to economic growth and political liberalization, but they have a more nuanced view of how trade affects particular human rights. For example, according to economists Kimberley Ann Elliott and Richard B. Freeman, trade does not necessarily improve labor rights. They concluded that the impact of trade on labor standards depends on the quality of country-specific institutions and conditions.²⁸

Although people have been debating the relationship between human rights and trade for centuries, the truth is that we know very little about how the two interact. Some scholars are testing how trade and foreign investment affect human rights.²⁹ The more rigorous studies are finding a complex relationship. For example, some studies have found that some types of foreign economic penetration (investment, trade, and aid) are reliably associated with increased levels of government respect for some – but not all – human rights. Several studies indicate that as citizens engage in trade, some rights seem to advance, whereas others seem to decline.³⁰

Some scholars have begun to rely on a comprehensive data set, the Cingranelli and Richards (CIRI) Human Rights Data Set, that provides a country-by-country summary of each nation’s human rights behavior (see <http://ciri.binghamton.edu/>.) Working with this data set, scholars have found

that higher levels of foreign investment and trade increase governmental respect for personal integrity rights (such as freedom from torture or arbitrary imprisonment). Thus far, studies reveal that states with better human rights records receive more investment.³¹ But none of these studies examine how trade flows per se affect particular human rights or how membership in the GATT/WTO over time affects particular human rights.

Scholars also don't know if promoting *certain* human rights could be trade enhancing or if increased trade inspires policymakers to do more to protect *specific* human rights. Moreover, researchers know little about the lines of causality. Do enhanced human rights protections lead to increased trade? Or does increased trade lead to improved human rights? Finally, we have little insight as to how trade policies and agreements will influence the realization of human rights *over time*.

To some extent, this knowledge gap is part of a larger hole in knowledge: scholars know very little about the relationship between economic development and human rights. Economists find it difficult to tease out the many variables that can stimulate or undermine economic or social development. In recent years, one scholar has stimulated a forceful rethinking about the relationship between human rights and development: the Nobel Prize winner Amartya Sen. Sen's insights have greatly influenced practitioners as well as scholars, including the authors of this book (Figure 1.1).

Sen's Insights

In the post-World War II period, development officials and scholars generally thought that public policies could facilitate economic growth and development if these policies could simply raise the income of the poor. They thought the problems of poverty could be solved by increasing the supply of money available for development. With foreign aid, they hoped, the poor and middle classes in the developing world would get jobs and use their earnings to save, consume, or invest. The economy could then "take off." But Sen believed countries and individuals are poor because, in many countries, citizens (a nation's most valuable resource) lack access to other productive resources such as education, land, health, justice, and credit. He argued that governments must actively provide these public goods to ensure that all citizens can obtain the services and resources they need to achieve sustainable development.

Sen also provided a normative framework for how human rights could guide the development process and, in turn, the international institutions designed to foster development. In *Development as Freedom* (1999), he explores the ways in which freedom is both a constituent of and a means to foster development. The

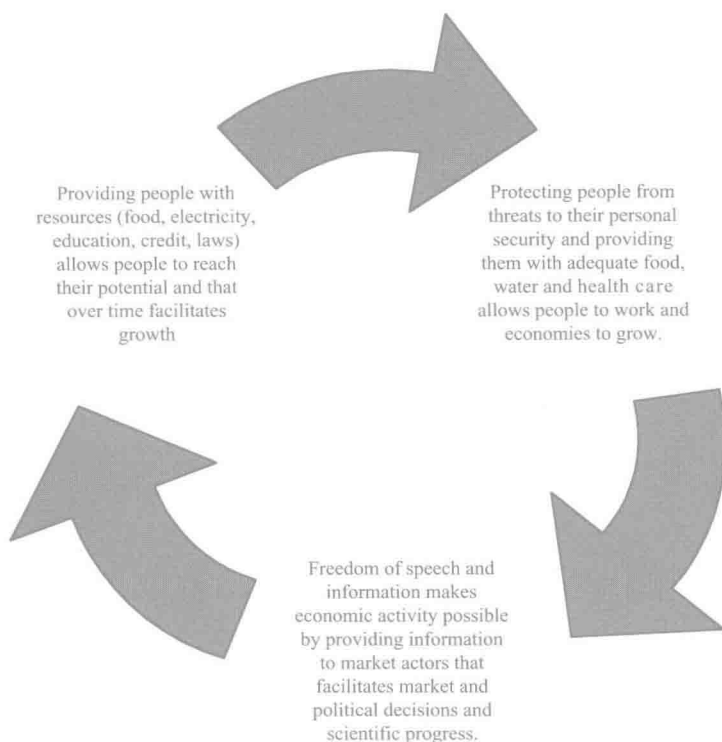


FIGURE 1.1. Sen's ideas on human rights and development.

book focuses on political freedoms and democracy, in particular, as democracy gives people a voice and a constructive role in shaping values, norms, and, ultimately, policy responses.³²

Sen is not the only modern economist to present ideas about the relationship between human rights and development. Nobel Prize-winning economist Robert Barro has shown that per capita gross domestic product (GDP), education level, and life expectancy are highly significant predictors of democracy and civil liberties, “firmly establishing the general link between democracy and the standard of living.”³³

Sen's insights have greatly influenced how economists think about development. For example, in 2000, the United Nations Development Programme (UNDP) declared, “rights make human beings better economic actors.”³⁴ In 2004, the WTO's Consultative Board noted, “the case for trade is made very definitely in terms of enhancing human welfare. Trade is a means to an end, not an end in itself.”³⁵ In its 2005 report, the UNDP noted, “eradicating poverty is more than a major development challenge; it is a human rights challenge.”³⁶