Human Rights and International Trade

Edited by

THOMAS COTTIER

JOOST PAUWELYN

and

ELISABETH BÜRGI BONANOMI

OXFORD
UNIVERSITY PRESS

Human Rights and International Trade

Edited by

THOMAS COTTIER

JOOST PAUWELYN

and

ELISABETH BÜRGI BONANOMI

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2005

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
Biddles Ltd., King's Lynn
ISBN 0–19–928582–9 (Hbk.) 978–0–19–928582–2
ISBN 0–19–928583–7 (Pbk.) 978–0–19–928583–9

General Editor's Foreword

JOHN H JACKSON

This book represents the results of a three- to four-year project on the difficult conceptual problem of the relationship of human rights policies and norms to the World Trade Organization. The interrelationship between human rights and international trade is an extraordinarily difficult conceptual problem involving (*inter alia*) civil and political rights on the one hand, and social and economic rights on the other hand. At an early conference for this project, there were essentially two large groups—one from the human rights community and one from the trade community. These groups were essentially talking *past* each other, which, given the different background of each group, should not be surprising. Indeed, part of the point of that first conference was simply to get issues out on the table.[1]

At the second conference, some brilliant case studies were discussed to try to develop empirical 'real world' perspectives. This was real progress, but it was only at the third conference that the project really began to get into the depths of a conceptual discussion.[2]

Hopefully, the project can lead further to an overall road map of these issues, which is extraordinarily complex.

To begin an analysis, the notion of human dignity being at the base of human rights is very valuable, but it may be a notion that has been pushed too far sometimes. There are also powerful instrumental or functional arguments that support some of the human rights. In other words, we can see two sets of arguments for human rights. On the one hand, the dignity that is inherent in each individual because we think that humans should be free from certain kinds of oppression, torture, and certain other kinds of degradation. On the other hand, one could say that there are also functional aspects. Some of those functional aspects support the dignity aspects, but functional aspects relate, perhaps, more to how governments operate and to the need for certain human rights to be effective in order for governments to govern appropriately. Thus freedom of speech, freedom of the press, and perhaps property rights all have functional value in the sense that a certain amount of individual freedom or property in the hands of individuals helps them fend off incursions from elsewhere, including from governments. This clearly could benefit from more exploration. Some of these rights also have economic policy implications.

[1] The results of this first conference will be published in F M Abbott/C Breining-Kaufmann/T Cottier (eds), International Trade and Human Rights, Foundations and Conceptual Issues, World Trade Forum, vol 5, University of Michigan Press (forthcoming 2005).

[2] The results of the second and the third conferences are published in the present volume.

To think these issues through, it is important to look at the goals of the human rights. What are the goals of protection against torture, freedom of speech, or ownership of property? What are the goals of some of the other human rights? It is at this point that we delve into thought approaches which are often avoided by the experts, namely the need to disaggregate the question of human rights, or differentiate among human rights and look at them case by case so as to develop priorities. In many ways, that task has been anathema to the discussion of human rights because, for one thing, it is politically detrimental to disaggregate the human rights spectrum, since, in doing so, you lose some of a broader coalition constituency. However, it is important to look at each individual human right, and look at the goals that support it because this may lead to different conclusions about how supporting those goals calls for different approaches at different levels of the vertical ladder of power in the world.

As an example on this subject, there are clearly some differences between the US perspective and European perspectives. This may stem from a broader difference over international law generally, and over a number of other issues being very strongly debated recently. Here we can mention one or two of those differences that affect the human rights area. For one thing Americans, particularly those who have delved deeply into constitutional law, know the 1930s' history of the US Supreme Court, which really leads many Americans to the almost inevitable conclusion that we *ought not to 'constitutionalize' economic rights*. There are real risks in bringing to the judiciary certain issues, including certainly some risks in the area of economic rights.

This does not mean that you can completely separate certain human rights from these economic ideas. For example, in the Bill of Rights there is a property right, which is an 'economic' right, but there are limits to how far the 'market ideas' will go. For instance, to impose the market idea on a constituency that any government regulation whatsoever is a 'taking' of property is very dangerous.

Many human rights scholars, including those in this project, recognize that one of the tough issues of human rights is the constant balancing, the constant defining of the limits to rights. The extraordinarily rich jurisprudence of the European Court of Human Rights with regard to human rights highlights this need for balance, limits, and definition. This includes the notion that the limits may evolve as society evolves, over time. (This is anathema to many national sovereignty enthusiasts, and to those who oppose any evolutionary notion of international law or interpretation.)

There is another aspect to this difference of opinion that is very pragmatic also. What are the goals of citizens—individual citizens trying to carry out their family life—and what will promote the ability to fulfil those goals? This comes with the realization that economics is very central to those needs. But there is a difference in attitudes between sides of the Atlantic on how structurally you design governments to aid individual citizens. The US has sensed over many years that it is the job of the nation-state, because in the US case, the nation-state has been a very strong protector of human rights and economic welfare of

its citizens. In Europe, the first half of the last century was a disaster, with two huge wars (European civil wars?), which naturally led to a view that nation-states cannot be relied on for adequate protection, and therefore citizens must go to a regional international organization which now is becoming extraordinarily important (and successful).

Those factors have led to a series of differences in each side's definition of the relationship between national law and international law. Some want international norms to be automatically introduced into domestic norms. Another view is that the international system is far from being democratic and legitimate in a lot of spheres, and therefore this approach is very dangerous and, to some degree anti-democratic. Many still think the nation-state, on the whole and in most places, better protects against misuse of power by governments than does the international system, although this may change over time.

Those issues engage concepts of 'constitutionalism', signs of which we can see in the WTO, especially its extraordinary and powerful dispute settlement system. The 27,000 pages of the WTO jurisprudence already reported probe the frontiers of these issues, such as in the remarkable *Shrimp—Turtle* case.[3] One feature that is clearly manifest is the notion of 'balancing' between competing policy objectives.

We have to consider in depth what some of the elements of constitutionalism are, but one of the salient elements is a system that has certain kinds of framework norms that are very hard to change, and that those more rigid framework norms protect unpopular views in the short term, and also protect against majority rule to some extent in favour of minority rights. Therefore, you end up, of course, protecting human rights in many ways.

In the *Shrimp—Turtle* case, the key alternative tension-building policy to trade is the environment. But you could read human rights into that kind of tension also. The Appellate Body says that it must not *only* look at the trade values, but must look more broadly. Then it embellishes that reasoning with something from the treaty text and discusses balancing.

This kind of balancing is clearly a key to the conceptual problem in a lot of these trade linkage areas. You also see a lot of balancing going on in the jurisprudence of the European Convention on Human Rights. There is also balancing undertaken in the US Supreme Court jurisprudence.

Another concern we may have for future explorations is that human rights linkage to the international trade agenda is a subject that is very hard to contain. It is a sprawling, broad landscape, sometimes referred to as a multi-dimensional chess game.

This project has at least helped to answer the question whether it is possible more explicitly to link trade and human rights. In a lot of areas, the link has been achieved, most poignantly and elaborately in the recent developments of

[3] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WTO Doc WT/DS58/AB/R (adopted 6 November 1998).

the European Community. We can now clearly see that there is a much more obvious and explicit link of human rights with a field many people had thought was purely economic. You also see at least the beginnings of it in some of the prior treaties of the European Community (eg with its ACP states), and you can also see it in the GSP issue (you can call it 'conditionality'). One of the things we are learning (at least in the background, as there has not been very much press devoted to it) is that in a number of free trade agreements, bilateral or regional, there are explicit treaty clauses being introduced for transparency, good governance, anti-corruption, and so on. It seems only a whisper away to add things like human rights. Furthermore, there is background conditionality of human rights for some of the agreements, without any treaty text. And human rights appear even in some proposed treaty texts in the case of the potential FTAA. In NAFTA, underneath the surface, Congress was always raising the question whether the US was going to accept as a NAFTA partner a country that is not pursuing human rights protections.

Amidst this debate something more dramatic is occurring, particularly in the last fifteen years, namely the changing fundamentals of international law. These changing fundamentals target the problem of the sovereignty concept, which, in many (but not all) ways, is a bankrupt notion. A corollary question involves the consent theory of international law, and the degree to which we are still going to rely upon a consent idea of legitimation of international norms. With regard to treaties, the answers are relatively easier, but must also address the questions of rogue states and failed states and their committing genocide or other actions on their own population. Given the many factors involved, it is easy to see why many say that customary international law is in a mess, and that the *jus cogens* ideas are part of customary international law, and therefore also in a mess. Human rights analyses must grapple with these problems.

Finally, we can return to 'constitutionalism', which was prominently mentioned in this project. One question to keep in mind is whether we are dealing with a 'living constitution'. If so, it is something that we have to assume will have a certain evolutionary aspect and, of course, that contrasts starkly with consent theory, with different ideas of legitimation. But one can also add here that, despite these changing fundamentals, there is a continuing and very crucial role for the nation-state—perhaps especially so in protecting human rights.

One of the remaining questions, of course, will be: where does this research go in the future? One thought is that a new project should develop some hypothetical cases that force thinking beyond the frontiers for which there are not (yet) cases. For example, suppose you have a situation of ethnic cleansing (without calling it genocide, although in some cases it may really amount to genocide). Suppose such a situation of ethnic cleansing is not even of the sort as lethal as we have recently seen. One could argue strongly that it is really a dramatic violation of human rights to send a population to the borders of other states or corral them in a particular territory. Then suppose the United Nations

imposes trade measures against a country that is engaging in the ethnic cleansing—an embargo and other measures of restricting trade of all kinds. The question becomes: how do you get compliance with those trade measures? A lot of countries will probably comply, but there are the rogue states that will not, and their actions undermine what the others are doing. It undermines the pressure that can be exerted, and it also creates a situation in which those rogue states are profiting from a sort of monopoly because the ones that are withholding trade now are at a disadvantage, making it even more valuable for smugglers, financial flows, and a whole series of related activities. Does there arise at any point some kind of right on the part of the states that are complying to defend against a WTO case? You can play this hypothetical either with a UN resolution, or without.

Without the resolution, the hypothetical creates a slightly more perplexing puzzle. Suppose you have a group of like-minded states, a 'coalition of the willing', if you will, who say they are not going to tolerate another Rwanda, and are going to do everything they can to bring pressure, just short of sending in troops. They agree to cut off the trade with the culprit state, as far as they can, but, at the same time, know that countries X, Y, and Z are just making a huge profit out of not complying, to say nothing of the potentates that rule the target country and are lining their pockets. So the coalition extends its trade limits to X, Y, and Z, and these states bring a case in the WTO. How far would or should the coalition be able to defend such a WTO case?

A hypothetical like that might force us to walk through a number of concepts, and navigate the broad landscape that we have in front of us. But clearly that is a task for further research, building on the admirable discussions of the project described in this book.

Acknowledgements

Many people have contributed to this project and book. The editors are particularly grateful to the American Society of International Law (ASIL), Professor John H Jackson, Georgetown University, Professor Frederick M Abbott, former co-director of the project, and Kathleen Wilson of ASIL. They all were critical in initiating research efforts on trade and human rights.

Three conferences took place under the auspices of the project. Two were hosted in 2001 and 2003 at the World Trade Institute (WTI) in Berne, one in 2004 at the Georgetown University in Washington, DC. This volume contains papers written for the second and third conferences, while a separate volume entitled International Trade and Human Rights, Foundations and Conceptual Issues, World Trade Forum Volume 5 (edited by F Abbott, C Breining-Kaufmann; University of Michigan Press, forthcoming) contains the initial contributions to the project. We hope that the books in tandem will stimulate debate and bring about solutions in a new and complex legal relationship. We express our gratitude to the hosting institutions and universities, and to the respective staff who made the realization of these conferences and volumes possible. We acknowledge with gratitude the John D and Catherine T MacArthur Foundation, USA, the Silva Casa Foundation as well as the Ecoscientia Foundation, both Switzerland, which have financially supported the project, allowing participants from all quarters of the World to attend the conferences. We are most grateful to the contributors to this volume and for their willingness to join an inspiring, but complex, effort. We also express our appreciation to Catherine Gerber, Sarah Levy, and Angela Bühler of the WTI and the Department of Economic Law at the University of Berne, for their invaluable editorial assistance in the preparation of this volume. We are grateful to Oxford University Press, in particular John Louth and Rebecca Smith, for making available the proceeds of the project to a broader audience.

Thomas Cottier
Joost Pauwelyn
Elisabeth Bürgi

Contents

List of Editors

Thomas Cottier is Professor of European and International Economic Law at the University of Berne, Switzerland, and Managing Director of the World Trade Institute, Berne, Switzerland, and has been a member and Chairman of numerous WTO/GATT panels. He has published extensively in the field of trade law, in particular with respect to intellectual property.

Joost Pauwelyn is Associate Professor of Law, Duke University School of Law. Formerly he was a Legal Affairs Officer with the WTO Secretariat (Legal Affairs Division and Appellate Body).

Elisabeth Bürgi Bonanomi lic.iur (LLM equivalent) and attorney at law, research fellow at the University of Berne and the World Trade Institute, Berne, Switzerland. She is in charge of the project on trade and human rights and is currently working on her PhD on 'Sustainability Principles for Trade in Agriculture'. Formerly she was a Legal Affairs Officer with the Economic Department of Berne.

List of Contributors

Frederick Abbott is Edward Ball Eminent Scholar Professor of International Law at Florida State University College of Law.

Yvonne Apea is Programme Coordinator for Africa and Legal Affairs at the International Centre for Trade and Sustainable Development (ICTSD), Geneva.

Lorand Bartels is a Lecturer in International Economic Law at the University of Edinburgh.

Jane Bradley is Deputy Director at the Institute of International Economic Law, Georgetown University Law Center. Previously she served in the Executive Office of the President of the United States for more than twenty years, primarily in the Office of the US Trade Representative (USTR). While at USTR, she was the lead US negotiator on the agreement that created the World Trade Organization (WTO) dispute settlement procedures, and she headed the USTR office responsible for WTO litigation. She held various positions within USTR, including Assistant US Trade Representative for Monitoring and Enforcement, Deputy General Counsel, and Legal Advisor to the USTR delegation in Geneva.

Christine Breining-Kaufmann is a Professor of International, European, Constitutional, and Administrative Law and Co-Director of the Institute of International and Comparative Constitutional Law at the University of Zurich. She is also a Member of the Board of the World Trade Institute in Berne. Previously, she served in the legal department and then as Director of Human Resources at the Swiss Central Bank. During that time she was a member of the EFTA expert groups on financial services and free movement of capital and services and represented the Swiss Central Bank in the negotiations on the European Economic Area.

Caroline Dommen is founder and director of 3D → Trade–Human Rights–Equitable Economy. Previously, she was International Law Officer of International Centre for Trade and Sustainable Development (ICTSD) based in Geneva. She has also held the posts of Programme Officer of the International Service for Human Rights in Geneva and New York, and Expert on Trade and Environment at UNCTAD. Caroline is a member of several professional bodies including the International Advisory Network of the Business & Human Rights Resource Centre, the IUCN–World Conservation Union Commission on Environmental Law, and the Editorial Board of the Journal of International Wildlife Law and Policy.

Masha A Echols is a Professor of Law at Howard University School of Law. Formerly she was a Member, United Nations Administrative Tribunal; Adjunct Professor, University of Virginia School of Law; Adjunct Professor, The National Law Center, George Washington University; and a Fulbright Senior Scholar.

Shelley Edwardson is an Associate at Allen & Overy LLP.

Christoph Beat Graber is Professor of Law, University of Luzern Faculty of Law and Head of i-call (International Communications and Art Law Lucerne). He was Managing Director of the Swiss Independent Complaints Authority for Radio and Television; he is now a member of the Swiss Federal Arbitration Commission for the Exploitation of Authors' Rights and Neighbouring Rights.

Kevin R Gray, LL.M. is currently Counsel at the Trade Law Bureau at the Canadian Department of Foreign Affairs and International Trade. He is an international lawyer and academic, having taught at the London School of Economics and the School of Oriental and African Studies. He has also been a research fellow at the Royal Institute of International Affairs and the British Institute of International and Comparative Law.

Maria Green is an Assistant Professor in the Graduate Programs on Sustainable International Development at The Heller School for Social Policy and Management, Brandeis University. She has previously worked in international economic, social, and cultural rights as Director of the International Anti-Poverty Law Center and International Advocacy Coordinator at the Center for Economic and Social Rights, and has been a consultant for several human rights-related projects at UNDP and the UN Office of the High Commissioner for Human Rights.

Laurence R Helfer is a Professor of Law and Director of the International Legal Studies Program at Vanderbilt University Law School. He has published numerous law review articles and lectured widely on international intellectual property law, international human rights, and international litigation and dispute settlement. He serves as a consultant to the United Nations Food and Agriculture Organization, which published his monograph, *Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments*, in late 2004.

Sangeeta Khorana is a Research Associate at the Swiss Institute for International Economics and Applied Economic Research, University St Gallen.

Qingjiang Kong is Dean and Professor at the Faculty of Law, Zhejiang Gongshang University. Adjunct Professor, China University of Political Science and Law.

Karin Lucke has worked as a human rights officer with the United Nations Office of the High Commissioner for Human Rights (OHCHR) since 1995,

including in the OHCHR field office in Croatia. Current responsibilities focus on supporting follow-up of treaty body recommendations by States parties and other stakeholders at the national level, including through training activities. Prior to joining the UN, she worked in several non-governmental organizations active in the field of preventive diplomacy, conflict prevention, transformation, and resolution. She holds a Master's degree in International Affairs from Columbia University, with a specialization in human rights and international law.

Werner Meng is Director of the European Institute and Professor of Law at the University of Saarland, Saarbrücken. Formerly he was Professor of Law at the Martin Luther University in Halle, Attorney at Law in Munich, and Research Fellow at the Max Planck Institute for Comparative Public and International Law, Heidelberg.

Victor Mosoti is Legal Officer in the Development Law Service of the United Nations Food and Agriculture Organization in Rome, Italy. Formerly he was Coordinator for African and Legal Affairs at the International Centre for Trade and Sustainable Development (ICTSD) Geneva.

Sisule F Musungu is a lawyer and the Team Leader on Intellectual Property, Investment, and Technology, South Centre.

Krista Nadakavukaren Schefer is a lecturer and senior research fellow at the Institute of European and International Economic Law, University of Berne and the World Trade Institute, University of Berne.

Ernst-Ulrich Petersmann is Professor of International and European Law at the European University Institute in Florence. He is Academic Director of the Transatlantic Programme of the Robert Schuman Centre for Advanced Studies, Florence. He has been a lecturer at the Universities of Hamburg, Heidelberg, and the Saarland and Professor of Law at the Universities of St Gallen, Fribourg, Geneva, and the Geneva Graduate Institute for International Studies. He is a former legal adviser in the German Ministry of Economic Affairs, GATT, and the WTO and Chairman of the International Trade Law Committee of the International Law Association.

Prabhash Ranjan is a Research Officer at the Centre for Trade and Development (Centad), an Oxfam GB initiative, in New Delhi. Before that he was a Legal Researcher at the CUTS Centre for International Trade, Economics, and Environment in Jaipur.

Gregory Shaffer is Professor of Law at the University of Wisconsin Law School; Director of the UW European Union Center; and Co-Director and Senior Fellow of the UW Center on World Affairs and the Global Economy.

Allyn L Taylor is a professor at the University of Maryland School of Medicine and Adjunct Professor in Residence at the University of Maryland School of

Law. Before that she was Senior Health Policy Adviser at the World Health Organization, Geneva, and Chair of the International Health Law.

Carlos Manuel Vázquez is Professor of Law at Georgetown University Law Center and Director of its Human Rights Institute. He has been a member of the Inter-American Juridical Committee, Organization of American States.

[T]oday's threats to our security are all interconnected. We can no longer afford to see problems such as terrorism, or civil wars, or extreme poverty, in isolation. Our strategies must be comprehensive. Our institutions must overcome their narrow preoccupations and learn to work across the whole range of issues, in a concerted fashion.

Kofi Annan's Foreword to the UN High-level Panel on Threats, Challenges, and Change (entitled A More Secure World: Our Shared Responsibility), available at http://www.un.org/secureworld/report.pdf, December 2004

Introduction

Linking Trade Regulation and Human Rights in International Law: An Overview

THOMAS COTTIER, JOOST PAUWELYN, AND ELISABETH BÜRGI

I. INTRODUCTION

Predictable and stable conditions of market access, gradual dismantlement of trade barriers in industrial goods and services, and enhanced protection of human rights epitomize Western perceptions of world order and peace after the Second World War. Both, trade regulation and human rights protection, aspire in their own ways after welfare in the pursuit of human happiness. Both formed essential parts of the 1942 Atlantic Charter. Ever since the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947 and the Universal Declaration of Human Rights in 1948, each of these two components evolved in their own and distinctive ways, with their own logic and institutions. Bluntly put, the Bretton Woods institutions (World Bank, International Monetary Fund, and GATT) focused on the world's economic problems;[1] the UN institutions had a wider, mainly political brief. Yet, post-war history shows that trade liberalization partly goes hand in hand with enhanced enjoyment and protection of human rights, while tensions are not excluded. Such tensions mainly appear in the context of structural adjustment. They partly render affirmative action necessary, in particular in support of sustainable agriculture and the rights of the rural poor as well as in efforts for safety nets and retraining of low-skilled workers in developed countries.

Both trade regulation and human rights have strongly contributed to the development of international law. For many decades, the legal relationship

[1] Both the IMF and World Bank articles of agreement, for example, explicitly stated that political factors could not be taken into account. Operations were to be based (eg loans are to be distributed) solely on economic grounds (and not, for example, with reference to a country's human rights or corruption record).

between the two may be described as a matter of co-existence. Interactions have existed since their inception, but remained marginal or largely ineffective. Linkages were created, for example, through UN embargoes aimed at ending apartheid or improving human rights. Similarly, efforts to ratchet-up labour standards, or at least prevent a race to the bottom in labour protection as a result of global competition, have been on the agenda for decades (and are addressed in International Labour Organization (ILO) conventions), but failed to materialize within the multilateral trade system. Linkages are manifest also in the human rights or good governance conditions attached to trade promotion programmes in domestic legislation and preferential market access in bilateral or regional agreements. Internationally, such linkages are reflected in IMF loan conditionalities and World Bank project guidelines on, for example, indigenous people.

In recent years, the debate has changed. A number of factors were conducive. Trade regulation expanded into the fields of intellectual property and services under the umbrella of the newly found World Trade Organization. Dispute settlement under the WTO was strongly reinforced, allowing for appeals and automatic rulings and trade sanctions in case of sustained violations of WTO law. At the same time, new social problems of a global scale emerged: in particular, the epidemic of HIV/AIDS called for access to essential drugs by many affected. Seemingly, patent protection for pharmaceutical products rendered mandatory for WTO members under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) emerged as a potential obstacle. Pharmaceutical companies, invoking the TRIPS Agreement, sought to limit or ban parallel importation of cheaper drugs. While there was no legal title to such a claim under the TRIPS Agreement, the attitude and pressure exerted triggered a counter-offence under the banner of the right to health, depicting the TRIPs Agreement and the WTO as a whole to be hostile and detrimental to human rights. A new subject of linkages was born: trade and the right to health. Importantly, the trade and health question arose owing to additional trade restrictions, based upon patent legislation, not because of new liberalization. For many, this was cause enough to argue against the inclusion of intellectual property standards into the trading system, supported by human rights claims. More moderate views, recognizing the importance of intellectual property rights (IPRs) for fair conditions of competition and investment, were encouraged to reassess the balance of rights and obligations, of private and public domain, in the field of intellectual property and to work towards modified rules.[2] Access to essential drugs was eventually settled, though not necessarily achieved in practice, by means of a waiver for exportation under compulsory licensing.

The incident, however, induced a much wider discussion of the subject that went far beyond the field of intellectual property. Many human rights lawyers

[2] See, for example, Keith Markus and Jerome Reichmann (eds), International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime (Cambridge University Press, 2005).

expressed the fear that WTO rules, supported by its enforcement mechanism, elevate free trade over and above human rights protection and promotion, leaving legitimate concerns without adequate protection and consideration. The problem parallels other areas of potential linkages: trade and environment, trade and labour, trade and culture. For each of these linkage questions, increased inter-dependence between states *and* between issue-areas made the separation between different fields of international law look all the more artificial. The emergence of non-state actors on the international arena (be it non-governmental organizations, companies, or world public opinion) put additional pressure on government representatives not to deal with problems in isolation, but when regulating international trade to take account also of what had been decided at the UN in terms of environmental or human rights protection. Trade lawyers, confronted with these challenges, felt compelled to clarify the relationship of trade regulation, economic law in general, and human rights. More specifically, they started to explore the status of human rights in trade law, including the prospects for WTO adjudication. A process towards greater coherence began, counteracting the legacy of fragmentation in international law.

The debate on trade and human rights is complex. The challenge is profound. It addresses a multitude of different problems. A major problem and challenge consists in organizing the work and subjects in a meaningful and clear manner. Work undertaken so far within and outside the project shows that the pertinent issues relate to different levels of the relationship of trade regulation and human rights. The following basic levels of the problem and questions may be distinguished:

- Constitutional theory: philosophical, cultural, and legal foundations of the relationship between trade regulation and human rights, both in domestic and in international law and as a matter of vertical interaction (multilayered governance).
- Institutional matters of jurisdiction and cooperation between different international organizations and institutions, entailing cooperation both in treaty-making and in dispute settlement.
- The status of human rights in trade regulation, in particular in WTO dispute settlement and law enforcement through authorized trade sanctions. How much leeway should trade law provide to countries pursuing human rights policies?
- The status of trade regulation in human rights instruments and adjudication. How can human rights take account of the principles and needs of the multilateral trading system?
- Trade and human rights responsibilities of the private sector.

Although these different levels are interactive, informing each other, it is useful to address them separately and place the respective papers and comments of this book in perspective. The book continues the conceptual debate initiated in

the first volume of the project.[3] In addition, it collects a number of case studies which may feed back into theoretical work and insights. In the following sections, we seek to offer a brief summary of the contributions and to place them in perspective. The introduction concludes with a number of suggestions for further work and specific action in interfacing trade regulation and the protection and promotion of human rights.

II. THE SEARCH FOR BRIDGING FOUNDATIONS

Before turning to the intricacies of international law, it is useful to address the relationship of trade regulation and human rights in terms of constitutional theory. The paper prepared by Ernst-Ulrich Petersmann (p. 29) builds upon the experience of constitutionalism in Europe which, on the basis of protecting human dignity, respects the indivisibility of political, social, and economic rights and accords market freedoms the status of fundamental constitutional rights. Petersmann calls for a stronger process of transnational constitutionalization, as multilevel governance requires multilevel constitutionalization. On this view, citizens and private economic actors should be recognized as legal subjects and empowered as such. The international system should shift from a state-centred UN system to a citizen-centred, human rights based system. Thereby the guarantee of market freedoms should go hand in hand with the protection of human rights, as the first is—according to Petersmann—a precondition to resolve the grave challenges with respect to the social and economic human rights the world is facing today. On the other hand, human rights need to balance the exercise of market freedoms:

> Multilevel constitutionalism helps better to understand, use, and strengthen the functional interrelationships between international and domestic constitutional rules. Just as democracies are not sustainable over time without 'constitutional democracy', so can market economies not properly function without respect for human rights and 'economic constitutions' that protect non-discriminatory, consumer-driven competition and social justice.[4]

While constitutional rights serve more specific functions in the US tradition, focused in particular on civil and political rights, human rights including market freedoms provide an overall normative framework, based upon which conflicts of competing policy goals and rights can be addressed. The experience of domestic and regional constitutional law within the European Union illustrates the close interaction between economic and human rights, first in the case law of the European Court of Justice, later in the treaties themselves (see the

[3] F M Abbott/C Breining-Kaufmann/T Cottier (eds), International Trade and Human Rights, Foundations and Conceptual Issues, World Trade Forum, vol 5, University of Michigan Press (forthcoming).

[4] See E U Petersmann, Human Rights and International Trade Law: Defining and Connecting the Two Fields in ch 1 of this volume.

Treaty establishing a Constitution for Europe). Domestic law, supported by the European Convention on Human Rights, established a careful balance between economic and non-economic rights.

Fundamental human rights guarantees in many ways support freedom of economic players, protecting them from undue government intervention. They play for example a crucial role in redressing asymmetries of market information. The case study on the *Hertel* case by Thomas Cottier and Sangeeta Khorana (p. 245) explores the relationship to unfair competition and highlights the importance of free speech and freedom of information as a means to secure symmetry of market information and thus the functioning of markets. In this light, freedom of expression is not just a core human value, but also an important ingredient of an efficiently functioning market economy. Therefore, the authors claim that freedom of expression should be included in the rules of the trading system at least to the extent that this is necessary in order to prevent and to remedy asymmetries of information on export markets. On the other hand, freedom of expression should also provide a basis for legitimate restrictions of economic activities. The authors refer to the experience of the European Communities which shows that human rights, sooner or later, enter the trade game, even though they were not positively inscribed into the original, functionalist EEC treaty.

Christoph B Graber (p. 273), commenting on Cottier and Khorana's paper, questions the economic approach chosen by the two authors. He agrees that an economic analysis of law, such as the theory of information asymmetry, can help legitimize the use of free speech. He finds the matter, however, to be more complicated and in particular insists on the established, but difficult, distinction between political and commercial speech with its varying standards of review under constitutional law and the European Convention on Human Rights.

Domestic or regional institutions, in particular Constitutional Courts, the European Court of Human Rights, and the ECJ, are well positioned to produce a proper balance in individual cases, as they enjoy comprehensive jurisdiction over all rights involved. It does not imply that these institutions always get the balance right. The said case study relating to freedom of speech and unfair competition shows that the balance sought by the Swiss Federal Court had to be remedied by the European Court of Human Rights. Protection of human rights by the ECJ for many years was subject to the criticism that it was merely functional in promoting integration, rather than genuinely protecting human rights. But the creation of institutions which have jurisdiction encompassing trade regulation and human rights provides the necessary and essential foundation for refining and balancing different rights. The same, of course, applies to law-making. In constitutionalism, one and the same authority legislates and thus is in a position to strike a balance. Interfacing trade regulation and human rights in a constitutional way therefore essentially depends upon the institutional framework.

The crucial question is to what extent the constitutional model and experience in domestic and European law can guide the level of international law, properly speaking. Its structure remains very different from national constitutions and

legal orders. Institutionally, a great number of diverging actors with different constitutional backgrounds, fragmentation of jurisdiction of international organizations, decentralization of decision-making, and lack of effective adjudication and enforcement in most areas is a starting point all too well known. On substance, human rights as well as principles of non-discrimination in trade law are not of a higher rank than any other source of law as any inherent hierarchy of international law sources (similar to the domestic divide between constitutions and statutes or contracts) is lacking. All sources of law are of equal status, except for the very limited concept of *jus cogens*, which is generally understood to include some core human rights, though not trade law.

In the debate on linking human rights and trade in international law, and given the starting point of the debate, it is, however, generally assumed that in most cases human rights should trump market access and economic regulations and work as a check on them. Trade obligations continue to be negotiated, framed, and enforced as bilateral state-to-state 'contracts', whilst human rights are construed as collective obligations that transcend the individual interests of any two states and take on an almost 'constitutional' value. However, given the patchy and fragmented judicial enforcement of international law, the interplay and checks-and-balances between the two fields *in practice* remains highly exceptional. The role of human rights in international law is, at least at this stage, different from that domestically or in regional integration. Transforming international law into constitutional modes fit to deal with the coordination of diverging values therefore requires fundamental changes. These may be induced over a longer period of time by changing attitudes and working towards multi-layered governance, or be induced by radical institutional changes, such as the creation of a common World Appeals Court.

The suggestions made by Petersmann indicate a long-term approach. He has no illusion as to the possibility and feasibility of fundamental changes from a short-term perspective. As a first and more realistic step, however, he advocates a new WTO Ministerial Declaration which would renew the commitment of WTO Members to respect universal human rights, support the need for harnessing the complementary functions of WTO rules and human rights, and require WTO bodies to take into account human rights obligations as relevant legal context for the interpretation of WTO rules. Petersmann further provides some concrete examples as to how the democratic monitoring of the WTO negotiations could be strengthened, for instance through institutionalizing the WTO's annual public symposia and financially supporting the parties of non-governmental organization (NGO) representatives from LDCs. Furthermore, he calls for an explicit WTO obligation committing domestic courts to interpret domestic laws in conformity with relevant WTO obligations and the possibility to agree bilaterally to give domestic legal effect to certain precise WTO guarantees of freedom, non-discrimination, rule of law, and social safeguards. As the European experience is closer to this approach, Petersmann wonders whether an 'EU leadership for a new transnational constitutionalism' may be needed to further advocate these aims.

While these are important steps toward constitutionalizing international trade regulation, they far from establish an overall constitutional structure capable of responding to the constitutional aspirations set forth in Petersmann's theory. It is important to understand that the main concern of his constitutional theory is to demonstrate the compatibility of market rights, non-discrimination, and human rights and the potential to bring them into harmony and coordination under the umbrella of a constitutional approach, as it has been gradually emerging in European integration. Petersmann, however, struggles with the current institutional infrastructure and architecture, which is still far away from his ideal.

The critique formulated against Petersmann's constitutional theory and the normative framework in which it is set stresses the fundamental differences between domestic and regional law, on the one hand, and international law, on the other. The critique offered by Philip Alston—reiterated orally at our third conference in 2004—is founded upon positive law, in particular the structure of contemporary international law, and largely addresses problems distinct from constitutional theory.[5] Although Alston fundamentally disagrees with Petersmann's equating of fundamental (economic) *freedoms* with fundamental (human) *rights*, his fears of merging human rights and trade, or the acquisition of human rights by trade law, are expressed from the vantage point of the current institutional and fragmented framework. From this perspective Alston's concerns as to who has authority and jurisdiction to interpret and apply broadly defined human rights standards are pertinent questions, as much as the fear that human rights may be subjected to trade law, given the relatively powerful and unique position of the WTO and its dispute settlement mechanism. His critique, however, is situated on a different level of the problem and topic. It squares and applies Petersmann's constitutional vision to the current institutional setting and framework. Not surprisingly, therefore, the notorious Alston–Petersmann debate reads like a *dialogue des sourdes*. The contenders, it would seem, are not on the same page as they talk in different words and worlds. At the same time, the debate does unearth fundamental questions as to the relation between civil and political rights, on the one hand, and economic and social rights, on the other. In particular, whilst Alston would, in the economic sphere, limit the label of human rights to the economic and social rights as they appear in UN instruments, Petersmann would expand those rights so as to include fundamental economic freedoms enshrined in trade law.

[5] See the 'Alston/Petersmann debate' in the European Journal of International Law: E U Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, European Journal of International Law, vol 13 no 3 (2002) 621–650; P Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, European Journal of International Law, vol 13 no 4 (2002) 815–844; E U Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously, Rejoinder to Alston, in European Journal of International Law, vol 13 no 4 (2002) 845–851.

The fear of merger and acquisition of human rights by the trading system must, therefore, be framed within the contemporary, lopsided setting of international law tilted in favour of trade rules and their harder law enforcement tools and mechanisms within the WTO. To what extent should jurisdiction to interpret and apply human rights be reserved to its proper institutions, in particular the UN Human Rights Commission or the International Court of Justice? And to what extent should other bodies, such as WTO panels or Appellate Body, be able not only to refer to, but also to construe, human rights? Those are fundamental questions of jurisdiction and allocation of powers that this volume attempts to address.

III. ISSUES OF JURISDICTION AND AGENCY COOPERATION

Jurisdiction and cooperation therefore emerge as the key component of the trade and human rights debate. Not surprisingly, it shares this dimension with other linkage problems. Several contributions to this book deal with the problem of jurisdiction. The problem arises both in law-making and in dispute settlement.

In law-making, international organizations today operate on the basis of a functional division of labour. Human rights values therefore are not taken into account in trade-related institutions unless institutional arrangements are made in order to give them a proper voice, and vice versa. While institutions may be set up differently and operate side-by-side, real-life problems do not respect jurisdictional boundaries, and law-making in different institutions inherently spills over into other regulatory fields. In today's interdependent world, any attempt to set up hermetically sealed compartments of international law is an illusion. Law-making therefore needs to entail mutual information and interaction between different fora and organizations.

The case study on the World Health Organization Tobacco Convention (FCTC) by Allyn Taylor (p. 322) and the respective comment by Werner Meng (p. 334), for example, show current deficiencies in the negotiating process. Allyn Taylor emphasizes the tensions that an open trading system might bring about with respect to health issues and the need for closer cooperation between the different institutions. During the negotiations, however, the relationship between the FCTC and trade agreements was very contentious and the question of conflict between them remained unresolved. In addition, Taylor expresses astonishment that human rights legal approaches were seldom invoked during the negotiations, although human rights and protection of public health are closely intertwined and the recourse to the language of rights would have been helpful to defend health interests. She attributes this deficiency to the fact that most negotiators were part of the public health community and therefore not familiar with human rights approaches, and that the reference to human rights-based approaches would not have been widely accepted, particularly within developing countries.

In this context, Werner Meng raises the question whether human rights claims were too unclear, or disputed, to have been invoked instead of 'readily stated sovereign rights'. Moreover, Meng explores the relationship between the WTO and the FCTC. Even if at first glance the agreements do not hamper each other, future conflicts are conceivable. According to Meng, such conflicts cannot be resolved simply by referring to the Vienna Convention. Rather cooperation and coordination of the involved institutions is indispensable in the law-making process, and negotiators should be vested with different complementary expertise. Considerations of human rights in law-making and negotiations are up to Members and are subject to the consensus principle. States must be convinced to discuss and regulate linkages whenever they negotiate new treaties. Failing to do so (as was effectively the case in the WHO Tobacco Convention and the Biosafety Protocol) shifts the burden to adjudicators, a burden that in the current constellation may turn out to be too demanding.

Following suit, the papers by Victor Mosoti (p. 165) and the respective comments by Laurence Helfer, Marsha Echols, and Caroline Dommen address the problem of cooperation and interaction between different international organizations. They submit recommendations for enhanced interaction and participation. Victor Mosoti presents some examples of already existing inter-institutional collaboration, but identifies many deficiencies. He asks, for example, whether the International Court of Justice (ICJ) should be vested with an oversight role over the international legal order or whether the strong role of the WTO could be used to further develop cooperation rules, acknowledging, however, that the latter may raise questions of democratic legitimacy.

Laurence Helfer (p. 180) examines the field of international intellectual property (IP) protection, an area where a proliferation of jurisdictions has taken place in recent years. He explains why IP law-making has broken out of the established international IP fora, such as World Intellectual Property Organization (WIPO) and the WTO, and has moved into a broad and growing array of other international venues in environmental law, human rights, and public health. According to Helfer, the proliferation causes delays, inefficiencies, and inconsistent norms; on the other hand, it may ultimately lead to better outcomes, while it is not clear yet whether the benefits of proliferation will outweigh its costs.

Marsha Echols (p. 192) introduces the Codex Alimentarius as an example of successful cooperation and interaction; more particularly, cooperation between the specialized UN agencies Food and Agriculture Organization (FAO) and WHO. She identifies the Codex as one of the most transparent international organizations, even though questions remain regarding the participation of developing countries and cooperation with other international institutions such as the Convention on Biological Diversity. She highlights the interrelation between the Codex and the WTO, as the norms of the Codex gained stature through their incorporation in the WTO agreements on sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT). This

has forced the Codex to adjust its rule-making procedures so as to increase their efficiency and legitimacy.

Caroline Dommen's comment (p. 199), finally, makes suggestions on how the role and influence at the WTO of internationally recognized human rights could be strengthened. She emphasizes that the regulation of trade and the promotion of human rights share the same basic objectives so that there is no need for a separate human rights statement within the WTO. Taking human rights seriously in trade negotiations would require broader participation of different actors and assessments of the potential impact of global trade policies on the enjoyment of human rights. Such assessments should take place *prior* to making commitments and the needs of the poorest and most vulnerable should be centre stage. Dommen calls for a more active role for the United Nations High Commissioner for Human Rights in preventing states from agreeing to binding commitments that deprive them of taking human rights relevant measures. She calls for more transparent trade outcomes by making risks and benefits of trade liberalization more explicit.

The idea of assessing the impact of trade on human rights is an interesting proposition, albeit suffering from the fact that relevant standards and benchmarks tend to be vague and thus allow for a wide range of different views in the legislative process. It is, however, clear that human rights impact assessments could lead to a rethinking and reshaping of existing trade rules which, in turn, could result, in some circumstances, in taking a step back from trade liberalization.

At the same time, the case studies in this volume illustrate that the problem of coordination is deeper rooted. It starts with the lack of adequate domestic policy coordination within governments. Problems faced on the international level between international organizations often merely reflect the fact that governments are equally fragmented and domestic policy making does not take into account trade and human rights concerns to the full extent. Ministries and departments are competing in the pursuit of their policy briefs, and supported by different constituencies in society. Efforts therefore are equally required in domestic law-making procedures. International law, as it currently stands, completely lacks the tools to secure domestic policy coordination. Whether this happens is entirely left to national sovereignty and structures of government. The concept of good governance and governance in general, however, may provide an interesting starting point in search of minimum domestic procedural requirements in internationally relevant legislation and policy making. It is here that WTO law and its many prescriptive procedural rules, ranging from transparency to domestic court proceedings, could offer the basis for innovative internationally defined institutional requirements or guidelines with which members of the international community would need to comply domestically prior to taking positions and actions in international organizations.

Similar problems of coordination arise in the enforcement of international trade and human rights law. Given the prominent and currently unique role of the WTO in dispute settlement, international organizations representing human rights should be in a position to provide advice and input to WTO

panels. Despite increasing forms of cooperation between international organizations and the granting of observer status, such interaction is far from developed as has been shown in the above-mentioned case studies.

One of the problems is that intergovernmental organizations are not well equipped to provide feedback or advice. Secretariats regularly do not have jurisdiction to voice an opinion representing the organization as the membership often has different views and will not be able to agree on a common position. Absent internal procedures to define views and positions on the level of the Secretariat or an Executive Board, practical interaction of different international organizations is difficult to achieve both in the field of law-making and law-enforcement. Similarly, procedures to define the appropriate interpretation and meaning of a text are required. Organizations should be prepared to provide authoritative interpretation and advice relating to a particular dispute within a reasonable period of time. This is of particular importance in the field of broadly textured human rights. It would seem that in that sector these institutions are not currently in place, as much as in other organizations, such as the WIPO. It is not clear whether general comments would offer sufficient guidance in a specific dispute. Whether or not human rights can and should be taken into account depends on whether more effective cooperation between institutions can be found in their respective jurisdictions. In practical terms, this requires strengthening the central bodies of an organization and allowing them to have a voice in advising other organizations.

Overall, it is thus a matter of bringing about appropriate substance–structure pairings. Both in legislation and adjudication, consideration of trade-related norms outside the jurisdiction of the WTO not only depends on the interaction of substantive law, discussed shortly, but also on appropriate mechanisms of mutual consultation and information in pursuit of balanced and fully informed decisions.

IV. THE STATUS OF HUMAN RIGHTS IN WTO LAW

From a practical point of view, and under current structures of international law, interfacing trade and human rights primarily boils down to the status of human rights in WTO law. It forms the core of this book and is of practical interest. To what extent can and should a Member of the WTO be allowed to take into account human rights policies in shaping foreign trade relations? To what extent should a panel and the Appellate Body take into account considerations relating to human rights, despite the fact that the multilateral trade system, as it stands, does not explicitly relate to the protection of human rights? The contributions by Christine Breining-Kaufmann and Joost Pauwelyn, as well as the case studies relating to conflict diamonds by Krista Nadakavukaren Schefer, the right to health by Frederick M Abbott, and the EC–India Generalised System of Preferences (GSP) dispute by Lorand Bartels, together with the respective comments, address these issues.

Christine Breining-Kaufmann (p. 95) depicts the differences between trade regulation and human rights including their distinct traditions. She emphasizes that although human rights and trade law share a common starting point, they developed in different ways. She reflects on the different nature of trade and human rights obligations and identifies fundamental conceptual differences with regard to the notions of 'non-discrimination' and equality. While human rights institutions have offensively reacted to the appearance of new actors and integrated them by granting rights and corresponding obligations to individuals and a special status to NGOs, international trade law did not accommodate the emergence of new actors in legal terms. Breining further explores the potential portals in WTO law for human rights concerns. She refers to the Appellate Body, which has recognized the importance of interpreting WTO law according to the rules of Article 31 of the Vienna Convention on the Law of Treaties; a method which is of particular importance in the context of exceptions such as Article XX of GATT and also in interpreting the term 'like product' in the various provisions of the GATT and the General Agreement on Trade in Services (GATS). Breining nevertheless identifies several questions, such as which human rights are universally accepted and could be considered in the context of WTO law? and who should develop the necessary benchmarks?

One of the basic questions in this respect relates to the scope that WTO Members enjoy or should enjoy for taking account of human rights in trade policy formulation and administration. The 'like product' analysis in defining whether two products are similar enough so that there can be trade discrimination in violation of WTO rules offers the potential to take account of human rights concerns as such concerns may be reflected in different process and production methods (PPMs), thereby potentially making, for example, footballs stitched with child labour 'unlike' other footballs. We submit that WTO law may be induced gradually to leave a rigid interpretation behind. Exceptions related to public morals provide another portal, albeit primarily focused on human rights compliance in the importing country and possibly ethical or moral concerns in the importing country related to human rights practices abroad.

As in other areas, recognition of PPMs entails market access restrictions. Not surprisingly, developing countries oppose such modifications as they may be adversely affected. For similar reasons, reflections offered by Qingjiang Kong (p. 232) advocate a clear separation of trade and human rights. In his view human rights and trade law approaches cannot be simultaneously utilized as the first is based on natural and the second on positive law. On this view, 'free trade' in itself has to be understood as a human right, a right which is violated by protectionism. And the argument that a human rights approach to trade would improve China's human rights conditions is 'myopic and self-defeating'. It endangers the market-liberal vision, a vision that contributes to the protection of human rights. For Kong, a broader human rights approach would do nothing but remind people of bitter memories of superpower hegemony.

To adopt a human rights approach in the WTO, first a consensus among members would have to be reached.

To overcome such objections, recognition of PPMs therefore should, as in other areas, be accompanied by flanking policies, such as transfer of resources, know-how, and thus investment. Exceptions to GATT can be positively justified in cases of trade restrictions on goods made by prison labour (under GATT Art XX[e]). Likewise, and based upon the obligation on all states to respect *jus cogens* and to take positive steps to stop its violation,[6] PPMs should be recognized as a ground for product differentiation where fundamental rights, in particular the prohibition of forced labour (slavery in all its forms), are concerned.[7] A further potential portal could be identified in the field of labelling. Again, the law is not settled, but we suggest that marking requirements or labels seeking compliance with human rights standards, especially when voluntary and linked to universally recognized standards, can be an important and legitimate tool to bring about human rights assessment in trade policy.

Another portal exists in the field of GSP. In light of the Appellate Body report on *Conditions for Granting of Tariff Preferences to Developing Countries*,[8] an argument can be brought forward that Members are entitled to condition their trade preferences for developing countries on compliance with universally recognized human rights. The case study submitted by Lorand Bartels (p. 463) confirms this finding with the caveat that principles of non-discrimination (MFN) are respected. He first outlines the different types of conditionalities identified in the GSP programmes of the EC and the US. He then discusses the EC GSP dispute and its far-reaching consequences, emphasizing that the continuing legality of non-trade conditions was not thoroughly addressed in the case. The Appellate Body did, however, create three criteria to assess the legality of GSP conditions. For Bartels, a move from negative to positive conditionalities is probable, as well as a reduction in the reasons that can justify a differentiation between developing countries. However, if generously understood, positive

[6] See Art 41 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts ('1. States shall cooperate to bring to an end through lawful means any serious breach [of a peremptory norm of general international law]... 2. No State shall recognize as lawful a situation created by a serious breach [of a peremptory norm of general international law]... nor render aid or assistance in maintaining that situation' (Report of the ILC on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), ch IV.E.1.

[7] In 2000, for example, the ILO recommended that ILO members 'review, in the light of the conclusions of the Commission of Inquiry [which had found the serious violations of the Forced Labour Convention], the relations that they may have with the member State concerned [Myanmar] and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations made' (Resolution of the International Labour Conference, 88th session (2000), available at http://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#II).

[8] WTO Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (adopted on 20 April 2004).