



Law, Social Justice & Global Development
(An Electronic Law Journal)

**The WTO as a Node of Global Governance: Economic
Regulation and Human Rights Discourses¹**

Sol Picciotto,
Professor of Law,
School of Law,
Lancaster University, UK

S.Picciotto@lancaster.ac.uk

This is a **refereed article** published on: 6 December 2007

Citation: Picciotto, S, 'The WTO as a Node of Global Governance: Economic Regulation and Human Rights Discourses', 2007 (1) Law, Social Justice & Global Development Journal (LGD).
<http://www.go.warwick.ac.uk/elj/lgd/2007_1/picciotto>

Abstract

The WTO acts in a number of ways as a global governance node, a point of intersection of a variety of regulatory networks. The interaction of WTO rules with human rights norms is both another example of such normative interactions, as well as raising more general questions about the relationship of the discourses and practices of economic regulation and those of human rights. The article examines first the procedural and institutional question of the possible inclusion of human rights principles explicitly within the WTO framework; secondly, the more substantive question of the relationship between the perspectives and discourses of trade and human rights and whether and how they could be reconciled, discussed in the context of two salient examples, medicine and food. In conclusion, it returns to the institutional issues by discussing the strategic aspects of the trade-human rights debates in the context of the role of the WTO as a node of global governance, and the critiques and challenges to it.

Keywords:

World trade organisation, human rights, medicines, food, global governance.

1. Introduction: Collision or Complementarity of Discourses?

In the past few years there has been impassioned debate about the compatibility of the agenda and principles for trade liberalisation pursued by the World Trade Organisation (WTO) with international human rights norms. Some critics of the WTO have attacked both its general orientation to trade liberalisation and specific WTO rules, as undermining human rights. Specific issues which have been said to demonstrate the conflict between trade liberalisation and basic human rights include restrictions placed by WTO rules on economic boycotts of countries on the grounds of violations of human rights standards, the impact on access to medicines of strong patent rights under the WTO's agreement on Trade Related Intellectual Property Rights (TRIPS), and the effects of liberalisation commitments under its Services agreement (GATS) on essential services such as water.

At the same time, there have been significant initiatives and proposals, both political and academic, for a rapprochement of the free trade and human rights agendas. From the academic perspective the most fervent advocate of the complementarity of these two approaches has been Ernst-Ulrich Petersmann, who has for some years and in many repeated writings proposed a combination of trade and human rights from a social-market perspective based on *ordo-liberal* theory.² This led to a memorably vehement clash with Philip Alston in the pages and on the website of the *European Journal of International Law*, in which Alston described Petersmann's approach as an attempt to 'hijack ... international human rights law in a way which would fundamentally redefine its contours'.³

Institutional initiatives have come from the UN High Commissioner for Human Rights (UNHCHR) and the Commission on Human Rights (CHR), who have produced a series of reports both on the general theme of the impact on human rights of globalisation and on the effects of specific aspects of the WTO agreements, notably of the agreements on agriculture, intellectual property (TRIPS), and services.⁴ Although these exercises seem to have been viewed initially with some suspicion and concern by the trade community, it seems that, as they have proceeded, some fruitful interchange of views has developed between the human rights and trade perspectives.⁵ This article explores the implications of introducing human rights discourses and principles into the framework of economic regulation institutionalised in the WTO. The WTO acts in a number of ways as a global governance node, ie a point of intersection of a variety of regulatory networks (Picciotto, forthcoming). These include preferential trade and investment agreements between two or more WTO members, which have begun to proliferate as the momentum for multilateral negotiations has been lost, as well as a range of regulatory arrangements governing substantive matters, such as health and environmental protection standards, or intellectual property rights. Thus, the interaction of WTO rules with human rights norms is both another example of such normative interactions, as well as raising more general questions about the relationship of the discourses and practices of economic regulation and those of human rights.

The article will examine three aspects. First is the procedural and institutional question of the possible inclusion of human rights principles explicitly within the WTO framework. This leads on to the second and more substantive question of the relationship between the perspectives and discourses of trade and human rights and whether and how they could be reconciled, which will be discussed in the context of

two salient examples, medicine and food. In conclusion, I will return to the institutional issues by discussing the strategic aspects of the trade-human rights debates in the context of the role of the WTO as a node of global governance, and the critiques and challenges to it.

2. Law and Human Rights in the Legitimation of the WTO

2.1. The Rule of Law in the World Economy

The legitimacy of the WTO is seen to derive from law, demonstrated by the great stress placed on the WTO as embodying the Rule of Law in world trade. Thus, after the organisation was shaken by the debacle at Seattle in December 1999, the then Secretary-General Mike Moore delivering a speech on ‘The Backlash against Globalisation?’ concluded as follows:

‘The WTO is a powerful force for good in the world. Yet we are too often misunderstood, sometimes genuinely, often wilfully. We are not a world government in any shape or form. People do not want a world government, and we do not aspire to be one. At the WTO, governments decide, not us.

But people do want global rules. If the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business. And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn’t get a look in.’ (Moore, 2000).

The theme of the WTO as an institutionalisation of the rule of law in the world economy has been debated among academic commentators under the rubric of the ‘constitutionalisation’ of international economic law. The term was applied to its predecessor, the General Agreement on Tariffs and Trade (GATT) by the doyen of trade lawyers, John Jackson, who coined the term the ‘trade constitution’ in the following terms:

It is a very complex mix of economic and governmental policies, political constraints, and above all ... an intricate set of constraints imposed by a variety of "rules" or legal norms in a particular institutional setting. ... This “constitution” imposes different levels of constraint on the policy options available to public or private leaders.⁶

The current WTO Director-General, Pascal Lamy, has stressed the ‘integrated and distinctive’ nature of the WTO’s legal order, and has considered its relationship to the legal systems of other organizations with sensitivity to accusations of being hegemonic (Lamy, P, 2006, p 977). However, he is forthright in stating the WTO’s basic philosophy as being that ‘trade opening obligations are good, and even necessary, to increase people’s standards of living and well-being’ (Lamy, P, 2006, p

978), and although he points to various means by which the WTO legal system contributes to an overall coherence of international law, he accepts that there are 'cracks' in that coherence (Lamy, P, 2006, p 982).

From a political perspective, Stephen Gill has attacked the 'new constitutionalism' represented not only by the WTO but other institutions of global governance as a 'project of attempting to make transnational liberalism, and if possible liberal democratic capitalism, the sole model for future development' (Gill, S, 2003, p 132). Gill argues that the global constitutionalisation project is well under way, and headed in a clearly undesirable, neo-liberal direction. A detailed study by Deborah Cass, however, suggests that it is inappropriate or premature to assume that the constitutionalisation of the WTO is a *fait accompli* (Cass, D, 2005). She identifies six core elements of the accepted meaning of the term, and outlines three models or 'visions' of WTO constitutionalisation: (i) institutional managerialism ('management of policy diversity between states by institutions and rules'), (ii) rights-based constitutionalisation (recognition of a right to trade, enforced in national laws) and (iii) judicial norm-generation (development of a WTO constitutional system by the Appellate Body, adopting constitutional procedural rules and incorporating domestic subject matters such as health) (ibid., pp 21-22). The formal inclusion of human rights into the WTO could form part of the latter two models. This poses the additional question of whether, if the WTO were to evolve in a 'constitutionalising' manner, the inclusion of human rights in its core principles might ameliorate, or only enhance, the neo-liberal dominance denounced by Gill and others. The next two sections will consider the implications and prospects for inclusion of human rights within a project of WTO constitutionalisation, first via judicial norm-generation, and then in a more formal rights-based system.

2.2. Judicial Constitutionalisation: WTO Rules OK?

Constitutional norms could emerge through the potential role of the WTO's Appellate Body (AB), as the apex of its dispute settlement system (DSS), in developing the jurisprudence of the WTO. This would follow the trail blazed by the European Court of Justice, which played a transformative role by developing doctrines such as supremacy and direct effect of European law, to help reconfigure the European Community as more than merely an international organisation (Stein, 1981; Weiler, 1991). There are nevertheless significant limitations on the role a judicial body can play in this respect. This has been clearly demonstrated by the EU's failure to create the political basis for any kind of 'constitution', leaving it in the institutional limbo of 'multi-level governance'. These limitations are even clearer for the AB, which has been kept on a very tight leash by the WTO's member states, as well as lacking the channels for networking with national judiciaries which have been an important element of the ECJ's relative success (Helfer, L & Slaughter, A, 1997). Although the AB is indeed an international economic court in all but name (Weiler, J, 2001), and has been gradually developing a coherent body of jurisprudence, it has done so under the cloak of a strict formalism (Picciotto, S, 2005). It is clearly mindful that under the WTO agreements its role is 'to provide security and predictability to the multilateral trading system' by *clarifying* the rules, and that only the WTO's political bodies are empowered to provide *interpretations* of them.⁷

Nevertheless, a basis exists for the AB to seek to enhance both its own and the WTO's legitimacy by incorporation of human rights norms. As Pauwelyn points out, although it may have come as a surprise to some trade negotiators, general rules of international law necessarily apply to the relations between WTO member states, and the WTO agreements form part of that general body of law and must be accommodated to it in some way (Pauwelyn, J, 2001). Indeed, the AB has often stressed that the reference to clarification of the WTO agreements 'in accordance with the customary rules of interpretation of public international law' requires it to apply the principles of the Vienna Convention on the Law of Treaties (VCLT), which include 'any relevant rules of international law applicable in the relations between the parties' as relevant context for treaty interpretation. Since many human rights principles are recognised as obligations *erga omnes* in general international law, and WTO member states are all parties to the UN Charter as well as in many cases other specific human rights conventions, the legal route lies open for the AB to assert that WTO obligations should be interpreted in line with obligations under international law, including human rights principles.

Yet there has been a marked reluctance to do so, not only on the part of the AB but also of WTO diplomats and officials.⁸ In any case, a claim under the dispute settlement procedure must allege a breach of WTO rules and, under the formalist approach favoured by the WTO, other rules can only be applied if they are invoked by the defendant state. Hence, the fact that no state has yet invoked human rights obligations in a dispute under the WTO (or for that matter the GATT), has been said to demonstrate that there is no incompatibility (Lim, H, 2001, p 284).

Even when non-WTO rules applicable between the parties are invoked, there is considerable scope for an adjudicator to decide whether to adopt a bold or cautious approach to the general question of the relationship between WTO rules and other international law obligations. From the side of the WTO, the preference has been for caution. First, the issue can be construed narrowly so as to confine it to WTO rules. This fits well within the AB's emphasis on the principle of 'judicial economy', or avoiding pronouncing on issues which are not necessary to resolve the specific complaint before it. In particular, this means that consideration of non-WTO rules can be avoided unless they are clearly in conflict with WTO obligations. A different approach has been suggested, notably by the work of the International Law Commission (ILC) on the Fragmentation of International Law (ILC 2006). This argued that international law must be regarded as a system, and hence that its norms may have relationships of interpretation, and not only of conflict. Under this approach the interpreter of a treaty has an obligation (under article 31(3)(c) of the VCLT) to take into account any relevant rules of international law applicable between the parties, and interpret them as far as possible in such a way as to further the 'objective of "systemic integration"' (ILC, 2006, para 17). So far, however, the AB has been reluctant to look beyond the texts of the WTO Agreements, unless a conflict is alleged with another norm. A key tactic then is to adopt a strict approach which assumes that rules are compatible unless it is impossible to comply with both. This has been the view of the AB, which has defined a conflict as 'a situation where adherence to one provision will lead to a violation of the other provision'.⁹

Legal indeterminacy leaves much room to interpret rules so as to find them compatible. A notable example is the approach taken by the AB to the application of

the 'precautionary principle' to food safety rules. It has rejected arguments that the WTO rules should be interpreted in the light of this principle, on the grounds that (i) opinions differ as to whether the principle is accepted as binding in international law, (ii) that it would therefore be 'unnecessary, and probably imprudent ... to take a position on this important, but abstract, question', and that in any case (iii) the principle is reflected in WTO rules.¹⁰ Finally, even if a conflict were to be found, there is considerable room for debate on how it should be resolved under the various accepted treaty interpretation principles. In particular, the principle *lex specialis derogat legi generali* (priority should be given to a specific rather than more general rules) is likely to lead to the view that WTO trade rules cannot be overridden by general human rights obligations (unless, of course, the latter are considered fundamental principles of *jus cogens*). Indeed, even authors who consider that the AB should apply non-WTO rules where relevant tend to accept that in case of a conflict the WTO rules should prevail (Bartels, L, 2001).¹¹

The general approach has been to stress the strictly limited function of WTO's dispute settlement system, to the point where it is said to be a *lex specialis*, or a self-contained legal system (Marceau, 2002, pp 32ff). Some writers nevertheless concede that 'if the WTO system is self-contained, it is not entirely self-contained' (Palmer & Mavroidis, 1998, p 413), in that WTO rules may themselves refer to or incorporate other international law rules (Trachtman, J, 1999, p 343). This is most notoriously the case for the TRIPS agreement, which incorporates (and therefore makes binding on all WTO members) the major provisions of key intellectual property conventions administered by World Intellectual Property Organisation (WIPO). Slightly more indirectly others, such as the Agreement on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) agreements, create an obligation for WTO member states to use standards developed by relevant international organisations where they exist.¹² Such provisions in effect make the WTO's DSS an enforcement body also for these other areas of international law.¹³ The 'partly self-contained' view of the WTO means that it is a matter for each state to ensure compatibility of WTO rules with its international obligations, such as human rights norms, which are not specifically incorporated into the WTO agreements. 'States, members of the WTO, remain fully bound and responsible for any violation of their international law obligations but they cannot use the WTO remedial machinery to enforce them.' (Marceau, G, 2002, p 34). Furthermore, the WTO is considered to be no more than a forum for states, with no executive powers, unlike the IMF and World Bank, so that neither the organisation itself nor its secretariat can have any direct obligations to ensure compatibility of its work with human rights obligations (Lim, H, 2001, p 280).

This approach suggests a modest role for WTO rules and their enforcement, but the effect is in fact quite the opposite, it reinforces their power. The WTO is exceptional, indeed unique, among international organisations as regards the range and effectiveness of its compliance mechanisms. Most prominent is the DSS, which provides independent adjudication providing a complainant with a guarantee of a decision within a relatively short timescale, and the possibility of applying what amount to trade sanctions if the decision is not complied with. Less visible, but also effective, are the more extensive procedural arrangements for supervision of member state compliance through the range of WTO committees. In contrast, the compliance mechanisms of international human rights instruments must be described as weak.

They rely mainly on self-reporting by states and scrutiny by committees of experts. Some (notably the International Covenant on Civil and Political Rights) also provide options for states to allow complaints by other states, as well as individual petitions, and other mechanisms such as fact-finding missions have also been developed. Crucially, however, compliance depends on ‘naming and shaming’, and lacks the hard economic impact of the WTO’s ultimate sanction of withdrawal of trade advantages. These are the potential attractions of a more formalised inclusion of human rights principles within the WTO framework, which are effectively denied by treating WTO law in an apparently modest way as a *lex specialis*.

2.3. Formalising a Rights-Based Constitution?

In the face of such a broad consensus for maintaining a distance between the WTO and human rights norms, one has a certain admiration for the iconoclasm of Petersmann in persisting with his proposals. They can certainly be said to have merit in resolving some of the uncertainties and difficulties of the present situation of a ‘not entirely self-contained’ WTO legal system. In particular, the explicit inclusion of human rights principles within the WTO would overcome a problem that judicialisation would face, that adjudicators would have to apply only universally applicable human rights norms, or else generate non-uniform interpretations of WTO rules dependent on which human rights obligations are applicable between the parties to a particular dispute.¹⁴ As Petersmann (2004, p 607) points out, this is especially problematic as over 30 WTO members, including the USA, are not parties to the 1966 UN Covenant on Economic, Social and Cultural Rights (ICESCR). Hence, Petersmann’s project is to effectuate a substantive rapprochement between traditional human rights norms and the economic rights and liberties that he sees as central to the WTO:

Just as UN human rights conventions do not refer to international division of labour, “market freedoms”, and property rights as essential conditions for creating the economic resources needed for the enjoyment of human rights,¹⁵ so WTO law does not explicitly refer to respect and protection of human rights as necessary means for realizing the WTO objectives of “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services” (WTO Preamble). (Petersmann, E, 2004, pp 607-8).

This clearly raises the question of *which* economic human rights should be recognised by the WTO, and *in what form*.

Of course, human rights, as they have developed historically, have been most strongly articulated in the ‘first generation’ civil and political rights, while the ‘second generation’ economic, social and cultural rights are considered by many to be aspirations or at best goals for states to achieve; and ‘third generation’ collective rights such as self-determination and sustainable development are hard to operationalise as enforceable rights. Alston, in his critique of Petersmann, distinguishes between the ‘instrumental’ nature of the guarantees of economic

liberties recognised by the WTO and the fuller 'political' character of rights as seen from the human rights perspective:

any such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognised for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, but not as political actors in the full sense and nor as the holders of a comprehensive and balanced set of individual rights. There is nothing per se wrong with such instrumentalism but it should not be confused with a human rights approach (Alston, P, 2002, p 826).

In response, Petersmann accepts that the market rules governing trade are 'only instruments for promoting individual freedom as the ultimate goal of economic life and the most efficient means of realising general welfare' (Petersmann, E, 2005, p 34), and that human rights are based on the fundamental principles of human dignity and liberty, which are very different from the 'macroeconomic, state-centred conceptions of national income and "efficiency" cherished by many economists and WTO governments' (ibid.). Quite clearly, however, his view is that human rights provide a moral underpinning for market economies. This entails 'legal protection of individual freedom to participate in markets (e.g. as dialogues about values, decentralized information, coordination and discovery mechanisms) and to exchange the fruits of one's labour for scarce goods and services needed for personal development' (idem, pp 30-31). For him the key right is the right to property, which is recognised in classic human rights instruments such as the Universal Declaration of Human Rights (UDHR) of 1948, and he points out that it is complemented by the protection of intellectual property rights in the TRIPS agreement (Petersmann, E, 2000, p 21). As he suggests, a moral justification has been provided by liberal philosophers for this right in various ways: by Locke as moral entitlements to the fruits of labour, by Hegel as expressions of the will and personality of their owner, and by Raz as constituent elements of an autonomous life. Petersmann argues that the right to property includes the right to dispose, so these moral justifications also support 'private rights to supply or demand one's goods in private markets'; hence, markets can be 'justified not only on grounds of economic efficiency but also as preconditions for individual autonomy and for a free, informed and accountable society' (idem, pp 48-9).

The key difference between Petersmann and Alston seems to hinge not so much on the distinction between economic rights and human rights, as on that between individual and social rights. Alston specifically doubts whether Petersmann properly includes in his schema 'social' rights such as the rights to education, health care and food, which are rejected by fundamentalist liberal theorists of whom Petersmann approves, such as Hayek. These are very much economic matters, the question is whether they should be viewed as individual rights or socio-economic policies, and hence obligations on the state. The emphasis on individual rights in liberalism aims to protect individual freedoms from the potentially autocratic power of the state. Hence,

the traditional human rights were civil and political rights. Their extension to individual economic rights in the same form could entrench liberal economic principles which assume that the pursuit of individual self-interest, especially through economic exchange, is ultimately beneficial to all. This could limit and constrain collective action or regulation through the state or public bodies. Petersmann indeed asserts that he considers economic and social rights equally as important as civil and political rights, a view which he contrasts with that held in the USA or the Anglo-Saxon world (Petersmann, E, 2005, p 69).

In contrast, the dominant perspective on social and economic rights in the contemporary human rights discourse views them as obligations for the state to 'respect, protect and fulfil'. Petersmann appears to accept the view put forward by the UN High Commissioner that this means that states may have *duties* to take action, whereas the WTO rules generally only refer to *rights* of states to regulate (Petersmann, E, 2004, p 615), and he concedes that this may entail the collective supply of public goods, and action to limit 'market failure' (Petersmann, E, 2005, p 64). However, for him state action is a fall-back, and in his view human rights tends to prioritise liberty rights over rights to redistribution of resources (*ibid.*, p 66). State action is likely to intrude on individual autonomy, especially if it entails collective provision or redistribution of resources. The priority which Petersmann gives to individual liberty, and his preference for property-based 'market' rights, would clearly restrict such state action. He nevertheless considers that his is a 'bottom-up' view of rights, which he contrasts to the 'top-down' perspective for example of Robert Howse, who has put forward some detailed proposals for shaping the WTO towards advancing the 'right to development' (Howse, R, 2004).

In an earlier and seminal piece on the right to food, Alston criticised international law dealing with food issues as having remained 'hermetically sealed' from human rights considerations; he attributed this to the restrictive approach to international economic law which saw it as constraining rules aimed at permitting the free flow of commerce, while an equally restrictive approach to human rights law had been preoccupied with post-hoc responses to violations (Alston, P, 1984, pp 14-15). The recasting of human rights discourses, to which Alston has notably contributed, do now emphasise the positive obligations of the state, but these are necessarily seen in terms of developing social programmes for economic development, rather than providing individual guarantees. On the other hand, international economic law continues to be dominated by negative obligations on states, requiring them to remove obstacles to 'free movement' of economic factors, and these are more easily cast as individual rights. Indeed, neo-liberal¹⁶ constitutionalism aims to entrench internationally-agreed principles to secure the 'effective judicial protection of the transnational exercise of individual rights' (Petersmann, E, 1998, p 26). It would enshrine economic rights such as the 'freedom to trade' as fundamental rights of individuals, legally enforceable through national constitutions in national courts (Petersmann, E, 1993). While accepting that freedom of trade should also be accompanied by other human rights, which should all be enshrined in the WTO 'constitution', Petersmann's emphasis is on rights of private property and market freedoms. However, he goes further and argues that liberal traders should welcome the inclusions of human rights protecting individual freedom, non-discrimination and equal opportunities, and that the mercantilist bias of WTO in favour of producers could be corrected by the protection

of competition and of the rights of 'the general consumer and citizen interest in liberal trade and ... human rights' (Petersmann, E, 2000, p 22).

The stress is on equality of rights, which appears to protect the weak. However, as classic critiques of liberalism argue, it tends to overlook the realities of inequalities of power. In human rights discourses, the non-discrimination principle may take account of inequalities by permitting positive discrimination or affirmative action, but this is an exception which is often contested. A similar tension would be created by inclusion of human rights in the WTO.¹⁷ In practice, the rights which would be most firmly implanted in a WTO 'constitution' would be the market-access and private-property rights, and their entrenchment in a global treaty would mainly benefit TNCs. The traditional civil and political rights were conceived as the rights of human beings, hence 'human' rights. Even economic rights when cast as human rights are commonly perceived as personal individual rights; hence the right to property finds broad acceptability as a right to personal property. However, economic development has resulted in ever more complex forms of institutionalisation of socio-economic activity. Yet from the perspective of liberal capitalism, these are also 'private' property rights. This extends to all sorts of fantastical and fictitious forms of 'intangible' property rights, from shares in a company to today's complex financial derivatives, and the contradictory concept of intellectual property rights. All these could come to be protected under the concept of the human right to the protection of property. Furthermore, corporations may also be recognised as bearers of human rights; although this may come as a surprise to some human rights specialists (Walker, S, 2006, p 177), it is the position in probably the most highly developed system of human rights protection, the European Convention on Human Rights.¹⁸

Already, the effect of institutionalisation of the WTO is to constrain national policy choices by embedding broad and stringent international obligations to liberalise international economic flows. WTO enthusiasts argue that this is necessary since national state regulation tends to be protectionist because it is the product of the 'capture' of states by special interests. For example:

Free trade and democratic government face a common obstacle - the influence of concentrated interest groups. ...the WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting free trade and democracy. (McGinnis J, and Movesian, M, 2000, p 515).

The anti-democratic implications of this view are justified by its roots in a particular concept of liberal democracy, in which state power must be confined, in order to safeguard individual rights and liberties. This would be further reinforced by the strong vision of constitutionalisation of the WTO, put forward especially by Petersmann, who considers that both national states and the WTO's rules and discourse are producer-biased, and sees his proposals for entrenching human rights as a means of counter-balancing this by representing general consumer and citizen interests (Petersmann, E, 2005, p 87). However, giving individuals, including 'investors' and corporations, rights which they could enforce directly, in national courts or through the WTO's DSS or both, would further constrain the possibilities of

collective action through the state or public bodies, and operate to exacerbate economic inequalities by handing a powerful weapon to those whose economic power can be defended in terms of morally-underpinned economic rights.

Other forms of recognition of human rights within the WTO could, of course, be envisaged. Most easily compatible with the original structure of the GATT as a type of 'embedded liberalism' (Ruggie, J, 1982) would be to allow exceptions from trade liberalisation obligations in favour of actions to protect and promote human rights. Pascal Lamy, the present Director-General, has pointed to the exceptions allowed in GATT article XX, and seems to suggest that these could be interpreted broadly, to the extent of saying that '[a]bsent protectionism, a WTO restriction based on non-WTO norms will trump WTO norms on market access' (Lamy, P, 2006, p 981). However, he accepts that 'it will be for the WTO judge to determine the balance, the "line of equilibrium" between trade norms and norms of other legal orders' (ibid., p 983). This approach has been most thoroughly explored in the debate about the linkage between trade and labour rights (Leary, V, 1996; Hepple, B, 2001). It has of course been strongly criticised from the viewpoint of developing countries as a protectionist move by the rich (TWIN-SAL, 1999). Some of the arguments have largely echoed trade liberalisation perspectives, by suggesting that the comparative advantage of countries with low labour costs should not be undermined. However, from the human rights perspective the issue is not comparative wage rates, but violations of rights such as freedom of association and free collective bargaining. A more cogent criticism is that the GATT approach of allowing exceptions for types of state action recognised as being in the public interest would legitimate unilateral state action, and allow selective targeting. Inevitably, of course, such action is generally taken by economically powerful states, wishing to deny or control access to their markets to economically weaker states, sometimes using human rights violations as a pretext. Accusations of human rights violations have been used to justify trade and economic boycotts in the US actions against Burma/Myanmar and Cuba, which might have been found in violation of WTO rules had not an accommodation been reached (McCrudden, C, 1999). Other methods which have been considered, which might help reinforce international labour standards by strengthening the role of the ILO through a linkage with the WTO (ILO, 1994; Charnovitz, S, 1995), have not been pursued, largely due to the strength of feeling about comparative advantage.¹⁹

Human rights could be recognised within the WTO in ways which might maintain the view of them as requiring the pursuit of socio-economic policies to achieve universal basic economic standards, simply by adding them as aims of the organisation. The WTO Agreement currently expresses its broad aims as follows:

relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...

Although there is some recognition of social objectives, such as the pursuit of full employment and sustainable development, the statement essentially reflects the neo-classical economic assumptions underpinning trade liberalisation, generally that 'a rising tide lifts all boats'. Inclusion of the achievement of basic socio-economic human rights such as food, water, shelter, health and education could inject concerns to ensure that policies should aim to achieve basic economic standards for all, rather than assuming that overall economic growth will automatically 'trickle down'. This could be strengthened by various institutional reforms which could 'mainstream' into the WTO consideration of the impact of trade measures on human development (Howse, R, 2004). Such a move might create space to debate the directions of trade and economic policies, going beyond the assumptions underpinning liberalisation.²⁰ The next section will explore how far human rights perspectives and discourses would help open up such alternative perspectives.

3. Debating Rights

Three perspectives may be discerned on the relationship between human rights norms and economic liberalisation. For some there is a fundamental conflict: 'neoliberal globalisation is incompatible with the globalisation of human rights' (George, S, 1999, p 15). Others consider that human rights, understood as liberal rights protecting both economic and political freedom of individuals, would complement and even reinforce the WTO's free trade mission, as shown above in the discussion of constitutionalisation. A middle view argues that although the two have developed in isolation, they have much in common and are converging: human rights are not confined to restricting the state but also prescribe positive state action; equally, trade regulation cannot aim only at negative integration but must provide a basis to balance the costs of liberalisation and make them socially acceptable; hence, it could be helpful to develop debate between the two perspectives (Cottier, T, 2002). This section will explore these viewpoints in relation to a couple of specific examples.

3.1. Access to Medicines

One much-debated issue has been the impact of the strong patent rights required by the TRIPS agreement on access to medicines. This of course is not just a trade matter, and trade purists as well as critics of the WTO have attacked the inclusion of intellectual property (IP) protection, which has greatly expanded the scope of the WTO. The effect of the TRIPS agreement was not only to oblige all WTO member states to comply with the basic provisions of the key IP treaties, but also to establish a uniform minimum level of protection, going well beyond existing treaties. In particular, article 27 of TRIPS requires that patents be made available 'for any inventions, whether products or processes, in all fields of technology'. At one stroke this deprived states of a policy option which many, especially developing countries, had previously chosen, by requiring all WTO member states to introduce patent protection for pharmaceutical drugs.²¹ Unless the 'flexibilities' for which developing countries had pressed in the TRIPS could be exploited, those countries which had succeeded in establishing a thriving and competitive generic industry producing low-cost essential drugs would be obliged to shift towards one based on research into new drugs, requiring high investments and hence aimed at rich countries, while others

which had not yet managed to stimulate low-cost drugs production would have that policy option restricted.²²

The desirability of patent protection for pharmaceuticals has long been debated both nationally and internationally, as indeed have the broader questions of whether and how far IP protections should be granted to stimulate innovation and creativity. The classic liberal internationalist framework for patents, established by the Paris Industrial Property Convention of 1883, had left states considerable leeway in deciding what the extent and level of protection should be, as well as the exceptions which could be provided, in particular through compulsory licensing. Conflict between developed and developing countries led to the breakdown of negotiations over proposed revisions to the Paris Convention in 1980-2 (Sell, S, 1998), and a powerful coalition of business interests successfully lobbied the US to place the issue on the trade agenda (Draho, P, and Braithwaite, J, 2002). In the battle over negotiation of the TRIPS in the Uruguay Round some of these exceptions were preserved, although with some significant modifications, notably in TRIPS articles 30 and 31. The TRIPS agreement also included two general articles (7 and 8) with broad statements of Objectives and Principles. In particular, article 8 provides:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

A number of human rights impinge on this issue. What is striking however is that arguments in terms of human rights could be made both for and against patent protection for drugs. The UDHR art. 27 states that 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. This is expressed in similar terms in ICESCR article 15, but it is balanced by the right of everyone to 'enjoy the benefits of scientific progress and its applications'. This need to balance the private right of appropriation with the public interests in diffusion is also central to intellectual property laws (UNHCHR, 2001, p 5). Thus, human rights may be used as a basis for arguing in favour of intellectual property protection, as well as for restricting it. This is well illustrated by the constitutional challenge brought by pharmaceutical firms against South Africa's medicines laws in 1998. Strikingly, this case was based on claims of human rights violations, especially the deprivation of property without compensation, as well as allegations of unfair discrimination.²³ This case raised echoes of the successful constitutional challenge brought by pharmaceutical companies in Italy in 1978, on the grounds that the exclusion of medicines from patent protection was unfairly discriminatory, which dealt a mortal blow to the once-flourishing Italian generic drug manufacturing industry.²⁴ Certainly, strong counter-arguments could be made,²⁵ especially since the South African constitution is in many respects post-liberal, and recognises rights to housing (article 26), as well as health care, food, water and social security (article 27). These provisions place an obligation on the government to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. Few other constitutions provide such a basis to balance vested property rights against the

rights of the dispossessed. However, the collapse of the case was due to the global attention attracted by the access to medicines campaign, which was able to build international support around the issue of HIV-AIDS, and gave a new impetus to the political debates around the TRIPS agreement (Drahos, J and Mayne, R, 2002, pp 248-250). In the absence of this political debate, the South African courts might easily have upheld the pharmaceutical companies' rights to their patents.²⁶

Certainly, activist bodies such as the Treatment Action Campaign (TAC) have successfully integrated legal strategies into their broader campaigns,²⁷ but these have necessarily entailed detailed and complex economic arguments about drug pricing across countries with very different income levels, many of which operate national health systems. The political effect of the campaign has certainly been very important, especially due to the global awareness of the AIDS issue, and the invocation of human rights discourses has contributed a rhetorical impact. However, further progress depends on converting these pressures into specific policy proposals, and here it cannot be said that human rights principles help to clarify the direction they should take. The same can be said of the global campaign that resulted in the compromise in the Doha Ministerial Declaration on the TRIPS Agreement and Public Health and its subsequent implementation by WTO Council Decisions.²⁸ Although this was portrayed by some as a victory for developing countries, it is a modest modification establishing a cumbersome procedure, which after two years had been used by only one state.

Examination shows that there is sufficient flexibility in the TRIPS agreement to allow national IP laws which promote health rights (Abbott, F, 2005, p 297) although for various reasons many governments fail to take advantage of this. Certainly, greater flexibility could be introduced further to encourage states to remodel their intellectual property protection to favour the diffusion of innovations in the public interest. The provision in TRIPS article 8 permitting states to 'adopt measures necessary to protect public health and nutrition' could perhaps be strengthened by adding more explicit and detailed references to human rights to health. Of greater importance would be the removal of the proviso 'that such measures [should be] consistent with the provisions of this Agreement.' This could also be achieved if human rights obligations were accepted as overriding the more specific provisions of the TRIPS agreement. However, this would be highly controversial and strongly resisted, as shown by the long conflict over the Doha Declaration.

3.2. Food

Central to the trajectory of the WTO, and the crucial element in the Doha 'development' round and any future trade negotiations, is agriculture. This is both the key sector for most developing countries and a vital one for the well-being of the world's poor. Human rights instruments recognise the right to food and the right to development. Consequently this topic was selected for examination by the UN High Commissioner for Human Rights in response to the call from the Human Rights Commission for a report on 'Globalisation and its impact on the full enjoyment of human rights' (UNHCHR, 2002). This examined the WTO's Agreement on Agriculture (AoA), which provides the framework for the WTO's approach to liberalisation of this sector. The Report accepts that:

Increased levels of trade in agriculture can contribute to the enjoyment of the right to food by augmenting domestic supplies of food to meet consumption needs and by optimizing the use of world resources. Similarly, on account of the AoA, international trade in agriculture is now subject to rules, which promotes transparency and accountability - important prerequisites for the enjoyment of human rights (ibid., p 13).

However, it stresses that:

Human rights law concerns itself in particular with the situation of the individuals and groups who might suffer during the reform process. Indeed, this is one of the key issues concerning globalisation and human rights. Even where the net social benefit from trade liberalisation favours the majority in a certain country, the principle of non-discrimination under human rights law requires immediate action to protect the human rights of those who do not benefit. In the case of the AoA, this means that States should use existing flexibilities in the Agreement where they exist, and WTO members should consider improving or adding flexibilities where appropriate.

Areas in which it suggests such flexibilities should be considered include permitting protection 'where trade liberalisation affects the availability, accessibility or sustainability of food supplies', and measures to deal with the vulnerability of primary producing countries to price fluctuations and consequently balance of payments problems. It also made an interesting distinction between the perspectives towards the principle of non-discrimination of trade law and human rights law.

"National treatment" envisages equal treatment for nationals and non-nationals - whether they are poor farmers or large agrobusiness or industrial firms. Treating unequals as equals is problematic for the promotion and protection of human rights and could result in the institutionalisation of discrimination against the poor and marginalised. Under human rights law, the principle of non-discrimination does not envisage according equal treatment to everyone in all cases. Affirmative action is necessary in some cases to protect vulnerable people and groups.

But here again it concedes that trade law has made some recognition of this, in the principle of 'special and differential treatment', which is of long-standing in the GATT and WTO, and was reaffirmed in the Doha Declaration as the basis of the Doha trade round.

The issues in the agriculture negotiations centre on the phasing out of subsidies in rich countries, and the extent to which other forms of farm support, which in principle are non-price-related, should be acceptable. While there is certainly evidence that trade liberalisation has affected food supplies and security in many developing countries, they often do not result from WTO commitments, but from the more rapid pace of liberalisation required as a condition of support especially by the IMF.²⁹ One detailed examination of the relationship between the human right to food and the WTO's

framework, especially the AoA, concludes that mutually compatible interpretations are possible (Breining-Kaufmann, C, 2005).

The key issue for food production and trade policies is the tension between food security and sustainable agriculture based on local farming, and large-scale, low-priced production based on open global markets and comparative advantage. An alternative vision of how agriculture could be regulated to safeguard human rights to food, based on food sovereignty, has been put forward by a coalition of NGOs (Coordination Sud, 2005). Although this does present a very cogent view of how agricultural trade should be managed, it is not the only one which would be compatible with the right to food. Its strength is not its reference to human rights principles, but its articulation of detailed policy proposals based on the perspectives of small farmers and conscientious consumers. A different approach is adopted in a report by the international trade union secretariat, the IUF, which argues for a 'rights-based multilateralism for the world food system' as a radical alternative to the WTO (IUF, 2004).

4. Conclusions

It seems hard to sustain the view that there is a fundamental conflict between human rights norms and principles of economic liberalisation as reflected in the WTO. Human rights had their origins in the liberal impulse of the Enlightenment, to expand the realm of individual freedoms against the autocratic state. However, the guarantee and protection of individual freedom in the economic sphere tends to exacerbate social inequalities, and could undermine collective action through public bodies and states. Recognising this, ideas and principles of human rights have undergone considerable development in the past half-century. Their formulation has evolved to a considerable extent towards articulating the protection of individuals within a perspective of social, cultural and economic rights, expressed as policy obligations on states.

However, human rights norms are still open to alternative, competing, and conflicting interpretations. Issues which would be central to a meaningful debate about their application to economic regulation remain open, such as whether their subjects are individuals or social groups, human beings or legal persons (including corporations). Thus, the debate about the relationship of trade and human rights rules is as much a battle over human rights discourse as one over the shape of the world trade system. Trade rules are a combination of broad principles and more detailed regulation.³⁰ Many of the general principles are couched in universalistic terms which appear to have much in common with basic human rights principles, notably non-discrimination. In addition, the WTO agreements include some general principles recognising the need to take account of the social impact of economic liberalisation, notably 'special and differential treatment' for developing countries, and the public interest objectives in the TRIPS, mentioned above. However, the general principles are usually expressed in such a way that they cannot be used to override the more specific provisions, except when formulated as exceptions permitting national state action. However, the strength of the WTO system depends on limiting and constraining such exceptions, since experience shows that they can be abused especially by the more powerful states, leading to a fragmentation of the trading regime.

Greater interaction between the trade and human rights viewpoints could have a variety of effects. One might be the (re)assimilation of human rights into the neo-liberal perspective of individual freedoms. As we have seen, that is the thrust of Petersmann's proposals for the integration of human rights into a 'constitutionalised' WTO. At the opposite pole, human rights discourses could be counterposed to the liberalisation principles of the WTO, to challenge its underlying assumptions, and help provide a basis for radical alternative policies. A middle outcome might be that the introduction of human rights concerns might help temper the negative effects of liberalisation by encouraging measures aimed at achieving basic standards of socio-economic provision. The outcomes of such interactions would also depend on the institutional form it takes. As shown by the analysis in the first section of this paper, the dominant view of the WTO's rule-based system is that it is and should remain largely self-contained from other areas of international law, including human rights. Paradoxically, however, this reinforces the power of the WTO as a node of global regulatory networks (Braithwaite, P & Drahos, J, 2000; Picciotto, S, 1997). On the other hand, inclusion of human rights norms within the WTO system might serve to strengthen the WTO's institutional legitimacy.

A major problem with current debates about global economic governance is the wide gap between the clash of rhetoric and the cogency and constructiveness of detailed policy proposals and arguments. A significant drawback of the debates about economic liberalisation and human rights is that they serve mainly to turn up the rhetorical decibel level, and contribute little to the much-needed democratisation of debates about specific issues of global economic governance. As Andrew Lang has argued, when trade rules are analysed from a human rights perspective, human rights norms do not provide either any new policy ideas or any means of choosing between existing policies, so that it is 'essentially illusory to think that we can derive or arbitrate, at least in any simple or direct way, alternative visions of the global trading order from human rights norms' (Lang, A, forthcoming, p xx). More modestly, Lang suggests that injecting human rights arguments into trade policy discourse would help initiate reflection on its broader goals, which tend to become taken for granted within closed policy communities (Lang, A, *ibid*), and indeed this has already occurred to some extent. It is less clear, however, given the widely disparate nature of alternative human rights visions that the space this opens up would lead to advances in the evaluation of trade policies. In view of the correlations that exist between some versions of human rights and liberal trade policies in particular, the interaction could result in simply repeating the same debates in different language. The bigger threat, from the perspective of advocates of socio-economic human rights, is that any rapprochement of human rights and trade law would integrate the classical liberal antecedents of the former with the neo-liberal preoccupations of the latter.

Endnotes

¹ An earlier version of this article was delivered as a paper for the Conference on Human Rights and Global Justice, University of Warwick, 29-31 March 2006. Some of the research on which it is based was made possible by an award by the Economic and Social Research Council of a 3-year research fellowship 2004-2007 for a research programme on *Regulatory Networks and Global Governance*, for which I am extremely grateful.

² Eg Petersmann, 1993, 1998, 2000, 2002a, 2002b, 2003, 2004, 2005. For a discussion of ordo-liberalism and its relation to classical liberalism, from a neo-liberal perspective, see Sally, 1998.

³ Alston, 2002, 816; for the full exchange see the European Journal of International Law's Discussion Forum on Trade and Human Rights at http://www.ejil.org/forum_tradehumanrights/. This clash was followed by a project organised by the American Society of International Law and others, which resulted in two edited books (Abbott, et al 2006, Cottier et al., 2005); although Petersmann made substantial contributions in both, Alston was in neither one. He has continued to research and publish on economic and social aspects of human rights, although not on the interaction between human rights and trade law, see e.g. Alston and Robinson, 2005.

⁴ See UN Commission on Human Rights, 2000, 2004; UN High Commissioner for Human Rights, 2001, 2002a, 2002b, 2003, 2004a, 2004b.

⁵ The preliminary report submitted to the UN Sub-Commission on the Promotion and Protection of Human Rights in June 2000 by J. Oloka-Onyango and Deepika Udagama provoked a letter of complaint from the WTO to the High Commissioner for Human Rights in August 2000 (reported in Singh, 2000). The objection was in particular to a reference to the WTO as a 'nightmare' for human rights, in the following context: 'WTO has been described as the "practical manifestation of globalisation in its trade and commercial aspects". A closer examination of the organisation will reveal that while trade and commerce are indeed its principle focus, the organisation has extended its purview to encompass additional areas beyond what could justifiably be described as within its mandate. Furthermore, even its purely trade and commerce activities have serious human rights implications. This is compounded by the fact that the founding instruments of WTO make scant (indeed only oblique) reference to the principles of human rights. The net result is that for certain sectors of humanity - particularly the developing countries of the South - the WTO is a veritable nightmare. The fact that women were largely excluded from the WTO decision-making structures, and that the rules evolved by WTO are largely gender-insensitive, means that women as a group stand to gain little from this organisation.' (UN Commission on Human Rights, 2000, para 15). This document was referred to in the WTO as the nightmare report (Marceau, 2002). Subsequent reports used more diplomatic language, e.g. the report of the Mission to the WTO in July-August 2003 of the Special Rapporteur for the UN Commission on Human Rights on the right to health (UN Commission on Human Rights 2004, Addendum 1), refers to constructive, helpful and informative discussions (paras. 4-5).

⁶ I cite this statement from the first edition of his text (Jackson, 1989, p 299), where the word 'constitution' is put in inverted commas; the wording remained very similar in the second edition (1997), but the inverted commas had gone.

⁷ Formally, the AB's decisions take the form of Reports to the Dispute Settlement Body (DSB), although they are automatically adopted unless there is a consensus decision to reject. Art. 3.2 of the DSU firmly states that the role of the dispute settlement system is 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements', while the WTO Agreement itself (art. IX.2) specifies that 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations ... of the ... Agreements', which requires a 75 percent majority of states; art.X provides for amendments.

⁸ WTO staff members have published academic articles on the subject (notably Lim, 2001; Marceau, 2002), although of course stressing that the views expressed are strictly their own and do not bind either the WTO secretariat or its member states. It is nevertheless interesting to note that one article by a member of the External Affairs division (Lim, 2001) appeared a year or so after the WTO's sharp response to the UN High Commissioner over the 'nightmare report'.

⁹ *Guatemala - Cement* 1998, para. 65, cited by Pauwelyn (2001, 551), who points out that this approach means that a state may be unable to exercise a right created under international law subsequent to the WTO agreements.

¹⁰ *EC Hormones* (1998,) para 123, which focused mainly on the agreement on Sanitary and Phytosanitary Measures (SPS). Not surprisingly, the Panel report in *EC Biotech Products* (2006, WT/DS291/R) followed this view (para. 7.89).

¹¹ Bartels bases this on treating articles 3.2 and 19.2 of the DSU as a 'conflicts' rule, since they specify that DSS decisions cannot add to or diminish rights or obligations of WTO members, Panels and the AB must apply the WTO rule in case of a conflict. Marceau does not agree with this reasoning but comes to the same conclusion. Pauwelyn (in my view rightly) says that these provisions actually aim at reining in the DSS from expansive or adventurous interpretations of WTO trade rules, but provides only a very egregious example of a situation in which a Panel might be obliged to find a WTO rule invalid, viz. if the WTO were to conclude a slave trading agreement (p 564).

¹² TBT art. 2(4), and SPS art. 3(1).

¹³ Thus the AB has ruled on whether food labelling regulations complied with a Codex standard (*EC Sardines* 2002, WT/DS231/AB/R), and a Panel has ruled on the validity of copyright exceptions under the 'three-step test' of the Berne Copyright Convention (*US - Copyright Act* 2000, WT/DS160/R).

¹⁴ Pauwelyn opts for the latter, conceding that it 'may complicate the matrix of rights and obligations between WTO members. But this is an unavoidable consequence of not having a centralised legislator in international law.' (Pauwelyn, 2001, 567).

¹⁵ 'It is only in the context of the right to work (Article 6) that the ICESCR of 1966 refers to the need for government policies promoting "development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual" (Article 6.2).' [Footnote in the original.]

¹⁶ The term neo-liberal is sometimes used as one of political opprobrium, but generally to refer loosely to a wide range of theorists who have revived classical liberal ideas of the enlightenment in the content of current global economic governance. As mentioned in the Introduction, Petersmann belongs more specifically to the European continental ordo-liberal stream, which gives greater importance to

legal and constitutional provisions to institutionalise market frameworks, as compared with the 'market fundamentalism' of economic neo-liberalism.

¹⁷ WTO law already recognises an equivalent, in the principle of Special and Differential Treatment for developing countries: see further below.

¹⁸ In particular the right to protection of property explicitly applies to 'every natural and legal person' (art.1 of Protocol 1 of 1952); the European Court of Human Rights has also accepted that some of the other Convention rights extend to corporations, although comparatively few cases have actually been brought directly by companies (3.8 percent of cases between 1998-2003: Emberland, 2006, p 14).

¹⁹ A Joint staff study of research on the impact of liberalisation on employment concluded that no simple generalisations are possible and further research is needed, but broadly that globalisation 'can be good for most workers in both industrialized and developing countries, provided the appropriate economic policies are in place. But it may not be good for all workers, and its distributional implications should not be ignored' (ILO-WTO 2007, p 87).

²⁰ This assumes that such changes would be politically feasible, which is doubtful.

²¹ Subject to the transition periods allowed for developing and least developed countries.

²² An example of the former is India (Chaudhuri, 2005), while Thailand exemplifies countries with a viable prospect of developing low-cost drug production which would be limited by TRIPS, and even more by so-called TRIPS-Plus standards in bilateral treaties (Kuanpoth, 2006).

²³ See Notice of Motion in the High Court of South Africa (Transvaal Provincial Division), Case number: 4183/98, 42 applicants, against the Government of South Africa (10 respondents), <<http://www.cptech.org/ip/health/sa/pharmasuit.html>> 28th February 2007. Article 25 of the constitution prohibits the taking of property except in terms of a law of general application, for a public purpose and with the provision of compensation. Simon Walker, who was involved with the UNHCHR report on TRIPS, has expressed surprise that pharmaceutical companies could complain of deprivation of patent rights on human rights grounds, and suggests that the negotiating history of the Universal Declaration of Human Rights shows that, although little attention was given to the matter, 'there is no evidence to suggest that [the drafters] even considered intellectual property rights as corporate-held rights' (Walker, 2006, p 178).

²⁴ Grubb, 1999, p 67; according to one study, the effects of the extension of patenting to pharmaceuticals in Italy were an increased propensity to patent, but no increase in R&D (Scherer, 1995).

²⁵ For example, as formulated in the Amicus Curiae brief by the Treatment Action Campaign, <<http://www.tac.org/za>> 10 June 2001.

²⁶ Since the companies' case was based on human rights claims, it is hard to understand Petersmann's assertion that its withdrawal 'demonstrated the importance of civil society support and of judicial remedies for reconciling national and international economic law ... with social human rights' (Petersmann, 2002a). His suggestion that the withdrawal by the USA of its WTO complaint against Brazil's local working requirement for patents also demonstrates the responsiveness of WTO procedures to social human rights concerns (ibid., footnote 70) is equally fanciful. It was the civil society campaign around access to medicines that persuaded the companies to withdraw their legal claims based on their human rights, and made the US challenge against Brazil politically inopportune.

²⁷ Heywood (2001) provides a detailed account and evaluation of the Medicines Act case. TAC and a number of other NGOs subsequently also brought a case against the Minister of Health to make the antiretroviral drug nevirapine available in the public health sector, which resulted in a thoughtful opinion by the South African constitutional court (*Minister of Health a.o. v. TAC a.o. 2002*). This discussed the extent of the state's obligation to take 'reasonable measures' to achieve socio-economic rights (such as health) provided for in the constitution, while stressing that 'in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards ... should be, nor for deciding how public revenues should most effectively be spent' (para. 37). It nevertheless did grant an order that the government should devise and implement a programme to combat mother-to-child HIV transmission, although 'within its available resources', and to allow doctors to prescribe nevirapine when they considered it medically indicated. The important issues of pricing and licensing HIV-AIDS drugs were also successfully pursued through actions before the South African Competition Commission. See <<http://www.cptech.org/ip/health/sa/tac-competition-complaint.html>> 28th February 2007 .

²⁸ A General Council Decision of 6 December 2005 agreed a Protocol amending the TRIPS Agreement (WT/L/641 8 December 2005), formally enacting the previous decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. This is the first time a core WTO agreement has been amended.

²⁹ For example imports of frozen poultry pieces at marginal cost prices have had a damaging impact on the local poultry industries in several West African countries, such as Ghana. Ghana's bound tariff on such imports under the WTO is still 99 percent, but a tariff of 25 percent was introduced to comply with conditions required by the IMF for a loan under its 'poverty reduction' facility. Pressures in the Ghanaian parliament resulted in legislation raising the tariff to 40 percent, but this was blocked by presidential action, following IMF pressures. WTO rules would allow Ghana to impose countervailing duties on imports which are properly found to be dumped, but Ghana has no anti-dumping law; a Competition and Fair Trade Bill has been under consideration for some years, but has faced opposition from some business circles (interviews with Dominic Ayine of the Centre for Public Interest Law, and Emily Larbi Jones, Economic Adviser to the Trade Ministry, Accra, 28th and 29th November 2005 on file with the author). IMF officials defended their actions by arguing for the need to maintain international competitiveness of local producers, and pointed to the continued expansion of poultry production (letter of 7th January 2004 from A. Bio-Tchané of the IMF African Department to D. Mukarji of Christian Aid; copy sent to ISODEC Ghana, on file with the author).

³⁰ The WTO itself comprises a complex package of agreements consisting of some 26,000 pages, undoubtedly the most extensive international convention ever negotiated.

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