
Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime

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Abstract

This article explores how the creative use of international economic and social rights law might assist actors operating inside and around the international trade law regime to address the impact of trade on social concerns. In a world context where trade and social concerns overlap in many ways, strategies based on international human rights law may disturb conceptions of the trade regime as narrowly directed towards trade facilitation, while also providing a basis to address difficult problems such as reconciling the concerns for high social standards in both the South and the North. The article describes and relates strategies based on international social rights at three potential venues for the development of the trade regime. First, a strategy of 'countering' could utilize international social rights law to guide interpretation and application of trade treaties, including to challenge the selective spread of such 'human' rights intellectual property rights and investment rights. Second, international social rights might be achieved by, and in turn guide, NGO 'branding' practices. Third, a strategy of 'dealing' informed by norms of international social rights could generate broader reforms to the trade regime that would address both concerns about fair trade and regulatory competition in developed countries and concerns about trade access and development in developing countries.

1 Introduction

Seattle, December 1999, was a watershed in the political contest and policy debate between the promoters and the critics of the international trade regime and of

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economic globalization.¹ Two years later, a standard map of the contested terrain seems set in international trade law commentary.² In better trade law scholarship, the conflict between the productive virtues of liberalized international trade and the accompanying harms to various economic and non-economic objectives is described in a structured and sophisticated policy discourse of benefits and costs.³ The literature also regularly evokes a tension between the concerns of ‘Northern’ progressives interested in protecting social objectives such as labour or environment standards and the interests of ‘Southern’ societies that fear that such linkage is often a cloak for protectionist denial of trade access for developing countries.⁴ While the orthodox critique of trade protesters as economically illiterate is still common,⁵ better commentary usually ends in a call for a balance between trade promotion and protesters’ concerns.⁶ In international trade politics as well, the conflict between the liberal trade orthodoxy and its progressive opposition is repeated in a predictable pattern — a discourse of demonstrations and media events — that tracks the meetings of various international institutions. The policy conflict is also replicated in other fora, such as in the debate at the International Labour Organisation concerning core labour rights.⁷ Although useful in describing the basic nature of the major policy conflicts in the international trade regime, this routinized structure of policy discourse within and about the international trade regime seems static and constraining.⁸

This article is an effort to think about ‘the box’⁹ of routinized policy debate in international trade regulation by exploring the role that international economic and social rights might play in disturbing and informing the policy discourses in and around the international trade regime. The article explores how international social and economic rights are useful for understanding and addressing two central conflicts

¹ Seattle, December 1999, has taken on some of the ritual significance in international law of dates such as 8 May 1945, or 1648; see Berman, ‘In the Wake of Empire’, 14 *Am. U. Int’l L. Rev.* (1999) 1521. Or 11 September 2001; e.g. Slaughter and Burke-White, ‘An International Constitutional Moment’, 43 *Harv. J. Int’l L.* (2002) 1.

² For a symptomatic article, see Tiefenbrun, ‘Free Trade and Protectionism: The Semiotics of Seattle’, 17 *Arizona J. Int’l L. & Comp. L.* (2000) 257.

³ For a helpful disaggregation of such claims, see Howse and Trebilcock, ‘The Free Trade-Fair Trade Debate: Trade, Labor and the Environment’, in J. Bhandari and A. Sykes (eds), *The Economic Dimensions of International Law* (1997) Ch. 5.

⁴ See e.g. Krugman, ‘Hearts and Heads’, *New York Times*, 22 April 2001, WK17; T. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (2000), at 363.

⁵ See e.g. the antagonistic initial reactions of various trade law specialists contained in the interesting historical document, ‘Quick Responses to Seattle’, in 3 *JIEL* (2000) 167. See also Chen, ‘Globalization and Its Losers’, 9 *Minnesota J. Global Trade* (2000) 157.

⁶ See Howse and Trebilcock, *supra* note 3, at 233–234; Rodrik, Borosage and Faux, ‘Seattle ... and After’, 11 *American Prospect* (17 January 2000).

⁷ See ILO Declaration on Fundamental Principles and Rights at Work 1998, International Labour Organization, 37 *ILM* 1233. For commentary, see Langille, ‘The ILO and the New Economy: Recent Developments’, 15 *Int’l J. Comp. Labour L. & Industrial Relations* (1999) 229.

⁸ As well as leading to security and violence surrounding international meetings that raise further issues of human rights to political expression, civil rights, and security of the person, as starkly demonstrated at the G-8 meetings in Genoa, July 2001.

⁹ Kennedy, ‘When Renewal Repeats: Thinking against the Box’, 32 *NYU J. Int’l L. & Politics* (2000) 335.

in contemporary international trade regulation: the conflict between trade and non-trade objectives and the conflict between the interests of developed and developing countries. Proceeding through three potential venues for the development of the trade regime, the article then explores how a creative use of international economic and social rights law may assist actors operating both inside and outside the official trade regime to counter narrow conceptions of the purposes of the international trade regime and to address difficult problems such as reconciling the key concerns of those interested in high social standards in both the South and the North.

2 Countering Rights

This article builds from the expanding literature on the potential use of international human rights law in international trade law.¹⁰ This article does not, however, address the question of whether enhanced international human rights law and institutions, including their 'constitutionalization' in the trade regime,¹¹ would redeem the international economic law regime as a vehicle for establishing greater protection of democratic, regulatory and distributive concerns.¹² International human rights norms are likely to operate, as they always have, in more diffuse ways than by providing the institutionalized basis for legal claims.¹³ It is more likely, and perhaps normatively less problematic, that any emerging system of transnational governance will involve a mix of strategies,¹⁴ including international treaties and institutions, transnational cooperation among governmental actors,¹⁵ national state regulation, transnational NGO activism,¹⁶ transnational litigation,¹⁷ consumer boycotts,¹⁸ and

¹⁰ Leading articles include R. Howse and M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000); Diller and Levy, 'Note, Child Labor, Trade and Investment: Toward the Harmonization of International Law', 91 *AJIL* (1997) 663; Feddersen, 'Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation', 7 *Minnesota J. Global Trade* (1998) 75; Charnovitz, 'The Moral Exception in Trade Policy', 38 *Virginia J. Int'l L.* (1998) 689; Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle', 25 *Brooklyn J. Int'l L.* (1999) 51; Howse, 'The World Trade Organization and the Protection of Workers' Rights', 3 *J. Small & Emerging Bus. L.* (1999) 131; Blackett, 'Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation', 31 *Colum. Hum. Rts. L. Rev.* (1999) 1. This literature in turn grows out of the extensive literature concerning the relationship of the trade regime to labour, environmental, and health and safety protection; see e.g. J. Bhagwati and R. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (1996).

¹¹ See e.g. Petersmann, 'The WTO Constitution and Human Rights', 3 *JIEL* (2000) 19; E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

¹² See e.g. Abbott, 'GATT as a Public Institution: The Uruguay Round and Beyond', 18 *Brooklyn J. Int'l L.* (1992) 31.

¹³ See T. Risse, S. Ropp, and K. Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999).

¹⁴ See G. Teubner (ed.), *Global Law without a State* (1997); Trubek, Mosher and Rothstein, 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks', 25 *Law & Soc. Inquiry* (2000) 1187; J. Braithwaite and P. Drahos, *Global Business Regulation* (2000).

¹⁵ See Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183.

¹⁶ See e.g. M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998).

¹⁷ See e.g. C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001).

¹⁸ See e.g. M. Friedman, *Consumer Boycotts: Effecting Change Through the Marketplace and the Media* (1999).

voluntary codes.¹⁹ Faced with a necessary eclecticism, this article explores how a set of strategies for advancing social goals in the trade regime might emerge out of distinct but related strategies of WTO treaty interpretation, NGO activism and international political negotiations.

The focus away from direct legal enforcement softens what is arguably most distinctive about rights discourse: the character of rights claims as ‘trumping’ claims.²⁰ In contexts such as constitutional discourse, rights often operate as assertions by individuals or groups that certain interests or values should be enforced in priority to collective objectives and interests of the state. To some observers, the introduction of human rights discourse into the domain of international trade, a regime dominated by the concerns of sovereign states, cannot but help to contribute to the progressive and democratic advance of the trade regime.²¹

To other observers, individualistic rights discourse itself can become an impediment to progressive social change. A turn to rights in international politics risks obscuring shared social concerns, legitimating the existing order and displacing more meaningful social change in the international system.²² Indeed, the selective placement of rights within the trading regime may act as a vehicle for the constitution of a neo-liberal order.²³ Those interested in protecting social objectives against individual rights claims sometimes critique an individualistic conception of rights and defend a social view of rights and their contents.²⁴ Another strategy, more common in international human rights law, is to argue that more kinds of rights should be recognized, including economic and social rights, and that in particular, human rights must be considered in relation to each other and as part of an indivisible package.²⁵

This article operates at a tangent to such debates by focusing on a function for social rights that does not involve a direct claim for or against government action, but rather uses international human rights as a ‘countering’ strategy. The article explores the use of international social rights in the trade regime as an argumentative and political strategy that can destabilize utilitarian-functional policy orientations in the trade regime, but also complicate problematic use of rights discourse itself. In this respect, international economic and social rights seem an exemplary form of countering rights. Social and economic rights are sometimes characterized as relating to positive obligations on governments which are hard to operationalize and hence largely

¹⁹ See e.g. O. Williams (ed.), *Global Codes of Conduct: An Idea Whose Time Has Come* (2000).

²⁰ R. Dworkin, *Taking Rights Seriously* (1977) at xi.

²¹ E.g. Petersmann, *supra* note 11.

²² Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, 3 *E.H.R.L.R.* (2001) 245.

²³ E.g. McGinnis and Movsesian, ‘The World Trade Constitution’, 114 *Harv. L. Rev.* (2000) 511. For a striking, early, ordo-liberal conception of international economic law as a vehicle to constrain activist national governments, see W. Roepke, *Economic Order and International Law*, 86 *RdC* (1954) 203.

²⁴ For example, Dworkin argues for an interpretation of rights informed by a theory of liberalism based on equality; see R. Dworkin, *A Matter of Principle* (1985), chapters 8 and 9.

²⁵ Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993) para. 5; Scott, ‘The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’, 27 *Osgoode Hall L.J.* (1989) 769.

aspirational.²⁶ They are therefore argued to be non-justiciable and to have limited potential for enforcement by individual rights holders.²⁷ While social rights scholars have elaborated on the reasons why this distinction is not sustainable,²⁸ this article brackets the issue by focusing on social rights as a counter to utilitarian policy arguments in international trade law and naive conceptions of trade-related rights.

A International Trade Law and the Policy Discourses of Cooperative Benefit

Trade law has traditionally been described as state-focused and utilitarian-consequentialist, and so an unlikely place for rights claims and analysis.²⁹ In this context, arguments framed in terms of rights may help to elevate and concretize concerns about the impact of trade on social and distributive concerns by disturbing the tendency towards sovereigntist assumptions in trade reasoning.³⁰ Rights claims can disturb the dominance of policy discourses or rationalities of 'economization' in the 'collision of discourses' in global law,³¹ either within systems such as international commercial systems or through their influence in systems such as labour or human rights networks that potentially act as countervailing forces in global politics.³² Human rights concepts also offer an ideational 'frame' for principled transnational advocacy and a strategic tool for providing a 'human face' to various social problems.³³

A set of economic, political and ethical discourses provides a parallel and reinforcing set of policy justifications for the cooperative benefits of liberal international trade.³⁴ Economic theories emphasize how specialization and exchange according to comparative advantage will be mutually advantageous to all societies

²⁶ See e.g. Charnovitz, 'The Globalization of Economic Human Rights', 25 *Brooklyn J. Int'l L.* (1999) 113 at 177.

²⁷ See e.g. Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime', 7 *Widener L. Symposium J.* (2001) 1 at 10–11.

²⁸ See e.g. J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (1997) at 136–138; Macklem and Scott, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution', 141 *U. Penn L. Rev.* (1992) 1. See also Committee on Economic, Social and Cultural Rights, 'The Domestic Application of the Covenant', General Comment 9, UN Doc.E/1999/24 (1998), para.10.

²⁹ See Garcia, *supra* note 10.

³⁰ In this sense, rights discourse can help to counter welfare assumptions of neoclassical economic theory based on utilitarianism, Kaldor-Hicks efficiency and even Pareto-optimality; see e.g. Dworkin, *supra* note 20, and Sen, 'The Impossibility of a Paretian Liberal', 78 *J. Political Economy* (1970) 152.

³¹ Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses', in R. Rawlings (ed.), *Law, Society and Economy: Centenary Essays of the London School of Economics and Political Science 1895–1995* (1997) 149.

³² See e.g. G. Teubner (ed.), *Global Law without the State* (1997).

³³ Keck and Sikkink, *supra* note 16, at 121.

³⁴ I discuss these liberal internationalist policy discourses of 'commerce, cooperation and cosmopolitanism' in the related context of private international law in Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', 40 *Columbia J. Transnat'l L.* (2002) 209 at 224–232.

because there will be increased total production available to be divided.³⁵ A liberal institutionalist view of international politics views the international trade regime as helping sovereign countries to gain cooperative benefits, by putting in place structures that limit the tendency in anarchic world systems towards cheating,³⁶ as well as to control for the focused political influence and lobbying of narrow, but concentrated, domestic interests.³⁷ At the level of ethics, liberal internationalists identify free trade with cosmopolitan values: openness to foreign influences, pluralism in values and concern for extra-national interests.³⁸

International trade law reinforces a concern with cooperative benefit and mutual advantage because of the centrality to international law of sovereign consent.³⁹ The preambles of both the GATT and the WTO Agreement observe that the various objectives of the signatory states are to be achieved ‘by entering into reciprocal and mutually advantageous arrangements’.⁴⁰ The continuing presence of mutual benefits is also important to the ongoing operation of existing regimes; international lawyers, for example, fear that compliance with international law will be compromised without some continuing sense of mutual advantage among states.⁴¹ The sense that international treaties such as the WTO treaties are analogous to contracts⁴² reinforces the notion that international trade law must be restricted to concerns based either on prior sovereign consent or continuous benefits to each sovereign party.

While it is not surprising that international trade lawyers emphasize the presence of mutual sovereign benefit, it may mean that other values, such as questions of distributional fairness as between countries or inside any particular state are not addressed.⁴³ For example, issues of restitution and compensation for past harm are

³⁵ See e.g. M. Trebilcock and R. Howse, *The Regulation of International Trade* (2nd ed., 1999), at 3–6.

³⁶ See e.g. Abbott, ‘The Trading Nation’s Dilemma: The Functions of the Law of International Trade’, 26 *Harv. Int’l L. J.* (1985) 500.

³⁷ See e.g. Trebilcock and Howse, *supra* note 35, at 15–17.

³⁸ See e.g. Petersmann, *supra* note 11, and references in note 47, *infra*.

³⁹ I elaborate on the relationship between consent and cooperation in the policy discourses of international law in Wai, ‘The Commercial Activity Exception to Sovereign Immunity and the Boundaries of International Legalism’, in Scott, *supra* note 17. Sovereign consent is central to both conventional and customary international law; see e.g. M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 52–73.

⁴⁰ General Agreement on Tariffs and Trade (GATT) and Agreement Establishing the World Trade Organization (WTO Agreement), preamble.

⁴¹ See e.g. the surrounding text to Louis Henkin’s famous observation that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’: L. Henkin, *How Nations Behave: Law and Foreign Policy* (1979), at 47.

⁴² E.g. in *Japan — Taxes on Alcoholic Beverages*, WT/DSS/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 4 October 1996, [hereinafter *Japan — Alcoholic Beverages*] at 14, the Appellate Body observes:

The *WTO Agreement* is a treaty — the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. . . .

⁴³ For this and other limits of cooperative benefits analysis, see Wai, *supra* note 39, at 235–239.

restricted in the trade regime.⁴⁴ Moreover, an overriding concern to maintain consensus support for the international law regime leads to an unwillingness to openly recognize or confront the gap between general liberal internationalist values and particular institutional programmes.⁴⁵ The aversion to openly addressing gaps and ambiguities, and the belief that liberal internationalist goals exhaust legitimate concerns, means that some concerns that do involve potential long-term benefit are rejected as being excessively ‘political’ and, for that reason, a matter to be deferred or suppressed. For example, problems of regulatory gaps or regulatory competition are often seen to be outside of the international trade regime because they involve ‘real conflicts’ and ‘political’ disagreements about regulatory standards among sovereign states.⁴⁶

In this setting, international human rights law may provide a basis to frame serious claims based on suppressed policy goals that disturb dominant policy discourses of international trade law. International human rights claims can highlight particular harms to concrete specific interests, and can remind us that liberal cosmopolitanism includes respect for rights at home and abroad. International human rights rest on established social values within almost all of the member states of the trading regime. At the same time, their status as international law helps to show that international human rights concerns are not parochial, but recognized and shared concerns of the international system and its member states.

B Countering the Selective Spread of Rights to International Trade

In addition to complicating policy frames based on cooperative benefit, economic and social rights have a further critical role in countering other rights claims that already and increasingly are made in the trade regime. Although the trade regime is not traditionally understood as based on rights, as the trade regime has expanded more claims about trade access are framed using concepts from rights analysis. Trade discourse has already borrowed concepts from human rights discourse, such as the idea of non-discrimination that informs core trade principles of Most-favoured Nation Treatment and National Treatment. Clearly, claims about equal or non-discriminatory treatment of goods are not identical to non-discriminatory treatment of peoples.

⁴⁴ For example, the Dispute Settlement Understanding of the WTO does not provide for payment of damages or required compensation; Sykes, ‘The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding’ in M. Bronckers and R. Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2000). The focus of the DSU is on voluntary compliance, backed up by a staged process to increase pressure of reputational harm and, ultimately, the threat of suspension of trade concessions by complaining states; DSU, Articles 19–22.

⁴⁵ Legal realists and critical legal scholars have repeatedly identified the tendency towards ‘false necessity’ in legal reasoning from general policy objectives or values to particular conclusions; e.g. D. Kennedy, *A Critique of Adjudication: fin de siècle* (1997), chapters 5–6; R. Unger, *False Necessity* (1987). A parallel sense that diverse institutional alternatives might serve goals such as development is found in Dani Rodrik’s recent work; see e.g. D. Rodrik, *The Global Governance of Trade as if Development Really Matters* (2001). Similarly, Joseph Stiglitz has criticized the market ‘fundamentalism’ of the Washington Consensus of policy prescriptions; J. Stiglitz, *Globalization and Its Discontents* (2002).

⁴⁶ See Singer, ‘Real Conflicts’, 69 *Boston U. L. Rev.* (1989) 1 and Wai, *supra* note 34.

But as the trade regime expands into more controversial realms, some trade writers⁴⁷ and some trade panels⁴⁸ risk conflating the instrumental concerns of non-discrimination in treatment of goods with the fundamental values of non-discrimination in the treatment of people.

In addition, the use of human rights discourse in trade regulation has increased as international trade regimes become identified with protecting individual or corporate interests rather than the interests of states. Two significant examples of this are foreign investment protections and trade-related intellectual property (IP) protections. Critics have observed that such provisions are a form of human rights protection for a special-interest group of business actors, an imbalance made worse by the lack of any equivalent protection in trade agreements for the human rights of workers or citizens.⁴⁹ Foreign investor and intellectual property rights are stark examples of what Upendra Baxi identifies as the shift in human rights towards a 'trade-related, market-friendly' paradigm.⁵⁰

More broadly and still more fraught are references to a human right to transact. The initial uses of this concept are careful and to a socially sensitive purpose. For example, Amartya Sen has invoked the 'right to economic participation and transaction' as part of his effort to develop a broader 'capability' approach to development that emphasizes the interdependence of freedom and development.⁵¹ The danger is not in the existence of such a right, but rather in a misunderstanding of its purpose and priority. In particular, the use of these rights in this context feeds into problematic libertarian conceptions of freedom of contract and the right to property. For Sen, the freedom to transact is more about freedom from basic constraints imposed by slavery, child labour, political oppression and male domination.⁵² More importantly, he expressly cautions against the prejudices and preconditions of a dominant market view that fails to see the complementarity of significant non-market institutions in fully protecting both freedom and development.⁵³ This caution is at risk of being lost in

⁴⁷ E.g. Petersmann, 'How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System', 1 *JIEL* (1998) 25, at 47 (identifying liberal international trade with the protection of freedom, non-discrimination, rule of law and economic welfare in transnational relations); Lim, 'Trade and Human Rights: What's at Issue?', 35 *J. World Trade* (2001) 275 at 277; M. Trebilcock, *The Limits of Freedom of Contract* (1993), chapter 9 (parallelism in discrimination in human rights law, immigration and trade).

⁴⁸ See e.g. *Japan — Alcoholic Beverages*, *supra* note 42 (discriminatory treatment of white and brown liquors).

⁴⁹ See e.g. Alvarez, 'North American Free Trade Agreement's Chapter Eleven', 28 *Univ. Miami Inter-American L. Rev.* (1996–7) 303 at 308; Schneiderman, 'Investment Rules and the New Constitutionalism', 25 *Law & Soc. Inquiry* (2000) 757.

⁵⁰ Baxi, 'Voices of Suffering and the Future of Human Rights', 8 *Transnat'l L. & Contemp. Probs.* (1998) 125, at 163–170.

⁵¹ A. Sen, *Development as Freedom* (1999), at 6–8 and 112–116.

⁵² *Ibid.*, at 113–116.

⁵³ *Ibid.*, at 111–112, 116. For an example of such a misuse of Sen's analysis to defend an unexamined faith in markets, see Lim, *supra* note 47, at 298–299.

efforts by trade writers to speak of a 'right to free trade'.⁵⁴ International social and economic rights law provides a useful check on such selective importation of rights into the trade regime.

3 Just Trade? The Converging Concerns of International Human Rights and International Trade

The relevance of human rights discourse to international trade has increased as the practical and doctrinal separation of the fields of international trade law and international human rights law, previously plausible to most actors in each area, has weakened in the face of developments in both the theory and practice of international trade and human rights.

International human rights and international trade have largely operated separately in the post-World War II era. The international human rights institutions, in particular those associated with the various human rights conventions, have focused on the United Nations as a site for change. The dominant international trade institutions, the GATT and now the WTO, operate outside the UN system, and have a different set of parties from the human rights conventions and institutions. Furthermore, scholarship in the two fields has largely operated in isolation from each other, with each field utilizing distinct discourses and frameworks for addressing similar problems. However, recent theoretical and practical developments indicate how the two fields substantially overlap in their concerns and could address each other more constructively.

A Attending to the Role of Trade in the Realization of Human Rights

The regulation for trade protectionism on the one hand and violation of human rights on the other seem to involve fundamentally different policy concerns.⁵⁵ Nonetheless, sophisticated human rights scholars have long observed that any strong isolation of human rights concerns from economic considerations is untenable. As Philip Alston observes, the isolation of human rights concerns from trade issues risks confirming the implausible assumption that 'human rights problems constitute political issues, whereas economic and other financial matters are technical or apolitical issues, and the separation between these two tracks should not be interfered with'.⁵⁶

Economists like Amartya Sen have also focused on the multiple connections between economic development and human rights.⁵⁷ While economic development and human rights can be in tension with respect to particular policies, they are not so at a more fundamental level involving a broader sense of social development.

⁵⁴ Petersmann, *Constitutional Functions*, *supra* note 11, at xxxii (the right to free trade as a basic human right); Charnovitz, *supra* note 26, at 122 ('right of individuals to export, to import, to invest, and to divest').

⁵⁵ See e.g. Garcia, *supra* note 10.

⁵⁶ Alston, 'International Trade as an Instrument of Positive Human Rights Policy', 4 *Hum. Rts. Q.* (1982) 155.

⁵⁷ Sen, *supra* note 31; Steiner, 'Social Rights and Economic Development: Converging Discourses?', 4 *Buffalo Hum. Rts. L. Rev.* (1998) 25.

Economic development is central to providing the economic means for the realization of human rights, as well as the conditions necessary for political pressure for higher social standards. In the other direction, protections for human rights help to foster economic and social development. For example, political freedoms and democratic rights can help to monitor for wasteful or dysfunctional social policies, such as those leading to famine.⁵⁸ In addition, a right to basic participation in the market is required to meet human needs in most societies.⁵⁹ In Sen's analysis, human rights should be promoted both as ends in themselves and for their instrumental value in development.⁶⁰

International human rights conventions related to economic, social and cultural rights recognize the many connections between economic policy and human rights.⁶¹ For example, advocates of social and economic rights have shown how certain economic policies can themselves impede the advancement of human rights.⁶² In addition, international social and economic rights are expressly acknowledged, for example in the concept of 'progressive realization', to depend on the economic contexts of stage of development and availability of resources.⁶³

The international human rights institutions have increasingly noted the need for international economic institutions to address concerns of human rights, including social and economic rights.⁶⁴ While institutions such as the United Nations Development Programme have acknowledged the connections between economic policy and human rights,⁶⁵ the international trade institutions have only minimally focused on the connection between trade and human rights.⁶⁶ Yet international trade is intertwined with the realization of human rights if only because the economic development and material resources of all contemporary societies have become

⁵⁸ Sen, *supra* note 57, chapter 6.

⁵⁹ *Ibid.*, chapter 5. See *supra* notes 53 and 54 for the potential misuse of Sen's basic argument concerning the right of market participation.

⁶⁰ *Ibid.*, at 36–37.

⁶¹ The article will focus on the International Covenant on Economic, Social, and Cultural Rights, 993 UNTS 3 (1966) (ICESCR), the Universal Declaration of Human Rights, UNGA Res. 217A (III), UN Doc. A/810 at 71 (1948) (UDHR), and the International Covenant on Civil and Political Rights, 999 UNTS 171 (1966) (ICCPR). However, the international conventions relevant to social rights include many other instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. A/34/46 at 193 (1979).

⁶² P. Alston, *International Governance in the Normative Areas*, Background Paper, UNDP Human Development Report 1999, at 16.

⁶³ ICESCR, Art. 2(1). See Committee on Economic, Social and Cultural Rights, 'The Nature of States Parties' Obligations', General Comment 3, UN Doc. E/1991/23 (1990).

⁶⁴ E.g. Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, 26 November 1999, UN Doc. E/C.12/1999/9.

⁶⁵ See UNDP Human Development Report 2000, *Human Rights and Human Development* (2000).

⁶⁶ The World Bank has become conscious of the connections to some extent; see e.g. World Bank, *Development and Human Rights: The Role of the World Bank* (1998); World Bank, *World Development Report 1999/2000: Entering the 21st Century* (1999) at 1, 43. More generally, the Bank's Comprehensive Development Framework emphasizes the interdependence of all aspects of development, including social aspects; see J. Wolfensohn, *A Proposal for a Comprehensive Development Framework: A Discussion Paper*, 21 January 1999.

increasingly dependent on connections to the global economy.⁶⁷ Trade access to export markets is required to provide a foundation for viable domestic production, and access is needed to imports such as medicines that can serve social development needs, especially in smaller developing states.

B Not Just Trade: The Increasing Presence of Human Rights Concerns in International Trade Regulation

Although there has been only limited direct recognition in the trade institutions of the relevance of international human rights law, there is growing awareness that the international trade regime cannot avoid addressing social issues that have not traditionally been considered relevant to trade. The recognition that international trade concerns social regulation requires a consideration of the conditions that would ethically define 'just trade'.⁶⁸ In that task, it seems unavoidable that human rights, an increasingly pervasive ethical and political discourse in world affairs,⁶⁹ will have an important role.

Some obvious connections between trade and human rights relate to the social displacement associated with opening a society to increased competition from foreign economic production. There are inevitably winners and losers in the process of trade liberalization. The effects are most serious for workers in sectors or businesses that are not internationally competitive. For a society overall, this detrimental impact is claimed to be more than offset by the benefits to consumers of better or cheaper production and the benefits to producers and workers in competitive sectors that increase their exports to foreign markets.⁷⁰ At the same time, there are clearly distributive consequences, which may or may not be offset by worker adjustment policies.⁷¹ In addition, there are harms associated with increased international economic production itself, such as harm to the environment, culture or governance of local communities.⁷²

The focus of this section, however, is on how the connection between trade and human rights is consistent with developments in core policy thinking in international trade regulation itself. Trade scholars increasingly confront the linkage of trade and non-trade matters through two central issues in the theory and in the operation of an advanced trade regime: (1) the impact of domestic laws not directly concerned with trade as trade barriers; (2) concerns of fair trade related to the impact of differential foreign social regulation on patterns of trade. Both of these concerns have significance

⁶⁷ *World Development Report 1999/2000*, *supra* note 66, at chapter 2.

⁶⁸ D. Finn, *Just Trading: On the Ethics and Economics of International Trade* (1996).

⁶⁹ M. Ignatieff, *The Rights Revolution* (2000); Donnelly, 'Ethics and International Human Rights', in J.-M. Coicaud and D. Warner (eds), *Ethics and International Affairs: Extent & Limits* (2001) 128, at 130.

⁷⁰ Trebilcock and Howse, *supra* note 35, at 4–5.

⁷¹ On the need for such transitional adjustments, see M. Trebilcock, M. A. Chandler, and R. Howse, *Trade and Transitions: A Comparative Analysis of Adjustment Policies* (1990).

⁷² E.g. T. Clarke and M. Barlow, *MAI: The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (1997), chapter 4.

for the normative and practical setting for international economic and social rights in the international trade regime.

1 Trade Law without Borders: Domestic Law and Policy as a Trade Barrier

A first step in realizing the significance of human rights to trade is the recognition in the trade field that as the international economic system becomes more deeply integrated, domestic policies other than just border measures can be the most significant source of trade barriers in practice.⁷³ Various forms of domestic regulatory laws, policies or requirements may — on their face or in effect — limit the ability of goods or services of foreign origin to compete with domestic products. This may justify the application of the disciplines of international trade rules, but in turn, the broader oversight by the trade regime means that international trade regulation becomes a significant constraint on domestic policy-making.

For some time, the principle of comparative advantage, in addition to explaining the mutual advantages of specialization and trade, permitted a form of agnosticism in the international trade regime about the background domestic laws and policies of a particular country. Domestic laws and regulations were effectively treated as if they were simply part of the configuration of domestic economic attributes — together with factor attributes such as natural resources, human capital and geography — which gave each economy its distinctive features and which constituted the comparative advantage and disadvantage of each economy.⁷⁴

Practical considerations reinforced the tolerance of comparative advantage theory towards diversity in most kinds of national laws and policies. The main focus of the GATT trade regime instituted immediately after World War II was on trade-distorting laws and policies that were specifically trade-oriented and often took effect at the border. Such measures included tariffs and customs laws, import and export quotas, and foreign exchange policy. The focus of the GATT regime on border measures was reinforced by a backdrop of ‘embedded liberalism’ which involved a similar set of views among major GATT states concerning an active governmental role in domestic policy-making, including in provision of social welfare and regulation.⁷⁵

In practice, as economic integration has advanced and the scope of the international trade regulation regime has expanded, the focus in the GATT-WTO has turned to non-tariff barriers, and in particular to non-border measures, including subsidies, domestic regulatory policies and domestic trade remedy laws.⁷⁶ A major difficulty in addressing non-tariff barriers is the dual aspect of many laws, regulations

⁷³ Roessler, ‘Diverging Domestic Policies and Multilateral Trade Integration’, in Bhagwati and Hudec, *supra* note 10.

⁷⁴ Bhagwati, ‘Fair Trade, Reciprocity, and Harmonization’, in D. Salvatore (ed.), *Protectionism and World Welfare* (1993) 17, at 40–43.

⁷⁵ Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’, 36 *Int’l Organization* (1982) 379.

⁷⁶ See J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed., 1997), at 130 (‘like ways to avoid income tax, human invention of non-tariff barriers will undoubtedly go on forever’).

or policies.⁷⁷ Most laws, policies and regulations are primarily ‘domestic aspect’, in that they are enacted for purely domestic purposes, which that society would have chosen even in a state of autarky. Since autarky does not exist in the contemporary world system, however, virtually every law and policy also has an ‘international aspect’ including through its external effects on international trade. As international interdependence increases, it becomes more difficult to neatly disentangle ‘self-regarding’ actions from their ‘other-regarding’ effects. Such distinctions cannot be made in a neutral fashion that does not rely on some baseline judgments related to the ‘normal’ range of domestic policies that are acceptable.⁷⁸ However, simply abstaining from judgments about such laws, regulations and policies is problematic because the dual aspect of such laws does mean that they can be manipulated to influence patterns of trade.

The response of the trade regimes has been to expand the domain of domestic policy that is regulated by the trade regime. This can involve harmonization of domestic policy standards as a means of removing trade-distorting differences, as in the European Union.⁷⁹ Examples of positive harmonization in the WTO context include some provisions of the TRIPS Agreement.⁸⁰ More often, the WTO restrictions on domestic policy are the indirect result of ‘negative integration’ under such provisions as the core non-discrimination principles of the GATT.⁸¹ WTO panels have found that the non-discrimination provisions protect against not just domestic policies that are intended to discriminate, but also situations of de facto or implicit discrimination.⁸² Consequently, how much such trade regulation interferes with domestic policy-making depends on the degree of deference to domestic policy-setting found in the trade-off or balancing mechanism that is adopted by the WTO panels interpreting these various rules and exceptions.⁸³ Regardless of whether positive or negative integration is involved, national governments are now under pressure to make

⁷⁷ See Roessler, *supra* note 73. The connection is also addressed in the trade ‘linkage’ literature; see ‘Symposium, Linkage as Phenomenon: An Interdisciplinary Approach’, 19 *U. Penn. J. Int’l Econ. L.* (Summer 1998) 201.

⁷⁸ This tension was clearly identified in foundational trade law articles by Daniel Tarullo. See Tarullo, ‘Beyond Normalcy in the Regulation of International Trade’, 100 *Harv. L. Rev.* (1987) 547; Tarullo, ‘Logic, Myth, and the International Economic Order’, 26 *Harv. Int’l L. J.* (1985) 533.

⁷⁹ For an overview of the trade aspects of European harmonization and their relation to current issues in the WTO, see Weiler, ‘Epilogue: Towards a Common Law of International Trade’, in J. H. H. Weiler (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (2000) 201.

⁸⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the WTO Agreement, 33 *ILM* 81 (1994) [hereinafter ‘TRIPS Agreement’]. Further examples are contained in the provisions of the General Agreement on Trade in Services, Annex 1B to the WTO Agreement, 33 *ILM* 44 (1994) [hereinafter ‘GATS’].

⁸¹ GATT Article I (Most Favoured Nation Treatment) and Article III (National Treatment).

⁸² See e.g. Jackson, *supra* note 76, at 216–221; *Japan — Alcoholic Beverages*, Report of the Panel, 11 July 1996, at paras 6.7–6.9 (rejecting the ‘aim-and-effect’ test).

⁸³ Cass, ‘The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’, 12 *EJIL* (2001) 39 at 66–69. For a discussion of various balancing standards and mechanisms, see Trachtman, ‘Trade and ... Problems, Cost-benefit Analysis and Subsidiarity’, 9 *EJIL* (1998) 32.

formerly sovereign decisions concerning domestic policy in light of international trade commitments.

Given the problem of dual aspect, the disciplines of international trade law could extend to restrictions on a number of domestic laws or policies related to social rights. The governmental measures potentially impacted by international trade law review could be wide ranging, including unemployment insurance, regional development assistance, public health care, and health and safety standards.⁸⁴ In addition, the challenge of dealing with ‘progressive’ domestic social measures that also act as non-tariff barriers corresponds to concerns about the trade effects of ‘regressive’ domestic social measures in trading partners. This last issue is a particular concern in demands for ‘fair trade’.

2 *The Collapsing Boundaries between Free Trade and Fair Trade*

Free trade based on comparative advantage is agnostic about the production conditions in any particular jurisdiction, including its domestic regulatory standards. Fair trade theory, in contrast, is very much concerned with defining the background conditions under which international trade should occur.⁸⁵ Production that violates these background conditions would constitute ‘unfair competition’ and could be subject to restrictions when internationally traded.⁸⁶

Fair trade arguments in their more sophisticated forms rely on some additional observations. For example, fair traders can marshal the significant theoretical insights related to strategic trade theory and theories of competitive advantage.⁸⁷ Strategic trade theory and theories of competitive advantage imply that both border measures and internal policies — ranging from subsidies through particular regulatory frameworks — can be used to ‘shift’ comparative advantage, and thereby advantage one jurisdiction over another in the competition for particular kinds of economic production. These theories also provide economic justifications to argue against agnosticism about the nature of a country’s comparative advantage. First, there are traditional concerns about development of infant industries. The concern here is that, because of economies of scale, economies of scope, and efficiencies of learning,

⁸⁴ E.g. the dispute about the use of the precautionary principle and standards of risk assessment in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998.

⁸⁵ See Tarullo, *supra* note 78; Bhagwati, *supra* note 74, at 40–41; Langille, ‘General Reflections on the Relationship of Trade and Labour (Or: Fair Trade is Free Trade’s Destiny)’, in Bhagwati and Hudec, *supra* note 10.

⁸⁶ Howse and Trebilcock, *supra* note 3, carefully parse fair trade claims. In general, they recognize the legitimacy of some fair trade claims, especially where they relate to the enforcement of normative reference points. In contrast, they find most fair trade arguments based on the idea of a ‘level playing field’ to be ‘normatively incoherent’ and ‘thinly disguised forms of protectionism’ (at 233 and generally at 223–226) and those related to regulatory competition to be empirically implausible (at 227–230). I consider regulatory competition concerns to have greater empirical justification, and that the widespread belief of governments and business in strategic trade and competitive advantage — including beliefs about infant industries and externalities — effectively requires acknowledgement and containment.

⁸⁷ See e.g. P. Krugman (ed.), *Strategic Trade Policy and the New International Economics* (1986); M. Porter, *The Competitive Advantage of Nations* (1990).

industrial development in some countries, especially late industrializers, requires assistance of various kinds, including subsidies and direct protection from foreign competitors. This assistance is needed to permit a starting industry to develop the basic scale, scope and expertise necessary to compete with established foreign competitors.⁸⁸

Moreover, theories of strategic trade and competitive advantage argue that particular industries may provide positive externalities. Certain kinds of economic production may produce additional 'spillover' benefits beyond the economic returns to producers; these benefits could include research and development of other products, the foundation for development of clusters of related companies, improved local environmental conditions, and support for rural communities. In addition, production in certain industries may yield unusually high rates of return because of imperfect competition in the international markets in those industries.⁸⁹ The continued existence of such thinking is evidenced in the decision of various states to adopt policies that encourage particular industries, such as agriculture or high-technology. Policies that champion national businesses in such sectors include protection from competing imports but also subsidies of many kinds.⁹⁰

Taken too far, theories of strategic trade and competitive advantage collapse into an apology for protectionism and a denial of any of the gains to be enjoyed from international specialization and exchange. Strategic trade theory may make sense for one country, but it would severely impede the gains from trade if generalized into a universal practice. It also is difficult in practice to implement a domestic policy that would effectively identify and assist industries that have potential as infant industries or for sustained positive externalities. Because of these dangers, most trade regulation scholars have opposed the idea of fair trade and competitive advantage as an organizing principle for the trade regime.⁹¹ However, the theoretical insight remains, as does the fact that most states, and many business actors, believe in its validity.⁹²

Fair trade concerns with shifting comparative advantage are reinforced by concerns about regulatory competition. Regulatory competition concerns arise because compliance with domestic regulatory policies — such as tax laws, environmental regulations, labour laws, and health and safety requirements — may affect

⁸⁸ See e.g. Trebilcock and Howse, *supra* note 35, at 9–10. The infant industry argument has a long history in international trade economics, traced back at least to J. S. Mill; see D. Irwin, *Against the Tide: An Intellectual History of Free Trade* (1996), chapter 8. The infant industry argument also informs GATT provisions which permit developing countries to provide some protection for the 'establishment of particular industries'; Article XVIII, paras 2 and 3.

⁸⁹ Krugman, *supra* note 87.

⁹⁰ As in the ongoing dispute between Brazil and Canada concerning assistance to manufacturers of civilian aircraft; see *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body, 2 August 1999; *Brazil — Export Financing Programme for Aircraft*, WT/DS46/AB/R, Report of the Appellate Body, 2 August 1999.

⁹¹ Krugman, *supra* note 87, at 15–20; P. Krugman, *Pop Internationalism* (1996), chapter 1 ('Competitiveness: A Dangerous Obsession').

⁹² It is revealing that the leading thinker of competitive advantage, Michael Porter of the Harvard Business School, is a business strategy scholar rather than a trade economist; see Porter, *supra* note 87.

the relative costs of production. In addition, the increasingly integrated global economic market means that economic producers are often able to shift production, or part of production, across borders to alternative locations in order to take advantage of the most favourable production conditions. The costs of regulatory compliance together with the possibility of shifting transnational production create a context for domestic producers to plausibly claim that regulatory conditions in foreign jurisdictions will have an effect on their own competitive opportunities. Furthermore, jurisdictions competing for economic production may engage in a sub-optimal process of altering regulatory standards to retain or attract economic producers. In the worst-case scenario, there is a 'race to the bottom' among jurisdictions.⁹³

In such a situation, the allocation of industrial production seems to depend on either jurisdictional competition or some system of international negotiation and management of the background 'conditions' of international trade. From this perspective, a trade regime can be viewed as the outcome of a political process in which each party seeks to negotiate a share of the production that it believes is in accordance with the cooperative gains from international trade *and* also ensures it a fair distributive share from that international trade. As a descriptive matter, this complex arrangement of cooperative conflict has been examined in many ways, including through tools of international relations theory, such as game theory.⁹⁴ But this view also should inform the normative interpretation of the trade regime and the broader political discussion of advanced international economic integration.

The insights associated with theories of strategic trade, competitive advantage and regulatory competition provide a theoretical, if contestable, basis for the claim that domestic policies must be addressed as part of the terrain on which free trade will occur.⁹⁵ Setting ground rules or baselines concerning domestic policies seems necessarily to follow from the collapse of any strong distinction between fair trade and free trade.⁹⁶ Any trade regime, including the current framework, operates with background understandings concerning 'permissible' domestic policy of member states. Negotiating such background norms is unlikely to be easy given the diversity of domestic policies and economic interests at stake, but it is an unavoidable negotiation in which the legitimacy of fair trade concerns of parties must be addressed. In such an international contest of norms, international human rights law seems clearly relevant.

⁹³ See e.g. Trebilcock and Howse, *supra* note 35, at 426–428, 455–456; W. Bratton *et al.* (eds), *International Regulatory Competition and Coordination* (1996).

⁹⁴ See e.g. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale J. Int'l L.* (1989) 335.

⁹⁵ See Howse and Trebilcock, *supra* note 3, at 223–233.

⁹⁶ Tarullo, *supra* note 78; Langille, *supra* note 85.

4 The Pervasive Problem of Dual Motives: Economic and Moral Motives and Who is ‘Protected’ by Protectionism

Given the substantial overlap between matters of international trade and of human rights, what are the barriers to the increased recognition of human rights concerns in the international trade regime? One major barrier is the familiar problem of dual motives in international relations. Although the motivation for international human rights protection may be genuine moral concern for the interests of others in foreign jurisdictions, it is frequently a selective, and often self-serving, engagement with these problems.⁹⁷ The main concern in bringing human rights into the international trade regime is the misuse of human rights for ‘selfish’ purposes such as protection of domestic producers.

A A Central Tension: Northern Progressives and Southern Development

At and since Seattle, the international trade orthodoxy has been confronted inside and outside the negotiating halls by two major critiques. As Dani Rodrik observes,

At present, two groups feel particularly excluded from the decision-making machinery of the global trade regime: developing country governments and northern NGOs. The former complain about the asymmetry in trade rules, while the latter charge that the system pays inadequate attention to fundamental values such as transparency, accountability, human rights, and environmental sustainability. The demands of these two disenfranchised groups are often perceived to be conflicting — over questions such as labour and environmental standards or the transparency of the dispute settlement procedures — allowing the advanced industrial countries and the leadership of the WTO to seize the ‘middle’ ground. It is the demands of these two groups, and the apparent tension between them that has paralyzed the process of multilateral trade negotiations in recent years.⁹⁸

The two critiques are not necessarily in conflict. Indeed, in strategy and personnel, there is significant interchange and interdependence among progressive groups in North and South.⁹⁹ They are also united in their perception that international trade liberalization has been racing ahead without the necessary complement of democratic, regulatory and distributive accountability required for any legitimate system of governance. Recently, more extensive consultation and cooperation has taken place between South and North non-governmental groups;¹⁰⁰ the most prominent of these

⁹⁷ See Atik, ‘Identifying Anti-democratic Outcomes’, 19 *U. Pa. J. Int’l Econ. L.* (1998) 229.

⁹⁸ Rodrik, *supra* note 45, at 35. Like Rodrik and others, I use the shorthand of South and North as an adequate frame for the problem addressed in this article, although for many other purposes South-North is an unhelpful simplification of complex realities.

⁹⁹ Such cooperation was important in the anti-Apartheid strategies against the South African government and companies doing business in South Africa; see N. Crawford and A. Klotz (eds), *How Sanctions Work: Lessons from South Africa* (1999).

¹⁰⁰ M. Barlow and T. Clarke, *Global Showdown: How the New Activists are Fighting Global Corporate Rule* (2001), chapter 10.

include the World Social Forum at Pôrto Alegre¹⁰¹ and in transnational alliances such as the Third World Network and the ‘Our World is Not for Sale’ coalition.¹⁰²

In several key respects, however, the policy objectives of these two groups are not congruent. Efforts to protect social standards in foreign jurisdictions via international standards are suspect as motivated not by a genuine concern for the impact of low regulatory standards on the human rights of foreign workers, but rather the desire to protect the economic interests of domestic constituencies.¹⁰³ Withholding market access is feared to harm social development in developing countries more than it will help.¹⁰⁴ Almost any job is better than no job, it is claimed, and some economic development is better than none at all.

There is much to this concern, although it overstates the unanimity of antagonism inside developing countries towards international pressure to improve social standards, particularly in undemocratic regimes.¹⁰⁵ In addition, such concerns can exaggerate the economic production that would be lost with higher labour or human rights standards.¹⁰⁶ More significantly, Northern progressives often are legitimately concerned about the negative effects of liberalized trade on vulnerable groups and on regulatory standards in the North.

As Rodrik notes, supporters of the trading order have been able to cast the claims of Northern progressives and developing countries as being in conflict. In response to demands from developing countries for better trade access to Northern markets, the reply is that the unilateral trade remedy laws, sectoral exceptions (in particular, for agriculture), and permitted subsidies that favour the North are necessary political compromises required to make politically feasible even the imperfect access that developing country exporters currently have in Northern markets.¹⁰⁷ In response to calls from progressive groups for regulation of social standards inside the WTO, the counter from the trade orthodoxy is that this stance is protectionist and particularly harmful to developing countries for whom trade is the main mechanism for promoting development and escaping dependence.¹⁰⁸

¹⁰¹ See www.forumsocialmundial.org.br (last accessed 20 February 2003).

¹⁰² See www.tninside.org.sg (last accessed 20 February 2003); www.ourworldisnotforsale.org (last accessed 20 February 2003).

¹⁰³ In this respect, it remains potentially problematic that the bulk of international NGOs are based in or have strong connections to the North; see e.g. Sikkink and Smith, ‘Infrastructures for Change: Transnational Organizations, 1953–93’, in S. Khagram, J. Riker and K. Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (2002).

¹⁰⁴ See e.g. Bhagwati, *supra* note 74; Krugman, *supra* note 4.

¹⁰⁵ Keck and Sikkink, *supra* note 16, at 124–125.

¹⁰⁶ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade* (1996).

¹⁰⁷ For explorations of this ‘public choice’ model of US trade remedy law, see Sykes, ‘Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’, 58 *U. Chi. L. Rev.* (1991) 255; Stephan, ‘Barbarians Inside the Gate: Public Choice Theory and International Economic Law’, 10 *Am. U. J. Int’l L. & Pol’y* (1995) 745.

¹⁰⁸ President George W. Bush, G-8 Summit, Genoa, 22 July 2001: ‘People are allowed to protest, but for those who claim they’re speaking on behalf of the poor, for those who claim that shutting down trade will benefit the poor, they’re dead wrong.’; *The Globe and Mail*, 22 July 2001, B1; Krugman, *supra* note 4; ‘Anti-Capitalist Protest: Angry and Effective’, *The Economist*, 23 September 2000, 85 at 87.

The sense that the current international trade regime achieves a practical 'balance' between the concerns of North and South insulates trade regime bureaucrats and other insiders from engaging with the valid criticisms concerned with non-trade objectives and development in developing countries.¹⁰⁹ The tension between progressive agendas in the South and North is also a challenge for the social movements associated with anti-globalization protests, especially as these movements attempt to generate a positive vision of an alternative path for the international trade regime.¹¹⁰

B The Problem of Protectionist Motives in Recent Efforts to Integrate Social Rights Concerns in the Trade Regime

In the context of deeper economic integration in the European Union, social rights concerns have been more fully addressed, including through harmonization of social policies and accession to the European Convention on Human Rights.¹¹¹ However, the achievement of greater social coordination in the EU may depend on particular conditions such as the fewer number of member states, the narrower range of development and domestic policy variation among its members, and the assistance provided to less developed members to soften the social impact of economic integration. Other regional trade areas, such as the NAFTA, have only limited provisions to address social policy concerns.¹¹² In the discussions concerning a Free Trade Area of the Americas at Quebec in 2001, for example, the discussion of human rights was confined to a 'democracy' clause that would permit states to limit access to any preferential trade arrangement if another state failed to meet certain democratic standards.¹¹³

In the WTO context, efforts to include linkages between the trade regime and social rights have been unsuccessful. In the Uruguay Round and its immediate aftermath, the major focus of progressives in the North was the inclusion of a social clause that would allow for sanctions of violations of certain social rights, especially labour rights.¹¹⁴ The social clause was strongly opposed by many developing countries, and this resistance was reflected in the WTO's 1996 Singapore Ministerial Declaration.¹¹⁵ The Declaration asserts that economic development fostered by increased trade liberalization will promote high labour standards, and that labour standards should not be used for protectionist purposes and must 'in no way put into question' the

¹⁰⁹ On the 'pragmatism' of international economic law fields, see Kennedy, 'The International Style in Postwar Law and Policy' (1994) *Utah L. Rev.* 7 at 20–25; Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden J. Int'l L.* (1999) 9 at 25–27.

¹¹⁰ For one effort by a leading NGO to articulate alternatives, see Oxfam, *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight against Poverty* (2002).

¹¹¹ Garcia, *supra* note 10, at 61.

¹¹² See Smith, 'NAFTA and Human Rights: A Necessary Linkage', 27 *U.C. Davis L. Rev.* (1994) 793.

¹¹³ Summit of the Americas, Declaration of Quebec City, 22 April 2001, para. 5; Organization of American States, Inter-American Democratic Charter, 11 September 2001, Article 19.

¹¹⁴ On the social clause, see Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)' in Bhagwati and Hudec, *supra* note 10; Blackett, *supra* note 10.

¹¹⁵ WT/MIN(96)/DEC/W, 13 December 1996, para. 4.

comparative advantage of countries.¹¹⁶ The Declaration left it to other institutions, particularly the ILO, to promote and develop social concerns. This result clearly reflected the tension between the negotiating positions of Northern progressives and developing countries, a tension that also significantly contributed to the failures at Seattle.¹¹⁷

Other institutions have proceeded with more limited objectives concerning the social dimensions of economic globalization. For example, the ILO has articulated an international agenda of core labour rights. However, the ILO agenda is focused on relatively few rights, has weak enforcement, and echoes the Singapore Declaration with respect to non-interference with comparative advantage in trade.¹¹⁸ Similar concerns characterize initiatives such as the UN Global Compact.

C *The Insights of International Social Rights Law*

International economic and social rights law, most specifically associated with the UDHR and the ICESCR,¹¹⁹ offers insights for thinking through the problem of trade/non-trade overlap and the problem of protectionist motives. These insights flow from the multilateral nature of international human rights law and from the distinctive conceptual understandings developed in that law. The ICESCR and other international human rights conventions do not offer the perfect solution for the trade regime. Rather, these international conventions offer a starting point for realistic and normatively defensible ways to address the impact of trade law on social concerns.

1 *Multilateral Regime*

Most obviously, the multilateral nature of the international human rights regime partially protects against protectionist motives.¹²⁰ The standards, definitions, associated reports and general comments associated with the multilateral human rights conventions help to control against unilateral claims of human rights violations by powerful state and non-state actors. A multilateral institution may also better protect less-powerful states than would bilateral relations.

Given the importance of sovereign consent to the legitimacy of international law,¹²¹ the status of the ICESCR and ICCPR as international treaties offers an interpretive basis to legal actors that is lacking in simple policy arguments about social concerns. Treaties such as the ICESCR may be relevant to trade disputes even where some WTO parties are not parties. For example, while the United States is not a party to the

¹¹⁶ *Ibid.*

¹¹⁷ Summers, 'The Battle in Seattle: Free Trade, Labor Rights, and Societal Values', 22 *U. Penn. J. Int'l Econ. L.* (2001) 61.

¹¹⁸ See e.g. *ILO Declaration on Fundamental Principles and Rights at Work*, *supra* note 7, para. 5, which stresses that 'labour standards should not be used for protectionist trade purposes' and that 'the comparative advantage of any country' should not be challenged by the Declaration.

¹¹⁹ Although this article focuses on the ICESCR, the interdependence of international human rights is emphasized by the Vienna Declaration, *supra* note 25, para. 5.

¹²⁰ See e.g. Bhala, 'Mrs. Watu: Seven Steps to Trade Sanctions Analysis', 20 *Mich. J. Int'l L.* (1999) 565 at 591–593.

¹²¹ Especially in the context of South-North relations, see e.g. Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599.

ICESCR,¹²² a WTO panel could still consider whether sanctions that the United States imposes are justified because the targeted country's regulations fail to meet its ICESCR obligations.

In substance as well, treaties such as the ICESCR specifically conceive of economic and social rights obligations as having a multilateral character. Under Article 2, each state party 'undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources' towards the progressive realization of the rights in the Covenant.¹²³ This provision clearly recognizes the importance of the international context for the achievement of economic and social rights, for example through the provision of foreign assistance. More generally, it problematizes the use of trade sanctions as a tool for achieving economic and social rights, in that such sanctions may themselves limit the resources available to any state to achieve international standards. It also highlights that not only states are responsible for economic and social rights, but also international institutions.¹²⁴ Institutions such as the WTO should be sensitive to the end objective of promoting the economic and social rights of the populations of all of its member states and such institutions should focus on the effect of their rules and rulings on the achievement of these rights.¹²⁵

2 Contextual Analysis

Partly because of its multilateral genesis, international social rights law also offers a sophisticated understanding about the economic contexts for the promotion of human rights.¹²⁶ For example, Article 2 of the ICESCR provides for progressive realization of rights, indicating an awareness of how protective standards may need to be related to limited resources.¹²⁷ In the trade context, this would suggest that unilateral sanctions, for example, are problematic where they sanction domestic violations of social rights without sensitivity to resources available to the sanctioned state.

The ICESCR is also contextual in that it recognizes that there are a variety of means and policies for achieving social rights. The covenant does not dictate, for example, a particular vision of the role of government in social service provision. This is important given that a single definition of the proper means to achievement of social policy would be inconsistent with a pragmatic understanding of the multilateral trading regime as an 'interface' among societies with different forms of domestic

¹²² US antagonism towards multilateralism has created problems for its espousal of human rights abroad; see Smith, *supra* note 112.

¹²³ ICESCR, Article 2(1).

¹²⁴ ICESCR, Article 23 provides that achievement of economic and social rights includes methods such as the conclusion of conventions.

¹²⁵ See Alston, *supra* note 62, at 30. Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference, *supra* note 64.

¹²⁶ In this respect, international social rights law complicates claims that human rights and trade discourses present a fundamental difference between deontological and utilitarian normative traditions; see Garcia, *supra* note 10, at 63–76.

¹²⁷ Article 2(1) provides that a state party to the Covenant is obligated to take steps to achieve the rights in the ICESCR 'to the maximum of its available resources'.

political and economic organization.¹²⁸ Such a contextual approach to social policy would problematize rigid application of a ‘normal’ role for government participation and expenditure, for example, in alleged claims of subsidization by trading partners.¹²⁹

It is important, however, to note that the contextual approach does not permit the endless deferral of economic and social rights obligations by developing countries. The Committee on Economic, Social and Cultural Rights has emphasized that ICESCR obligations are immediate and binding. Provisos such as ‘taking steps’, ‘to the maximum of its available resources’, or ‘by all appropriate means’ are not an excuse for inaction.¹³⁰

3 *Market Policies as Potential Violations of Social Rights*

The international economic and social rights regime focuses not only on the consequences for human rights of governmental policies, but also on the gaps in, or lack of, government policies. This focus on consequences for individual rights means, for example, that domestic policies that promote market reforms might have the effect of violating social and economic rights.¹³¹ While a state is free to choose policies that are oriented towards market reforms and that may lessen the role of government, the mix of policies should not have the effect of threatening the achievement of social rights.¹³² Under this framework, acquiescence or failure to address harm to the social or economic rights of individuals may be as significant a problem as active governmental threats to rights.¹³³ International social and economic rights law also clearly recognizes the problems with the distinction between positive and negative rights.¹³⁴ State responsibility for human rights violations extends to policies that fail to adequately protect the social rights of individuals from non-state actors.¹³⁵ Government laws and policies are understood to construct the terrain of the market and of market actors. Social rights concepts also comprehend the role of state actors in

¹²⁸ For an articulation of an ‘interface’ conception of the world trading system, see Jackson, *supra* note 76, at 248–249, 331–332. This conception can be contrasted with the narrow set of policy prescriptions, including with respect to trade and financial liberalization, viewed as ‘best practices’ by institutions such as the IMF; see e.g. Stiglitz, *supra* note 45, chapter 3.

¹²⁹ Tarullo, *supra* note 78; see General Comment 3, *supra* note 63, para. 8.

¹³⁰ General Comment 3, *supra* note 63, para. 9, states that the ICESCR ‘imposes an obligation to move as expeditiously and effectively as possible’ towards the realization of the rights in the Covenant. The Comment also notes at para. 10 that: ‘In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’

¹³¹ Garcia, *supra* note 10, at 53, n. 6, citing J. Donnelly, *Universal Human Rights in Theory and Practice* (1989) at 64.

¹³² Donnelly, *supra* note 69, at 151–154. State parties to the ICESCR undertake realization of the rights ‘by all appropriate means’; Article 2(1).

¹³³ This may require legislative action by state parties; see General Comment 3, *supra* note 63, para. 3.

¹³⁴ E.g. H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd ed., 1996) at 35–40.

¹³⁵ E.g. Committee on Economic, Social and Cultural Rights, ‘The Right to the Highest Attainable Standard of Health’, General Comment 14, UN Doc. E/C.12/2000/4, paras 49 and 51.

regulating private actor conduct that hampers the realization of human rights. For example, privatization of services may constitute a threat to social rights.¹³⁶

4 *The Social Rights Expertise of Other International Institutions*

In addressing contextualization and international obligations, the institutional expertise and experience of the international human rights regimes can be helpful in the trade context. While the General Comments and state reports of the Committee on Economic, Social and Cultural Rights and of the Human Rights Committee may not be binding on the WTO, these reports can provide careful studies of the current state of economic and social rights in different jurisdictions.¹³⁷ Because of their multilateral character, these reports and recommendations may provide a basis for reconciling some disagreements in the trading order between North and South about acceptable levels of social standards. Similarly, the work of specialized international organizations, such as the ILO or the World Health Organization, may provide the kind of multilateral, specialized and contextualized analysis of social regulation that would assist actors in the trade regime to reconcile different claims about 'unfairly low' social standards. More generally, a dialogue with other international institutions engaged in social policy may help to reframe and refine efforts within the WTO to address criticism from both the North and the South about its rules and rulings.¹³⁸

5 **Countering in Treaty Interpretation**

Even without reforms to the WTO treaties, such as the inclusion of a social clause, international economic and social rights can be an effective tool, and may be appropriately deployed, in a 'countering' strategy. Countering in this context would involve the use of international social rights as part of a corrective or countervailing strategy in the interpretation and application of existing international trade agreements. The objective is not the direct enforcement of international human rights through the international trade regime. Rather, social rights would be deployed to counter or complicate excessive claims made for liberalized trade under the existing WTO agreements. This section also explores how a consideration of international social rights could restore some balance to the spread of rights discourse in trade law.

A International Human Rights Law and the Interpretation of International Trade Treaties

The countering use of social rights would see trade tribunals consider international human rights law such as the UDHR and the ICESCR in the course of WTO treaty interpretation and application.¹³⁹ Several commentators have argued that general international law should be referred to in interpreting the provisions of trade

¹³⁶ *Ibid.* paras 35, 42, 43.

¹³⁷ More controversially, monitoring for social rights concerns might occur through the WTO's Trade Policy Review Mechanism; see e.g. Oxfam, *supra* note 110, at 205.

¹³⁸ See the discussion of jurisdictional gaps in UNDP, *supra* note 65, at 83–85.

¹³⁹ See Howse and Mutua, *supra* note 10.

treaties.¹⁴⁰ The WTO Appellate Body has made some cautious use of international law in the interpretation of the trade treaties.¹⁴¹ Such a practice might seem like illegitimate ‘legislation’ by tribunals to include what was blocked at the level of treaty negotiation. From another view, however, tribunals should turn to the context of general international law in order to address the inevitable complexity of treaty interpretation and application, and by doing so avoid problematic one-sided decisions that would be contrary to the general values of international society as expressed in international law.

Trade treaties, like other legal texts, are frequently open-textured and full of gaps and ambiguities. An entity charged with interpreting such texts, most obviously in the application of the treaty to actual disputes, must find a way to deal with these gaps and ambiguities.¹⁴² One technique, it is argued, should be attention to other rules of international law. The treaty foundation for this is Article 3:2 of the Dispute Settlement Understanding, which directs panels to consider the ‘customary rules of interpretation of public international law’.¹⁴³ The Appellate Body has turned to the Vienna Convention on the Law of Treaties, in particular Articles 31 and 32, to clarify the contents of these customary rules.¹⁴⁴ Advocates of the use of broader principles of international law further focus on Article 31(3)(c), which provides that ‘relevant rules of international law applicable in the relations between parties’ shall be taken into account together with context.¹⁴⁵

The Vienna Convention is the only international treaty that has been discussed by WTO panels as though it were directly applicable to WTO dispute settlement. To some scholars, this focus on the Vienna Convention suggests a limited role for ‘substantive’ international law at the WTO.¹⁴⁶ However, WTO panels have tentatively referred to other international law treaties in the course of their decisions, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora

¹⁴⁰ See references *supra* note 10; Palmetier and Mavroidis, ‘The WTO Legal System: Sources of Law’, 92 *AJIL* (1998) 4; Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAS and Other Treaties’, 35 *J. World Trade* (2001) 1081; Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, 95 *AJIL* (2001) 535.

¹⁴¹ E.g. *Japan — Alcoholic Beverages*, *supra* note 42. For the view that Appellate Body members may be concerned with broader legitimacy rather than simply trade promotion, see Behboodi, ‘Legal Reasoning and International Law of Trade: The First Steps of the Appellate Body under the WTO’, in P. Mengozzi (ed.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (1999) 303.

¹⁴² Trachtman, ‘The Domain of WTO Dispute Resolution’, 40 *Harv. Int’l L.J.* (1999) 333. These gaps make possible a shift of significant substantive issues in a ‘move to interpretation’; see Skouteris, ‘Customary Rules of Interpretation of Public International Law and Interpretative Practices in the WTO Dispute Settlement System’ in Mengozzi, *supra* note 141, at 113.

¹⁴³ Dispute Settlement Understanding, Article 3:2.

¹⁴⁴ E.g. *Japan — Alcoholic Beverages*, *supra* note 42, at 10.

¹⁴⁵ Article 31(3)(c). In this connection, the Panel in *Korea — Measures Affecting Government Procurement*, WTO/DS163/R, Report of the Panel, 19 June 2000, at para. 7.96, observed that the relationship of the WTO agreements to customary international law is broader than just the rules of interpretation, and that ‘[c]ustomary international law applies generally to the economic relations between WTO members’. See Pauwelyn, *supra* note 140, at 543.

¹⁴⁶ See e.g. Trachtman, *supra* note 142.

(CITES)¹⁴⁷ and the Convention Concerning Safety in the Use of Asbestos.¹⁴⁸ Although not discussed as if directly binding, these references suggest that a broader consideration of international law is possible. Greater sensitivity to the relationship of the trade regime to other areas of international law is perhaps indicated by recent appointments to the seven-member Appellate Body, which have included several generalists with broad international law training and experience, including a leading expert in public international law, Georges Abi-Saab.¹⁴⁹

There are several additional reasons for an interpretive turn to international law related to economic and social rights. First, Article XXIX:1 of the GATT provides that contracting parties are to observe the general principles of various provisions of the Havana Charter.¹⁵⁰ In particular, Article 7(1) provides that states are to recognize that in measures related to employment, states must 'take fully into account the rights of workers under inter-governmental declarations, conventions and agreements'.¹⁵¹ Further evidence of an intention for decision-making panels under the GATT to consider issues of social rights may be found in the provisions of Article XXIII:2, which provide that when the GATT investigates and makes recommendations with respect to claims of nullification and impairment, they may consult with the Economic and Social Council of the UN and with appropriate intergovernmental organizations.¹⁵² Some writers have observed that this provision would also facilitate consultation of the WTO with relevant international organizations, such as the ILO or WHO.¹⁵³

Whether and how the Dispute Settlement Body should consider international law is contested.¹⁵⁴ This article does not focus on whether a panel is legally bound to consider international human rights law. Rather, I try to show why consideration of international social and economic rights norms in WTO interpretation and application can enrich a vision of the international trade regime that is narrowly focused on policy goals of trade facilitation. In addition, where treaties such as the TRIPS Agreement or Chapter Eleven of the NAFTA already institute 'a human rights treaty

¹⁴⁷ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998 [hereinafter *United States — Shrimp*] at para. 132.

¹⁴⁸ ILO Convention 162, adopted on 24 June 1986; *EC — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, Report of the Panel, 18 September 2000, at paras 8.210, 8.295, 8.298.

¹⁴⁹ 'WTO Appoints New Appellate Body Members', WTO Press/246; 25 September 2001; 'WTO Completes Appointment of AB Members', WTO Press/179, 25 May 2000.

¹⁵⁰ See Leary, *supra* note 114, at 197–199; Charnovitz, 'The Influence of Labour Standards on the World Trading Regime: A Historical Overview', 126 *Int'l Labour Rev.* (1987) 565.

¹⁵¹ See Alston, *supra* note 36, at 172–173. Article 7(1) of the Havana Charter further provides that

The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

Final Act and Related Documents, United Nations Conference on Trade and Employment, Havana, Cuba, 21 November 1947–24 March 1948, UN Doc. ICITO/1/4 (1948).

¹⁵² GATT Article XXIII:2.

¹⁵³ See Leary, *supra* note 114, at 194–195. For the significance of this kind of dialogue among different international organizations, see Scott, 'Towards the Institutional Integration of the Core Human Rights Treaties', in V. Oosterveld and I. Merali (eds), *Giving Meaning to Economic, Social and Cultural Rights* (2001).

¹⁵⁴ See Alvarez, *supra* note 27.

for a special interest group', a consideration of the impact of such claims on the rights of other actors seems appropriate.¹⁵⁵ While some commentators may wish that all such rights discourse was removed from international trade regulation, the second-best alternative surely is for panels to be sophisticated in considering the context for the interpretation and application of rights discourse.

B International Social Rights and the Contingent Protectionism of Unilateral Trade Sanctions

1 Sanctions and GATT Interpretation

The most commonly discussed use of international economic and social rights as a potential interpretive tool would authorize what was anticipated in the social clause with respect to the trade treatment of unilateral trade sanctions.¹⁵⁶ Trade panels would not directly monitor social regulation or protection in any country, but trade treaties would permit individual members to restrict imports from trading states that were considered to be in violation of certain social standards. In this sense, it is argued that where trading partners abuse human rights, states should be permitted to engage in contingent protectionism,¹⁵⁷ as they are currently permitted to do (with some substantive and procedural limitations) with respect to problematic practices of trade partners such as dumping or subsidization.

Several WTO-GATT treaty provisions could, when informed by a consideration of international social and economic rights, be used by panels to authorize sanctions as a form of permitted protectionism. First, weak social standards could be characterized as dumping or subsidization, which would permit retaliation through anti-dumping or countervailing duties. The WTO-GATT framework for anti-dumping permits retaliation by individual members against goods imported at prices below fair value that are causing material injury to domestic producers. Social dumping analysis would extend the definition of dumping to goods that are internationally competitive only because produced, for example, through labour practices that violate international human rights. Similarly, weak social legislation that permits violations of human rights could constitute a subsidy as a form of 'financial contribution' made by a foreign government to its producers, and so be subject to countervailing duties where the practice materially injures domestic producers.¹⁵⁸ Both these 'social dumping' claims argue for use of trade remedy laws to address problems of regulatory competition and 'unfair trade'. International treaties, such as the ILO conventions or the ICESCR, could be used to articulate when social regulation is so weak as to be considered to be dumping or subsidization.

¹⁵⁵ Alvarez, *supra* note 49.

¹⁵⁶ See e.g. Stirling, 'The Use of Trade Sanctions as Enforcement Mechanisms for Basic Human Rights: A Proposal for Addition to the World Trade Organization', 11 *Am. U. J. Int'l L. & Policy* (1996) 1; McGee, 'Trade Embargoes, Sanctions and Blockades: Some Overlooked Human Rights Issues', 32 *J. World Trade* (1998) 139. More generally, see G. C. Hufbauer *et al.*, *Economic Sanctions Reconsidered* (2nd ed., 1990).

¹⁵⁷ See e.g. 'Policy Forum: Contingent Protectionism', 105 *Economic Journal* (1995) 1548, in particular, Tharakan, 'Political Economy and Contingent Protectionism', 105 *Economic Journal* (1995) 1550.

¹⁵⁸ GATT Articles VI and XVI; Agreement on Subsidies and Countervailing Measures, 15 April 1994. See ILO, 'The Social Dimensions of Liberalization of World Trade', *Working Party Paper*, ILO Doc. GB.261/WP/SLD/1 (1994); discussed in Leary, *supra* note 114, at 193–196.

A second potential use of international economic and social rights law within the GATT could be in the articulation of the non-discrimination standards of Articles I and III. With respect to the Most Favoured Nation and National Treatment provisions, panels face the often difficult issue whether imported and domestic goods are 'like products', for which WTO members must provide non-discriminatory treatment. It is argued that goods should not be considered like products where either the products themselves or, more controversially, the processes by which the products are produced violate standards articulated in international treaties, for example the protection of endangered species under the CITES.¹⁵⁹ For example, goods produced through unfair labour practices in violation of international human rights standards — such as the exploitation of child labour in violation of Article X:3 of the ICESCR — should not be treated as like products to goods not so produced, and thereby not entitled to the non-discrimination treatment of Articles I and III.

A third, and most discussed, potential use of international economic and social rights law would be in the application of GATT Article XX exceptions to permit unilateral measures that would otherwise violate the GATT.¹⁶⁰ A number of the Article XX exceptions, notably Article XX(e) with respect to products of prison labour,¹⁶¹ overlap with concerns of international human rights law. International social rights might help articulate the purposes listed in exceptions such as Article XX(a) 'public morals'¹⁶² or Article XX(b) 'human, animal or plant life or health'.¹⁶³ In addition, protection of international social rights might ease the proportionality assessment of any specific measure under the limiting words of each paragraph of Article XX or under the opening words (the chapeau) of Article XX.¹⁶⁴ The existence of an international social rights treaty relevant to the particular measure might also signal that a state had adequately considered international cooperation, a significant concern in a number of panel determinations of Article XX proportionality.¹⁶⁵

Although early cases on Article XX exceptions were not encouraging in the use of international law in this way,¹⁶⁶ more recent cases offer more hope. The *Shrimp-Turtle* decision of the Appellate Body, for example, referred to international treaties on a number of issues,¹⁶⁷ although it concluded that the manner in which the US

¹⁵⁹ See Howse and Regan, 'The Product/Process Distinction — An Illusory Basis for Restraining "Unilateralism" in Trade Policy', 11 *EJIL* (2000) 249.

¹⁶⁰ See e.g. Howse and Mutua, *supra* note 10, at 9–10.

¹⁶¹ See e.g. Declaration on Fundamental Principles and Rights at Work, *supra* note 7, and such ILO conventions as Convention (No. 29) Concerning Forced or Compulsory Labour, 1930.

¹⁶² See Feddersen, *supra* note 10.

¹⁶³ As was done by reference to the WHO in *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, 37 BISD (1990) 200, at para. 73 [hereinafter *Thailand — Cigarettes*].

¹⁶⁴ See Garcia, *supra* note 10, at 91–95, and in particular, at 94–95, arguing to soften somewhat the 'least trade-restrictive alternative' interpretation of the 'necessary' requirements of sections such as Article XX(b). For a menu of different trade-off standards, see Trachtman, *supra* note 83.

¹⁶⁵ E.g. *United States — Shrimp*, *supra* note 147.

¹⁶⁶ E.g. *United States — Restrictions on Imports of Tuna*, Unadopted Report of GATT Panel, 39 BISD 155 (1993); *United States — Restrictions on Imports of Tuna*, Unadopted Report of GATT Panel, DS29/R, 33 ILM 839 (1994).

¹⁶⁷ *United States — Shrimp*, *supra* note 147, at paras 130, 132, 135, 154, and 168; see Howse and Regan, *supra* note 159.

measures were administered constituted unjustifiable and arbitrary discrimination under the chapeau of Article XX for reasons including that there were better multilateral alternatives and that the details of the programme were more trade restrictive and discriminatory than necessary for an effective programme.¹⁶⁸ In a subsequent implementation ruling under Article 21.5 of the Dispute Settlement Understanding, the panel accepted that changes to the US programme, including good faith efforts to negotiate an accommodation with the complainants, were adequate to bring the programme in line with WTO requirements.¹⁶⁹ That broader considerations of international law and efforts at international cooperation might become increasingly relevant to evaluation of Article XX is further suggested by the Appellate Body decision in *EC — Asbestos*, in which French import bans on asbestos were successfully justified before the Appellate Body as necessary to the protection of human life and health under Article XX(b).¹⁷⁰ To some observers, this first successful use of XX(b) to justify a trade restriction directed towards human health is an indication that the WTO is inching towards better accommodation of non-trade objectives under Article XX.¹⁷¹ In furthering that advance, the existence of multilateral treaties, including international human rights treaties supporting those objectives, may be useful.

2 *The Problems of Sanctions from a Social Rights Perspective*

Although international economic and social rights concerns could justify sanctions in some contexts, viewing sanctions from a perspective informed by human rights also highlights a number of policy problems with their use.¹⁷²

The use of international economic and social rights law in the oversight of unilateral sanctions by WTO dispute panels could help to ensure that the definition and interpretation of the rights to be protected, as well as the permitted trade sanction, would be based on international rather than domestic standards. Similarly, the interpretations developed by the international institutions responsible for the articulation of international human rights — such as the Committee on Economic, Social, and Cultural Rights in the economic and social rights context or the ILO in the labour context — would help to refine what was permitted at the multilateral level. In this way, reference to international standards may provide the discipline necessary to control problems of protectionist motives and the notoriously malleable determinations of what is ‘pricing below fair value’ so as to constitute dumping or what sorts of ‘financial contribution of government’ constitute a subsidy.¹⁷³

¹⁶⁸ *Ibid.*, paras 158–186.

¹⁶⁹ *United States — Import Prohibition of Certain Shrimp and Shrimp Products — Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, Report of the Appellate Body, 22 October 2001.

¹⁷⁰ *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, Report of the Appellate Body, 12 March 2001.

¹⁷¹ See e.g. Weinstein and Charnovitz, ‘The Greening of the WTO’, 80 *Foreign Affairs* (2001) 147.

¹⁷² See Committee on Economic, Social and Cultural Rights, ‘The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights’, General Comment 8 (1997), UN Doc. E/C.12/1997/8.

¹⁷³ Tarullo, *supra* note 78.

Even with the use of international social rights law, there remain formidable problems with the use of unilateral trade sanctions. Sanctions pose a significant risk of overbreadth, sweeping in production that has not been advantaged by the lack of adequate social standards or basic protection of human rights. WTO oversight of sanctions imposes on states facing protectionist measures the obligation to challenge such measures at the WTO, which involves time, cost and substantial uncertainty. In addition, permitting unilateral sanctions means that the powerful economies to which access is required for any trading country would be the ones making the initial decisions about what to permit or not to permit. These logistical concerns are more serious given that the jurisprudence on the interpretation and application of the ICESCR is still developing.¹⁷⁴

Most significantly, the use of unilateral sanctions, even with oversight by the WTO, may cause as much harm to economic and social rights in the sanctioned country as the state measure that is the putative target for the sanctions. First, the targets of sanctions tend to be those countries most in need of trade access and development assistance. The economic and social rights literature emphasizes the sensitivity required with respect to available resources, resources that would be reduced by denial of trade access. Sanctions often have a direct negative impact on such basic social rights as the right to food, health, education and work.¹⁷⁵ Moreover, in provisions such as Article 2(1), parties to the ICESCR have agreed to take steps, including through international assistance and cooperation, to progressively achieve the full realization of the rights in the Convention.

Sanctions may be valuable to progressive change because of their longer-term impact in either coercing or providing incentives for social change,¹⁷⁶ or in constituting and structuring domestic and transnational oppositional networks.¹⁷⁷ It still appears, however, that successful sanctions regimes have required both support from impacted local groups within a society, and broader international action that includes multilateral, bilateral and non-governmental support.¹⁷⁸

Strategies more consistent with international human rights law may instead involve less punitive assistance including 'deals', as will be discussed below, in which the social rights protected and the mechanisms for their protection are refined and, perhaps, narrowed, to address developing countries' concerns.¹⁷⁹

¹⁷⁴ This is not to argue that there is not an increasingly helpful and determinate set of interpretations from the Committee, through its country reports, annual reports and General Comments. Rather, the concern is that the current state of interpretation of the ICESCR might be abused in the context of unilateral sanctions.

¹⁷⁵ See General Comment 8, *supra* note 172, para. 3.

¹⁷⁶ E.g. Chang, 'An Economic Analysis of Trade Measures to Protect the Global Environment', 83 *Georgetown L.J.* (1995) 2131.

¹⁷⁷ See Hulbauer, *supra* note 156; Crawford and Klotz, *supra* note 99.

¹⁷⁸ See e.g. A. Klotz, *Norms in International Relations: The Struggle against Apartheid* (1995).

¹⁷⁹ See e.g. J. Bhagwati, *The Wind of the Hundred Days: How Washington Mismanaged Globalization* (2000), chapter 14.

C ‘Defensive’ Countering through Social Rights: Framing the Concern for Social Protection of High Domestic Regulatory Standards in New Areas of Trade Regulation

A second countering use for international social rights law in the interpretation of existing trade laws focuses not on justifying unilateral sanctions, but rather on a more ‘defensive’ use of international social rights law in analysis of claims in new areas of trade law such as investment and intellectual property. This use of international human rights law is not well articulated in the trade literature or by trade panels, but may become increasingly important as the trade regime expands its scope in new areas. The countering use of international social rights is also less controversial from a South-North perspective than the authorization of unilateral sanctions discussed in the previous section. In essence, this strategy of countering deploys international social rights as a ‘shield’ rather than as a ‘sword’.

From a social and economic rights perspective, the expansion of international trade regulation into subjects such as intellectual property (under the TRIPS Agreement), services (under the GATS), and investment (under the Uruguay Round Agreement on Trade-Related Investment Measures, but also under bilateral investment treaties and regional treaties such as Chapter Eleven of the NAFTA) raise significant problems related to how national social regulations can be reconciled with providing market access for foreign producers. These trade provisions tend to impact on a number of sectors related to social and economic rights, such as health, education, law, communications, and finance. Relevantly, these are sectors of substantial governmental regulation and where states are often themselves significant economic actors and service providers.

Rights discourse is important in these new areas of trade regulation. This is most obvious in the TRIPS Agreement, which is filled with detailed provisions concerning intellectual property ‘rights’. The protection of intellectual property in international trade rests on more controversial policy foundations than does the protection of free trade in goods. The justification for protecting intellectual property depends on a difficult balance between providing adequate incentives for intellectual property (IP) producers and ensuring access to the benefits of the IP for users, as well as encouraging further innovation and competition.¹⁸⁰ Further policy justifications for IP often analogize to property ownership in order to make claims that violation of IP rights are equivalent to piracy or stealing. However, such claims are contestable for distributional reasons and because of the failure to acknowledge that innovations draw heavily on social knowledge and resources.¹⁸¹ The contested policy balance between incentives and anti-competitive monopolies and the indeterminate line between fair use and stealing is still more difficult in a cross-cultural and international environment.¹⁸²

In this context, rights discourse plays an important role. As with all the WTO agreements, the TRIPS Agreement is an agreement among states, and only states can

¹⁸⁰ Trebilcock and Howse, *supra* note 35, chapter 12.

¹⁸¹ See J. Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996).

¹⁸² See W. Alford, *To Steal a Book Is an Elegant Offense* (1995).

make complaints for violations of the TRIPS Agreement. But member states agree to implement certain, often specific, kinds of domestic substantive¹⁸³ and procedural¹⁸⁴ protections for private party holders that are more extensive than under existing international intellectual property agreements. This amounts to the creation of specific and justiciable rights for individual rights holders. For example, member states are required to provide some form of injunctive relief and damages¹⁸⁵ and to provide a customs process with respect to counterfeited or pirated goods.¹⁸⁶

The impact of protection of IP rights on international economic and social rights concerns has been identified in a number of areas. For example, protection of IP rights affects such human rights concerns as the right to food, the right to share in cultural and scientific advancement, and the rights of indigenous and other communities to self-determination and to benefit from traditional and communal knowledge.¹⁸⁷ Most prominently, application of provisions like the 20-year patent protection to essential medicines has been argued to threaten the ability of developing states to respond effectively to public health emergencies, such as HIV/AIDS, and thereby the right to health of impacted populations.¹⁸⁸

The relevance of international economic and social rights to trade adjudication was highlighted when, in 1997, the South African government became concerned with the cost and availability of various medicines, in particular HIV/AIDS drugs, and amended patent legislation that had been passed at least partly to implement TRIPS obligations.¹⁸⁹ The amendments included provisions to permit parallel importation of medicines from third countries, generic substitutions without consent and compulsory licensing. In addition to threats of a WTO complaint, the South African government faced bilateral pressure from the United States, including threats of unilateral trade action under Section 301 of the US Trade Act.¹⁹⁰ Pharmaceutical companies also filed suit in South African courts arguing that the legislation was invalid for a number of reasons, including violations of the South African Constitution

¹⁸³ Most controversially, the 20-year term for patent protection; TRIPS Agreement, Article 33.

¹⁸⁴ TRIPS Agreement, Part III.

¹⁸⁵ TRIPS Agreement, Articles 44(1) and 45.

¹⁸⁶ TRIPS Agreement, Article 51.

¹⁸⁷ See Sub-Commission on the Promotion and Protection of Human Rights, 'Intellectual Property Rights and Human Rights', UN Doc. E/CN.4/Sub.2/2000/7; Statement by the Committee on Economic, Social and Cultural Rights, 'Human Rights and Intellectual Property', 14 December 2001, UN Doc. E/C.12/2001/15.

¹⁸⁸ See Sub-Commission on the Promotion and Protection of Human Rights, 'The Impact of the Agreement on Trade-related Aspects of Intellectual Property Rights on Human Rights', Report of the High Commissioner, UN Doc. E/CN.4/Sub.2/2001/13.

¹⁸⁹ Act 90 of 1997, Medicines and Related Substance Control Amendment Act 1997; see Snyder, 'South Africa's Medicines and Related Substances Control Amendment Act: A Spoonful of Sugar or a Bitter Pill to Swallow', 18 *Dickinson J. Int'l L.* (1989) 175.

¹⁹⁰ 19 USC §2420; see generally R. Bhala, *International Trade Law: Theory and Practice* (2nd ed., 2001), chapter 19.

and violation of international law, in particular the TRIPS Agreement and illegal expropriation under public international law of investment.¹⁹¹

This case demonstrates well how the TRIPS Agreement raises contested issues of treaty interpretation that might be well informed by international human rights law. For example, with respect to IP rights and essential medicines, interpretive ambiguity surrounds the possibility of unauthorized use in situations of ‘national emergency’ or of ‘extreme urgency’.¹⁹² In interpreting such treaty provisions, a WTO panel might usefully refer to international social and economic rights law.

First, to counter the ‘rights’ claims of intellectual property rights holders and the countries that are championing their protection, international human rights treaties could be considered.¹⁹³ States have an obligation under such conventions to protect the right to health¹⁹⁴ as well as the right to security of the person.¹⁹⁵ In other words, health rights holders have as significant a set of rights claims under international law as intellectual property rights holders. Moreover, international treaty provisions that both protect the right to benefit from one’s own scientific, literary and artistic production must be balanced against the right of everyone to share in scientific advancement and its benefits.¹⁹⁶ Identifying competing social rights of identifiable rights holders should help to focus the attention of decision-makers on the serious distributive issues at stake. The introduction of a broader set of social rights would recast the issue as not simply one in which the rights of IP owners should trump the utilitarian considerations of governments. It would clarify the fact that governments are required to balance among different rights and rights holders, and that trade panels should be aware of these balancing requirements in dispute settlement under the TRIPS Agreement.

Second, in interpreting claims to property rights, an international trade panel should be sensitive to limited social resources that informs the international obligations on social and economic rights.¹⁹⁷ For example, in considering whether a government has done what is necessary to get voluntary agreement before compulsory licensing¹⁹⁸ or provide ‘adequate remuneration’¹⁹⁹ under Article 31 of the

¹⁹¹ *In the matter between Pharmaceutical Manufacturers’ Association of South Africa and the President of the Republic of South Africa and others*, Case No. 4183/98; Notice of Claim, 18 February 1998 (High Court of South Africa, Transvaal Provincial Division); see Block, ‘Big Firms Defend Right to Patents on AIDS Drugs in South Africa’, *Wall Street Journal*, 6 March 2001, A3.

¹⁹² TRIPS Agreement, Article 31(b). For a helpful discussion of further interpretive issues, such as the interpretation of the ‘ordre public or morality’ exception in Article 27(2), see Sub-Commission, *supra* note 188, at paras 16–19 and Howse, ‘The Canadian Generic Medicines Panel — A Dangerous Precedent in a Dangerous Time’, 3 *J. World Intellectual Property* (2000) 493.

¹⁹³ Arguments based on international social rights law including the ICESCR were submitted in the South African case by, for example, the *amicus curiae* Treatment Action Campaign; see Heads of Argument on Behalf of Treatment Action Campaign, 17 April 2001, at paras 3.33–3.49.

¹⁹⁴ E.g. ICESCR Article 12; General Comment 14, *supra* note 135; UNDP, *supra* note 65, at 84.

¹⁹⁵ UDHR Article 3; ICCPR, Article 9.

¹⁹⁶ UDHR Articles 27(1) and 27(2); ICESCR Articles 15(1)(b) and 15(1)(c). See UNDP, *supra* note 65, at 84; Committee on Economic Social and Cultural Rights, *supra* note 187, para. 17.

¹⁹⁷ General Comment 3, *supra* note 63.

¹⁹⁸ TRIPS Agreement, Article 31.

¹⁹⁹ TRIPS Agreement, Article 31(h).

TRIPS Agreement, a panel should consider the limited public resources of some states.²⁰⁰

The South African case was withdrawn in the face of resistance of developing country governments and non-governmental actors, and I will return to this example below. But the withdrawal of the South African case removed the chance to test the use of international social rights to counter trade claims. International social rights could plausibly have played a significant countering role in any decision. Social rights are expressly justiciable under the South African Constitution, and recognition of the social rights to life and health of those in need of medicines could have effectively countered the claims for property rights by the drug companies.²⁰¹ Similarly, in considering the TRIPS Agreement, any WTO panel hearing such a claim would consider the countering role that international social rights law provides to explain why such government measures could be justified as consistent with the GATT and the other WTO agreements. Such a linkage of TRIPS concerns to international social rights may also prove useful in future disputes related to such matters as the rights of developing countries to traditional knowledge, concerns about biodiversity, and restrictions on the patenting of life forms and biological processes.²⁰²

D Countering Investment Claims with Social Rights Arguments

The investment context provides a further example of how new kinds of trade commitments might threaten the protection of social rights. The provisions of the Uruguay Round TRIMS Agreement²⁰³ are relatively weak, but various bilateral investment treaties, regional treaties such as Chapter Eleven of the NAFTA, and the failed Multilateral Agreement on Investment (MAI), contain provisions that might be problematic.²⁰⁴ In such contexts, international social rights can play a countering role in treaty interpretation, as well as demonstrating concerns for extending such investment protections beyond the NAFTA.

Chapter Eleven of the NAFTA goes well beyond the WTO provisions in the TRIMS with respect to both substantive protection and complaints procedure. The key procedural feature of Chapter Eleven is that it provides private party access to dispute resolution for investment dispute claims against NAFTA national governments.²⁰⁵

²⁰⁰ For example, such constraints should have been relevant to whether the Thai government could realistically be expected to find a less trade-restrictive means of reducing smoking in *Thailand — Cigarettes*, *supra* note 163; see e.g. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence', in Weiler, *supra* note 79, 35 at 63.

²⁰¹ The South African courts have expressly considered the ICESCR and the General Comments of the Committee in other constitutional cases involving social rights; see *Grootboom v. Oostenberg Municipality* (2000) 3 BCLR 277; Scott and Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise', 16 *S. African J. Hum. Rights* (2000) 206.

²⁰² See Sub-Commission, *supra* note 188; World Bank, *World Development Report 2000/2001: Attacking Poverty* (2000) at 184–185.

²⁰³ Agreement on Trade-Related Investment Measures, 15 April 1994.

²⁰⁴ See Schneiderman, *supra* note 49. See also Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada', 46 *U. Toronto L.J.* (1996) 499 at 523–535.

²⁰⁵ Chapter Eleven, Part B.

Private investors can make various claims under the Chapter to arbitration tribunals set up either under the ICSID Convention or its Additional Facility Rules, or under the UNCITRAL Arbitration Rules.²⁰⁶ In this way, the rights discourse shared with the TRIPS Agreement is transformed into something more: a procedure to permit private parties to themselves make rights claims and receive remedies.

Three substantive provisions of Chapter Eleven of the NAFTA cause particular concern for social activists, who consider the Chapter a kind of ‘human rights treaty’ for a special interest group, business investors.²⁰⁷ First, the National Treatment provisions require NAFTA governments to accord investors and investments from other NAFTA parties ‘treatment no less favourable’ than treatment of domestic investors and investments, with respect to ‘establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments’.²⁰⁸ Although this provision may be onerous, particularly if *de facto* discrimination is broadly covered, the non-discrimination principle is less controversial than two further ‘positive’ standards under the Chapter. Article 1105 provides that NAFTA states shall accord to the investments of investors of NAFTA parties ‘treatment in accordance with international law, including fair and equitable treatment and full protection and security’.²⁰⁹ Article 1110 provides for compensation for direct or indirect expropriations of investments of NAFTA foreign investors or for measures ‘tantamount to nationalization or expropriation’.²¹⁰

The provisions of Chapter Eleven have led to a number of complaints concerning governmental measures, some of which impinge on areas of social rights. One case involved a successful claim for compensation after a Mexican municipality refused zoning for a site intended by a US investor for a hazardous waste facility.²¹¹ Another US investor successfully sought compensation from the Canadian government for Canadian prohibitions on PCB exports that were claimed to negatively prejudice the investor’s PCB waste-processing business.²¹²

There is evidence that debate in Canada on some matters of social policy now operates in the shadow of Chapter Eleven. For example, the threat of Chapter Eleven complaints supported lobbying efforts against Canadian proposals for plain-package regulations for cigarettes.²¹³ In the debate over privatization of health care in certain Canadian provinces, there has been concern about the potential limits that trade

²⁰⁶ Article 1120.

²⁰⁷ Alvarez, *supra* note 49, at 308.

²⁰⁸ Article 1102. Investments are very broadly defined in Article 1139.

²⁰⁹ Article 1105(1).

²¹⁰ Article 1110 also provides that compensation is to be based on fair market value, paid without delay and fully realizable, and freely transferable.

²¹¹ *Metalclad Corp. v. Mexico*, Arbitration Award (30 August 2000). The judicial review of the arbitration award partially reduced the award; *Mexico v. Metalclad Corp.* [2001] B.C.J. No.950 (British Columbia Supreme Court, 2 May 2001).

²¹² *S. D. Myers, Inc. v. Government of Canada*, Partial Award (13 November 2000). See Weiler, ‘A First Look at the Interim Merits Award in *S. D. Myers, Inc. v. Canada*: It Is Possible to Balance Legitimate Environmental Concerns with Investment’, 24 *Hastings Int’l & Comp. L. Rev.* (2001) 173.

²¹³ See Schneiderman, *supra* note 204, at 523–535.

agreements may impose on any efforts to return privatized sectors to the public sector, as foreign private investors in these services might seek compensation for lost profits under Chapter Eleven.²¹⁴

Concerns about the social implications of these private investor complaints have been central to many protests against globalization and the international economic institutions.²¹⁵ The protests against the Multilateral Agreement on Investment focused on investment provisions that were similar to the NAFTA Chapter Eleven.²¹⁶ It has also led Canadian government officials to claim that Canada would resist the inclusion of similar provisions in future regional or WTO agreements.²¹⁷ Even the NAFTA Commission, representing the three national governments, issued an Interpretation on 31 July 2001 indicating that (a) Chapter 11 rulings would be made public, and that (b) the substantive protections provided by Article 1105 did not go beyond what was already included in international law.²¹⁸

In structure, investment treaty claims are not substantially different from claims made under domestic constitutional or expropriation laws. Critics note the potential negative impact of such agreements on domestic social policies. For example, Chapter Eleven provisions, particularly in the context of the potential privatization of services provided by the welfare state, might require national governments to pay compensation if they sought to nationalize social service delivery. In addition, investment treaties may constrain efforts to regulate foreign private service providers. Both critics and investors have argued that Articles 1105 and 1110 may require compensation for 'regulatory takings' — losses in economic value of investments due to any changes in state regulations — even where those regulations are undertaken for a valid social purpose.²¹⁹ While present in US constitutional law, such 'regulatory taking' claims are more limited under the domestic law of the other NAFTA parties. However, early arbitration decisions under Chapter Eleven have not ruled out claims based on regulatory changes, although neither have they accepted that all detrimental effects on investment of regulatory changes will create a successful claim under Article 1105 or 1110.²²⁰

The language of 'rights' is important to private party claims for investment losses. Typically, an investor claims that governmental action of some kind violated the property, contract or due process rights of the investor. This is a familiar strategy from domestic constitutional and property law. Social rights can play a countering role against characterization of investment disputes as a contest solely between the legal

²¹⁴ Janigan, 'Stretching the Medicare Envelope', *Maclean's*, 3 April 2000, 46; Caulfield, Flood and von Tigerstrom, 'Bill 11: Health Care Protection Act', 9 *Health Law Review* (2000) 22.

²¹⁵ See e.g. Clarke and Barlow, *supra* note 72.

²¹⁶ See *ibid.*; Picciotto, 'Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment', 19 *U. Pa. J Int'l L.* (1998) 731.

²¹⁷ See e.g., Scofield, 'Pettigrew Rejects NAFTA Dispute Model', *The Globe and Mail*, 6 April 2000, B5.

²¹⁸ NAFTA Free Trade Commission, Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

²¹⁹ See e.g. Schneiderman, *supra* note 204; B. Appleton, *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement* (1994), chapter 11.

²²⁰ *Pope & Talbot Inc. v. Canada*, Interim Award (26 June 2000) at paras 96–105.

rights of investors and an amorphous governmental or utilitarian interest. Instead, they make clear that there are competing rights of other persons, such as the right to protection from hazardous waste or to reasonable health care. By characterizing disputes as disputes among different rights holders, the policy issues and competing interests at stake are more accurately disclosed, and hopefully, will be more accurately weighed.

International economic and social rights law may provide an especially effective countering strategy in the context of treaty claims under the NAFTA. Chapter Eleven provides specific direction to panels constituted under the Chapter to decide disputed issues in accordance with the NAFTA and ‘applicable rules of international law.’²²¹ In addition, the NAFTA directs that the interpretation and application of the treaty shall be in accordance with applicable rules of international law.²²²

International human rights conventions would be relevant to the interpretation of many important provisions of the Chapter, such as in deciding what constitutes the minimum standards of treatment ‘required by international law’ under Article 1105. Obviously, international human rights related to non-discrimination,²²³ equal protection of the law²²⁴ and remedies for violation of fundamental rights²²⁵ might be as relevant to the procedural protections under Article 1105 as are the standards developed in such ‘soft law’ contexts as the OECD.²²⁶ In addition, the interpretation of the standards that can be demanded of NAFTA governments under Article 1105 could consider whether these governments were acting to protect or advance the rights, such as the right to health, of individuals other than investors.²²⁷

Similarly, international human rights conventions might factor in the consideration of whether a regulatory measure is expropriation or tantamount to expropri-

²²¹ Article 1131 provides that

1. A Tribunal established under this Section shall decide the issues in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

The statement issued 31 July 2001 by the Commission, *supra* note 218, was arguably an effort to provide an interpretation under Article 1131(2). Some experts question whether the interpretation is binding with respect to Article 1105, because it amounts to an amendment of the provisions, but was not done in accordance with the NAFTA treaty amendment procedure; see e.g. Second Opinion of Professor Sir Robert Jennings, *Methanex Corporation v. United States of America*, 6 September 2001.

²²² Article 102(2). This article has been interpreted by NAFTA panels to include the customary rules of treaty interpretation in the Vienna Convention; *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, NAFTA Arbitral Panel (CDA-95-2008-01), 2 December 1996.

²²³ UDHR, Article 2.

²²⁴ UDHR, Article 7.

²²⁵ UDHR, Article 8.

²²⁶ E.g. OECD, *OECD Regulatory Checklist*, Doc. OCDE/GD(95)95; OECD Working Party on Regulatory Reform and Trade, *Assessing the Effectiveness of the Efficient Regulation Principles*, Doc. TD/TC/WP(97)23. For commentary, see Weiler, ‘International Regulatory Reform Obligations’, 34 *J. World Trade* (2000) 71 at 82–84.

²²⁷ ICESCR Article 12; ICCPR Article 25. The protection of local residents and the environment against risks of a waste processing facility was argued to be the concern of the Mexican government in the *Metalclad* case, *supra* note 211.

ation under Article 1110.²²⁸ The promotion of an internationally recognized social right would be useful to gauge whether the governmental measure serves a public purpose, which is also a requirement under Article 1110(1)(a). More significantly, in deciding whether a regulatory change constitutes an expropriation or a measure tantamount to expropriation, the international law is far from settled.²²⁹ Some commentators have suggested that panels would use US domestic jurisprudence on expropriation,²³⁰ although it is not clear why such jurisprudence is unusually protective of claimants, would be more relevant than that of Canada and Mexico, which take a more restricted approach to such claims.²³¹

A more plausible approach would be for panels to interpret the meaning of expropriation under Article 1110 or the contents of minimum standards of international law under Article 1105 according to relevant provisions of international treaties. In this context, a panel should have reference to the international human rights treaties that most members of the international community have signed. The protections contained in these treaties are not directly justiciable, but individual member states are obliged to protect them. In addition, an investment panel should not demand unduly high standards of compensation for regulatory or other legal reform directed towards the achievement of international human rights. Because the achievement of economic and social rights is subject to the use of available resources; thus, it makes sense that interpretations of the provisions of international economic agreements recognize that compensation findings against state governments may limit the ability of such states to promote social rights.

Finally, identification of international human rights law will assist panels to more fully identify the interests potentially impacted by an investment dispute. For example, non-parties might use international human rights law to frame submissions that they have particular interests in proceedings before an arbitration tribunal under Chapter Eleven, and that therefore they should be permitted to submit *amicus* materials.²³²

E *The Limits of Countering and the Necessity of Countering*

Countering based on social rights as so far discussed is a strategy aimed at the application of existing trade treaties in particular cases. However, the strategy also

²²⁸ *Pope & Talbot*, *supra* note 220.

²²⁹ See Banks, 'NAFTA's Article 1110 — Can Regulation be Expropriation?', 5 *NAFTA Law & Business Review of the Americas* (1999) 499.

²³⁰ See e.g. Schneiderman, *supra* note 204.

²³¹ See e.g. Macdonald, 'Chapter 11 of the NAFTA: What Are the Implications for Sovereignty?', 24 *Canada-US L.J.* (1998) 281 at 287.

²³² For example, two arbitration tribunals under Chapter 11 of the NAFTA have indicated that they might consider *amicus* submissions from non-parties, but that potential *amici* would have to demonstrate a real interest in the matter under dispute; see *Methanex Corporation v. United States*, Decision on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 January 2001); *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001).

suggests how international social rights can be used in broader debates about international trade.

The role that countering arguments could perform outside the legal regime is demonstrated well by the case of the protests against the proposed MAI. Activists opposed to the agreement raised concerns about its impact on social rights in order to express and generate opposition to the proposed agreement. The negative publicity associated with Chapter Eleven of the NAFTA and the many examples of threats to social regulations and the provision of social services were an effective political tool that showed how a countering strategy could operate outside of particular legal disputes.²³³ It also illustrates how non-governmental activists have developed strategies that engage in a structured policy opposition to pro-trade positions.

The broader countering function of social and economic rights claims is also evident in recent NGO activism concerning the TRIPS Agreement and its impact on access to essential medicines in African and other developing states. This resistance placed significant pressure on pharmaceutical companies and their home governments not to rigidly enforce IP protections under the TRIPS Agreement, and also led to an inter-governmental 'deal' at Doha, in the form of the Declaration on the TRIPS Agreement and Public Health.²³⁴

The need to export countering strategies to other levels of the trade regime is also exemplified by the potential expansion of trade in services. Critics have identified the potential expansion of the GATS as a key threat to social policy concerns.²³⁵ If GATS applied to services such as health, education and finance, social rights concerns might be compromised; for example, a domestic law or regulation with non-trade related social policy purposes might in effect limit the ability of foreign producers to compete.²³⁶ Moreover, minimum standards with respect to the domestic regulations and their impact on trade are anticipated under the GATS.²³⁷ Currently under the GATS, most of these potential social rights concerns are addressed by the basic structure of the agreement as an 'opt-in' agreement, in which parties list services in

²³³ See e.g. Clarke and Barlow, *supra* note 72. The authors, leaders in the organization of opposition to the MAI, use chapter headings that repeatedly invoke rights discourse: e.g. 'The Assault on Economic Rights', 'The Demise of Social Rights' and 'The War on Cultural Rights'.

²³⁴ Declaration on the TRIPS Agreement and Public Health, adopted 14 November 2001, WT/MIN(01)/DEC/2.

²³⁵ See e.g. S. Sinclair, *GATS: How the World Trade Organization's New 'Services' Negotiations Threaten Democracy* (2000).

²³⁶ For example, public support for health and welfare systems might be argued to constitute a countervailable subsidy. The claim that monopoly control over postal delivery is a subsidy for Canada Post in its competition for courier services with UPS is part of UPS's innovative complaint under Chapter Eleven of the NAFTA; see *United Parcel Service of America Inc. v. Canada*, Notice of Arbitration, 19 April 2000. Such claims rely on controversial claims about the 'normal' market role for government; see Tarullo, *supra* note 78.

²³⁷ GATS, Article VI(4); see Weiler, *supra* note 226; Nicolaidis and Trachtman, 'From Policed Regulation to Managed Recognition', in P. Sauvé and R. M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (2000).

Schedules of Specific Commitments.²³⁸ Even with respect to included sectors, parties can specify in the Schedules limitations and conditions to market access and national treatment obligations.²³⁹ As some countries push to expand the list of included industries under the GATS, international social rights law may have its most important countering role not in the interpretation of existing provisions, but rather in the policy debate concerning potential expansion of the GATS.

The examples of intellectual property, investment and services signal how a countering function for international social rights can operate at multiple levels. The next two parts of this article seek to describe how those interested in promoting social rights have moved beyond countering in dispute settlement to strategies oriented towards protest outside of the trade regime and towards the political negotiation of the trade treaties themselves.

6 Branding

A key component of current trade politics is the mobilization of NGOs to engage with international trade actors including other NGOs (in particular multinational enterprises) and international organizations like the WTO. This trend towards 'direct action' rejects reliance on state governments as the intermediary for representing popular desires and preferences with respect to international trade regulation. This section examines some of the ideational aspects of these strategies, in particular 'branding' strategies that serve a countering function in promoting social rights concerns in trade politics.²⁴⁰

A *The Use of the Market in Social Activism*

In addition to overlap in substantive concerns, human rights and trade are often connected at the level of strategy. Economic pressure including trade access has been used to bring about changes in problematic policies and practices of state and non-state actors. For example, governments have long used economic sanctions to pressure other governments and private actors concerning their social practices.²⁴¹

²³⁸ GATS, Articles XVI, XVII, XVIII; Trebilcock and Howse, *supra* note 35, 280–281.

²³⁹ For example, the general MFN treatment in Article II can be exempted by listing the exempted measure; Article II:2. National Treatment and Market Access commitments can be qualified in the Schedule of Specific Commitments; Article XVI:1 and Article XVII:1.

²⁴⁰ Keck and Sekkink, *supra* note 16, at 3.

²⁴¹ E.g. An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), 1996 Mass. Acts ch.130; see Fitzgerald, 'Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era', 34 *Cornell Int'l L.J.* (2001) 1. Another fraught example is the US Helms-Burton legislation; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–91. Both the Massachusetts Burma law and the Helms-Burton legislation elicited substantial international criticism, and were potentially subject to WTO complaints. The Massachusetts law was withdrawn for domestic US constitutional reasons, and the Helms-Burton provisions have been waived in an uneasy political settlement between the United States and its principal trading partners.

Contemporary NGO groups increasingly realize that while the market can be an obstacle to progressive social change, it also offers some possibilities as a venue for resistance and activism. Such strategies include consumer boycotts, shareholder pressure, divestment measures, civil protest at corporate events and meetings, and disruptive counter-advertising. Such strategies were often directed against state actors, such as the apartheid regime of South Africa,²⁴² but also have targeted non-state actors such as multinational enterprises.

Social activists are becoming increasingly sophisticated in their understanding of the operation of the market. For example, Naomi Klein has described several forms of protest associated with the economic value of 'brands' under the rubric of 'No Logo' activism.²⁴³ Protest possibilities are created in an era where significant market value for corporations such as Nike is related to their corporate name, brand or trademark. Corporate brands, which are heavily reliant on advertising, promotion and accumulated goodwill, have spread into all facets of everyday existence. However, businesses in the era of the brands are also vulnerable to strategies that create pressure through the manipulation of signs, symbols and reputations. For instance, the strategy of 'culture jamming' disrupts the power of brands of major businesses through performance art such as parody/satire, through variations or defacement of corporate advertising and media, and through counter-advertising.²⁴⁴ The use of communications technology, in particular web-based campaigns, has also become one of the most typical features of anti-branding campaigns, as well as a major vehicle for the dissemination of information and the generation of 'cyberspace solidarity' among NGO groups.²⁴⁵

Although initially anti-branding strategies protested against the excesses of the branding process itself, activists have increasingly used pressure on brands to generate changes in corporate policies along other dimensions, such as in their labour policies. For example, the transnational production of corporations such as Nike is not as vulnerable to older forms of resistance and regulation at local sites of production because most of their economic value is related to intangibles such as their brands rather than their physical production. But at the same time, the economic value attached to intangibles means that corporations such as Nike or Pepsi are vulnerable to protest strategies that associate the brand in the minds of consumers and investors with objectionable business policies, including the foreign production practices of the branded business.²⁴⁶ Perhaps the most sustained examples have been the campaigns against Nike for low pay and bad working conditions in its production facilities abroad and amongst its subcontractors.²⁴⁷

²⁴² Crawford and Klotz, *supra* note 99.

²⁴³ N. Klein, *No Logo: Taking Aim at the Brand Bullies* (1999).

²⁴⁴ The term is traced to M. Dery, *Culture Jamming: Hacking, Slashing and Sniping in an Empire of Signs* (1993).

A prominent example of culture jamming strategy is the journal *Adbusters*.

²⁴⁵ See Baxi, *supra* note 50, at 160–161. On the global political significance of the growth of such communication, see M. Castells, *The Information Age: Economy, Society and Culture* (2nd ed., 2000).

²⁴⁶ Klein, *supra* note 243, chapter 15 ('the brand boomerang').

²⁴⁷ *Ibid.*, at 365–379.

This kind of pressure also has been used by non-governmental actors against multinational companies doing business in countries such as Sudan and Burma to protest against both the conduct of the companies themselves and their complicity in conduct by state governments that does not conform with basic human rights and standards. For example, worldwide consumer protests against Shell were undertaken because of the company's alleged direct and indirect involvement in the displacement and mistreatment of peoples such as the Ogoni in relation to Nigerian oil extraction projects.²⁴⁸

Branding now includes a multiplicity of strategies to communicate concerns about corporate accountability. Litigation in domestic courts, for example, has also been used as a means for pressuring corporate actors in respect of their business practices.²⁴⁹ Even when progressive actors are put on the defensive, court cases can be used as a medium for generating bad public relations for corporate plaintiffs, as in the *McLibel* trial in the United Kingdom.²⁵⁰ Branding strategies have also been used by NGOs to pressure governments for legislation to regulate the conduct of domestic corporations who operate in problematic ways abroad.²⁵¹

Recent proposals related to 'ratcheting labour standards' have also picked up on the use of branding strategies through the market influence of consumers to pressure for a virtuous spiral of compliance by multinational actors to ensure that their production and that of their subcontractors meet certain standards.²⁵² The interest in the impact of branding strategies also seems to lie behind the hopes for voluntary codes of conduct of various kinds, such as the OECD's Guidelines for Multinational Enterprises and the United Nations Global Compact.²⁵³

Most recently, branding has been used as a mode of influencing or resisting international institutions in the context of international trade politics.²⁵⁴ In the period since the Seattle protests, many forms of NGO protest have been deployed to contest the messages of the WTO and its 'brand' of liberal trade, including street theatre (most memorably protestors dressed as sea turtles), mass marches, mail-in campaigns, civil disobedience, and, controversially, resistance to police and actions aimed at damaging

²⁴⁸ *Ibid.*, at 379–387.

²⁴⁹ Scott, *supra* note 17.

²⁵⁰ *McDonald's Corp. v. Steel and Morris*, [1997] E.W.J. No. 4456 (Queen's Bench, June 19, 1997); J. Vidal, *McLibel: Burger Culture on Trial* (1997); Klein, *supra* note 243, at 387–390.

²⁵¹ See e.g. the Massachusetts Burma Law, *supra* note 241, and the U.S. Sudan Peace Act, which initially included provisions that would have barred companies doing business in Sudan from listing on US stock exchanges and raising funds in US capital markets; see Lacey, 'U.S. Urges Sudan to Divide Oil Income as Step to Peace', *New York Times*, 5 May 2002, YNE6; Simon, 'A Canadian Oil Man Gives In: Reluctantly Talisman Energy Pulls Out of Sudan', *New York Times*, 10 November 2002, BU2.

²⁵² Fung, O'Rourke and Sabel, 'Realizing Labor Standards', *The Boston Review* (Feb/Mar 2000).

²⁵³ OECD Guidelines for Multinational Enterprises (revised 27 June 2000); UN Global Compact (2000). For a critical view, see Arthurs, 'Private Ordering and Workers Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation', in J. Conaghan, M. Fischl and K. Klare (eds), *Labour Law in an Era of Globalization* (2002).

²⁵⁴ That this was a relatively late turn is evident in that Klein's book, published shortly before the Seattle Ministerial, only briefly touches on the use of protest strategies against international institutions; see Klein, *supra* note 243, at 439–446.

private or public property.²⁵⁵ These are all now a central part of contemporary trade politics.

B Relating Inside and Outside Discourses Concerning Trade Problems

One way to understand branding strategies is that through various forms of media — including words, theatre, signs, symbols, costumes and events — they are intended to engage in the communication of ideas and influence key policy debates.²⁵⁶ In this respect, they partake of policy discourses that also operate inside international trade regimes. The recognition of shared policy discourses is one way to bridge scholarship on international trade law and the expanding literature concerning anti-globalization movements and trade politics.²⁵⁷ In order to respond to paralysis in trade negotiations and concerns about the legitimacy of the international trade regime, international trade law scholarship should take more seriously these significant political movements as policy actors.²⁵⁸ Here, as in other subjects, the gap between legal and other political discourses can be overstated in that broader political discourses about trade share many of the same challenges, failures and limits of legal discourses of trade.²⁵⁹ In some sense, participants in legal and extra-legal debates are engaged in a broader political dialogue, or at least a competition in which actors seeking to influence the trade regime must be concerned with the quality of their policy communication, including with respect to South-North issues.

NGO strategies are valuable to the protection and promotion of social rights. In many ways, these strategies are a useful complement and alternative to more legalistic claims concerning international social rights law. NGO branding strategies, for example, do not face the substantive barriers faced by social rights claims in courts concerning non-justiciability of such rights. Nor do they face concerns about lack of 'horizontal' enforcement of social rights against non-state actors. Branding strategies are generated by non-state actors who do not need state actors to either cooperate or champion their claims, as is required in most fora of international law. The protests also involve the public more directly than do legal strategies. Finally, branding

²⁵⁵ On the challenge of violent protest to legitimacy of the anti-globalization movements, see e.g. Barlow and Clarke, *supra* note 100, at 220–221.

²⁵⁶ See Keck and Sikkink, *supra* note 16, at 3; Klotz, *supra* note 178, at 29–33.

²⁵⁷ It is difficult to describe and analyse positions of the diverse anti-globalization movements. I focus on *No Logo* as a representative text, both because it summarizes well the communicative aspects of 'branding' strategies and because the volume has become influential in its own right among many contemporary activists. Other leading activist texts focus more than *No Logo* does on international trade agreements and their effects. For example, see the website of Global Trade Watch, which is part of Ralph Nader's Public Citizen, and Nader's own book, *The Case against Free Trade: GATT, NAFTA and the Globalization of Corporate Power* (1993). A leading Canadian organization in trade politics has been the Council of Canadians, the honorary chair of which is Maude Barlow, who has a longstanding engagement and knowledge of international trade treaties in the Canadian context and who became a leading figure in international resistance to the MAI; see Clarke and Barlow, *supra* note 72.

²⁵⁸ Rodrik's work on the international political economy of globalization does this, see *supra* note 45 and D. Rodrik, *Has Globalization Gone Too Far?* (1997).

²⁵⁹ See e.g. Kennedy, *supra* note 45, at 64–70 (exploring the relevance of appellate court decisions in the face of critiques from the sociology of law tradition).

strategies escape familiar defects associated with court-based strategies, such as delay and cost. Given these advantages, branding strategies will undoubtedly continue to be a significant part of contemporary international trade politics.

Moreover, protest movements deploy a multiplicity of approaches in strategy both as a matter of practical necessity and because of a belief in plural processes. These strategies operate both inside state processes, such as international institutions, nation-state and local governments, and outside such processes through various transnational, national and sub-national organizations and networks.²⁶⁰

C The Uses of Social Rights for NGOs in Constructing Positive Agendas

Among these multiple venues for NGO activism, there are strategic contexts in which non-governmental actors can benefit from a careful use of international legal instruments, including international human rights law. As NGOs seek to influence international institutions such as the WTO, the foundation of human rights in international conventions may be necessary to framing arguments and finding influence. In addition, NGOs have increasingly used human rights discourse, including international human rights law, to influence domestic change, such as through transnational litigation in local courts.²⁶¹

In addition to being a useful strategic instrument for framing claims in venues such as the WTO, attention to the serious policy issues wrestled with in the literature on international economic and social rights can provide important lessons for NGO branding strategies as they attempt to frame a constructive agenda that addresses real conflicts among different interests, including state interests.

Protest strategies have been effective in preventing most forms of trade negotiation from advancing, for now. These protests have so far been relatively successful in bracketing tensions so as to permit those interested in social regulation in the North and those interested in development in the South to protest together.²⁶² Both agendas share dissatisfaction with the current regime and its expansion, and so both could contribute to impeding new trade initiatives. Moreover, a multiplicity of causes and methods is consistent with the pluralistic notion of protest shared by both movements.²⁶³

However, it seems clear to many in the protest movement that there is a need to advance a more detailed and coherent agenda to the public in order not to be

²⁶⁰ Keck and Sikkink, *supra* note 16.

²⁶¹ Risse, Ropp and Sikkink, *supra* note 13.

²⁶² However, there remain some doubts as to how representative the anti-globalization protests in Western capitals have been of the interests of workers and other residents of developing countries; see e.g. Silver and Arrighi, 'Workers North and South', in L. Panitch *et al.* (eds), *Working Classes, Global Realities: The Socialist Register 2001* 53–76; 'Responding to Seattle, Interview with Jagdish Bhagwati', 44 *Challenge* (Jan.–Feb. 2001) 6 at 11.

²⁶³ The synergy of multiple voices is a potential virtue of transnational networks; see Keck and Sikkink, *supra* note 16, at 207; but inconsistency and cross-purposes are clearly a risk as well, see e.g. Barlow and Clarke, *supra* note 100, at 211–214.

dismissed simply as naysayers.²⁶⁴ An alternative agenda also becomes necessary as more NGOs directly lobby and appear at international organizations like the WTO or IMF.²⁶⁵ A shift from obstruction towards a positive agenda of reform will require cooperation of state governments and international negotiation. To rollback existing provisions, for example, requires changes to the WTO and therefore the support of WTO member states.

Attention to international economic and social rights law by NGOs engaged in branding strategies could provide guidance, not unlike the potential guidance for tribunals in treaty interpretation, to connect progressive causes in the North and South. First, because international human rights are multilateral rather than unilateral, they provide a defence for NGO strategies against accusations of self-interest and parochialism. By ensuring that branding strategies respect international social rights standards, such protests would be more effective in linking different interest groups in North and South. Second, attention to international social rights law would demonstrate sensitivity to the interrelationship of different kinds of claims — for example, the relationship between rights to health and safety at work and issues of civil and political rights or non-discrimination claims. Third, the approaches towards ‘progressive realization’ in the international economic and social rights literature may provide guidance that NGOs must address the problem of resource constraints in developing countries and be cautious with advocating the use of unilateral trade sanctions. Strategies of branding against corporate actors may need to consider what the actual effects in terms of social resources will be for the developing country in question. Finally, the international social rights literature focuses on the rights and welfare of the individuals in question rather than any particular form of protection. This kind of flexibility with respect to social rights compliance is needed in thinking through whether branding strategies might themselves be causing problems for the protection of social development.

D Strategizing Branding to Promote International Social Rights in the Trade Regime

Perhaps the most significant recent example of a transnational advocacy strategy in international trade regulation has developed around the impact of the TRIPS Agreement and other trade provisions on the ability of developing countries to address serious public health pandemics associated with HIV/AIDS and tuberculosis. The advocacy network in this context included both domestic and transnational NGOs, and the state governments of a number of developing countries. Among other venues, transnational alliances formed in the contest between the South African government

²⁶⁴ E.g. Barlow and Clarke, *supra* note 100, at 211–212. Oxfam’s recent report, *supra* note 110, evidences the sense among NGOs, still controversial, of the need to engage the international trade regime and to present some positive account of how trade and social justice issues can be reconciled.

²⁶⁵ Howse, ‘From Politics to Technocracy — and Back Again: The Fate of the Multilateral Trading Regime’, 96 *AJIL* (2002) 94, at 115–117.

and pharmaceutical companies concerning amendments to patent protection related to various essential medicines.²⁶⁶

In South Africa, domestic protests against the pharmaceutical companies and the court case, led by the local grassroots Treatment Action Campaign, together with mobilization of transnational allies and networks, such as *Medicins Sans Frontières*, generated significant reputational damage to the companies.²⁶⁷ In the United States, activists and a number of legislators, including many African-American governmental leaders, lobbied to have the United States ease its trade pressure against South Africa.²⁶⁸ The court case was eventually withdrawn by the companies.²⁶⁹ As described above, the submissions of NGOs such as the TAC included arguments based on the norms of international economic and social rights law.²⁷⁰

In turn, the complex battle in South Africa was a significant part of the political backdrop to the Doha Meetings of the WTO where the Declaration on the TRIPS Agreement and Public Health was reached.²⁷¹ The Declaration acknowledges a broader ability of developing and least-developed countries to address public health crises, including provisions affirming the right to grant compulsory licences and determine the grounds of their grant, and the right to determine what constitutes a national emergency.²⁷² While it remains to be seen how the Declaration will be applied in particular trade disputes at the WTO,²⁷³ its invocation, perhaps buttressed by further arguments based on international human rights norms, makes it seem unlikely that a complaint concerning intellectual property protection would succeed in the context of essential medicines.²⁷⁴

This episode highlights how different kinds of strategies can be reconciled and complement each other in advancement of the goals of international human rights law. Moreover, international human rights law may provide one basis for an alliance of progressive forces in the North and South in future negotiations of the international trade regime. Instead of working at cross purposes, eliminating these tensions between progressive forces in the South and North may permit a move from the incremental interpretive strategies of countering and the protest strategies in

²⁶⁶ Park, 'The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients', 11 *Minnesota J. Global Trade* (2002) 125.

²⁶⁷ Geffen, 'Applying Human Rights to the HIV/AIDS Crisis', 2:4 *Human Rights Dialogue* (2001) 13.

²⁶⁸ Park, *supra* note 266, at 151–153; Rosenberg, 'How to Solve the World's AIDS Crisis', *New York Times Magazine*, 28 January 2001, 26 at 52, 58 and 62.

²⁶⁹ Swarns, 'Drug Makers Drop South Africa Suit over AIDS Medicine', *The New York Times*, 20 April 2001, A1.

²⁷⁰ *Supra* note 193. Claims based on domestic and international social and economic rights law have also figured in subsequent constitutional litigation by the TAC that successfully challenged the failure of the South African government to provide a comprehensive programme to prevent mother-to-child HIV transmission; *Minister of Health v. Treatment Action Campaign and others*, Case CCT8/02, 5 July 2002.

²⁷¹ *Supra* note 234.

²⁷² *Ibid.*, para. 5.

²⁷³ US complaints at the WTO against Brazil for measures not unlike the South African measures were withdrawn; see e.g. Capella, 'Brazil Wins HIV Drug Concession from US', *The Guardian*, 26 June 2001.

²⁷⁴ See e.g. Park, *supra* note 266.

branding towards more transformative changes of the international trade regime itself.

7 Dealing

Countering and branding strategies offer ways of tempering concerns about the ‘social deficit’ in the international trade regime. However, an international social rights perspective highlights how countering and branding are limited because each is based on a largely static idea of what trade agreements provide. Countering in interpretation is obviously limited by the terms of the trade agreements that have already been negotiated. Branding strategies are constrained by the lack of direct control that NGOs exercise over the policies of nation-states and international institutions. With fewer alternative policy options available, it is more difficult to find the trade-offs that might form the basis for an acceptable compromise among governments and progressive NGOs in the South and North. A social clause might be less offensive to developing countries in the context where it was made part of a broader deal that included removal of protectionist barriers of Northern countries such as trade remedy laws or agricultural subsidies.

A New Deals between North and South

An international New Deal can be imagined in the world trade regime.²⁷⁵ This might seem fanciful, but the political preconditions for achieving a more general reform of the international trading order are present given the magnitude and persistence of opposition and critique. Examples of deals that might be politically feasible and normatively defensible can be developed from the concerns of international social rights law. In particular, a deal is possible that would address more fully the social concerns of both Southern and Northern progressives, and enable associated groups to more effectively operate in terms of public opinion and political pressure on future trade negotiations.

A change in the existing trade deal may require that those interested in better access for developing countries to markets concede the validity of the concerns about regulatory competition and fair trade among potentially vulnerable social groups in the North. They will need to recognize this as a matter of normative fairness and to ensure the continuing political legitimacy of open markets for the exports from the South. The result may be that the trading regime would directly address international social standards in areas such as labour, health, environment, and in human rights more generally. That most developing countries have acceded to international social rights law suggests that negotiating and providing for a set of international standards within the trading regime related to social rights is politically feasible. As discussed above, the multilateral genesis and content of international social rights law should

²⁷⁵ E.g. Faux, ‘A New Grand Bargain’, 11 *American Prospect*, 17 January 2000 (developing nations should enforce social standards in exchange for long-term aid and debt relief); Faux, ‘How Should the Left Respond to Globalization’, *Dissent* (Winter 2001), at 11.

help to ease concerns among developing countries about the protectionist abuse of international social regulation inside the trade regime. At the procedural level, furthermore, a negotiated arrangement could include various forms of procedural protection. Already, the unilateral imposition of trade sanctions is subject to indirect multilateral oversight as WTO-violating tariffs or quotas.²⁷⁶ Further reforms to WTO processes could be instituted as part of a larger deal. For example, dispute settlement procedures could provide for greater participation of NGO groups in disputes involving economic and social rights.²⁷⁷ WTO procedures might also contemplate coordination with and submissions by other international organizations (such as the WHO, ILO or the Economic and Social Council),²⁷⁸ or ongoing monitoring within the WTO for the impact of trade policies on human rights.²⁷⁹

In exchange, Northern countries could reduce their reliance on protectionist devices that have an unusual impact on developing countries, such as sectoral barriers in areas such as agriculture or textiles. Developed countries may also need to abandon, at least against developing countries, the use of trade remedy law in exchange for express international disciplines on social standards in trading partners. Social progressives in the North and South sharing a concern for economic and social rights could also push for reduction of developing country obligations in negotiations in areas such as investment, services and intellectual property. Ideally, commitments by developing countries to social standards could also be part of larger deals to provide debt relief or increased foreign aid.²⁸⁰

B Dealing with the Establishment: The Legitimacy of the International Trade Regime

There remains the difficult issue of whether a deal that addresses the concerns of Northern progressives and of developing countries would be acceptable to interests which favour a trade regime focused on maximizing efficiency and trade openness. Why would Northern business interests, for example, be willing to sacrifice intellectual property protection or strong investment protection to deal with social rights concerns? Although any new deals in the international trade regime will have to satisfy the perceived national interests of WTO member states, the global protests against the current regime and the resistance to further movement forward without a

²⁷⁶ See Stirling, *supra* note 156, at 33–46. An impacted state does bear the onus to challenge the measure.

²⁷⁷ For example, international social rights law could frame non-party NGO participation as *amicus curiae* in particular disputes; see Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', 44 *Duke L.J.* (1995) 829; Nichols, 'Extension of Standing in World Trade Organization Disputes to Nongovernment Parties', 17 *U. Pa. J. Int'l L.* (1996) 295; Appelton, 'Amicus Curiae Submissions in the *Carbon Steel* Case: Another Rabbit from the Appellate Body's Hat', 3 *JIEL* (2000) 691.

²⁷⁸ See Scott, *supra* note 134.

²⁷⁹ E.g. Charnovitz, 'Opening the WTO to Nongovernmental Interests', 24 *Fordham Int'l L.J.* (2000) 173; Stirling, *supra* note 156, at 40–42.

²⁸⁰ *Ibid.*

new focus on social concerns may make it politically realistic to expect states and trade bureaucrats to consider new deals that would address social rights concerns.

Legitimacy is important for the WTO in at least two senses.²⁸¹ First, supporters of the trade regime must be concerned with perceived political legitimacy in order to move ahead or even sustain the current system. Broad popular antagonism towards trade liberalization and economic globalization reflected in the protests at sites such as Seattle, Quebec and Genoa will impede further negotiations and may undermine national support for existing commitments. Failure to address concerns such as fair trade or regulatory competition, developing countries' development or human rights, contributes to lack of popular national support for trade liberalization, as seen in the difficulties faced by the US President in achieving trade promotion authority.²⁸²

A new deal that considers international social rights norms would also increase the substantive legitimacy of the international trading order.²⁸³ The sub rosa but imperfect protection of fair trade concerns through domestic trade remedy law would instead be expressly part of the WTO framework. The unfair burdens on developing countries of sectoral barriers (as in agriculture), domestic trade remedy laws and high TRIPS standards would be expressly addressed. Although further democratization of the processes of the WTO would obviously be desirable, a new deal based on the inclusion in the trade regime of international social rights would provide some recognition and attention to the WTO's de facto influence on non-trade matters.

The WTO meetings at Doha and the resulting Ministerial Declarations show how NGO politics, developing country concerns and international human rights concerns can be linked into a larger deal. The Doha meeting occurred in the political context of concerns about the stability of the international economic order after the September 11 events, but also in light of the substantial opposition expressed by protestors from the South and North at and since Seattle in 1999. The meeting also signalled some acknowledgement by the trade establishment of the concerns of both social activists and developing countries, even if largely rhetorical. Much of the Ministerial Declaration was framed in terms of the needs for development,²⁸⁴ and a number of the concerns of developing countries were placed on the negotiation agenda, including implementation issues,²⁸⁵ trade remedy laws,²⁸⁶ technical cooperation and capacity building,²⁸⁷ and special and differential treatment.²⁸⁸ Most obviously, the Declaration on the TRIPS Agreement and Public Health recognized the public health threats of

²⁸¹ See e.g. Howse, 'The Legitimacy of the World Trade Organization', in J.-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001).

²⁸² Koh, 'The Fast Track and United States Trade Policy', 18 *Brooklyn J. Int'l L.* (1992) 143. President Bush has received trade promotion authority, but only after much political effort, including unilateral trade measures involving new subsidies, trade remedy actions and safeguards; see Andrews, 'Why Isn't Fast Track Faster?', *New York Times*, 18 August 2002, BU1.

²⁸³ Howse, *supra* note 10.

²⁸⁴ E.g. Ministerial Declaration, adopted 14 November 2001, WT/MIN(01)/DEC/1, at paras 2, 3.

²⁸⁵ *Ibid.*, para. 12.

²⁸⁶ *Ibid.*, para. 27.

²⁸⁷ *Ibid.*, paras 38–41.

²⁸⁸ *Ibid.*, para. 44.

pandemics in developing countries and the need for the TRIPS Agreement to be part of wider action to address the problems.²⁸⁹

Admittedly, the Declaration on the TRIPS Agreement contains hedged language and was not an amendment of the WTO treaties, and there is debate among international lawyers as to its legal status.²⁹⁰ Moreover, it is not clear that negotiations pursuant to the Doha Agenda will result in a deal that reconciles the concerns of developing countries and those of other critics of the WTO. However, the Doha Declarations at least show how a deal in the international trade regime can be fashioned and that such a deal might include a broader consideration of international law. Part of the soft 'deal' in the Ministerial Declaration at Doha, for example, tries to address the concerns of both environmentalists and developing country governments through a loose commitment to negotiations concerning the relationship between existing WTO rules and multilateral environmental agreements.²⁹¹

8 Conclusion

The three levels of strategy discussed in this article are linked in important ways. For example, seemingly arcane issues of treaty interpretation have been important to NGO mobilization. Disputes concerning the TRIPS Agreement and South African essential medicines legislation led to transnational mobilization, and local NGOs used their knowledge about the technical details of the treaty and cases under NAFTA Chapter Eleven in generating opposition to the MAI.²⁹² Many anti-WTO and anti-globalization efforts have developed in the wake of these original protests concerning technical issues of treaty interpretation.

In the other direction, what happens in the streets matters to trade bureaucrats and adjudicators. While problematically insulated in many respects, trade bureaucrats and adjudicators can be made conscious of broader social contexts. Such decision-makers are often not blind supporters of international trade liberalization, but rather are progressive internationalists who believe that the trade agenda best serves the conflicting interests of various groups.²⁹³ By dealing with concerns about the unilateral imposition of social standards and by reconciling the concerns of South and North progressives in the international trade regime, reforms based on international social rights would be more palatable and likely to be supported by such decision-makers in their 'interstitial' decisions on particular cases and in their broader support for international reforms. Panellists increasingly may look, especially if efforts to

²⁸⁹ *Supra* note 234.

²⁹⁰ Similar debates surround other understandings between trade parties, such as the NAFTA Commission interpretation, *supra* note 218.

²⁹¹ Ministerial Declaration, para. 31(i).

²⁹² See Clarke and Barlow, *supra* note 72.

²⁹³ See e.g. Kennedy, *supra* note 109; Howse, *supra* note 265.

change treaties fail, for counters to one-sided interpretations of trade provisions.²⁹⁴ For example, if the Doha round of negotiations leads nowhere, the international politics of the WTO may play out in the Dispute Settlement Body.²⁹⁵ Critics may see an ‘activist’ turn in adjudication to human rights as transparently political. But although legalism is, of course, an ideology and a continuation of international politics by other means, it is nonetheless a form of politics that has some particular virtues.²⁹⁶

Of course, the more open method is for trade negotiators to acknowledge the necessity of a new international deal that would respond to the wave of critiques in and around the trade system. In this context, activism around the trade regime can impact on negotiations within the institutions; branding can lead to dealing. The principal architects of negotiations are still national politicians, and the protests at Seattle and since demonstrate that domestic and international direct action does have an impact on how politicians act. Moreover, some national politicians share some of the protestors’ concerns, as well as being required to consider them out of political necessity.²⁹⁷

In the end, the simultaneous pursuit of a multiplicity of techniques will be needed to humanize transnational economic governance. By linking inside and outside strategies, a trade agenda informed by the concerns of international economic and social rights may broaden the narrow trade-facilitative understanding of the policy purposes of the international trade regime, begin to address issues of regulation and distribution, and assist the move from free trade to just trade.

²⁹⁴ The recent Appellate Body decisions in *United States — Shrimp*, *supra* note 147, and *EC — Asbestos*, *supra* note 170, signal to some observers DSB awareness of environmentalist protests and perspectives; see Weinstein and Charnowitz, *supra* note 171.

²⁹⁵ In this respect, the DSB could begin an ‘activism’ phase not unlike that which Weiler describes the European Court of Justice as having played in promoting the integration project during periods in which the political advance of the project was stalemated; see Weiler, ‘The Transformation of Europe’, 100 *Yale L.J.* (1991) 2403.

²⁹⁶ J. Shklar, *Legalism: Law, Morals and Political Trials* (1964).

²⁹⁷ Consider the reflections of Pierre Pettigrew, the current Canadian Minister of International Trade, on the challenge of governance in an era of globalization in his book *The New Politics of Confidence* (1998). See Greenspon, ‘The Talented Mr. Pettigrew’, *The Globe and Mail*, 14 April 2001, A19.