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PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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Te Whare Wānanga o te Ūpoko o te Ika a Māui



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THE ROLE OF THE HUMAN RIGHTS MOVEMENT IN TRADE POLICY-MAKING: HUMAN RIGHTS AS A TRIGGER FOR POLICY LEARNING

*Andrew T F Lang**

This article reflects on a decade of engagement by the human rights movement in debates about the international trading system. It contends that this engagement has occurred with little explicit consideration of precisely what human rights actors and human rights language have to offer trade policy debates. The question is an important one, in part because trade policy debates have traditionally been framed in technical language and primarily conducted among a group of specialised experts. In addressing this question, the article reconstructs three models of the 'value-added' of human rights, which are viewed as implicitly structuring much of the current trade and human rights literature. It sets out some advantages and limitations of each of these three models, before offering a fourth, which sees the human rights movement as a 'trigger' for policy learning. Human rights actors have begun to ask new questions about international trading order, and in doing so have facilitated the production of new kinds of trade policy knowledge, and the creation of new kinds of trade expertise. To the extent that the current international trading system is deeply structured by prevailing trade policy knowledge, the article argues that this model captures an important and rarely recognised mechanism by which social movements generate change in the international economic system.

I INTRODUCTION

Over the course of roughly the last two decades, there has been a transformation in the nature and the extent of the human rights movement's engagement with matters of international economic policy. There has been, for example, a resurgence of interest in the relevance of human rights norms to the activity of transnational corporations, as well as efforts to elaborate a rights-based approach to development. More recently, these two topics of discussion have been combined with a third, focussing on the human rights impacts of the international trade regime. This article is the

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result of prolonged engagement with, and reflection on, the third prong of that tripartite agenda — the so-called "trade and human rights" debate. I approach this debate from the perspective that interaction between the two fields — human rights and international trade — is potentially tremendously constructive. At the same time, it is hard to shake the conviction that participants in this debate tend often to be talking past one another. Seasoned trade policy commentators in particular seem to find it difficult to engage with arguments framed in human rights terms — not only because they are unfamiliar, but more importantly because it has rarely been explicitly stated what human rights language brings to trade policy debates. What, these commentators often ask, is the distinctive contribution of human rights actors to discussions about what trade policy ought to be? How has the intervention of human rights actors and language clarified and progressed public debates about what the trading system ought to look like? In what ways has it, conversely, muddied the waters? These are the questions that this article seeks to explore. By starting with these questions, I do not wish to imply that human rights actors need to justify their participation in debates about trade policy, nor that such actors must identify their "value-added" before they can be taken seriously in those debates. On the contrary, it is my view that such policy debates ought to be highly inclusive and participatory, particularly at the present moment. But even if it is agreed that human rights actors (like any other groups) have a legitimate place in debates about the trade regime, it is still necessary to think carefully about precisely what value human rights adds to these debates. Thinking clearly about this question is a necessary precondition for a productive dialogue between the two fields.

Part II of this article sets the scene by providing a brief account of the construction of international trade as a "human rights issue" since around the mid to late-1990s. In Part III, I set out and critique what I see as the three main models of what human rights offer, as well as the different forms of scholarship which each of these three models has generated. Finally, in Part IV, I offer some preliminary thoughts on a fourth model. I suggest that the human rights movement has helped in crucial ways to create the conditions for policy learning in the field of trade policy. That is to say, human rights actors have helped to facilitate the production of new forms of knowledge about the trading system, and of new ideas about legitimate and desirable trade policy.

II INTERNATIONAL TRADE AS A HUMAN RIGHTS ISSUE

The social history of the trade and human rights debate is yet to be written, and we still have no fully satisfactory account of who and what provided its initial impetus, nor of the factors that have shaped its progression since then.¹ Nevertheless, it is possible to provide at least a brief impressionistic survey of some key moments in the debate's evolution, and some basic features of its discursive landscape. Probably the most important feature, in terms of its shaping influence on the debate as a whole, has been the series of reports produced by the United Nations (UN) human

1 A useful brief sketch is offered in Gudrun Monika Zigel "WTO and Human Rights: Examining Linkages and Suggesting Convergences" (2005) 2 IDLO Voices of Development Jurists 1.

rights institutions on a number of different aspects of the international trading system.² This work began around 1999, with the initiation of a broad inter-institutional work programme under the rubric of "globalization and its impact on the full enjoyment of all human rights".³ Among the first fruits of this programme was a progress report of that name by Oloka-Onyango and Udagama, which dealt in large part with the impact of the World Trade Organization (WTO) and the trading system more generally on questions of poverty, development and public health.⁴ This report is remembered by many as controversial,⁵ and there are those who saw it as setting an early adversarial tone to the debate. While that progress report certainly was critical of the trade regime, with hindsight the critiques advanced in it are better understood as a reflection of and response to the strength of contemporary concerns about economic globalisation prevailing at the time. Since then, perhaps the most sustained and influential contribution has come from the High Commissioner's office, in the form of a series of (so far) six reports. The first, released in 2001, addressed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and its impact on human health.⁶ Since then the topics covered have included agricultural liberalisation and the right to food, the liberalisation of trade in services, investment liberalisation, and the principles of non-discrimination and participation as they apply in the context of trade policy.⁷

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- 2 See UNCHR "The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights" E/CN.4/Sub.2/2001/13 (27 June 2001); UNCHR "Globalization and Its Impact on the Full Enjoyment of Human Rights" E/CN.4/2002/54 (15 January 2002); UNCHR "Liberalization of Trade in Services and Human Rights" E/CN.4/Sub.2/2002/9 (25 June 2002); UNCHR "Human Rights, Trade and Investment" E/CN.4/Sub.2/2003/9 (2 July 2003); UNCHR "Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-Discrimination in the Context of Globalization" E/CN.4/2004/40 (15 January 2004); UNCHR "Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Participation and Its Application in the Context of Globalization" E/CN.4/2005/41 (23 December 2004).
 - 3 See, for example, UNCHR Resolution 1999/59 (28 April 1999) E/CN.4/RES/1999/59; UNGA Resolution 54/165 (17 December 1999) A/RES/54/165.
 - 4 UNCHR "Globalization and its Impact on the Full Enjoyment of All Human Rights" Preliminary report (15 June 2000) E/CN.4/Sub.2/2000/13; UNCHR "Globalization and its Impact on the Full Enjoyment of All Human Rights" Progress report (2 July 2001) E/CN.4/Sub.2/2001/10; UNCHR "Globalization and its Impact on the Full Enjoyment of All Human Rights" Final report (25 June 2003) E/CN.4/Sub.2/2003/14.
 - 5 As a result of the phrasing of one sentence in the Preliminary Report, that report has come to be known in some circles somewhat disparagingly as the "nightmare report".
 - 6 UNCHR "The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights" (27 June 2001) E/CN.4/Sub.2/2001/13 ["Trade-Related Aspects of Intellectual Property Rights"].
 - 7 UNCHR "Globalization and its Impact on the Full Enjoyment of All Human Rights" (15 January 2002) E/CN.4/2002/54; UNCHR "Liberalization of Trade in Services and Human Rights" (25 June 2002) E/CN.4/Sub.2/2002/9; UNCHR "Human Rights, Trade and Investment" (2 July 2003) E/CN.4/Sub.2/2003/9; UNCHR "An Analytical Study on the Fundamental Principle of Non-Discrimination in the Context of Globalization" (15 January 2004) E/CN.4/2004/40; UNCHR "An Analytical Study on the Fundamental Principle of Non-Discrimination in the Context of Globalization" (23 December 2004) E/CN.4/2005/41. See

While these reports certainly have a critical edge, they have taken a consistently moderate line, continually stressing that the international trading system can and ought to work for the protection and promotion of human rights. They have been read and distributed widely, and have been strongly influential in mobilising human rights actors, and generating and shaping the present debate. In addition, other human rights bodies — including treaty-monitoring bodies — have made significant contributions to this broad work programme.⁸

Of course, this body of work did not arise in a vacuum, and UN human rights institutions were not the first to make a connection between human rights and international trade. This seems to have been an innovation of some elements of civil society, particularly in the context of the campaigns conducted during the negotiation of both the North American Free Trade Agreement and the aborted Multilateral Agreement on Investment.⁹ Thus, while it is true that the work of UN human rights institutions continues to generate, sustain and focus civil society activism on trade matters, at the same time the UN work programme can itself be understood in part as a response to civil society pressure — or at least to a growing perception (arising in part as a consequence of civil society campaigns) that international trade matters ought to be a central part of the modern human rights agenda. The result is that at present civil society actors play a central, expanding and vigorous role in the trade and human rights debate, and have been some of most important drivers. It is hard to single out the work of particular non-governmental organisations (NGOs), without a degree of arbitrariness. However, the important place of civil society in the trade and human rights debate can be seen in a number of different developments: the diffusion of human rights language into the work of NGOs primarily interested in trade matters; the trend among human rights NGOs to develop new expertise in, and pursue activities related to, international economic questions; as

also more recently, OHCHR *Human Rights and World Trade Agreements: Using General Exceptions Clauses to Protect Human Rights* (New York, 2005).

8 For a selection of other trade-related work carried out by a variety of UN bodies, see: the series of reports from the UN Secretary-General "Globalization and its Impact on the Full Enjoyment of All Human Rights" (31 August 2000) A/55/342; (31 July 2001) A/56/254; (1 September 2004) A/59/320; (24 August 2005) A/60/301; the work of the Committee on Economic, Social and Cultural Rights (CESCR), in particular, CESCR "The Right to Adequate Food" (12 May 1999) E/C.12/1999/5; CESCR "The Right to Education" (8 December 1999) E/C.12/1999/10; CESCR "The Right to the Highest Attainable Standard of Health" (11 August 2000) E/C.12/2000/4; and CESCR "The Right to Water" (20 January 2003) E/C.12/2002/11; as well as various statements made by CESCR, including at WTO Ministerials (CESCR "Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization" E/C.12/1999/9 (26 November 1999); CESCR "Human Rights and Intellectual Property" (14 December 2001) E/C.12/2001/15); and Paul Hunt, Special Rapporteur on the Right to Health "The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health – Mission to the World Trade Organization" (1 March 2004) E/CN.4/2004/49/Add.1.

9 See for example, James F Smith "NAFTA and Human Rights: A Necessary Linkage" 27 (1994) UC Davis L Rev 793.

well as the significant growth in groups and networks specifically mandated to work at the nexus between the trade and human rights regimes, and to facilitate dialogue between the two.¹⁰

Alongside the work of both UN institutions and civil society has arisen a very large and diverse academic literature, produced by scholars of both the international trading system and the human rights regime. A number of events and publications have been important in generating momentum and a sustained interest in the theme. From 2002 to 2004, the American Society of International Law, in cooperation with a number of other institutions,¹¹ organised three influential conferences on the trade and human rights theme, the proceedings of which have been published relatively recently.¹² Earlier, in 2001, a lively and high-quality exchange of views between leading scholars in the pages of the *European Journal of International Law* served to excite interest and raise the profile of the debate.¹³ More generally, there has been something of an explosion of conferences, edited collections and monographs looking at impact of international trade on a wide range of human rights, either as a topic in its own right, or as part of larger studies looking at economic globalisation more generally.¹⁴

10 For those interested in perusing the work of NGOs in this area, the ESCR-Net network <www.escr-net.org> (accessed 27 March 2007) is a good starting point. Some NGOs active in the field include: 3D (Trade, Human Rights, Equitable Economy), Amnesty International, the International Federation for Human Rights, Ethical Globalization Initiative, the Center for International Environmental Law, International Gender and Trade Network, the Centre for International Trade and Development, the People's Movement for Human Rights Education, Dignity International, Association for Women's Rights in Development, the Lutheran World Federation and formerly the International Centre for Human Rights in Trade and Investment, among others. Some prominent NGOs working closely on trade matters, such as Oxfam, Institute for Agriculture and Trade Policy, Trade Law Centre for Southern Africa and the Third World Network, have in varying degrees also incorporated some aspects of human rights language into their publications.

11 The Georgetown University Law Center, the Max Planck-Institute for International Law (Heidelberg) and the World Trade Institute (Berne).

12 Thomas Cottier, Elisabeth Bürgi and Joost Pauwelyn (eds) *Human Rights and International Trade* (Oxford University Press, Oxford, 2005) [*Human Rights and International Trade*]; Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds) *International Trade and Human Rights: Foundations and Conceptual Issues* (University of Michigan Press, Michigan, 2006) [*International Trade and Human Rights*]. See also International Trade Law Committee "Draft Seventh Report of the International Law Association" <[www.ila-hq.org/pdf/Trade Law/Draft Report 2006.pdf](http://www.ila-hq.org/pdf/Trade%20Law/Draft%20Report%202006.pdf)> (accessed 27 March 2007).

13 Philip Alston "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" (2002) 13 EJIL 815; Robert Howse "Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann" (2002) 13 EJIL 651; Ernst-Ulrich Petersmann "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" (2002) 13 EJIL 621; Ernst-Ulrich Petersmann "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston" (2002) 13 EJIL 845.

14 Among the vast literature, some early examples from a diversity of perspectives include: Tony Evans and Jan Hancock "Doing Something Without Doing Anything: International Human Rights Law and the Challenge of Globalisation" (1998) 2 IJHR 1; Asif Qureshi "International Trade and Human Rights from the Perspective of the WTO" in Friedl Weiss, Erik Denters and Paul de Waart (eds) *International Economic Law with a Human*

An interesting dynamic of this scholarly literature (and indeed of the debate more generally) has been its tendency to progressively expand its substantive scope. In many ways, it seems as if the literature has proceeded by borrowing critiques of the trading system originally developed in other contexts, and re-articulating them in human rights language. Early on, discussions on the theme of trade and human rights tended to concentrate on essentially two main topics: human rights conditionality (particularly in respect of trading relations between the US and China, Cuba and Burma);¹⁵ and the labour and employment impacts of international trade.¹⁶ While these subjects retain their place in the contemporary literature, the debate has significantly expanded, and nowadays they occupy a far less central position. An early addition was intellectual property,

Face (Kluwer Law International, The Hague, 1998) 159; Robert McCorquodale and Richard Fairbrother "Globalization and Human Rights" (1999) 21 *Hum Rts Q* 735; Malini Mehra (ed) *Human Rights and Economic Globalisation: Directions for the WTO* (Global Foundation, Sweden, 1999); A Erh-Soon Tay "The New Century, Globalisation and Human Rights" (2000) 8 *APLR* 139; International Institute of Human Rights *World Trade and the Protection of Human Rights: Human Rights in Face of Global Economic Exchanges* (Publications de l'Institut International des Droits de l'Homme, Brussels, 2001); Alison Brysk *Globalization and Human Rights* (University of California Press, Berkeley, 2002); Matthew Gibney *Globalizing Rights: The Oxford Amnesty Lectures* (Oxford University Press, Oxford, 2002); as well as the symposium issue "The Universal Declaration at 50 and the Challenge of Global Markets" (1999) 25 *BJIL* 1.

- 15 Philip Alston "International Trade as an Instrument of Positive Human Rights Policy" (1982) 4 *Hum Rts Q* 155; J F Smith "NAFTA and Human Rights: A Necessary Linkage" (1994) 27 *UC Davis LR* 793; James A Dorn "Trade and Human Rights: The Case of China" (1996) 16 *Cato Journal* 77; Patricia Stirling "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization" (1996) 11 *Am U J Int'l L & Pol'y* 1; Robert W McGee "Trade Embargoes, Sanctions and Blockades – Some Overlooked Human Rights Issues" (1998) 32 *JWTL* 139; C McCrudden "International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws Under the WTO Government Procurement Agreement" (1999) 2 *JIEL* 3; Salman Bal "International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT" (2001) 10 *Minn J Global Trade* 62; Lorand Bartels "Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWTL* 353; Sarah H Cleveland "Human Rights Sanctions and International Trade: A Theory of Compatibility" (2002) 5 *JIEL* 133.
- 16 The question of the effects of trade on employment and working conditions is invariably a part of virtually all general commentaries on the relationship between trade and human rights: Shelley Wright "Women and the Global Economic Order: A Feminist Perspective" (1995) 10 *Am U J Int'l L & Pol'y* 861; Lance A Compa and Stephen F Diamond *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press, Philadelphia, 1996); Robert Howse "The World Trade Organization and the Protection of Workers' Rights" (1999) 3 *J Small & Emerging Bus L* 131; Annie Taylor and Caroline Thomas *Global Trade and Global Social Issues* (Routledge, London, 1999); Robert Howse and Makau Mutua *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Policy Paper, International Centre for Human Rights and Democratic Development, 2000); Marjorie Cohn "The World Trade Organization: Elevating Property Interests above Human Rights" (2001) 29 *Ga JCIL* 427; Hoe Lim "Trade and Human Rights — What's at Issue?" (2001) 35 *JWTL* 275; Brysk, above n 14; Dinah Shelton "Protecting Human Rights in a Globalized World" (2002) 25 *BCICIL* 273; Robert Wai "Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime" (2003) 14 *EJIL* 35. There are those, it should be noted, who do not think that labour rights issues are properly part of a human rights agenda.

as human rights language was heavily deployed in the TRIPS and public health debate, particularly in the context of South African activism on the issue.¹⁷ More recently, a great deal of work in the trade and human rights field has begun to centre on questions of development: that is, questions of whether and how the international trade regime disadvantages developing countries and (certain sections of) their populations. Furthermore, recent work has started to concentrate on concerns which have been raised about the possible constraining impact of the international trading system on what has been termed social regulation — health and safety regulation, consumer protection regimes, equal opportunity legislation, labour market regulation, all of which are seen as tools for the protection of human rights.¹⁸ From around 2000 or 2001, the debate has also encompassed questions concerning the impact of services liberalisation on the provision of essential services to the poor.¹⁹

Although at first it was a struggle even to establish that a link exists between international trade and human rights, a decade after its beginning it is now clear that the literature on trade and human rights has reached a level of maturity. It is a recognised feature in the discursive landscape of trade policy debates, is regularly discussed in journals and at conferences, and it has found a

17 See "Trade-Related Aspects of Intellectual Property Rights", above n 6; Hunt above n 8; Caroline Dommen "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies" (2002) 24 *Hum Rts Q* 1; E M Fox "Globalization and Human Rights: Looking out for the Welfare of the Worst Off" (2002) 35 *NYU J Intl L & Pol* 201; Wai, above n 16; Laurence R Helfer "Mediating Interactions in an Expanding International Intellectual Property Regime" (2004) 36 *Case JIL* 123; Laurence R Helfer "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 *Yale J Intl L* 1; Frederick Abbott "The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the context of TRIPS" in *Human Rights and International Trade*, above n 14, 279; Frederick Abbott "TRIPS and Human Rights: Preliminary Reflections" in *International Trade and Human Rights*, above n 14, 145.

18 Discussions of these and other regulatory issues can be found in: Anne Orford "Contesting Globalization: A Feminist Perspective on the Future of Human Rights" (1998) 8 *Transnat'l L & Contemp Probs* 171; Steve Charnovitz "The Global Market as Friend or Foe of Human Rights" (1999) 25 *BJIL* 113; Howse and Mutua, above n 16; James Thuo Gathii "Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis" (2001) 7 *Wid L Symp J* 137; Thomas Cottier "Trade and Human Rights: A Relationship to Discover" (2002) 5 *JIEL* 111; Dommen, above n 17; Gabrielle Marceau "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753; Andrew Lang "The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry" (2004) 7 *JIEL* 801.

19 OHCHR "Liberalization of Trade in Services and Human Rights" (25 June 2002) E/CN.4/Sub.2/2002/9; Center For International Environmental Law (CIEL) *Going with the Flow: How International Trade, Finance and Investment Regimes Affect the Provision of Water to the Poor* (Washington DC, 2003); CIEL *Water Traded: A Center for International Environmental Law Issue Brief* (Washington DC, 2003); Aaron Ostrovsky, Robert Speed and Elisabeth Tuerk *GATS and Water: Retaining Policy Space to Serve the Poor* (CIEL, Washington DC, 2003); Aaron Ostrovsky, Robert Speed and Elisabeth Tuerk *GATS, Water and the Environment: Implications of the General Agreement on Trade in Services for Water Resources* (World Wide Fund for Nature, Gland, 2003); Andrew Lang "The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry" (2004) 7 *JIEL* 801.

place in a number of the leading textbooks.²⁰ The time has come then to take stock and to evaluate the literature as it currently stands. In what ways has the construction of international trade as a human rights issue been a useful development? What benefits has this brought, or can it bring? Is it possible to identify a prevailing theory or theories about how the human rights movement can help us to design or achieve a better international trading system? If so, how compelling are these theories?

II THE ROLE OF THE HUMAN RIGHTS MOVEMENT: THREE COMMON MODELS

In this section, I outline and critique what I see as the three most common conceptions of what it is that human rights offer to those engaged in debates about international trade policy and the international trading system. This typology comes with the usual disclaimers: the models are idealised types; they are intended primarily as heuristic aids; and they can be difficult to distinguish in practice, particularly since most commentators combine a number of them. Nevertheless, it is helpful to set them out in this stylised fashion, so as to make explicit some of the structuring assumptions and conceptual models that in my view shape many human rights interventions into trade policy debates.

A Human Rights Norms as the Source of Substantive Policy Guidance

The first model sees human rights norms and values as a source of substantive guidance for trade policy-makers. When the UN High Commissioner for Human Rights observes that WTO members must take their human rights obligations into account when negotiating and designing international trade law,²¹ or when commentators such as Howse and Mutua suggest that "the spirit of human rights law must frame the development of trade law",²² their claims seem to rest more or less explicitly on a belief that human rights principles, norms and rules offer to trade policy-makers a way of determining what the international trade regime ought to look like. On this view, human rights norms set the boundaries of acceptable trade policy choices, and provide a framework by means of which policy-makers can arbitrate between competing trade policy agendas and priorities. Put simply, policy-makers must not implement certain trade policies where to do so would lead to a violation of their human rights obligations (or, somewhat more vaguely, where to do so would be contrary to the principles and values which human rights hold dear). Conversely,

20 See, for example, John H Jackson, William J Davey and Alan O Sykes *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations* (4 ed, West Group, St Paul (MN), 2002); M J Trebilcock and Robert Howse *The Regulation of International Trade* (3 ed, Routledge, London, 2005).

21 See, for example, UNCHR "Liberalization of Trade in Services and Human Rights" (25 June 2002) E/CN.4/Sub.2/2002/9 para 14 and *passim*.

22 Howse and Mutua, above n 16.

they ought to pursue those policies which best facilitate the progressive enjoyment of human rights.

Such a model leads us to ask, of course, the difficult question of precisely what kinds of trade policy best facilitate the progressive enjoyment of human rights. Even those commentators who are in favour of using human rights in this way are acutely aware that human rights norms need to undergo a degree of elaboration if they are to provide meaningful guidance to trade policy-makers.²³ While of course no one suggests that human rights principles can or ought to be fully reducible to a universal set of policy prescriptions in the field of trade policy as in any other field, nevertheless there are many who see value in enhancing the specificity of human rights obligations, and thereby enhancing their practical utility to policy-makers. This model has therefore led to a body of literature designed to begin this progressive development, to "cash out" human rights norms into concrete policy prescriptions — or at least something close to them. This logically involves a number of discrete stages: elaboration of the normative and legal content of the relevant human right; analysis of different trade policies (and WTO rules) and their practical effects; a comparison of those effects to the kinds of outcomes envisaged or required by the relevant human right; and a set of proposals for changes to either trade policies or WTO rules to make them conform more closely to what human rights obligations require.

A clear example of this approach is Breining-Kaufman's excellent analysis of the right to food and its implications for agricultural trade rules and policies.²⁴ Her analysis begins with a comprehensive description of the content of all WTO agreements affecting agricultural trade, thus establishing first of all the precise constraints which WTO obligations place on members' agricultural trade policies. She then turns her attention to the right to food, setting out first its legal basis, and then its content as elaborated by the Committee on Economic, Social and Cultural Rights in its General Comment No 12.²⁵ Thus, for example, Breining-Kaufman emphasises, in common with a number of other commentators, that the right to food covers both the availability and accessibility of food, that states have an obligation to take the right into account when negotiating trade treaties, and that states have a tripartite obligation to "respect, protect, and fulfil"

23 See, for example, Frederick Abbott "The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the context of TRIPS" in *Human Rights and International Trade*, above n 12, 279, 294; Christine Breining-Kaufmann "The Right to Food and Trade in Agriculture" in *Human Rights and International Trade*, above n 12, 341, 359. Alvarez has criticised the deployment of human rights law for this reason: José E Alvarez "How Not to Link: Institutional Conundrums of an Expanded Trade Regime" (2001) 7 *Wid L Symp J* 1.

24 Christine Breining-Kaufmann "The Right to Food and Trade in Agriculture" in *Human Rights and International Trade*, above n 12, 341.

25 CESCR "Implementation of the International Covenant on Economic, Social and Cultural Rights — General Comment 12" E/C.12/1999/5 (12 May 1999).

the right.²⁶ After establishing the content of the right to food as a matter of general principle, she then goes on to describe recent experience with particular agricultural trade policies, in order to determine what kinds of policies are best and worst suited to the protection of the right to food. She looks at the effect that disciplines in the WTO Agreement on Agriculture have had on the actual incidence of protectionist measures in agricultural trade, as well as at the effect that patterns of agricultural trade liberalisation and protection have recently had on a variety of developing countries, particularly in terms of food security, unemployment, poverty and social dislocation.²⁷ After a discussion of alternative policy choices to resolve some of these difficulties, Breining-Kaufman concludes with a list of policy reforms designed to "reconcile" the present agricultural trading system with the dictates of the right to food. These include: improved market access for developing country products; further special and differential treatment for developing countries; the lowering of export subsidies in developed countries; the provision of further food aid; and a renewed focus on employment programs, targeted food supplies, and food price stabilisation at the national level, specifically aimed at the rural and urban poor.²⁸

This pattern of argumentation is common to many interventions into the trade and human rights debate. There are any number of other examples that could have been chosen covering any of the substantive issues typically addressed. The key question, for my purposes, is precisely what function human rights are playing in this form of analysis. As just noted, it is common in this context to talk as if human rights are in some sense the source of the ultimate trade policy prescriptions that arise from this kind of analysis — as if human rights rules provide the criteria by which to arbitrate between alternative trade policy proposals. In fact, however, almost all of the intellectual work in these analyses is not done by human rights norms at all. When it comes to the analysis and evaluation of concrete policy proposals — and remember that within this model the elaboration of concrete proposals is precisely the point of the intervention — the discussion invariably tends to reproduce and rehearse precisely the same kinds of arguments which characterise trade policy discussions in other arenas, and which are perfectly familiar to trade policy experts. Thus, in the example given above, Breining-Kaufman's analysis of the effects of agricultural trade liberalisation, and of alternative policy proposals for reform to WTO rules, is effectively a sophisticated synthesis of arguments already canvassed and widely discussed by development-policy and trade-policy experts. At this point, human rights language recedes into the background, and we are presented with a series of argumentative steps, sets of data, and ultimately policy prescriptions which reproduce those emanating from more traditional trade policy circles. I am not suggesting that human rights commentators necessarily tend to reproduce orthodox opinion

26 See *ibid*, para 15. This is of course a standard formulation common through many of the general comments issued by the CESCR.

27 Breining-Kaufman, above n 24, 358 and surrounding.

28 *Ibid*, 372.

on these questions. In fact, the opposite is almost always the case: human rights have come to be seen as a language for articulating counter-orthodox critiques of certain kinds of prevailing trade policy consensus. But, regardless of the substantive positions taken, the point is that the discussion of trade policy matters engages with precisely the same set of arguments, in essentially the same way, as have characterised trade policy discussions for some time.

The result is that one can often be left wondering why it is necessary for these commentators to frame their arguments in human rights terms.²⁹ Why not simply analyse (as many others do) the impacts of domestic subsidies on the rural poor in developing countries, on subsistence farmers, on global commodity prices, and so on, and conclude from that discussion that such subsidies ought to be reduced? Do we really need the right to food to tell us that domestic agricultural subsidies ought to be reduced, or that developing countries ought to be given greater market access for their exports? Or, to use another example: why is it not enough simply to point to the implications of the TRIPS agreement for access to essential medicines, and draw the conclusion that certain rules need to be changed, rather than re-framing the analysis in terms of the right to health? As will become clear below,³⁰ this kind of re-framing does perform a number of potentially important functions. But we need to be clear about what human rights are doing in this kind of analysis, and what they are not. My point here is simply the limited one that — contrary to what seems often assumed — human rights norms are not providing substantial policy guidance. They are neither a source of new policy ideas nor (despite appearances) do they provide a means of choosing between competing ideas. In reality, all the serious policy analysis is done without the aid of human rights — and the ultimate policy prescriptions for a more "human rights friendly" trading system are drawn from, and justified by reference to, policy ideas already in widespread circulation. In an important sense, in this kind of intervention human rights actors end up simply reflecting and re-articulating policy proposals already generated elsewhere. Indeed, on current evidence, it seems essentially illusory to think that we can derive or arbitrate, at least in any simple or direct way, alternative visions of the global trading order from human rights norms.

B The Human Rights Movement as a Source of Political, Moral and Legal Pressure

The second model is perhaps more pragmatic. Whether or not we need human rights to tell us that developed country agricultural markets ought to be opened, this second argument runs, it certainly helps the cause if we can say that such measures are *required* by human rights law. On this view, to say that certain reforms to the international trading order are necessary to conform to

29 It should be noted, in light of the earlier example, that Breining-Kaufman herself alludes to a similar difficulty in her study of trade and the right to food: "What is the motivation for a rights-based approach to food? Would it not be sufficient hunger and malnutrition as a serious moral evil or violation of a basic need?" (Ibid, 359). Her response seems essentially to be the desirability of the strong moral and legal imperative associated with rights-based approaches.

30 See Part IV(B).

the dictates of human rights law gives those claims greater weight — and therefore greater political impact — than simply making the case that such reforms are desirable for some other reason. The argument can be deemed pragmatic because it sees human rights as essentially a politically useful tool to be used strategically in the pursuit of a particular policy agenda. Although it is rarely stated so explicitly, this pragmatic streak is never far from the surface in a good deal of the trade and human rights literature: many commentators are perfectly aware that their work is not simply the application of a pre-existing body of law, but also the construction of an international legal framework to support a policy agenda originally derived and justified elsewhere.

To speak more generally, this second model is one in which the human rights regime is seen as providing a valuable set of political technologies which may be deployed to achieve desirable trade policy outcomes. When authoritative human rights bodies begin to develop a set of norms and legal rules applying in any particular policy field, a number of processes are set in motion, mobilising a variety of sources of political pressure for change. These processes are familiar to us from studies of other policy areas in which the human rights regime is active.³¹ For example, the activity of international human rights institutions can help to mobilise human rights-based transnational advocacy networks, which have proven themselves particularly adept at raising public awareness of particular issues, generating broad-based public consensus around controversial issues, influencing the agenda of international institutions and their members, as well as generating significant political pressure through both grassroots campaigning and direct lobbying.³² In addition, international human rights institutions can also bring pressure to bear more directly. Treaty monitoring bodies, for example, scrutinise and comment on certain aspects of States Parties' trade policies, raising governmental awareness of problematic issues, and forcing them to justify their policy choices.³³ More diffusely, processes of socialisation and normative diffusion among participants in the international trade regime may lead some actors to internalise human rights norms and seek to influence trade policy through internal domestic governmental processes. Furthermore, at a domestic level, in those jurisdictions with strong human rights traditions and a

31 See for example, the contributions to Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, New York, 1999).

32 For a succinct and compelling description of the functions of transnational advocacy groups from a leading commentator, see Kathryn Sikkink "Transnational Advocacy Networks and the Social Construction of Legal Rules" in Yves Dezalay and Bryant G Garth *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (Michigan, Ann Arbor, 2002) 37-64.

33 The Committee on Economic, Social and Cultural Rights has been known in recent years to focus on trade issues – and particularly IP-related trade issues – in its ongoing review and monitoring mechanism. This has received a degree of civil society attention and engagement, see, for example, the submission of 3D (Trade-Human Rights-Equitable Economy) to the CESCR "Trade-related Intellectual Property Rights, Access to Medicines and the Right to Health – Ecuador" (April 2004) <www.citizen.org/documents/3D_IP_Ecuador_AFTA.pdf> (accessed 29 April 2007).

judicial willingness to look to international law, the development of international human rights law relating to a particular policy area may inspire particular domestic actors to press their countries for change through rights-based claims in domestic courts.

There is no doubt that this model identifies some important ways in which human rights actors have altered the dynamics of trade policy debates. The trade and human rights movement has given rise to pressure from all these sources, and more besides. There is even some reason to think that these processes will, in the longer term, lead to some significant changes to trade policy and the international trading order more generally. In some cases, impediments to change in the arena of trade policy have much more to do with a lack of "political will" — that is to say, with the political economy of trade, and the distribution of political power among particular special interest groups — than they have to do with a failure of our collective policy imagination.³⁴ Thus, to the extent that the human rights movement can mobilise actors and interest groups presently marginalised in trade debates, and provide effective tools to augment their political influence, it follows that the human rights movement may be able to achieve real change. Although it is difficult to measure the precise impact, there is at least some indication already of such effectiveness. For example, it appears that the human rights movement played an important part in the negotiations leading to the Decision on the Implementation of Paragraph 6 of the Doha Declaration in August 2003.³⁵ Human rights institutions and actors added weight to the campaign for the modification of TRIPS commitments, by lending additional legitimacy, new constituencies, and (to a certain extent) further resources to those groups pressuring for change.³⁶ The deployment of human rights language also helped to frame the debate as a *moral* issue, and through the mobilisation of moral outrage, thereby helped to generate a widespread sense that the TRIPS agreement in its current form could not be justified. Another example may be the initiation of domestic proceedings in South African courts on the basis of the constitutional right to health, in respect of health policies closely related to the TRIPS and public health campaign.³⁷

At the same time, we should not be too hasty in concluding that the human rights movement provides tools for genuinely effective change to the international trading order. It is perfectly possible that it will have only a slight or marginal impact in the longer term. Many of the

34 Reform of industrialised country agricultural policies is a classic example.

35 Decision of the General Council "Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health" (30 August 2003) WT/L/540; WT/L/540/Corr.1.

36 For an interesting discussion of the evolution of the TRIPS and public health debate, including an account of the role of social movements such as the human rights movement in it, see John S Odell and Susan K Sell "Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001" in John S Odell (ed) *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge UP, Cambridge, 2006) 85-114.

37 *Minister of Health v Treatment Action Campaign* (TAC) (2002) 5 SA 721 (CC).

techniques available to human rights actors depend heavily on the moral legitimacy of human rights language — and, for all the claims to the contrary, it remains the case that in respect of trade policy the human rights regime is still in the process of building significant authority and legitimacy. Since policy-makers view trade policy as a specialised domain, and look to trained experts as more appropriate arbiters of trade policy prescriptions, the processes of persuasion and normative socialisation deployed by the human rights regime may be less effective in this policy area. But more importantly, even if such processes *were* ultimately highly effective in producing change, it is crucial to recognise that in this model the role set out for the human rights movement is very limited and constrained. This model still provides no understanding of how the human rights movement may productively be involved in *policy* debates — that is, in generating new ideas about desirable and appropriate trade policy, or alternative visions of the international trading system. In this framework, the human rights movement is still figured as a passive recipient of policy knowledge, and is seen as being deployed in the service of a policy agenda still defined in the context of traditional trade policy debates. Trade policy élites, deploying traditional conceptual frameworks, still play the role of gatekeepers of policy ideas, monopolising not only the production but also the legitimation and authorisation of acceptable policy proposals. The inevitable result is that the human rights movement can do nothing to remedy those flaws in the international trading order which arise as a consequence of this knowledge — or rather as a consequence of its flaws, blindspots and other inadequacies. Put another way, to the extent that the international trading system is already structured and informed by prevailing expert knowledge — and in my view this is a very significant extent — the human rights movement has in this model no critical or transformative power at all.

C Fragmentation, Coherence and Constitutionalisation

Let me turn now to the third conceptual model which guides the trade and human rights debate — what I call the "coherence" model.³⁸ What is distinctive about this model is the way in which it characterises the problem which the trade and human rights debate addresses. It begins with the notion of a policy "trade-off". It is self-evident, so this argument runs, that all societies generate a variety of social goals (economic prosperity, distributive justice, environmental protection, and so on), and that in many circumstances these goals make conflicting demands on policy-makers. At the domestic level, a variety of processes have of course evolved to coordinate actors and institutions tasked with different goals, and to resolve difficult and contentious trade-off decisions.

38 For works which illustrate this coherence framework in a clear and sophisticated manner, see for example Breining-Kaufmann, above n 24; Thomas Cottier "Trade and Human Rights: A Relationship to Discover" (2002) 5 JIEL 111; Caroline Dommen "Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence" in *Human Rights and International Trade*, above n 12, 199; Victor Mosoti "Institutional Cooperation and Norm Creation in International Organizations" in *Human Rights and International Trade*, above n 12, 165; Prabhash Ranjan "International Trade and Human Rights: Conflicting Obligations" in *Human Rights and International Trade*, above n 12, 311.

At the international level, however, these processes are, at best, at an embryonic stage of development. The different spheres of international political life — trade, human rights, environment, labour, finance, development, health, security, and so on — along with their associated organisations, each respond to only a particular subset of shared values, one particular valued goal among the many that the international polity (such as it is) considers desirable. But, this argument goes on, there are few mechanisms of coordination and coherence to address those circumstances in which these goals generate conflicting demands. Thus, within this model, the trade and human rights debate is at its heart about those circumstances in which the desire to create and sustain a liberal trading order comes into conflict with the desire to promote and protect human rights. The problem, that is to say, is the lack of appropriate infrastructure to resolve complex policy trade-offs between the liberal trade project and the human rights project — in other words, the problem is the fragmentation of the international legal and political order. The challenge is to develop a more coherent policy-making environment at the international level.

In the previous two sections, two different ideas about the contribution of human rights to trade policy debates were offered. So then, what is the role of human rights in those debates according to the "coherence" model? In fact, because the relevance of the human rights regime is built into the starting premises of this model, the question makes little sense in this context. The issue from this perspective is the relationship between the trade and human rights regimes, and the task is how best to resolve any conflicts that might arise. The human rights regime, therefore, is treated in this framework as an object of study, rather than as a tool to help address trade policy problems. The entire point of the trade and human rights literature, on this view, is to map the objectives, values and rules of the human rights regime, compare them to those of the trade regime, identify conflicts and incompatibilities, and design solutions to aid in the resolution of those conflicts.³⁹ To the extent that human rights actors and language are seen as "performing a function" in the trade and human rights debate, it is the same function that the human rights regime as a whole performs — to act as the mouthpiece and champion of a particular set of social values and shared objectives. That is to say, human rights actors tend to understand their role as ensuring that the objectives and values of the trade regime do not (excessively or unduly) prevail over those of the human rights regime when conflicts between the two arise. Many see themselves moreover as attempting to counteract a "trade bias" within the WTO itself, as well as within the international system more broadly.⁴⁰

39 The clearest example of this approach is Thomas Cottier "Trade and Human Rights: A Relationship to Discover" (2002) 5 JIEL 111. Trachtman's excellent work on linkage and constitutionalisation is informed by a similar conceptual framework. See Joel P Trachtman "The Constitutions of the WTO" (2006) 17 EJIL 623; Joel P Trachtman "The WTO Constitution: Tertiary Rules for Intertwined Elephants" (ExpressO Preprint Series, Working Paper 753, Berkeley Electronic Press, 2005).

40 Talk of the existence of such a bias in the WTO is extremely common, see for example Marco C E J Bronckers "More Power to the WTO?" (2001) 4 JIEL 41, 46; Sungjoon Cho "Linkage of Free Trade and Social

This framework is a very common one, and it has produced a broad and highly sophisticated body of literature. Some of this literature concentrates on identifying a series of situations in which the desire to liberalise trade appears to come into conflict with the protection of human rights.⁴¹ Many of these apparent conflicts are familiar, and overlap with the kind of work already described in the previous sections: the TRIPS and public health dilemma, the complex problems caused by agricultural trade liberalisation, the difficult trade-offs related to the trade-restrictive effect of food safety regulation, the question of human rights sanctions, and so on. Others are more specialised, such as the adverse health effects of international trade in tobacco products, or the human rights problems caused by the international trade in "conflict diamonds".⁴² But the identification of such conflicts serves primarily as a springboard to the question of how to ensure greater inter-regime coherence. Some have advocated an approach based on a principle of deference, whereby the trade regime defers to the judgment of other institutions in respect of matters which closely affect their mandate.⁴³ Others have argued for a variety of informal and formal mechanisms to encourage collaboration and discussion between actors in the trade and human rights regimes.⁴⁴ Still others have outlined more ambitious agendas for the constitutionalisation of the trade regime, and the creation of an overarching normative and institutional framework for managing its interfaces with

Regulation: Moving beyond the Entropic Dilemma" (2005) 5 *Chi J Int'l L* 625, 640 ("liberal trade bias"); Gregory C Shaffer "The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters" (2001) 25 *Harv Env L Rev* 1, 12 ("neoliberal bias"); Gregory Shaffer "WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future" (2000) 24 *Fordham Int'l LJ* 608, 611 ("closed, trade-biased ... institution"); John H Knox "The Judicial Resolution of Conflicts Between Trade and the Environment" (2004) 28 *Harv Env L Rev* 1, 1 ("biased"); Andrew T Guzman "Global Governance and the WTO" (2004) 45 *Harv Int'l LJ* 303, 306 ("trade bias"); Larry A DiMatteo and others "The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime" (2003) 36 *Vand. J Transnat'l L* 95, 133 ("free trade bias"); Hannes L Schloemann and Stefan Ohlhoff "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence" (1999) 93 *AJIL* 424, 451 ("protrade bias").

- 41 See Cottier, above n 38.
- 42 Krista Nadakavukaren Schefer "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process" in *Human Rights and International Trade*, above n 12, 391; Allyn L Taylor "Trade, Human Rights, and the WHO Framework Convention on Tobacco Control: Just what the Doctor Ordered?" in *Human Rights and International Trade*, above n 12, 322.
- 43 See for example the important vision set out by Kalypto Nicolaidis and Robert Howse in "Legitimacy through 'Higher Law'? Why Constitutionalizing the WTO Is a Step Too Far" in Thomas Cottier and Petros C Mavroidis (eds) *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press, Michigan, 2003) 307.
- 44 See for example Caroline Dommen "Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence" in *Human Rights and International Trade*, above n 10, 199; and the work of the OHCHR referred to in note 7 above.

various other regimes.⁴⁵ Among legal scholars, there has also of course been considerable work on the rules governing the relationship between trade law and human rights law, including the extent to which human rights law can be used in WTO dispute settlement.⁴⁶

The difficulty that I have with the coherence model, and with the body of literature which follows from it, lies in its starting premises. It is true that much of the work of the trade regime, and of trade policy-makers, involves making complex and highly value-laden choices about how to prioritise competing social demands (or "values"). Furthermore, it is crucial to make these decisions visible, and to put in place measures to ensure that appropriate procedures are followed in resolving them and that certain kinds of values are not systematically marginalised and under-emphasised in the process. To some extent, it may also be true that the human rights regime can help to ensure the trade regime accords appropriate weight to "social" values such as the protection of health, improving working conditions, and so on — though generally speaking I am of the view that the trade regime has its own balancing mechanisms which (in principle at least) can do the job perfectly well.⁴⁷

But where I part company with the coherence framework is in its characterisation of these value trade-offs as trade-offs between the liberal trade project and the human rights project — or, in the stylised shorthand commonly used, between trade values and human rights values. This characterisation confuses matters considerably and leads in some troubling directions. Contemporary public debates about the international trading order — debates to which the trade and human rights literature is a response — raise fundamental questions about the nature and social purpose of the liberal trade project itself. They are the latest chapter in the ongoing story of contestation over the particular social goals which the trade order is designed to achieve, and over the kind of liberal trading order we want to have. The same can also be said in respect of each of

45 See Ernst-Ulrich Petersmann "The WTO Constitution and Human Rights" (2000) *JIEL* 19, the work of Trachtman, above n 39, and for some critiques. See Nicolaïdis, above n 43, 307; Deborah Z Cass *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford, 2005); J L Dunoff "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law" (2006) 17 *EJIL* 647.

46 See, for example, Joel P Trachtman "The Domain of WTO Dispute Resolution" (1999) 40 *Harv Int'l LJ* 333; G Gabrielle Marceau "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753; Joost Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, New York, 2003); Joost Pauwelyn "Human Rights in WTO Dispute Settlement" in *Human Rights and International Trade*, above n 12, 205.

47 That is to say, while it may help panels and the Appellate Body to be able to call on certain human rights norms and principles to help justify their interpretive choices, this is a relatively marginal role for human rights law. In most arguments of this kind, taking human rights law into account when interpreting trade law seems to be assumed to be roughly equivalent to being sensitive to the values for which human rights law purportedly stands. The real issue, then, is sensitivity on the part of decision-makers to the competing values at stake: if such sensitivity exists, there is not much for human rights to do; if it does not, formal consideration of human rights law is unlikely to make much difference.

the specific conflicts described in the preceding paragraphs: debates about how to resolve these conflicts are the venue in which collective ideas about the underlying purpose of the liberal trade project are generated, contested, and disseminated. But — and this is the important point — through the framework of fragmentation and coherence, these debates have become recast as conflicts between the liberal trade project and other social projects, between the demand for trade liberalisation, and the need to protect human rights. The result has been that questions about the purpose of the liberal trade project have therefore been put to one side, and in their place we have constitutionalist discussions about how to ensure coherence between the trade project — which, crucially, in this framework is now taken as *given* — and the human rights project. Potentially transformative contestations over the definition and constitution of the trade regime give way to discussions about how to manage the interface between the trade regime and the human rights regime, and about how to resolve conflicts between trade law and human rights law.

This foundational conceptual move of the coherence framework — in which the value choices made by trade policy-makers come to be understood not as constitutive of the trade project, but rather as decisions about how to prioritise trade liberalisation and other social demands — therefore has the (unintended) effect of limiting and containing the potentially transformative impact of human rights voices in debates about the trade regime. It does this in a number of ways. As just noted, it diverts attention from questions about the nature and purpose of the trade regime, instead treating those questions as self-evident and taken-for-granted. As a result, it hides from view the processes by which prevailing conceptions of the purpose of the trade regime are generated and sustained, and therefore enhances and sustains elite control over those processes. More than that, by presupposing a distinction between trade values and human rights values, it diverts attention from the ways in which the values currently associated with the human rights regime (such as equality, protection of the poor and vulnerable, democratic self-actualisation, distributive justice, and so on) might profitably be engaged in defining and constituting the liberal trade project itself. Instead, those values and the project of pursuing them come to be seen as necessitating exceptions from, or additions to, the core project of the trade regime. Furthermore, the coherence framework contains and limits the potentially profoundly disruptive and destabilising influence of critical voices by confining their input to fairly narrow institutional channels.

If what is at stake in these debates is coherence between the trade and human rights projects, then the appropriate response would seem to be to develop institutional links between the two regimes responsible for the respective projects: formal and informal collaborations; mutual observer status; systematic consideration of each other's rules in their respective legal orders; and so on. Without wishing to downplay the desirability of these initiatives, it is easy to see how such

mechanisms of inter-regime engagement could substitute for a more thoroughgoing, "ground up" reconstitution of the trade regime itself.⁴⁸

IV HUMAN RIGHTS AS A TRIGGER FOR SOCIAL LEARNING

In this section, I suggest a fourth way of thinking about what human rights have to offer trade policy debates, and about the processes by which the human rights movement has influenced their dynamics and direction. As it is a less familiar approach than the previous three, and because it approaches the question from a somewhat different point of view, the approach requires a short introduction. One of the underlying premises of my argument so far has been that transformative change to the international trading order — which at some level is the essential point of human rights engagement with trade issues — cannot easily occur without "new thinking". By "new thinking" I mean new ideas about the kinds of trade policies which are desirable and legitimate, and about the kinds of governance structures through which political power is constituted and exercised in the trading order. I have suggested that none of the three models considered in the previous section provide any basis for thinking about how the human rights movement may be involved in the production of such ideas. While it is common to speak as if human rights norms may provide the substance of an alternative vision for the international trading order, I have said that in my view that promise is illusory. Furthermore, I have suggested that the discourse of fragmentation and coherence — propagated in part within the trade and human rights debate — may actually make such "new thinking" *more* difficult. Does this mean that, in the end, the human rights movement has only a marginal role to play in the ongoing evolution of the trading system? The question is still open, but on balance I think not. Put most simply, the claim I make in this section is that the human rights movement can facilitate the production of new forms of policy knowledge about the trading system. Even if human rights are not in themselves a source of new policy ideas, human rights interventions into trade policy debates perform the crucial function of providing a trigger for policy learning, and helping to create the conditions in which learning is more likely. That is to say, the engagement of human rights voices and actors in trade debates provides an impetus for the evolution of ideas regarding rational and desirable trade policy.

The kind of learning that I have in mind can take a number of different forms, and occur in a number of different ways.⁴⁹ First, it may involve a change in the nature of causal beliefs held by policy-makers. Contemporary ideas about desirable trade policy rest on particular understandings of the economic dynamics of the trading system: the impact of trade flows on allocative and dynamic efficiency; the relationship between factor endowments and patterns of international

48 To be clear: it is not my claim in this section that the coherence and constitutionalisation literature is misguided in any simple sense. Rather, I am simply pointing out the questions which it fails to address, and why they are important.

49 See generally, Jack S Levy "Learning and Foreign Policy: Sweeping a Conceptual Minefield" (1994) 48 *International Organization* 279.

trade; and the causal determinants of the changing size, composition and direction of trade flows. They also rest on another set of causal understandings of the political dynamics of the trade system — ideas, that is, about the nature and incidence of political forces for and against liberalisation. Learning can involve change to both of these sets of beliefs. Second, learning may involve changes in policy beliefs — that is, ideas about the kinds of policies which ought to be pursued in light of our best understanding of the causal dynamics of the trading system. These can themselves be broken down into a number of levels.

At the lowest level is a change in prevailing ideas about the best technical means of achieving policy goals. In the context of the WTO, for example, this may involve changing ideas about the appropriate bargaining positions to take within multilateral trade rounds. In a domestic context, it may involve refining the nature, scope and sequencing of programs of liberalisation, as well as the broader policy environment in which liberalisation is carried out. At a somewhat deeper level, learning can involve a change to "strategic policy beliefs".⁵⁰ In the international context, prevailing strategic beliefs may include: the belief that liberalisation is most effectively achieved through the exchange of reciprocal trade concessions; the belief that questions related to the distributive and equity effects of the international trading system ought to be addressed at the national level; or the belief that the international trade regime ought ideally to strive for universality in its application and membership. Finally, at the deepest level, learning can involve a change in the nature of the overarching goals towards which trade policy-making is directed (or a change given to the relative weight given to different goals). For example, a variety of different overarching goals of the post-war trading regime have been given different emphases at different times. These include, among others, the reconstruction of post-war Europe, the maintenance of international and domestic economic stability, the generation of a global market in goods and services, and the effort to drive global economic growth.⁵¹

Policy learning — at any of these levels — is not an automatic or natural process. Certain conditions and policy-making environments are conducive to learning, while others are not. And

50 This term is taken from Philip E Tetlock "Learning in U.S. and Soviet Foreign Policy: In Search of an Elusive Concept" in George W Breslauer and Philip E Tetlock (eds) *Learning in US and Soviet Foreign Policy* (Westview Press, Boulder, 1991) xiv, 27.

51 See generally, John Gerard Ruggie "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order" in Stephen D Krasner (ed) *International Regimes* (Cornell University Press, New York, 1983) 195; Frank Trentmann "Political Culture and Political Economy: Interest Ideology and Free Trade" (1998) 5 *Review of International Political Economy* 217; Frank Trentmann "National identity and Consumer Politics: Free Trade and Tariff Reform" in Donald Winch and Patrick K O'Brien (eds) *The Political Economy of British Historical Experience 1688-1914* (Oxford University Press, Oxford, 2002) 215; Andrew Lang "Reflecting on Linkage: Institutional and Cognitive Change in the Trade Regime" (forthcoming, *Modern Law Review*, 2007).

certain organisations are better at learning than others.⁵² Without more detailed study, it is hard to speak in general terms about the extent to which the international trade regime helps to generate a policy-making environment that is conducive to learning. Certainly it is not hard to point to at least one or two periods in the history of the post-war order in which learning of a profound kind appears to have occurred.⁵³ At the same time, it is equally true that there are a number of features of the trade regime which inhibit learning — and it is these obstacles which the activity of the human rights movement helps to overcome.

First, and most simply, the work of a variety of organisational theorists remind us of the importance of feedback loops in the facilitation of organisational learning.⁵⁴ Causal and policy beliefs change through response to environmental stimuli — that is to say, through the process of continuously monitoring the outcomes of policy choices, and by systematically incorporating the lessons learnt into processes of policy formation and re-formation. The international trade regime, however, has always lacked a systematic, institutionalised system of monitoring the impact of decisions taken within it and feeding back lessons learnt into new decision-making processes. It is true that the committee system established as part of the WTO in 1995 began, to some degree, to reflexively monitor the activity of the trade regime. However, these monitoring activities are focussed primarily on questions of compliance and implementation, rather than on reflexively evaluating the effects and outcomes of the WTO agreements themselves.⁵⁵ By contrast, over the past decade or so, human rights actors — and indeed transnational civil society networks more generally — have helped to perform precisely this feedback function. A very large proportion of the work undertaken by human rights actors consists precisely of collecting and collating information on the outcomes produced by the international trading system, formulating it into a relatively coherent and systematic body of knowledge, and repeatedly bringing it to the attention of trade policy-making élites.⁵⁶ In doing so, they have helped to provide the impetus for these policy-makers to learn — that is, for a rethinking of beliefs which these policy-makers hold concerning how the trading system operates, and what the outcomes of their interventions are likely to be. The

52 For some of the conditions which make some organizations better learners than others, see B Hedberg "How Organizations Learn and Unlearn" in Paul C Nystrom and William H Starbuck (eds) *Handbook of Organizational Design* (Oxford University Press, New York, 1981) xxii; and generally Barbara Levitt and James G March "Organizational Learning" (1988) 14 *Annual Review of Sociology* 319; Chris Argyris and David A Schön *Organizational Learning II: Theory, Method and Practice* (Addison-Wesley, Reading (Mass), 1996).

53 The period from the beginning of the Tokyo Round, through the Uruguay Round, until the creation of WTO is the clearest example.

54 See generally Hedberg, above n 52, xxii.

55 Hoekman makes this observation in relation to the TPRM. Bernard Hoekman "Making the WTO More Supportive of Development" (2005) 42 *Finance and Development* 1.

56 This is true in particular of the work done by many of the NGOs listed in n 10 above.

argument repeatedly made by the High Commissioner for Human Rights that "human rights impact assessments" ought to be incorporated into trade policy-making processes represents an attempt to institutionalise and systematise this function, both at the domestic level and within the WTO itself.⁵⁷

Secondly, the human rights movement can facilitate learning of a deeper kind by prompting reflection on the broader goals and values which the trading system is designed to achieve, and on the responsibilities which trade policy-makers see themselves as bearing. Commentators such as Barnett and Finnemore have noted that there can be a tendency in international organisations for the broader goals associated with an institutional project to fade from view over time, and institutional actors to focus on habitualised routines, practices and procedures in themselves and for their own sake.⁵⁸ The result can be a lack of any critical reflection on those original goals and the broader project which gives the institution its direction, even where the environment in which the organisation operates has changed considerably. To a significant extent, this dynamic can be observed within the contemporary trade regime. It is reflected not only in the relative lack of genuine discussion of the goals of the trading system, but also in the fact that, to the extent that the purpose of the trading system *is* discussed, it is common simply to settle for thin and stylised versions — such as the "liberalisation of international trade", or the "reduction of trade barriers" — which say nothing meaningful about the nature and purpose of the present regime. Again, it is clear that the human rights movement has, at least, the potential to counter-act these tendencies and to help create an environment in which reflection on the trade policy goals is facilitated and encouraged. While I have made it clear that I do not think "human rights" themselves necessarily provide a vision of the most appropriate ends towards which the trade regime ought to be striving,⁵⁹ human right actors have nevertheless been instrumental in generating a renewed critical

57 See, for example UNCHR "Globalization and its Impact on the Full Enjoyment of Human Rights" (15 January 2002) E/CN.4/2002/54 para 46; UNCHR "Liberalization of Trade in Services and Human Rights" (25 June 2002) E/CN.4/Sub.2/2002/9 para 72; UNCHR "Human Rights, Trade and Investment", above n 7, para 63.

58 Michael N Barnett and Martha Finnemore *Rules for the World: International Organizations in Global Politics* (Cornell University Press, New York, 2004) ch 2.

59 A contrary point of view has been put forward by the UNCHR "Human Rights, Trade and Investment", above n 7, para 57. A subtler and perhaps more compelling variant of the same argument has been put forward by Frederick Abbott. In the context of a discussion of the relationship between human rights and competition law, he has argued that systems of competition law typically have at least three different basic objectives (consumer protection, protection of democracy, and protecting the integrity of the market), and that the emphasis given to each objective changes across systems and over time. He suggests that "integrating human rights law" with competition law may mean a greater emphasis on its consumer protection function. Whether or not we agree with the specifics of his analysis (and it has much to commend), his general point that human rights may work more indirectly by subtly reshaping constitutive ideas about the fundamental purposes of a regulatory system is a strong one, and one which may well have application in relation to trade law. See Frederick Abbott "The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS" in *Human Rights and International Trade*, above n 12, 279, 289 and surrounding.

debate about the social purposes of the international trading system. By forcing the trade regime to justify its activities and policies according to ethical criteria, they have helped to prompt reflexive questioning of both the means and ends of trade policy.

Thirdly, and perhaps most importantly, human rights networks can help to overcome cognitive obstacles to trade policy learning.⁶⁰ Institutionalised processes of monitoring environmental feedback and encouraging critical reflection are not always sufficient on their own to generate learning. The production of new knowledge can still be impeded by the cognitive frameworks which trade policy-makers use to make sense of the world, and to draw lessons from past experience. These cognitive frameworks can be deeply embedded and highly resistant to change — even when faced with unexpected and seriously adverse policy outcomes, policy-makers tend to draw lessons which reinforce their pre-existing beliefs.⁶¹ Institutions and organisations which are designed and rationalised on the basis of particular ways of seeing the world also tend to perpetuate and entrench such world views, and can impede vital cognitive change.⁶² For example, many of the "strategic policy beliefs" mentioned earlier — that liberalisation is best conducted reciprocally and progressively, or that the distributive outcomes of international trade ought not to be the business of the trade regime — are deeply engrained in the architecture of the contemporary trade regime itself. They are sustained and disseminated through institutional practices and procedures; routines and habits; histories and narratives; and a variety of discursive and institutional processes at work within the trade regime. Such institutional features, in other words, do not simply guide participants' behaviour, but also *teach* participants a particular way of understanding the trading system, and of how political power ought to be deployed within it.⁶³

The human rights movement can help to overcome these cognitive obstacles in a number of ways. It can provide an alternative institutional and discursive environment — an alternative social space — for the generation and dissemination of knowledge about the trading system. To take a simple example, I said above that contemporary trade policy beliefs are built on prevailing knowledge about the economic dynamics of the international trading system. Regarding the effects of international trade, this knowledge base has traditionally tended to focus on the impact of trade on growth, on resource allocation, on some distributive questions such as relative factor returns, and similar matters. Human rights actors, however, have a different set of preoccupations and therefore provide the impetus for the production of different kinds of knowledge. For example, human rights actors have helped to stimulate the production of knowledge about the impact of

60 See Hedberg, above n 52, xxii.

61 Robert Jervis *Perception and Misperception in International Politics* (Princeton University Press, New Jersey, 1976) ch 4.

62 See generally Mark Easterby-Smith and Marjorie A Lyles (eds) *The Blackwell Handbook of Organizational Learning and Knowledge Management* (Blackwell, Oxford, 2003).

63 See W Richard Scott *Institutions and Organizations* (2 ed, Blackwell, Oxford, 2001).

trade policy on health, on access to food, and on the livelihoods of the rural poor, women and other vulnerable groups. As this new knowledge has developed, it has helped to change ideas about what constitutes relevant knowledge in the field of international trade policy: it has begun to appear in standard trade policy textbooks, and reflexively influence the kinds of questions that actors in more traditional knowledge-producing institutions address.⁶⁴ In this way, the human rights movement has helped to bring about a change in the concepts and categories used to map the outcomes of the trading system, and to redefine the domain of relevant knowledge which is deployed in trade policy debates. Although no-one would suggest that the human rights movement is solely responsible for shifts which are already observable, it has in my view contributed to this process by providing resources and institutional space for the production and dissemination of this knowledge, and a ready-made audience for it.

The human rights movement has influenced not only what information tends to be produced about the trading system, but also how that information is interpreted. In order to transform it into usable policy knowledge, raw information about the outcomes of the trading system needs to be embedded within narratives and thick causal descriptions, which give meaning to this information and suggest ways of responding to it. These processes are inescapably social: they involve the production of collective meanings and policy narratives, and the generation of broadly shared cognitive frameworks. The language of human rights can help in the process of collectively transforming information into new knowledge by providing a repertoire of discursive and cognitive resources — habits of thought, concepts, images and principles — different from those available in traditional trade policy discourse. These alternative discursive resources can help to generate different interpretative frameworks through which information about the trading system is processed. The interpretative frameworks are, of course, highly contingent. Accordingly, what is produced does not, in other words, amount to a "human rights perspective" on the trade regime in any simple sense.

While their nature makes it difficult to give pithy examples, some brief contrasts may help to illustrate the point. As mentioned earlier, traditional trade policy discourse tends to view resistance to liberal trade as the natural state of politics, protectionism as the outcome of pressure from special interest groups, and consumers and exporters as the carriers of the public interest. By contrast, contemporary human rights discourse tends to understand these political dynamics in different terms, seeing those in favour of liberal trade primarily as (predatory) special interest groups, while various actors such as civil society groups tend to be discursively constructed as carriers of the public interest. Another example might be the different ways that questions about the distributive consequences of trade policy are framed in different discourses, and the different

64 An interesting recent example is T Paul Schultz *Does the Liberalization of Trade Advance Gender Equality in Schooling and Health* (Discussion Paper No 935, Yale University Economic Growth Center, 2006) <www.econ.yale.edu/growth_pdf/cdp935.pdf> (accessed 8 May 2007).

modes of problem definition they employ. As noted above, orthodox views teach us that distributional questions are properly of national or local concern. Responses to distributional inequities therefore tend to begin with attempts to fix redistributive mechanisms at the national level, and only secondarily to enquire whether international action is possible or desirable. In much human rights discourse, the problem is framed somewhat differently: there is a growing perception that the distributional inequities of the present trading system are *precisely the result* of prevailing perceptions that the decisions could be made in the trade regime without attention to their distributive consequences. Within the human rights framework, contemporary forms of trade governance are initially seen not so much as the solution, but as the problem. However, regardless of the specifics of these examples, the point I am making is a general one: that human rights can help to provide the social space, and cognitive resources, to aid in restructuring knowledge about the trading system, the reframing of trade policy questions, and the discursive reconstruction of the trading order. In doing so, it can help to overcome the cognitive rigidities which currently impede trade policy learning.

Though it is rarely made explicit, the human rights movement is, therefore, very much in the game of knowledge production. When human rights actors produce their numerous commentaries on the "human rights impact" of the trading system, one of the most important functions they are performing is facilitating the production of social knowledge: generating shared narratives; synthesising some kind of consensus about how certain aspects of the trading system operate; and selecting, reframing and imparting new meaning to information produced by various kinds of trade policy experts. The knowledge thereby produced can, of course, inform the actions of policy-makers directly, helping them to reformulate their strategies and their policy preferences. Just as important, however, is the destabilising role it can play in respect of traditional trade debates. New frameworks facilitate the reconsideration and renewal of contemporary trade policy knowledge by highlighting its (inevitable) cognitive limitations, and by demonstrating that traditional trade experts have no monopoly on the truths which can be told about the trading system. As Jacobsen has noted in a different context, it is precisely the "public clashes" among different communities, and among different regimes of truth, that can often yield "the most valuable and self-critical input into policy decisions".⁶⁵ This is one of the most productive functions that the human rights movement has so far performed in trade policy debates and one which, if made more explicit, may usefully guide their future interventions.

V CONCLUSION

It has been one of the main points of this article to argue that we must not simply assume that human rights discourse provides a useful frame for trade policy debates. It is necessary to think clearly and deeply about exactly how human rights discourse is (and is not) useful, and what

65 John Kurt Jacobsen "Much Ado about Ideas: The Cognitive Factor in Economic Policy" (1995) 47 World Politics 283, 303.

functions it can (and cannot) perform. In this respect, the present trade and human right literature leaves much to be desired. The three main models used to think about these questions are flawed in important ways. It is, first of all, illusory to believe that human rights norms offer substantive policy guidance to trade policy-makers, or a normative foundation from which an alternative trading order can be derived. And, second, while there is much to the claim that human rights can alter the political dynamics of trade policy debates — and therefore help to achieve (even if not define) desirable trade policy goals — we ought not to be overly sanguine about either the effectiveness or the transformative potential of human rights in this regard. Third, through the discourse of fragmentation and coherence, the trade and human rights literature may actually be diverting attention away from crucial questions, and making it *more* difficult to imagine alternative futures for the trading system. But — and this is an important point — critiquing these models is not altogether the same thing as critiquing the literature which has developed from them. On the contrary, this literature in fact performs a variety of tremendously useful functions, even if such functions are rarely explicitly noted or even conceptualised. In particular the human rights movement, in its work on the trade regime, is helping to overcome obstacles to policy learning — in the context of international trade — and helping to facilitate the ongoing evolution of knowledge about the trading order and beliefs about how best to act in it. There are, no doubt, other important functions which the human rights movement performs in this context which are yet to be acknowledged, and it is one of the aims of this paper to provide an impetus for further reflection on such questions. Such further reflection will both enable human rights actors to target their interventions in trade policy debates in the most productive ways, and also facilitate the serious engagement of trade scholars and practitioners with human rights claims.