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Dear Professor Ruggie (John):

Enclosed please find a submission on the relationship between trade and human rights. I believe this will be helpful as you complete your mandate. As you know, I bring significant expertise on this issue, having served as a Congressional staffer on trade issues and later as a scholar and consultant working on these issues. I am currently Research Associate Professor at the Graduate School of Business and Elliott School of International Affairs, George Washington University. In recent years, my research has focused on case studies of what governments do to promote human rights (at home and abroad) as they seek to expand trade. I am the author (with my research associate Jamie Zimmerman) of a new book on trade and human rights (Trade Imbalance: The Struggle to Weigh Human Rights in Trade Policymaking), published in October 2007 by Cambridge U. Press. I have also written empirical and analytical studies about this relationship in World Trade Review, World Policy Journal, and Human Rights Quarterly. In the attached memorandum, I have summarized key issues of concern as well as policy recommendations.

With best regards,

Susan Ariel Aaronson, Ph.D.



## Submission to Professor John Ruggie: The UN Special Representative on Business and Human Rights

From: Professor Susan Ariel Aaronson, George Washington University  
Subject: Summary of Effect of WTO Rules on Business Ability to Meet Human Rights Responsibilities and upon the State Duty to Protect

**Overview:** Trade agreements regulate how and when nations can apply measures that can distort trade. The most important trade agreements are embedded in the World Trade Organization (WTO) comprised of 151 nations or members as of February 1, 2008.<sup>1</sup> **The WTO agreements limit but do not undermine the ability of nation states to advance human rights at home and abroad.** However, the WTO system makes no explicit mention of human rights and there are many omissions in WTO rules which can hamper the ability of states to use trade policies to advance human rights. Moreover, in some instances, WTO rules do not provide guidance to policymakers as to how to juggle human rights and trade goals. Despite these limitations, omissions, and lack of clarity, policymakers can and are finding ways to advance human rights at home and abroad as they expand trade. (See Table I below) In the final section, I delineate recommendations to WTO member states.

**Why is this important? Nation states have few tools to influence the human rights practices of other governments. Trade is one such tool. But the international system does not delineate how and when nations can use trade (access to their home market or trade bans) to alter the behavior of policymakers in another state with respect to human rights.**

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<sup>1</sup> The WTO includes many agreements which govern trade in goods and services. For the purposes of simplicity, I have limited the discussion to GATT 1994, which delineates the basic norms of the world trading system. It includes: (a) Understanding on the Interpretation of Article II: 1 (b); (b) Understanding on the Interpretation of Article XVII; (c) Understanding on Balance-of-Payments Provisions; (d) Understanding on the Interpretation of Article XXIV; (e) Understanding on the Interpretation of Article XXV; (f) Understanding on the Interpretation of Article XXVIII; and (g) Understanding on the Interpretation of Article XXX. GATT 1994 incorporates the GATT 1947 provisions (except for the Protocol on Provisional Application). See [www.usinfo.org/law/gatt/toc.html](http://www.usinfo.org/law/gatt/toc.html) (last searched 8/10/2006.)

**Table 1: Examples of Human Rights Issues Seeping into the WTO**

<b>Human Right</b>	<b>Avenue</b>	<b>Response by Members of WTO</b>
<b>Generic Human Rights and Rule of Law</b>	<b>Accession</b>	<b>Issues sometimes included in working paper documents.</b>
<b>Labor rights</b>	<b>Attempt to include in trade negotiations, accessions. Included in trade policy reviews.</b>	<b>Increased discussion in trade policy reviews. Beginning of discussion in Vietnam accession.</b>
<b>Access to Safe Affordable Food</b>	<b>Negotiations</b>	<b>Discussion is at a stalemate.</b>
<b>Preventing the undermining of Human Rights through Conflict</b>	<b>Kimberley Process Waiver</b>	<b>Members approved a waiver, which was accepted by WTO members. This waiver, however, is temporary.</b>
<b>Providing Access to Affordable Medicines</b>	<b>Negotiations at Doha</b>	<b>First amendment of WTO.</b>
<b>Right to health</b>	<b>Trade disputes</b>	<b>EU, Brazil argued some protection was necessary to protect public health.</b>
<b>Generic Human Rights</b>	<b>Trade Waivers allowing for Preference Programs</b>	<b>EU uses a trade waiver, the Generalized System of Preferences (GSP) to promote developing country adherence to internationally accepted human rights conventions. US uses its own version of GSP to promote labor rights and intellectual property rights protection (specific rights).</b>

**I. Limitations: The WTO system (and most trade agreements) makes no explicit mention of human rights.**

Neither the WTO nor the GATT (the precursor to the WTO) was in any way intended to address human rights questions. (*WTO rules do permit nations to ban goods made with prison labor.*) In addition, neither the GATT nor the WTO has human rights qualifications for participating members.<sup>2</sup> The WTO sets limits to how and when nations can apply policies that distort trade and provides a means for governments to discuss trade distorting policies. In following its rules, the members of the WTO must ensure that

<sup>2</sup> Any state or customs territory with full autonomy in the conduct of its trade policies may accede to (join) the WTO. However, WTO members must agree on the terms of membership, as a result, these terms differ for each country. The U.S. for example, links human rights performance in formerly communist states to the granting of most favored nation (MFN) status. One can argue that membership in the WTO is inherently human rights enhancing as members are required to grant their citizens (and non-citizens) the right to comment on any trade related rulemaking and to challenge such rulemaking. In this way the WTO promotes due process and political participation rights, which may spill over into the polity as a whole. See Susan Ariel Aaronson, "Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO," *World Trade Review* 2007, vol. 6, issue 03, pages 413-449.

trade rules and conditions don't differentiate (in trade parlance-discriminate) among producers, nations, and like products of member states. In that way, the WTO makes it harder for nations to put in place incentives or sanctions against another member that may abuse the human rights of its own citizens or citizens of other nations.

However, the WTO doesn't prevent nations from using trade policies and agreements to influence the human rights practices of other countries or, more rarely, to protect the human rights of their **own** citizens.

## II. Omissions

The architects of the GATT/WTO did not clarify how the WTO should interact with UN bodies, particularly human rights mechanisms, when WTO member states undermine human rights. There is no mechanism for regular consultation with UN human rights bodies such as the Human Rights Council or the treaty monitoring bodies; in general the WTO acts only under the direction of the UN Security Council or the General Assembly (as in the case of conflict diamonds or sanctions against South Africa in the time of apartheid). WTO members have no guidance when another nation (say Burma) undermines the human rights of its own citizens but remains a WTO member in good standing. WTO members cannot expel another member for any reason, including the failure to protect and promote human rights.<sup>3</sup> Interestingly, some states such as the United States and the European Commission have used trade sanctions to signal their concerns about the human rights practices of other countries or when necessary, to punish other countries such as Burma (Myanmar), Cuba and Sudan. Targeted countries have never challenged such trade sanctions. Such countries are probably reluctant to discuss their human rights practices within the WTO. Thus, neither the GATT nor the WTO's dispute settlement body has ruled on such practices.<sup>4</sup>

Some countries have however, used human rights arguments to justify policies that can distort trade.<sup>5</sup> But we don't know whether the WTO's dispute settlement body and the

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<sup>3</sup> As Communism spread throughout Europe and Asia in the 1940s, U.S. policymakers became increasingly determined to prevent Communist countries from joining the GATT. They argued that these nations did not protect political rights. The U.S. wanted to ensure that only democratic capitalist nations could join the WTO and in fact pushed to eject Czechoslovakia, which became a communist country through a coup. But France and other GATT signatories objected to this strategy. The U.S. Congress soon forced the hand of U.S. trade policymakers. In 1951, Congress passed a law forbidding the U.S. government from providing commercial concessions to the Soviet Union or any Soviet bloc country. The United States revoked Czechoslovakia's tariff benefits, but no nation challenged this violation of MFN. Both Cuba and Czechoslovakia remained GATT/WTO members (until 1993 when Czechoslovakia became two countries, the Czech Republic and Slovakia). Thomas H. Zeiler, Free Trade, Free World: The Advent of GATT (Chapel Hill: University of North Carolina Press, 1999), 122, footnote 48.

<sup>4</sup> India almost challenged the EU's labor rights clauses in its GSP program. As noted above, the EU's GSP program grants either duty-free access or a tariff reduction to certain imported products, depending on which of the GSP arrangements a country enjoys. But a beneficiary country is not automatically or unconditionally entitled to these benefits. The EU can withdraw trade preferences granted to developing countries under these arrangements if the beneficiary country systematically violates core UN and ILO conventions on human and labor rights or exports goods made by prison labor. The Generalized System of Preferences, [http://europa.eu.int/comm/trade/issues/global/gsp/index\\_en.htm](http://europa.eu.int/comm/trade/issues/global/gsp/index_en.htm).

<sup>5</sup> For example, both the EU and Brazil have argued that they need to restrict trade in certain products to protect their citizens' right to health (in cases regarding beef hormones and tires). More on the tires case below.

Appellate Body of the WTO can take such arguments into account. We also don't know what status panelists should accord to such arguments. According to legal scholar Joel Trachtman, "Scholars debate whether WTO panels or the Appellate Body are mandated to apply non-WTO international law as law. They generally agree that non-WTO international law cannot form the basis of claims in the WTO dispute settlement system, but disagree as to whether such law can form the basis of defense to claims. They also agree that certain non-WTO international law may be used in interpreting the WTO agreements." Please see Part III.c for more detail.<sup>6</sup>

A trade dispute centered on human rights questions might provide greater clarity on this issue. It could provide insights as to whether the WTO agreements are superior to or equivalent to other international laws in WTO dispute proceedings, and whether trade can be conditioned on human rights practices.

### III. Reality: Human Rights Are Seeping into WTO Deliberations and Activities

As Table 2 delineates, members are introducing a wide range of human rights concerns during day to day WTO deliberations. Members use trade waivers and exceptions to promote human rights at home or abroad. They occasionally bring up human rights during accessions and trade policy reviews. They have amended the TRIPS agreement to make it clear that nations can use the public health exception to TRIPS in times of public health emergencies (this is the only amendment to the WTO).<sup>7</sup> Human rights concerns have even entered into trade negotiations (e.g. food security).<sup>8</sup>

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<sup>6</sup> Personal communication, Professor Joel P. Trachtman, Professor of International Law, Fletcher School, Tufts University, and Member of the Advisory Committee for the Human Rights and Trade Policy Project directed by Professor Susan Aaronson, Kenan Institute, 10/28/2005. He is also a member of editorial boards of *American Journal of International Law*, *European Journal of International Law*, and *Journal of International Economic Law*.

<sup>7</sup> For a history of these negotiations, see [http://www.wto.org/english/tratop\\_e/trips\\_e/health\\_background\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/health_background_e.htm), last searched 12/05/2006; also see Sangeeta Shashikant, "Heated Discussions as Trips and Health Deadline Is Missed," South-North Development Monitor SUNS # 5772; "African Group Rejects EU TRIPS Amendment Proposal," *Inside U.S. Trade*, 10/7/2005; "African Group, U.S. Discuss Possible Trips and Health Solution," *Inside U.S. Trade*, 10/28/2005.

<sup>8</sup> "To ensure food security, a food system should be characterized by (i) the capacity to produce, store and import sufficient food to meet basic needs for all; (ii) maximum autonomy and self-determination (without implying self-sufficiency), which reduces vulnerability to international market fluctuations and political pressures; (iii) reliability, such that seasonal, cyclical and other variations in access to food are minimal; (iv) sustainability, such that the ecological system is protected and improved over time; and (v) equity, meaning, as a minimum, dependable access to adequate food for all social groups." Jostein Lindland, OECD, "Non-Trade Concerns in a Multifunctional Agriculture: Implications for Agricultural Policy and the Multilateral Trading System, COM?AGR/CA/TD/TC/WS(98)124," <http://www1.oecd.org/agr/trade/ws98-124.pdf>; also see <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm>, both last searched 8/12/2006.

**Table 2: A Snapshot of Where Human Rights May Enter the Discussion in the WTO System**<sup>9</sup>

Accessions: as members join the WTO	In general, members have not introduced human rights concerns, per se, in accessions. The U.S. wanted to attach conditions to Vietnam's accession, relating to its commitments to put in place various ILO conventions. The U.S. eventually dropped this demand. In the China accession, China was asked to enforce all of its laws in all of its territories, including export processing zones.
Non-application	When nations accede, WTO members may choose not to extend trading rights and privileges. US used non-application to deny trading rights to Romania, when it was communist and undemocratic. U.S. use of non-application, in general, has been temporary.
General exceptions	Article XX includes language allowing nations to restrict trade when necessary to protect life, protect public morals, secure compliance or conserve natural resources. Article XXI allows member states to restrict trade for reasons of national security. Used for South Africa's violations of human rights during Apartheid, when UN Security Council authorized trade restrictions.
Waivers	The Kimberley waiver for conflict diamonds was the first waiver approved for a human rights purpose. Stimulated by several UN Security Council Resolutions including 1132, 1171 and 1299, and broad member interest and support. <sup>10</sup> Preference programs were originally put in place under a waiver. <sup>11</sup> Some preference programs have human rights conditionality.
Dispute settlement	There have been no disputes that centered directly on human rights questions. First dispute on public morals (Internet Gambling) was in 2005. Food safety disputes to some degree center on the right to health (but not explicitly defended as human rights concerns (e.g. the beef hormones case)).
Trade policy reviews	The WTO Secretariat and member states jointly review trade policies and practices of member states. Larger trading nations are reviewed more frequently. Officials increasingly bring up human rights concerns, particularly labor rights, in these discussions. Examples include China, Egypt, El Salvador, and United States.
Amendments to existing agreements or clarification	WTO members recognize there are times when they need to provide greater guidance to member states. In amendments, members agree to alter existing agreements to stipulate what member states can or can not do, as in intellectual property rights (IPR) and the right to health (access to affordable medicines). In addition, members have agreed to further discussions to clarify the relationship between IPR and traditional communal knowledge, but have made little progress.
Negotiations	Some members sought to include labor rights in negotiations, but they failed. Members have discussed non-trade issues such as access to affordable food and food security during agricultural negotiations.

In the next section, I elaborate on some of the human rights issues trickling into the WTO.

<sup>9</sup> Tables 1 and 2 come from Aaronson, "Seeping in Slowly," copyright belongs to Cambridge University Press.

<sup>10</sup> On the UN resolutions, see [http://www.globalwitness.org/pages/en/the\\_united\\_nations\\_and\\_conflict\\_diamonds.html](http://www.globalwitness.org/pages/en/the_united_nations_and_conflict_diamonds.html) and <http://www.diamonds.net/news/NewsItem.aspx?ArticleID=4203>.

<sup>11</sup> On the waiver creating preferences, see WTO High Level Symposium on Trade and Development Geneva, 17-18 March 1999. Background Document Development Division, WTO, "Developing Countries and the Multilateral Trading System: Past and Present, Background Note by the Secretariat," at [www.wto.org](http://www.wto.org).

#### *a. Accessions*

Vietnam's adherence to international labor standards became an issue as it moved closer towards joining the WTO.<sup>12</sup> The United States wanted the Working Party report on Vietnam's accession to emphasize that Vietnam had not ratified eight of the International Labor Organization's conventions relating to core labor standards. The U.S. also wanted Hanoi to provide information on how it was applying these standards nationally. Vietnam and other governments objected to such criteria.<sup>13</sup> The U.S., having made its point, dropped this proposed requirement, and labor issues were not mentioned in the Report of the Working Party on Vietnam's accession.<sup>14</sup> This strategy may have paid off. In documents prepared for the World Bank, the Vietnamese government admitted that it was under pressure to do a better job implementing ILO conventions and it acknowledged that such pressure could be useful to the government as it worked to improve social conditions.<sup>15</sup>

Members were also deeply concerned about how China protected workers' rights. While the members of the WTO did not condition China's accession on improvements in labor rights, the accession agreement reflected members' concerns about labor rights and conditions in China's export processing zones (EPZs).<sup>16</sup> China has used these zones (special economic zones) to experiment with market-based, outward-oriented policies.<sup>17</sup>

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<sup>12</sup> WTO, "Vietnam's Talks Well into Final Stages," 3/27/2006; and Alan Beattie et al, "Vietnam Leaps Hurdles to Join Trade Body," *Financial Times* 11/7/2006.

<http://search.ft.com/ftArticle?queryText=vietnam+wto+accession&y=0&aje=true&id=061107007372&x=0>

<sup>13</sup> In 2000, the United States and Vietnam signed a memorandum of understanding to cooperate on labor rights. [http://www.usvtc.org/trade/bta/MoU\\_DoL\\_MOLISA.htm](http://www.usvtc.org/trade/bta/MoU_DoL_MOLISA.htm); and Daniel Pruzin, "WTO Circulates Accession Documents, Final Vietnam Working Party Report," *International Trade Report*, 10/26/2006, <http://www.bna.com/itr/arch369.htm>.

<sup>14</sup> Report of the Working Party on the Accession of Vietnam, 10/26/2006, WT/ACC/VNM/48. Also see Asian Analysis, Australian National University, Vietnam-September 2006: "Did the Government Cave In to Strikes or did it Lead them?" [www.aseanfocus.com/asiananalysis/article.cfm?articleID=984](http://www.aseanfocus.com/asiananalysis/article.cfm?articleID=984); and AmCham Vietnam, "Letter: re: Minimum Wage and Illegal Strikes Involving Violence," 1/11/2006, at <http://www.amchamvietnam.com/679>.

<sup>15</sup> Government of Vietnam, "Labour and Social Issues Emerging From Vietnam's Accession to the WTO," [http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/viet-labor\\_trao.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/viet-labor_trao.pdf), pp. 8-9. Also see Vietnam Labor Rights Issues, 8/22/2006, at <http://www.vietnamembassy-usa.org/news/story.php?d=20060828141753>. Vietnam noted that the US Government and the ILO had helped the country revise and redraft labor laws. Vietnam had experienced more than 289 strikes from Jan-May 2006, which indicated workers were to some extent able to exercise their rights. For WTO discussion, see WTO, "Quantum Jump Needed if Vietnam is to Ratify WTO Agreement Within Two Years," 5/2003; [http://www.wto.org/english/news\\_e/news03\\_e/viet\\_nam\\_member\\_nego\\_12may03\\_e.htm](http://www.wto.org/english/news_e/news03_e/viet_nam_member_nego_12may03_e.htm);

<sup>16</sup> Many of the countries acceding to the WTO in recent years have major human rights problems. Some of these countries have had credible allegations of abuse in their foreign trade zones. However, members of the WTO have not included similar language designed to ensure that the country applies the rule of law to all of its environs, including special/foreign trade zones or EPZs. See, as example, Accession of the Republic of Panama, WT/ACC/PAN/21, 10/11/1996, and Accession of the Hashemite Kingdom of Jordan, WT/ACC/Jor/35, 12/1999, both at <http://www..wto.org>

None of these accessions included information on administration of trade agreements, special economic zones, or transparency. See also accessions, noted in footnotes 64-68, of Cambodia, Nepal, Macedonia, and Saudi Arabia.

<sup>17</sup> Dorsati Madani, "A Review of the Role and Impact of Export Processing Zones," World Bank Research Working Papers, No. 2238, p. 17.

In many of these zones, the Chinese government ignores or flouts its own labor laws.<sup>18</sup> As they weighed whether or not to allow China to join the WTO, other members of the WTO expressed concern that China might thus attract investment from countries that have more stringent workers' rights standards.<sup>19</sup> They also noted that China lacked an impartial judiciary, an effective and transparent social and environmental regulatory system, and a strong central government capable of enforcing the law. Thus, they put in place unusual conditions for China's accession. Unlike other Accession Protocols, the 2001 Protocol on the Accession of the People's Republic of China states that as a condition of accession, China must enforce "uniform administration of Chinese law" throughout China. The agreement also calls on China to "apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures...pertaining to or affecting trade.... China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application."<sup>20</sup> The agreement requires China to notify the WTO about "all the relevant laws, regulations and other measures relating to its special economic areas." Finally, it calls on China to ensure that "those laws, regulations and other measures pertaining to and affecting trade shall be enforced."<sup>21</sup> Should China fail to enforce labor rights (and the rule of law), the accession agreement provides a tool to challenge such failure.

#### ***b. Waivers***

WTO members have repeatedly discussed how they can use trade to protect citizens of other countries from harm. The Kimberley Process Waiver provides an example of how WTO members found common ground on conflict diamonds, which the members of the UN determined were financing and perpetuating conflicts and human rights violations in Africa.

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<sup>18</sup> Richard H. Steinberg, "Institutional Implications of WTO Accession for China," February 1999, <http://www.brie.busa.org/news/story.php?d=20060828141753erkeley.edu/~briewww/publications/WP110.pdf>, last searched 1/10/2006, pp. 5, 6, 8.

<sup>19</sup> On debate over China Joining the WTO, WTO and China, <http://www.uschina.org/public/wto/archive.html>; on Asian views of China joining, see [http://china.tdctrade.com/content.aspx?data=CHINA\\_content\\_en&contentid=177674&src=CN\\_BuNeTrSt&w\\_sid=194&w\\_pid=630&w\\_nid=9929&w\\_cid=177674&w\\_idt=1900-01-01&w\\_oid=124&w\\_jid=](http://china.tdctrade.com/content.aspx?data=CHINA_content_en&contentid=177674&src=CN_BuNeTrSt&w_sid=194&w_pid=630&w_nid=9929&w_cid=177674&w_idt=1900-01-01&w_oid=124&w_jid=); and [http://www.tibet.ca/en/newsroom/wtn/archive/old?y=1994&m=8&p=16-2\\_8](http://www.tibet.ca/en/newsroom/wtn/archive/old?y=1994&m=8&p=16-2_8). Concerns over China's compliance with WTO rules and international standards continue. In 2006, the members of the WTO assessed China's Compliance with the WTO. "The representative of the European Communities thanked China for the clarification on technical barriers to trade (TBT) and standards, including about merging the two previous systems and its commitment to international standards. The EC, through discussions with its industries, believed that the adoption of international standards was not quite at the level suggested by China's figures." Trade Policy Review, "Minutes of Meeting," April 19 and 21, 2006, WT/TPR/M/161, quotation, #159, Also see # 30, and # 155. For an overview monitoring China's compliance, see <http://www.uschina.org/public/wto/archive.html>

<sup>20</sup> WTO, "Accession of the People's Republic of China, Decision of 10 November 2001," WT/L/432, (A) 1, 2, <http://www.wto.org>. "The provisions of the WTO Agreement and this protocol shall apply to the entire customs territory of China, including...special economic zones...and other areas where special regimes for tariffs, taxes and regulations are established."

<sup>21</sup> *Ibid.*, Sections (B), (C), 3.



After the members of the United Nations called for a ban on trade in conflict diamonds, WTO member states called for and eventually agreed upon a waiver under the WTO for such a ban.<sup>22</sup> Under the waiver, nations are allowed to trade only those diamonds certified under the Kimberley Process Certification Scheme. Members applying for the waiver had to commit to ensure that the measures taken were consistent with international trade rules. The Kimberley Process Certification Scheme is a way for consumers and producers to ensure that they do not trade diamonds that indirectly fund wars in Sierra Leone or the Democratic Republic of the Congo.<sup>23</sup> The Kimberley waiver sets an important precedent because it is the first time that the WTO has approved a waiver to protect human rights.<sup>24</sup>

Members of the WTO have also used waivers to put in place preferential trade programs for developing countries, and some of these preference programs have human rights conditionality clauses. The EU's Generalized System of Preferences-Plus (GSP-Plus), authorized under the Enabling Clause, provides additional market access to developing countries that support sustainable development and good governance policies. Specifically, these countries must have ratified key human rights conventions (as well as labor rights and environmental laws) and effectively implemented them through national law.<sup>25</sup> Across the pond, the United States GSP program requires GSP recipients to adhere to certain requirements related to workers rights and the protection of intellectual property rights.<sup>26</sup> However, these very different approaches to human rights may send conflicting signals to developing countries regarding human rights. While the U.S. focuses on specific human rights, the EU uses GSP to promote its view that human rights are universal and indivisible.

Trade waivers may not be the most effective tools to use at the intersection of trade and human rights. Waivers are temporary measures and human rights problems generally cannot be solved on a temporary basis. Moreover, these waivers provide little guidance to trade policymakers on how to react to future conflicts between WTO rules and human rights objectives.

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<sup>22</sup> Under GATT 1994, the members in attendance at a ministerial conference may waive an obligation imposed on a member, provided that any such decision is approved by three-quarters of the other members. (These waivers were supposed to be limited to exceptional circumstances and in fact such waivers are rare.) Thus, members could technically waive WTO obligations in cases where trade may exacerbate human rights abuses if they agree.

<sup>23</sup> <http://www.kimberleyprocess.com>. Also see WTO, "Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds," Decision of 15 May, 2003. 2003, WT/L/518, 5/27/2003.

<sup>24</sup> Others such as Canadian Trade Minister Pierre Pettigrew agreed. Foreign Affairs and International Trade Canada, Press Release, "Pettigrew Welcomes WTO Waiver for Kimberley Process Certification Scheme," 5/22/2003, [http://w01.international.gc.ca/MinPub/Publication.asp?publication\\_id=380114&Language=E](http://w01.international.gc.ca/MinPub/Publication.asp?publication_id=380114&Language=E), last searched 8/10/2006.

<sup>25</sup> EU Generalised System of Preferences, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/...>, last searched 2/17/2006.

<sup>26</sup> U.S. T.R., U.S. Generalized System of Preferences Guidebook, 1/2006, [http://www.ustr.gov/Trade\\_Development/Preference\\_Programs/GSP/Section\\_Index.html](http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html)

### *c. Exceptions to WTO rules and trade disputes*

WTO members might find the foundation for a more effective approach to protecting human rights at home or responding to human rights abuses abroad in one of the GATT WTO's exceptions - Article XX and Article XXI. Article XX permits members to restrict trade when necessary to "protect human, animal or plant life or health; protect public morals; secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement," or to conserve natural resources.<sup>27</sup> In 2005, the UN High Commissioner for Human Rights noted that "member states' obligations towards their own populations could fall within the compass of the 'public morals,' 'public order' and human life and health exceptions of the WTO."<sup>28</sup>

Article XX paragraph (a) allows nations to ban trade under a public morals exception. It is feasible that a WTO member state could argue that its citizens' public morals are threatened by trading with another member state known to be lax on human rights protection, but no nation has sought to justify a human rights ban on trade as an offense to public morals.<sup>29</sup> Article XX paragraph (e) covers measures directed at goods produced by prison labor. The paragraph explicitly refers to the products of prison labor rather than the labor conditions under which they are produced. Therefore it seems designed to protect domestic industries rather than workers from other countries that toil in unfair conditions. However, some scholars argue that governments might use paragraph (e) to ban trade from countries where workers toil in conditions of slave labor, forced labor, or child labor.<sup>30</sup>

With respect to the first aspect of Article XX concerning the protection of public health, Brazil tried to use Article XX to justify a ban on imports of retreaded and used tires in the

<sup>27</sup> The text of Article XX is at [http://www.wto.org/english/res\\_e/booksp\\_e/booksp\\_e/analytic\\_index\\_e/gatt19...](http://www.wto.org/english/res_e/booksp_e/booksp_e/analytic_index_e/gatt19...)

<sup>28</sup> Office of the UN High Commissioner for Human Rights, "Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights," p. 6.

<sup>29</sup> This provision of the article was not tested in dispute settlement until 2003, in a dispute related to a ban on internet gambling. See Monika Gudrun Zagel, "WTO and Human Rights: Examining Linkages and Suggesting Convergence," IDLO Voices of Development Jurists Paper Series, Vol. 2, No. 2., 2005, p. 13, footnote 37, when Antigua and Barbuda requested consultations with the United States regarding measures applied by central, regional, and local authorities in the United States that affected the cross-border supply of gambling and betting services. The panel found the use of the provision justified as long as it did not violate existing trade obligations or discriminate among domestic/foreign providers. Nations might use a public morals exception to protect the rights of women or children (internet pornography). But these articles contain a necessity test that requires that measures pass a "weighting and balancing test," to see if a measure is necessary to achieve the intended goal and the trade impact of the challenged measure. Governments should implement the least-trade-restrictive means to reach the goal (whether product labeling or an import ban). But law Professor Joost Pauwelyn believes that "by broadly interpreting the per se prohibited market access restrictions exhaustively listed in Article XVI of the GATS, the Appellate Body has considerably expanded the reach of GATS prohibitions...to include also substantive qualitative regulations...This may well mean that...the validity of scores of domestic services regulations...are threatened." See Joost Pauwelyn, "WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling But Confirms Broad Reach into Sensitive Domestic Regulation," *ASIL Insight*, 4/12/2005, [222.asil.org/insights/2005/04/insights050412.html](http://222.asil.org/insights/2005/04/insights050412.html), last searched 7/20/2006.

<sup>30</sup> Also see Zagel, "WTO and Human Rights," p. 12; and Hoe Lim, "Trade and Human Rights: What's at Issue?" E/C 12/2001/WP.2, 2001, 4-5, at <http://www.unhchr.ch/tbs/doc.nsf/0/907f88e4d28e4cb9c1256a63003069fd?Opendocument>.

interest of protecting public health, a human right delineated in the Brazilian constitution. But a WTO dispute settlement panel was not convinced by this argument.<sup>31</sup> A WTO investigative panel announced on June 12, 2007 that although Brazil had the right to restrict trade in certain goods for environmental or medical grounds, it could not be used as an excuse for trade discrimination or protectionism.<sup>32</sup> The WTO's Appellate Body concurred with the Dispute Panel's decision that Brazil's approach to this problem distorted trade. Some scholars see this case bolstering the right of nations to use trade to protect their citizens' right to health as long as they do not violate WTO norms of nondiscrimination.<sup>33</sup>

George Washington University Law Professor Steve Charnovitz has written extensively on Article XX and he believes that it could be used to protect the human rights of persons outside the state's jurisdiction, without the direction of the Security Council or other international bodies. Charnovitz notes that Article XX's moral exception was, in fact, put in place because many governments already banned imports or exports for moral or humanitarian reasons (for example treaties banning slavery.) No government has ever challenged the use of such trade bans in a trade dispute under the GATT or the WTO.<sup>34</sup> Tufts Law Professor Joel Trachtman notes that in 1993, a GATT panel said that a state may only protect its own human, animal or plant life or health, not that of others. That panel decision was not adopted and thus, has no legal effect of any kind. In the Shrimp-Turtle case, the WTO's Appellate Body specifically declined to answer that question. Thus, Professor Trachtman concludes, "we just don't know yet whether under Article XX

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<sup>31</sup> The EU claimed that Brazil's import ban on retreaded and used tires were WTO inconsistent and treated retreaded and used tires differently. Brazil did not deny the WTO inconsistency of the targeted measures. Brazil held that the measures were justified under Article XX (b) as necessary to "protect human, animal, and plant life and health" and that no alternative measures are reasonably available. The Brazilian government claimed that its measures were supported by its constitutional duty to "defend and preserve the environment for the present and future generations" and to guarantee the right to health "by means of social and economic policies aimed at reducing the risk of illness." Bridges Trade BioRes, <http://www.ictsd.org/biores/07-03-16/story2.htm>; and "WTO Panel Created on EU-Brazil Retreaded Tyres Dispute," 6/16/2006; [http://www.trade-environment.org/page/legal/Tyres\\_Brazil\\_factsheet\\_June06.pdf](http://www.trade-environment.org/page/legal/Tyres_Brazil_factsheet_June06.pdf); and <http://www.ictsd.org/biores/06-02-03/story1.htm>; and Bridges Trade Bio Res, "EU Submits First Submission in Trade Dispute, Civil Society Weighs In," 7/14/2006, <http://www.ictsd.org/biores/06-07-14/story2.htm>, all searched 4/24/2007. On Brazilian government suggestion that it had a constitutional duty to protect the right to health and the environment, see Bridges Trade Bio Res, "WTO Panel Created on EU-Brazil Retreaded Tyre Dispute," 6/2/2006, <http://www.ictsd.org/biores/06-02-03/story1.htm>, all searched 8/14/2006.

<sup>32</sup> Brazil-Measures Affecting Imports of Retreaded Tires, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm).

<sup>33</sup> The Appellate Body upheld the Panel's finding that the import ban was "necessary" within the meaning of Article XX (b) and was thus provisionally justified under that provision. Brazil-Measures Affecting Imports of Retreaded Tires [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm); Joost Pauwelyn, <http://worldtradelaw.typepad.com/ielpblog/2007/07/brazil-tyres-th.html>; AP, "WTO Finds Brazil Illegally Blocked Used Tires from Europe," International Herald Tribune, 12/3/2007; and <http://www.ictsd.org/biores/07-10-19/inbrief.htm#2>.

<sup>34</sup> Steve Charnovitz, "The Moral Exception in Trade Policy," 38 *Virginia Journal of International Law* 689-745 (1998), 7, 10 (fn 128); and Interview with Professor Steve Charnovitz, 31 March, 2008.

(a) (morals) or XX (b) human, animal or plant life or health, a state may use trade policies to protect those values in other states.”<sup>35</sup>

The GATT/WTO provides another option to ban trade in the interest of protecting human rights. The Article XXI exception allows nations to take any action that a member deems necessary for the protection of its essential security interests or to pursue its “obligations under the United Nations Charter for the maintenance of international peace and security,” but there are some limitations to this article. The language allows members to take action for their **own** national security. Members are not permitted, however, to take trade action to protect another member’s security or the citizens of another member, unless the UN Security Council authorizes trade restrictions.<sup>36</sup>

It is important to note that the UN General Assembly has declared that no “State may use or encourage the use of economic, political, or any other type of measures to coerce another State.” Some scholars even argue that economic coercion that internationally interferes with trade (even to promote human rights) may be illegal under international law.<sup>37</sup> Nonetheless, in recognition that WTO Article XXI allows WTO member states to act in particular egregious circumstances, the Security Council has called for sanctions against countries such as South Africa and Somalia, which violated the human rights of their own people.<sup>38</sup> But such actions by the Security Council are rare.

**IV. Lack of Clarity:** While human rights questions are seeping into the workings of the WTO, it is also clear that WTO member states need further guidance from the members of the WTO as well as the dispute settlement body on:

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<sup>35</sup> Email, Professor Joel P. Trachtman, Professor of International Law  
Fletcher School of Law and Diplomacy, Tufts University, to Susan Aaronson, 30 March 2008.

<sup>36</sup> Article XXI provides that:  
Nothing in [the GATT] shall be construed  
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or  
(b) to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests  
(i) relating to fissionable materials or the materials from which they are derived;  
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;  
(iii) taken in time of war or other emergency in international relations; or  
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.  
Article XXI was determined to ensure that governments could take care of perceived national security interests.

<sup>37</sup> Charnovitz, “The Moral Exception,” 3, fn. 16.

<sup>38</sup> The United States has also used this provision against countries such as Libya and Iraq, which it defined as terrorist nations. Over the past several years, U.S. and/or multilateral sanctions have been placed on several significant oil-producing countries, including Iran, Iraq, Libya, Sudan, and Syria. In addition, North Korea has faced energy sanctions by the European Union and the United States, while Cuba and Burma (Myanmar) remain subject to comprehensive U.S. trade sanctions, including energy, <http://www.eia.doe.gov/emeu/cabs/sanction.htm>, last searched 1/06/2006.

- The relationship between international trade law and international human rights law.<sup>39</sup>
- Whether WTO member states can use Article XX (a) as a rationale to justify trade distorting policies designed to protect human rights in another member state.
- Whether the WTO agreements are superior to or equivalent to other international laws in WTO dispute proceedings, and whether trade can be conditioned on human rights practices.<sup>40</sup>
- Whether governments can use social labels, procurement policies, and link their trade and CSR strategies without distorting trade. Several member states such as Belgium and South Africa use social labels to reward domestic and foreign market actors for their human rights practices.<sup>41</sup> South Africa uses procurement policies (BEE) to

<sup>39</sup> Some scholars allege that “in the Shrimp/Turtle case, the Appellate Body of the WTO confirmed that import restrictions may be justifiable under WTO law for “protecting human rights values.” However, the Appellate Body did not link the notion of conservation of exhaustible natural resources to human rights values. The case is U.S.-Import Prohibition of Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (October 12, 1998). The quote is from Howse, “Human Rights in the WTO,” p. 6, footnotes 9, 10, 8–10; and Consultative Board to the Director-General Supachai Panitchpakdi, “The Future of the WTO,” 2004, pp. 52–53.

<sup>40</sup> For more on this question, see Gabrielle Marceau, “WTO Dispute Settlement and Human Rights,” *European Journal of International Law* 13(4) (2002), 753-814; Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can we Go?”, *American Journal of International Law* 95 (535) (2001), at <http://www.asil.org/ajil/pauwelyn.pdf>; and Caroline Dommen, “Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies,” *Human Rights Quarterly*, 24 (1) (2002).

<sup>41</sup> The South African government partnered with organized labor, business, government and community organizations, to support job creation and socially responsible business in South Africa. To use the “Proudly South Africa Label,” a company's products or services must incur at least 50% of their production costs, including labor, in South Africa, and be “substantially transformed” (in other words a product that is merely imported and re-packaged would not be eligible) in South Africa, and meet high quality standards. A company must also be committed to fair labor, employment and sound environmental standards. By meeting these standards, consumers can be assured that companies and their products carrying the *Proudly South African* symbol are of a high quality, are socially responsible and are supporting the local economy. While the *Proudly South African* label can be viewed as an incentive to attract and maintain production in South Africa through higher social standards, it can also be perceived as a potential trade barrier. Ayesha Kajee, “Made in China, Made Scared In a Textile Mill in Africa,” [www.saija.org.za/modules.php?op=modload&name=News&file=article&sid=515](http://www.saija.org.za/modules.php?op=modload&name=News&file=article&sid=515). In January 2002, the Belgian Parliament approved a law aiming to promote socially accountable production by introducing a voluntary social label. According to the Belgian government the law “offers companies the possibility to acquire a label, which is granted to products whose chain of production respects the eight fundamental ILO conventions. The label is given by the Ministry of Economic Affairs after a positive and binding opinion of a stakeholder committee (composed of government officials, social partners, business federation, consumers, and NGO representatives for a maximum of three years (it can be renewed)). The Committee for Socially Responsible Production established a program of control for the company and monitors its compliance. Certification is carried out by the inspection bodies accredited by the Minister of Economic Affairs. This social label was not designed to link to a trade agreement but was vetted both by the Belgian government and the European Commission to ensure that it was compatible with WTO rules. The label is not just for Belgian or EU firms. A US NGO, Social Accountability International, has been accredited under the Belgian Social labeling law. Thus, it does not seem to violate one key norm of the WTO, to treat foreign and domestic market actors similarly. Information on the Belgian Social Label at [http://www.mineco.fgov.be/protection\\_consumer/social\\_label/home\\_nl.htm](http://www.mineco.fgov.be/protection_consumer/social_label/home_nl.htm); and [http://www.social-label.be/social-label/FR/home/home\\_fr.htm](http://www.social-label.be/social-label/FR/home/home_fr.htm). SA8000 is a strategy that enables retailers, brand companies, suppliers and other organizations to maintain just and decent working conditions throughout the supply

provide preference to those firms that empower disadvantaged South Africans. But the members of the WTO have yet to clarify whether or not such actions violate WTO norms.<sup>42</sup>

- Whether it is appropriate to allow nations to ignore and or breach their own labor law in export processing zones. Such behavior not only undermines their own labor law but undermines their international obligations under ILO covenants and some human rights conventions.<sup>43</sup> Members have also not clarified whether it is appropriate to encourage trade in conflict zones and when such trade may perpetuate conflict and undermine human rights. Although it is understandable that policies regarding trade in conflict zones must be designed on a case by case basis, market actors may be confused by policy inconsistencies.

#### **V. Unclear Priorities at the National Level: How Should Policymakers juggle their Trade and Human Rights Obligations?**

In a recent book, coauthored with Jamie Zimmerman, I examined how policymakers in the EU, India, South Africa, Brazil and the U.S. attempted to expand trade while advancing human rights at home and abroad. We traveled to each country or trading bloc and interviewed policymakers, activists, academics, and others. We also performed a literature review of some 20 other nations.<sup>44</sup> Our findings were similar to the findings in the state survey conducted by the SRSG and included as an addendum in his 2007 report to the Human Rights Council.<sup>45</sup> We found that *trade policymakers are not explicitly tasked to find ways to coordinate trade and human rights objectives*. Trade officials make trade policies as if they are strictly commercial policies. They weigh the interests of their producers and consumers, but they rarely bring their international human rights obligations into such deliberations. When and if they talk about human rights, they do so on a case by case basis. They rarely discuss their “duty to protect” both their own citizens and humankind and how these people may be affected by specific trade policies.

#### **VI. Recommendations:**

##### **a. National policymakers should:**

- **Make a policy determination that trade and human rights should be coordinated.**

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chain. [www.sa-intl.org/SA8000/SA8000.htm](http://www.sa-intl.org/SA8000/SA8000.htm). On the BEE, <http://www.info.gov.za/otherdocs/2003/dtistrat.pdf>; on trade distortions, see Scott Sinclair, “The GATS and South Africa’s National Health Act, A Cautionary Tale,” Occasional Paper 11, Municipal Services Project, May 2006; and Aaronson and Zimmerman, *Trade Imbalance*, South Africa Chapter, 81-86.

<sup>42</sup> Susan Ariel Aaronson, “A Match Made In the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO,” *Journal of World Trade*, 41, No. 3, June 2007, 629-660; and Barbara Fliess et al, CSR and Trade: Informing Consumers about Social and Environmental Conditions of Globalised Production,” OECD Trade Policy Working Papers No. 47, 10/01/2007.

<sup>43</sup> Committee on Employment and Social Policy, “Employment and Social Policy In Respect of Export Processing Zones (EPZs), GB.286/ESP/3 286<sup>th</sup> Sess., Geneva, March 2003.

<sup>44</sup> Susan Ariel Aaronson and Jamie M. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights in Trade Policymaking* (N.Y: Cambridge University Press, 2007).

<sup>45</sup> <http://www.reports-and-materials.org/Ruggie-survey-Govts-and-Fortune-500.pdf>

- **Set up a channel for human rights concerns to enter the policymaking process. Include human rights policymakers and advocates in the decision-making process.**
- **Task advisors to ask and answer questions such as: Is trade policy an effective tool to achieve human rights objectives? If so, what rights, and whose rights, might be affected by a cutoff in trade? Does more trade or less provide more or less leverage?**
- **Policymakers should consider how to influence the supply as well as the demand for policies consistent with human rights overseas.** On the supply side, policymakers can provide foreign aid to improve the rule of law. They can train policymakers and provide funds and other assistance to human rights institutions. On the demand side, policymakers can support human rights activists and organizations, and press trade partners to provide their citizens with political participation and due process rights at the very least. Some governments even include these rights within the body of the trade agreement (e.g. the US environmental chapters).<sup>46</sup> By bolstering both the supply and the local demand for good human rights governance abroad, policymakers are much more likely to help other countries achieve sustainable economic growth that also advances human welfare.
- **Encourage business to make human rights a business priority and send a consistent message that human rights are important.**
- **Find ways to collaborate with other industrialized country governments to advance a consistent message that advancing human rights can be an incentive to trade and investment.**
- **When calling for sanctions, policymakers from member states should bear in mind that they may be viewed as violating international law if their actions are considered to violate the non-intervention principle. Further, they should also consider whether sanctions designed to prod pariah regimes to advance some human rights such as freedom of association or freedom of speech may negatively impact other rights, including economic and social rights such as access to food or medicine.**

**B. At the WTO, policymakers should call for:**

- ***No-standards-lowering clause.*** Clearly, increasingly trade is being distorted by the failure of some member states to enforce their own labor and human rights laws. During the next round of negotiations, policymakers should consider a no-standards lowering clause. Such a clause would establish a bottom line for trade to occur. Members must uphold the rule of law throughout their territories and should not be allowed to trade from areas where they do not fully enforce the rule of law. This provision would apply both to export processing zones and conflict zones where human rights are frequently undermined.
- ***Further study:*** Only one member of the WTO need request that the WTO Secretariat study whether or not members need clarity regarding incentives that governments can

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<sup>46</sup> Aaronson and Zimmerman, Trade Imbalance, 173-176.

offer foreign and domestic firms to promote human rights such as social labels, procurement policies, etc. WTO members should also request that the Secretariat study whether WTO member states can use Article XX (a) as a rationale to justify trade distorting policies designed to protect human rights in another member state.

- ***Ombudsman and Interagency Liaison:*** The members of the WTO should appoint an ombudsman, a staff person with human rights expertise, to point out potential conflicts between trade negotiations or member trade policies and human rights obligations. This person should also be delegated to serve as a liaison to the UN human rights bodies.