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doi: 10.1093/chinesejil/jmr011; Advance Access publication 24 May 2011

WTO Law and Human Rights: Bringing Together Two Autopoietic Orders

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Abstract

In comparison to GATT law, WTO law is characterized by a notably expanded coverage. Since its inception in 1995, its material density and reach has been further extended. It was only a question of time before the demand would arise for this branch of law to fulfil objectives lying outside the traditional borders of International Economic Law (IEL). In particular, it was recognized that WTO law touches in many ways upon human rights issues. Vigorous claims were made to transform the WTO order into a human rights organization. Some authors were of the opinion that human rights law (HRL) could be integrated into WTO law via the interpretative rules of the VCLT. This contribution tries to evidence that such attempts are inherently flawed. There is no possibility, nor even a perceptible need, to transform the WTO system into a human rights instrument. After examining the many areas of interaction between HRL and IEL, it is evidenced that the many common ends of each branch of IL are best served if both masses of law are mutually coordinated but at the same time maintain their autopoietic nature. This is also to demonstrate that the consideration of this fragmentation as a so-called problem of IL is overrated.

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* Professor of International Law, Innsbruck University, Austria. This article benefits from earlier studies by this author, in particular Peter Hilpold, Human Rights and WTO Law: From Conflict to Coordination, 45 Archiv des Völkerrechts (2007), 484 and Peter Hilpold, Die WTO im Legitimationskonflikt - unter besonderer Berücksichtigung der Herausforderungen im Bereich des Menschenrechtsschutzes, 109 Zeitschrift für Vergleichende Rechtswissenschaft (2010), 135, which have been further developed and amplified. This article was completed on 3 March 2011. All websites are current as of this date unless otherwise noted. The abbreviations used frequently in this article include: DSU for Dispute Settlement Understanding; IL, International Law; TEC, Treaty Establishing the European Community; TEU, Treaty on European Union; TFEU, Treaty on the Functioning of the European Union; VCLT, Vienna Convention on the Law of Treaties; WTO, World Trade Organization.

I. Introduction

1. The relationship between WTO law and HRL has been discovered as a hot topic by several quarters of the broad IL academic community: by the generalist (primarily to exemplify the pitfalls of fragmentation of IL), by the human rights community (first of all to point at a new danger on the horizon for effective human rights protection) and also by the International Economic Law (IEL) guild (primarily to demonstrate openness to new challenges). It cannot be overlooked that behind this disponibility to redraw the frontiers of the respective academic camps there was some hegemonic thinking. To consider the needs of the other field may also be a disguise for attempting to integrate it. In a neighbour's garden, there have also grown some attractive flowers. Should the borders of the various legal camps coming into play here be redrawn? Or, is it time for a merger between these fields?

2. Before entering into this debate, however, we must consider two things:

- Awareness of the substance of this problem is not wholly new. In fact, the awareness of clashes, overlappings, and also synergies between IEL and HRL can be traced far back into history. Several elements of the present dispute on the integration between these two branches of IL resemble, therefore, older disputes which have fallen into oblivion often without being a convincing solution at hand.
- The driving forces for the reorientation described were exogenous, as they came primarily from the civil society. As much as civil society offers an unwieldy appearance, so are the currents that shape the discussion with which we have to deal here. Some of these forces pursue a more or less evident political agenda. As a consequence, this whole topic offers widely diverging modes of access and an ever-growing number of conflicting positions emerge.

It would therefore be wrong to assume that a full-fledged, broadly agreed-upon theory on the relationship between WTO law and HRL is behind the curtain and that we have only to assemble the various pieces of the previous discussion in order to obtain the definite image. Rather, the contrary is true: the closer we get in analysing this relationship, the more the complexity of the underlying problem becomes evident. It becomes improbable that one single theory will ever be able to describe this whole issue in a convincing manner. This subject can rather be compared to a house with many flats which are not interconnected according to a structured plan. Many stairs come suddenly to a close while others open up to unexpected passages.

3. What is the point, therefore, in dealing with this matter? First of all, it has to be noted that this is in many ways a comparative endeavour—with all the ensuing drawbacks and advantages. As to the first aspect, we have always to take care that

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we are juxtaposing elements that are really comparable. If this is done correctly, we can also reap the considerable rewards of comparison. As has been aptly said, the main benefit one can draw from comparative studies consists primarily in a better knowledge about one's own subject.[1] Furthermore—if we may keep with the image presented before—it can occur that new connections are found or opened in a house, that of IL, that is continuously in reconstruction.

4. In the following, some historic considerations about this subject shall be given. Subsequently shall come an attempt to portray the linkages between IEL and HRL in all their complexity. After examining in detail the traditional narrative of conflict between these two branches of IL, usually couched in a "government" understanding of the international legal order, it will be evidenced that the different perspective of "governance" could provide a far more appropriate vision on this whole issue.

II. The historic roots and the further development of this subject

II.A. Earlier predecessors

5. The fields of human rights and international trade came into touch with each other long before modern IEL and HRL came into being. This was the case with the outlawing of piracy,[2] and of the trade of women, children[3] and slaves.[4]

6. With regard to piracy, outlawing these assaults meant identifying the first international crime and creating the basis for what much later became international criminal law. This was purported as an attempt to fight an insidious threat to human life on the High Seas as much as to protect the safety of international exchanges on what was then the main international channel of transfer for merchandize. With regard to trade of slaves, women and children, it has to be mentioned that the trade element was essential in the outlawing of these abhorrent events: at that time the International Community had no jurisdiction to interfere with internal questions, loathsome as they may have been.[5] Slavery and mistreatment of

1 See Léontin-Jean Constantinesco, II Rechtsvergleichung, Die rechtsvergleichende Methode (1971), 335; Karl Heinz Neumayer, Grundriss der Rechtsvergleichung, in: René David and Günther Grasmann (eds.), Einführung in die großen Rechtssysteme der Gegenwart (1988), 1 (35); Max Rheinstein, Einführung in die Rechtsvergleichung (1987), 14; Peter Hilpold, Modernes Minderheitenrecht (2001), 15.

2 See Alfred Rubin, Piracy, III EPIL (1997), 1036.

3 See above n.1.

4 A specific declaration "sur l'abolition de la traite des nègres" was issued on 8 February 1815 at the Congress of Vienna. See Alfred Verdross and Bruno Simma, Universelles Völkerrecht (1984), 797.

5 In 1841, however, a treaty was concluded between Austria, Great Britain, Prussia and Russia according to which each of these countries could enter each other's territory to look whether slavery occurred there. See David Weissbrodt, Slavery, MEPIL online edition (2007), para.24.

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women and children in slavery-like situations continued to remain legal in many countries long after trade in slaves, women and children had been prohibited.

II.B. The influence of the East–West conflict on the shaping of the relationship between HRL and IEL

7. The end of World War II became a watershed: the introduction of international human rights protection and the laying of the foundations for a truly international economic order created a unique opportunity to make a decisive step towards a solidary international order simply by linking these two areas. Article 28 of the Universal Declaration of Human Rights seemed to take up this challenge. According to this provision "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[6] At that time, the Bretton Woods institutions, created in 1944, were already in place and the regulation for the financial markets was supplemented in 1947 by a new multilateral order for the trade in goods, which entered into force in 1948.[7] As is known, however, the lead offered by Article 28 of the UDHR was not taken up. The impetus to devise and to implement great new ideas, as had found expression only a few years before in the Atlantic Charter, had been literally frozen down in the Cold War.[8] The IL of solidarity[9] which seemed to be just around the corner between 1945 and the end of the 1940s appeared to grow ever farther away. The two steps from an IL of coordination to an IL of cooperation and finally to an IL of solidarity, which seemed so easy to undertake in theory, became nearly impossible

6 See also art. 55 of the UN Charter: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations [...] the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems [...]; (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." See furthermore the Preamble of the Universal Declaration of Human Rights which, referring to the UN Charter, calls for the promotion inter alia of "[...] better standards of life in larger freedom." See H. Lim, Trade and Human Rights—What's at Issue?, 35 Journal of World Trade (2001), 275 (276).

7 To be precise, the GATT never entered into force directly as it was ratified only by Haiti. The General Agreement was rather applied provisionally but—leaving the so-called grandfather-rule aside—this had no greater repercussions on the effectiveness of this order.

8 On the stimulus wars and large international crises can give to reform movements—with reference to the UN system—see Peter Hilpold, Reforming the United Nations: New Proposals in a Long-lasting Endeavour, LII NILR (2005), 389.

9 On the concept of the law of solidarity, see Peter Hilpold, Solidarität als Rechtsprinzip - völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen, 55 Jahrbuch des öffentlichen Rechts (2007), (195); and Rüdiger Wolfrum and Chie Kojima (eds.), Solidarity: A Structural Principle of International Law (2010).

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to undertake in practice.[10] It is worth remembering that international consensus crumbled to the point that not only the linkage between trade and human rights was impossible to achieve but even within the field of human rights the great masses of civil and political rights on the one hand and social, cultural and economic rights on the other hand, so artfully brought together in the UDHR, were subsequently de-linked. Already in 1951, the decision was taken to split the work of an international human rights convention in two areas[11] and the results were two independent conventions: the Covenant on Civil and Political Rights on the one hand and the Covenant on Economic, Social and Cultural Rights on the other. Therefore, it can be said that the failure at the end of the 1940s of the last century to link trade with human rights in a consistent way was not the consequence of a lack of understanding with regard to this interrelation but rather the result of a deliberate choice. The confrontational, politically highly loaded climate of that time seemed to make it advisable to address the two areas separately. Seen in hindsight, this two-tier approach had its obvious advantages:

- First of all, it was a question of political expedience not to insist on a course blocked by insurmountable ideological barriers. The limited capital for new human rights legislation had to be spent wisely.
- The decision to separate the two prongs of HRL—representing at the same time the so-called first two generations of human rights—offered an opportunity to pay tribute to different understandings of human rights and to allow States to set different priorities.
- It is obvious that the implementation of political and economic rights has to follow different paths as they are conceptually different and the costs associated with the implementation can differ widely. To offer two different instruments means that both sets of rights can be addressed more effectively.

8. Looking back to 1948, it is safe to say that the time was not yet ripe for such a far-reaching approach as was set out in Article 28 of the UDHR. This was probably true even leaving the East–West conflict aside. Firstly, HRL and international trade law had to be further specified and firmly grounded in IL, separately and independently. The Cold War was not very propitious for the development of bold, overarching concepts, but nonetheless neither was it a period of absolute standstill as it is often described.[12] It

10 Even the famous treatise by Wolfgang Friedmann, The Changing Structure of International Law (1964), in which this great international lawyer depicted the passage from a law of coordination to a law of cooperation, was of more a prophetic nature than a description of the actual reality.

11 See M. Nowak, Einführung in das internationale Menschenrechtssystem (2002), 92.

12 See on these developments: Christian Tomuschat, Human Rights—between Idealism and Realism (2003) 28.

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offered rather the opportunity to undertake the painstaking, time-consuming technical clarification process each developing legal order has to undergo if it is to meet the demands of a highly complex societal reality.

9. As is known, this process came to an end with the triumph of Western liberalism in 1989/1990. Before this came to happen, however, another attempt was undertaken to reconcile HRL and IEL, this time from a Southern perspective.

II.C. The search for a New International Economic Order

10. The call for a New International Economic Order (NIEO) can be seen as an attempt to redefine international economic relations according to criteria of fairness and positive discrimination in favour of developing countries. Although mainly presented in a sovereign rights language, it was also closely related to the human rights discussion as it was premised on the idea of (economic) self-determination which is usually seen to be a pre-condition for the full realization of human rights. Without doubt, economic empowerment of developing countries should have direct consequences on economic and social rights of their citizens. As is known, this whole programme ended up widely as a failure. The one-sided attempt to re-state the terms of international transactions was bound to be unsuccessful from the beginning, as the consensual structure of IL did not provide any basis for a radical unilateral redrawing of the rules. While there should have been considerable margin for an evolutionary re-direction of IEL in favour of the needs of developing countries, the radical language chosen by the proponents of the NIEO[13] left next to no margin for compromise. The final deadly blow to this current of thought resulted probably from the inability of the NIEO's advocates to disconnect this agenda from the East–West conflict and from the ensuing rhetoric. Salient features of the proposed NIEO were a deep-rooted distrust towards the market mechanism as a steering mechanism for both the allocation of goods and the distribution of income as well as sympathies for the creation of *dirigiste* instruments at an international level. In comparison, the Western model of the international economy was far stronger premised on the defence of national sovereignty while international economic institutions should be attributed mainly a coordinating and supporting role. While the basic aspiration

13 See in particular the Declaration for the Establishment of a New International Economic Order (UNGA Res. A/RES/S-6/3201 of 1 May 1974) as well as the Charter of Economic Rights and Duties of States (UNGA Res. A/RES/3281 of 12 December 1974). As it was said, Western countries in international institutions became alienated "by the way the developing countries have used the United Nations; by their ideological propaganda—accusatory, demanding, antiliberal—that the Group of 77 with its three-quarters majority iterates in the course of many speeches and resolutions; by the manner in which, on all occasions, Western countries are condemned; in general by the moralizing attitude adopted by governments of poorer countries which are moreover more often than not dictatorial and little burdened by scruple in their domestic policy." See Maurice Bertrand, A New North/South Dialogue, 9 International Relations (1987/1989), 244.

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to empower developing countries in international economic relations did not succumb alongside the concept of NIEO, it is interesting to note that in the aftermath Western style IEL came under pressure from exactly the opposite front. As will be seen in the following, present attempts to rewrite the relevant liberal rules are mostly characterized by the aspiration to strengthen the State against the international economic institutions.[14] This, of course, results from the fact that the dominant International Economic Institutions (the Bretton Woods institutions as well as the WTO) are basically inspired by neoliberal thought. As it appeared to be impossible to find a consensus for the creation of international institutions following a redistributive agenda, the defence for social and economic rights should fall back to the State.

II.D. Civil society and linkaging

11. As is known, the Uruguay Round was characterized by the attempt to fully integrate the developing countries in the international economic order.[15] While the GATT system, which resulted from the Tokyo Round, was fragmented and qualified by an uncountable number of exceptions, the Uruguay Round followed the opposite approach: in principle, the same rules should apply for all members of the newly created WTO. Developing countries had to make a series of concessions, in particular in the field of market access, acceptance of binding dispute settlement and adherence to binding normative standards in the field of intellectual property rights. This deal turned out, however, to be unsatisfactory for the developing countries as the corresponding promises by the industrialized countries, in particular with regard to provide broader access to their agricultural markets, remained largely unfulfilled.[16]

12. Here the NGO movement stepped in.[17] After these organizations had been able both to block the negotiations on a Multilateral Agreement on Investment in 1997/1998 and to uproot the WTO Ministerial in Seattle towards the end of 1999, civil society became fully conscious of its power in international relations. Human rights language seeped into this protest movement for two reasons. First of all, the individual stands at the very basis of civil society. It stood to reason that it was only a

14 As will be seen, a notable exception in this context is the work by Ernst-Ulrich Petersmann.

15 On this process, see, inter alia, Edwini Kwame Kessie, Developing Countries in the World Trade Organization, 22 World Competition (1999), 83; George A. Berman and Petros Mavroidis (eds.), WTO Law and Developing Countries (2007); and Rorden Wilkinson and James Scott, Developing Country Participation in the GATT: A Reassessment, 7 World Trade Review (2008), 473.

16 On these unfulfilled promises, see Rafiqul Islam, Globalisation of Trade Liberalisation under the WTO: Its Effects on Human Rights and Social Justice, 1 Indian Journal of International Economic Law (2008), 1–28.

17 For a detailed analysis of this phenomenon, see Andrew T.F. Lang, Inter-regime Encounters, in: Joseph et al. (eds.), The World Trade Organization and Human Rights (2009), 163.

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question of time before the individual rights language would seep into the programmes of these organizations. Secondly, their programme of action was extremely variegated and some demands stood very close to the classic human rights agenda. Most prominently, this was the case for the call for labour standards[18] but in the end, practically all other claims were also suitable for interpretation in the human rights perspective.

13. This whole discussion began as a linkage issue. The trade order should be interlinked with other fields of IL, on the one hand in order to avoid conflict, on the other to allow for more effective operation of international trade rules. The "trade and . . . " discussion was born. A very extensive network of possible linkages was elaborated. These were, for example, trade and environment, trade and labour rights (or social standards), trade and democracy and trade and development. If one were, however, to interpret human rights more extensively, as was the case with the UN Committee on Economic, Social and Cultural Rights, it would appear that the human rights language was something like a lingua franca into which nearly all linkages could be translated, at least to a considerable extent. As already stated, Article 28 of the UDHR offered the broad language according to which human rights could be interlinked with practically all fields of the international reality and in particular with trade. Widely ignored in practice not only because of the Cold War but also because of its vagueness, now it offered interesting perspectives.

14. The trade order created in 1995 had come about in a rather haphazard way. Only a few years earlier, few would have believed in such an outcome, which appeared to herald the total triumph of market capitalism and which portrayed requests for an NIEO as an absurdity. The trade and human rights rhetoric offered a set of formulae which were well recognized both on the political and on the legal planes to unwind, at least partially, this consensus. On the ground, however, the points of criticism advanced against the newly established trade order were most disparate and came from very different ideological quarters.[19] Recourse to the human rights language offered only prima facie a common basis for discussion. The challenge to give structure to this discussion still persists.

III. The many faces of the linkage of trade law with HRL

15. Of all the linkages mentioned above, the one between trade law and HRL, which is probably the most complex one, shall now be given central attention. As has already been indicated, this is a multifaceted issue with regard to which continuously new perspectives are discovered. Furthermore, more or less all other linkages

18 Ibid., 166.
19 Ibid., 169.

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come here into play if we adopt a broad human rights concept. The following questions, to mention only a few, have been identified in this context[20]:

- What are the effects of trade liberalization on the human rights situation in individual countries?
- On which channels do human rights considerations seep into WTO law?[21]
- Is the imposition of trade sanctions for human rights abuses compatible with WTO law?
- What role is to be attributed to human rights conditionality in trade agreements?
- Should human rights principles and obligations be integrated in the WTO system?
- To what extent should the WTO dispute settlement system take into account human rights issues?
- Does the "mainstreaming approach", according to which all UN activities have to be informed by human rights principles,[22] extend beyond UN law and also involve WTO law?
- What are the exact relations between the attempt to democratize WTO law and the aim to further human rights within this institution?
- Should Article XX of the General Agreement be interpreted more extensively in order to take the human rights question better into account?
- Should (vice versa) international human rights be re-interpreted in view of the needs of a well-functioning international trade system?

All these research questions may appear, at first sight, to be neutral. The way they are posed in practice, however, often encapsulates a hidden anti-trade bias. In fact, many technical analyses presented so far on this issue seem to take for granted that the relationship between trade and human rights is basically of a negative, conflicting nature. In reality, this relationship is also of a synergistic kind and it seems very likely that this second aspect is even the empirically more relevant one.[23] However,

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20 See Floris v. Hees, Protection vs. Protectionism, The Use of Human Rights Arguments in the Debate for and against the Liberalisation of Trade (2004), 2.

21 This specific question has been examined in detail by Susan A. Aaronson, Seeping in Slowly: How Human Rights Concerns Are Penetrating the WTO, 6 World Trade Review (2007), 413. See also Wolfgang Benedek, The World Trade Organization and Human Rights, in: Wolfgang Benedek et al. (eds.), Economic Globalization and Human Right (2008), 169; and Peter-Tobias Stoll, Handel und Menschenrechte in der internationalen Ordnung, in: Rainer Grote et al. (eds.), Die Ordnung der Freiheit, FS Christian Starck (2007), 1019.

22 See Nowak, Einführung in das internationale Menschenrechtssystem (2002), 87.

23 This has recently been restated in a forceful and convincing manner by WTO Director-General Pascal Lamy. See Pascal Lamy, Comparative advantage is dead? Not at all, Lamy

conflicting situations in this field are regularly felt far more intensively.[24] While the advancement of human rights through trade is of a diffuse nature and hard to measure, the negative impact single trade measures can have on specific rights or on specific subjects is far easier to localize and gauge.

16. To give at least some structure to all these questions, two main perspectives shall be distinguished in the following: the offensive, positive or co-optive use of human rights in international trade law and the defensive or negative approach. In the first case, the relationship between trade and human rights is considered to be of a positive nature, i.e. trade instruments can (and should) be used to further human rights. According to the second approach, trade is considered to be potentially detrimental for the achievement of human rights goals.[25] As a consequence, various attempts have been undertaken in literature and in practice to contain the reach of trade norms and to open up space for human rights consideration. Where trade rules and human rights provisions enter into conflict, the latter should prevail.

17. Alongside these two main prongs of the discussion on the intersection between trade and human rights, there would be a third perspective on which less research has been done so far. Reference is made here to the question whether, and to what extent, international HRL has been influenced by principles of international trade law. Here we are entering widely uncharted waters but on a closer look it becomes clear that both areas could benefit from a mutual exchange.[26] Of course, within all three fields of research, further questions can be identified which are also suitable for an autonomous study. It is, however, only the overall perspective that can give an idea of the complexity as a whole in this area. This field of intellectual exchange is prone to occupation by factious groups. Those who limit their interest to only a few of these perspectives run the risk of being accused of partiality while a truly comprehensive study of the linkage between trade and human rights may founder because of the unwieldy subject and the dependence of one linkage problem on many others indicated above. We are, therefore, confronted here with a rather amorphous subject where much research has still to be done notwithstanding the ever-increasing academic output in this field.[27] Nonetheless,

tells Paris economists (www.wto.org/english/news_e/sppl_e/sppl152_e.htm (last visited 13 October 2010)).

24 Eleanor M. Fox, Human Rights, Human Welfare, Globalization and Trade, in: Carl Baudenbacher and Erhard Busek (eds.), Europa und die Globalisierung (2003), 169 (170).

25 See, with regard to this distinction, Maria Green, Integrating Enforcement of Human Rights Laws with Enforcement of Trade Laws: Some Baseline Issues, in: Thomas Cottier et al. (eds.), Human Rights and International Trade (2005), 236.

26 As will be seen in the following, the human rights community has taken over the last years a far more open attitude to the needs of the trade community.

27 It can be said without exaggeration that this area is one of the most dynamic ones of the whole subject of IEL.

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already at this stage of development of the pertinent discussion, some important insights can be gained and conclusions can be drawn. In the following, these elements shall be set out in detail.

IV. The positive perspective: trade law as an instrument to further respect for human rights (and vice versa)

18. To this perspective, usually, less attention is paid on the academic level, at least when the linkage issue is addressed. Again, two further specific issues can be distinguished in this field.

19. First of all, there is the general question whether trade may enhance respect for human rights and, as a consequence, whether trade law, conceived to strengthen trade relations and to augment international trade, may also be conducive to this end to the promotion of human rights.

20. Secondly, the question may be asked whether specific trade instruments can be employed to further individual human rights or to improve individual country situations.

IV.A. What impact does trade have on human rights in general?

21. Generally it is said that trade enhances the overall human rights situation. Among economists may be noticed a far-reaching consensus that international trade as the decisive prerequisite for the international division of labour is welfare-enhancing.[28] David Ricardo's Theory of Comparative Advantage has survived all contestations[29] and constitutes now the theoretical underpinning for the most important institutions and regulatory frameworks dedicated to international trade.[30] Greater welfare constitutes, on the other hand, one of the most important contributions to furthering human rights. This is in particular true for social and economic rights, as thereby the welfare basis is created to satisfy the respective

28 See Alan O. Sykes, International Trade and Human Rights: An Economic Perspective, University of Chicago Law and Economics, Olin Working Paper No. 188 (2003).

29 See the compelling overview in Michael J. Trebilcock and Robert Howse, The Regulation of International Trade (2005), 3. Also the discussion engendered by one of the last major works of late Nobel laureate Paul Samuelson (Why Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization, 18 Journal of Economic Perspectives (2004)), a paper evidencing some serious flaws in free trade theory, has not been able to shutter the basic soundness of this approach. See Jagdish Bhagwati, Arvind Panagariya and Thirukodikaval N. Srinivasan, The Muddles over Outsourcing, 18 Journal of Economic Perspectives (2004)).

30 As the WTO Secretariat states, there is a "definite statistical link between freer trade and economic growth". In the 25 years after the Second World War, world trade grew about 8 per cent per year while trade barriers were continuously lowered. In the same period, economic growth averaged 5 per cent per year (www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.thm (17 March 2010)).

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human needs and, at the same moment, to soften distributional fights with all of their ensuing human suffering. This also holds true, however, when civil and political rights are at issue. The respective guarantees always come at a cost.[31] Greater welfare makes an ever more sophisticated human rights protection system affordable. Furthermore, it has to be evidenced that today international trade is an important element of a functioning market system. It contributes to maintain a coherent pricing system and therefore to allow for an effective allocation of factors and resources.[32]

22. At the same time, it is also known that open borders not only permit the free exchange of goods but also favour the free flow of ideas and opinions creating thereby an environment propitious for the further strengthening of human rights.[33] Finally, it cannot be overlooked that liberal economic rights are closely intertwined with human rights protection in general. In literature, a strong plea has been made to empower citizens with economic rights protected by international constitutional provisions so as to better ensure the protection of an "inalienable

31 See Alan O. Sykes, International Trade and Human Rights: An Economic Perspective, in: F.M. Abbott et al. (eds.), International Trade and Human Rights (2006), 69 (70).

32 See Jeffrey M. Waincymer, The Trade and Human Rights Debate: Introduction to an Interdisciplinary Analysis, in: Joseph et al. (eds.), The World Trade Organization and Human Rights, 1 (24).

33 Ibid., at 71. Two elements stand out in this context: the flow of information, ideas and opinions creates, first of all, human rights awareness and, as a consequence, a respective demand for such rights. Secondly, these flows constitute as such a direct implementation of important human rights, for example in the field of free speech, the free expression of opinions and press liberty. In literature, conflicting views have been exposed in this regard. Robert Howse and Makau Mutua have written: "It is absurd to expect a country that systematically violates basic human rights to faithfully execute and implement the processes that WTO agreements require". On the other hand, José Alvarez was of the opinion that "Many human rights violators routinely comply with international economic agreements and many prominent defenders of human rights, including the United States, have trouble adhering to and complying with some international agreements." See: Trade and the Environment: Implications for Global Governance: How Not to Link: Institutional Conundrums of an Expanded Trade Regime, 7 Widener Law Symposium Journal (Spring 2001), cited according to Gabrielle Marceau, The WTO Dispute Settlement and Human Rights, in: F.M. Abbott et al. (eds.), International Trade and Human Rights (2006), 181 (235). Both positions appear at first sight to be convincing, and this is the best demonstration that they are operating at a different level—they do not really contradict each other. An inward-looking repressive regime will usually not have greater difficulties in adhering to the rather few international economic obligations it has assumed. A highly developed democracy with very far-reaching economic obligations will far more often have difficulties complying with its extensive obligations, exactly because they are so demanding and because the power to decide is not concentrated in an oligarchy but attributed to many actors. At the same time, however, this participative model opens enormous space for further growth, wealth creation—and again, competition between concepts, ideas and goals. There can be no question that the second model is the superior one both from the economic and from the human rights perspectives.

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core" of universal human rights.[34] In general, it can be stated that the economic basis of human rights protection is all too often neglected by critics of modern IEL institutions.

23. It would be wrong, however, to ignore that trade liberalization can have devastating effects on certain country situations or on certain subjects. With regard to the first aspect, in some situations it may be advisable to afford some protection to developing countries until they become competitive on the international market. If trade barriers are torn down too rapidly, these countries will never have the opportunity to build up domestic industries and to engage in respective learning processes.[35] The WTO rules on trade in agriculture may be an example for a case in which the right balance between liberalization and necessary protection has not yet been found.[36] With regard to single individuals hurt by measures of trade liberalization, it could be argued that they can be compensated with the overall welfare gains from free trade and the winners would be still better-off.[37] Although the intuitive and political appeal of this Kaldor–Hicks theorem cannot be denied, it suffers not only from conceptual[38] but also from practical deficits. In fact, there is

34 See extensively, in many contributions, Ernst-Ulrich Petersmann. See, for example, Petersmann, International Trade Law, Human Rights and Theories of Justice, in: Steve Charnovitz et al. (eds.), Law in the Service of Human Dignity, Essays in Honour of Florentino Feliciano (2005), 44 and, most recently, Petersmann, Constitutional Theories of International Economic Adjudication and Investor-State Arbitration, in: Pierre-Marie Dupuy et al. (eds.), Human Rights in International Investment Law and Arbitration (2009), 137.

35 Admittedly, this is a delicate issue. While it may be advisable for some countries in very specific situations to maintain some trade barriers, other countries might abusively take recourse to this "infant industry" argument as a pretext for purely protectionist purposes. On the other hand, it is surely the case that countries like the United States, Germany, Japan or South Korea have successfully utilized such a policy to build up a competitive industry on their own. The great challenge will be to handle such a policy in a careful, balanced way.

36 In this regard, the outcome of the Uruguay Round seems particularly unhappy: developing countries had to promise far-reaching market access (while they would have needed some degree of protection to allow for the survival of subsistence farming) and industrialized countries promised to open up their agricultural market in the future (a promise that remained largely unfulfilled). See, inter alia, Jean Ziegler, Report of the Special Rapporteur on the Right to Food, UN Doc E/CN.4/2006/44 (16 March 2006), 40.

37 As is known, economists (and social scientists) consider a situation as "Pareto efficient" if it is not possible to make one person better off without making someone else worse off. It is doubtful whether the passage from protectionism to free trade could be justified by recourse to Pareto efficiency. Such a justification can be obtained, however, referring to the criterion of Kaldor–Hicks efficiency. According to this criterion, a situation is more efficient if there is an overall improvement of welfare and the losses suffered by those worse-off can be compensated by the gains of those better-off.

38 The main conceptual problem with this theorem lies in the fact that it is premised on the assumption that the individual welfare function can be aggregated to a social welfare function. This would impose an impossible requirement, namely the cardinal measuring of utility.

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no guarantee that such compensation will actually occur. Furthermore, there might be considerable structural barriers impeding compensation, at least in the short and medium terms.[39]

24. On the whole, it seems fair to say that trade liberalization is beneficial to human rights protection. The same is true for the institutions created for the promotion of free trade. While there may be some extreme critics demanding the closure of the WTO and of the Bretton Woods Institutions, the mainstream approach goes in the direction of requiring that these institutions be reformed so as to allow for broader consideration of human rights. Those countries and trading blocs that are pushing hard for trade liberalization in developing countries should also take care that structural adjustment takes place as smoothly as possible and that apposite safety nets are created.[40]

IV.B. The merit and the limits of accommodating IEL and HRL

25. There can be no doubt that much can be done to better accommodate IEL in general and the WTO in particular with HRL. In the following, it will be shown that it is possible to achieve this end both through a positive approach and through a negative one, as either trade instruments can be employed actively to pursue this end or trade law could possibly be reformed in many ways so as to eliminate possible and actual elements of conflict (negative approach).

26. As far as the broader public takes notice of these endeavours in the first place, there is the danger that all these measures will be considered half-hearted or outright insufficient. The reasons for this situation are diverse ones. First of all, any compromise holds elements of dissatisfaction. Insofar as concessions have to be made to trade interests, the impression might arise that human rights have been sacrificed. Even though enhanced trade might have positive long-term consequences on the human rights situation, these improvements might not be registered in the respective cost–benefit analysis as the cause of this development is not broadly known. An improved human rights situation will rather be considered a simple given. Furthermore, as human needs are infinite, so is the desire for human rights protection which can never be fully satisfied, even outside actual conflicts with other needs and aspirations. This holds particularly true for economic rights which are directly related to these needs.

39 As has been said, David Ricardo simply assumed that grape owners and wine makers in England would become weavers and tailors while the weavers and tailors in Portugal become grape growers and wine makers. See Lorand Bartels, Trade and Human Rights, in: Daniel L. Bethlehem (ed.), The Oxford Handbook of International Trade Law (2009), 571 (580) with reference to David Palmeter, A Note on the Ethics of Free Trade, 4 World Trade Review (2005), 449 (449–450).

40 See Pranab K. Bardhan, Globalisation and Human Rights: An Economist's Perspective, in: Sarah Joseph et al. (eds.), The World Trade Organization and Human Rights (2009), 91 (99).

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27. Furthermore, the concept of human rights itself is in continuous fermentation in parallel with IEL. As both legal systems are enlarging in scope, the potential for overlap and conflict increases. Even if some accommodation is achieved, the overall impression could be that human rights interests are stubbornly ignored by the trade community. Closely associated with this problem is the fact that the human rights language is suitable for being adopted also by interest groups outside the traditional human rights community. As it is the only truly universal system of legal norms[41] endowed with particular legitimacy (in part even qualified as *jus cogens*), it becomes attractive to clothe interests and demands in human rights language. Even representatives of purely economic interests, so far not adequately considered within IEL, can adopt such a strategy.

28. It would therefore be unrealistic to aspire for a once-and-for-all settlement of the conflict between HRL and IEL. It is rather the case that some balancing will always be needed. As will be shown, it might not even be desirable that both masses of law become too much integrated. The main interests involved may receive better protection if both fields maintain some autonomy, even though this might entail considerable tension or outright conflict in the future.

IV.C. Trade instruments designed to improve specific rights or country situations

29. Specific encroachments on human rights, whether actual or only imagined, are often, on the other hand, felt far more strongly by the individual, who is the immediate victim of this development, especially if these rights are of specific importance to the subject.[42] For the overall evaluation of this linkage issue, it is, therefore, very important to show that there are cases in which trade instruments are also employed in a specific way as a device to further single human rights—or even respect for human rights in general. A closer look at State practice reveals that many political and economic efforts have been undertaken to build sophisticated instruments in this area. This subject is usually discussed under the heading of "conditionality".

41 See Nowak, above n.11, at 13.

42 The same may be true with regard to the so-called race-to-the-bottom discussion which concerns, first of all, the issue of social standards but which is also referred, in a larger sense, to the human rights area. Although there is little evidence that such a race is actually taking place in the public discussion, sporadic phenomena which could be interpreted in this sense are often taken as a sufficient proof for a broad and consistent trend in this direction. See Petros Mavroidis, Human Rights, Developing Countries and the WTO Constraint: The Very Thing That Makes You Rich Makes Me Poor?, in: Eyal Benvenisti and Moshe Hirsch (eds.), The Impact of International Law on International Cooperation (2004), 244 (257). See also The Future of the WTO, WTO (2004), 13, para.24: "[...] there is more reason to suggest pressure for a 'race to the top'".

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30. As is known, the European Union (EU) has developed, in this field, unprecedented and still unmatched experience. Beginning in the early 1990s, the EC has inserted human rights clauses in all its agreements with third countries, be they developing countries or industrialized countries. According to Article 177, paragraph 2, of the TEC, "Community policy in [the area of development cooperation had to] contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

31. In the Treaty of Nice, a corresponding clause was introduced for agreements with third countries not constituting developing countries.[43] With the Treaty of Lisbon, which entered into force on 1 December 2009, development policy has become an integral part of the EU's external action. Development policy has thereby become more political and at the same time it has to be coordinated more closely with other branches of its external action, in particular with its external commercial policy. In this context, the overall values as stated in Article 2[44] and Article 3, paragraph 5,[45] of the TEU, referring, *inter alia*, to democracy, the rule of law and respect for human rights as well as free and fair trade, have to be respected.

32. According to Article 21 of the TEU, "the Union shall define and pursue common policies and actions, i.e. to consolidate and support democracy, the rule of law, human rights and the principles of international law."[46]

33. Although Article 208 of the TFEU, the central provision on development cooperation in the TFEU, appears to be more neutral in comparison to Article 177 of the TEC, in view of the overall political conditions portrayed it becomes clear that conditionality has now become a firm element in the EU's external action in general and in its development policy in particular.

34. The human rights clauses as such consist mainly of two elements: the "essential element clause" and the "additional clause" or "non-execution" clause.

43 See art. 212, para.1, second subparagraph, of the TFEU. See Peter Hilpold, Kommentar zu Art. 212 TFEU, in: Heinz Mayer (ed.), Kommentar zu EU- und AEUV-Vertrag (2010).

44 "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

45 "In its relation with the wider world, the Union shall uphold and promote its values and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

46 See also art. 21, para.2, of the TEU.

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35. The first clause goes as follows: "Respect for democratic principles and fundamental human rights [established by the Universal Declaration of Human Rights] inspires the internal and international policies of the Parties and constitutes an essential element of this agreement."[47]

36. The "additional clause" was originally a mere suspension clause for cases of extreme violations of the principles mentioned above. However, as these clauses did not operate in a really satisfactory way, a more sophisticated mechanism was created[48] which gave large room to consultation and mediation.[49]

37. Generally speaking, the EU tried more and more to move away from a negative approach, characterized by the adoption of sanctions in the case of human rights violations towards a positive approach according to which priority should be given to incentives for greater adherence to internationally agreed-upon standards and for closer cooperation in this field.[50]

38. While human rights conditionality now finds general application in the economic cooperation by the EU, its main field of experimentation has always been, as is known, the special relationship with ACP countries. At the latest stage of development of this relationship, represented by the Cotonou Agreement of 23 February 2000, recourse was taken to a new concept[51]: "good governance".[52] While the

47 See Elena Fierro, Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?, 7 European LJ (2001), 41, citing the co-operation agreement between the European Community and the Lao People's Democratic Republic, 1997, L 334/15 Official Journal of the European Communities (1997).

48 These technical changes were characterized by a change in the designation: the so-called Baltic clause was substituted by the "Bulgarian clause".

49 The "Bulgarian clause" goes as follows: "If either Party considers that the other Party has failed an obligation under this Agreement, it may take the appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution between the Parties. In the selection of measures, priority must be given to those which least disturb the agreement. These measures shall be notified immediately to the Joint Committee if the other Party so requests." See also Der-Chin Horng, The Human Rights Clause in the European Union's External Trade and Development Agreements, 9 European LJ (2003), 677 and, as one of the first comprehensive expositions on this subject, Frank Hoffmeister, Menschenrechts - und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaften (1998).

50 On the advantages of "positive" measures over sanctions, see Bruno Simma/Jo B. Aschenbrenner/Constanze Schulte, Human Rights Considerations in the Development Co-operation Activities of the EC, in: Philip Alston (ed.), The EU and Human Rights (1999), 571 (578) with further references.

51 To be true, this concept is not totally new in the broader field of IEL. In fact, it was first used in the 1989 World Bank Report. See Simma/Aschenbrenner/Schulte, above n.50.

52 See Peter Hilpold, EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance, 7 European Foreign Affairs Review (2002), 53; and Rudolf Dolzer, Good Governance: Neues transnationales Leitbild der Staatlichkeit?, 64 ZaöRV (2004), 535.

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exact content of this concept has not yet been determined, it is nonetheless clear that it holds great promise: aid will be given and trade will take place only if democratic principles are observed and if human rights are respected. But this is not enough: respect for the principle of good governance makes sure that the very pre-conditions which make observance of human rights possible are obeyed. The introduction of this principle therefore shows a way to go beyond the mere linkage of trade and human rights. It rather aims at a new all-encompassing value orientation and legitimacy in international trade relations. Of course, the soundness of this new approach will largely depend upon the actual content given to the concept of good governance. This concept was held so generically primarily because the EU wanted to avoid the impression that it tried to impose its values on other countries (in particular, third world countries). In this field, as in other situations where the subjects of trade and human rights have been linked, it is of pivotal importance that pertinent standards are developed in international organizations. Linking trade with human rights is contentious enough—at least the relevant human rights standards taken recourse to should not give rise to further dispute.

39. Less ambitious than the EU's conditionality approach is the Generalized System of Preferences (GSP), which, on the other hand, is applicable on a far larger scale. Originally created at the initiative of UNCTAD (and therein sponsored by the developing countries), it was afterwards integrated into the world trading order. As this package of measures consists in the granting of trade preferences to developing countries, it constitutes, on the face of it, a violation of basic principles of GATT law, first of all of the most favoured nations principle. Due to a—temporary—waiver in 1971[53] and finally a permanent waiver in 1979 (the so-called enabling clause),[54] this exception has become part of the GATT—and later the WTO—acquis.[55] The extent to which the conditionality principle can be applied also to the GSP has been hotly disputed in the past. As is known, in December 2003 a WTO dispute settlement panel took a rather negative attitude towards such an option.[56] According to this panel, the "enabling clause" presupposed "that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations". Furthermore preferential treatment for the LDCs should also be possible under this exception.[57] On the

53 GATT, Generalized System of Preferences; Decision of 25 June 1971, L/3545 (28 June 1971).

54 GATT, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; Decision of 28 November 1979, L/4903 (3 December 1979).

55 The enabling clause has been integrated in WTO law. See para.1(b)(iv) of GATT 1994 and Appellate Body Report, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R (7 April 2004), para.90.3.

56 See European Communities—Conditions for the Granting of Tariff Preferences in Developing Countries, WT/DS246/R (1 December 2003).

57 Ibid., paras.7.161, 7.176.

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other hand, the Appellate Body has taken a more liberal approach: conditionalities can be integrated in GSP schemes insofar as they "respond positively" to the "development, financial and trade needs" of developing countries.[58] "The term 'non discriminatory' [...] does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that [...] identical treatment is available to all similarly-situated GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond".[59] In view of the fact that the development needs of different GSP beneficiaries also may vary, the respective measures may assume a different nature. Conditionalities must not be an instrument for discrimination but be based on "objective standards" as they are principally set out in multilateral agreements.

40. In its new GSP scheme for the years 2006–2015, the EU has fully taken advantage of this possibility by introducing the so-called GSP+ category. According to the relevant provisions, special incentives are introduced for countries which have signed up to the main international agreements on social rights, environmental protection, governance and combating the production of and trafficking in illegal drugs. In the past, special arrangements with regard to drugs, social issues and the environment were in place but this approach lent itself to criticism as possibly being discriminatory. The new GSP+ category can, as a single, unitary concept, squarely address the development issue as such and thereby avoid any accusation of being discriminatory or biased.[60]

IV.D. Regional versus universal approaches to further human rights through trade instruments

41. The pro-active or positive use of trade instruments for the promotion of human rights goals is, as already mentioned, an approach still in the making. While human rights motivated trade sanctions, i.e. the limitation or the termination of trade in cases of human rights violations, have a long tradition in economic history, the pro-active approach is more demanding and is the result of more recent developments. It requires the existence of sophisticated human rights standards and the political will to implement them coherently. Furthermore, measures of this kind are regularly more expensive than trade sanctions, at least at the moment when they are adopted.[61]

58 See Appellate Body Report on EC—Conditions for the Granting of Preferences to Developing Countries, WT/DS246/AB/R (20 April), paras.162–164.

59 WT/DS246/AB/R (7 April 2004) paras.173, 190.

60 The main motive for the creation of the GSP+ system has been exactly the necessity to bring the EU's preference system into conformity with the Appellate Body's ruling in the Appellate Body Report on EC—Conditions for the Granting of Preferences to Developing Countries.

61 Of course, in the long run, trade sanctions can be far more expensive. Often, the negation of trade hurts the sanctioning State at least as much as the addressee of these sanctions.

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It is therefore no wonder that regional institutions such as the EU and NAFTA[62] have taken the lead in the development of this approach. This experience has inspired some writers to imagine similar models for universal application.

42. Some have suggested that the WTO should be transformed into a human rights organization, i.e. that the requirement to respect human rights should be inserted at the very constitutional level. Already, for the time being, some references to human rights can be found, at least implicitly, in GATT/WTO law.[63]

43. It may appear intriguing to draw a parallel between the WTO and EU in the sense that what has been possible for the latter, the transformation of a once mainly economic organization into an institution qualified by some as a human rights organization,[64] should become possible also at the universal level, i.e. for the WTO.

44. However, even leaving apart the fact that what has been successfully experimented at the regional level will not necessarily also become a success in the universal sphere, there are fundamental differences between WTO law and EU law. The EU is far more highly integrated than the WTO and follows not only an approach of "negative integration" (regarding the elimination of discriminatory measures) but in many senses a positive approach, actively promoting integration and also harmonization.[65] Thereby the basis is created for the identification of common values which are in many senses closely related with human rights protection. Furthermore it has to be remembered that the WTO is a "Member-driven organization". In fact, the WTO, unlike the EU, does not have any norm-setting capacity independent from its members. On this basis, the WTO Members can make sure that delicate issues that could impinge on their sovereignty (such as the human rights agenda) are not dealt with. Also, the law-creating capacity of WTO dispute settlement, though not totally excluded, is far more limited than that of the ECJ.[66]

62 See Paul Teague, Standard-setting for Labour in Regional Trading Blocs: The EU and NAFTA Compared, 22 Journal of Public Policy (2002), 325.

63 Already in 1947, the preamble of the GATT mentioned the raising of standards of living as a general aim. Even more far-reaching was the language adopted in the WTO preamble. There we find a reference to the need for "positive efforts designated to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". As will be examined in more detail, according to art. 3, para.2, the DSU, which is an integral part of the Uruguay package, "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".

64 See Armin von Bogdandy, The European Union as a Human Rights Organization?, 37 CMLR (2000), 1307.

65 See extensively on the differences and similarities between EU law and WTO law: Grainne de Búrca and Joanne Scott, The Impact of the WTO on EU Decision-making, in: de Búrca and Scott (eds.), The EU and the WTO—Legal and Constitutional Issues (2001), 1.

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45. Should the WTO be opened up to human rights concerns, coherence would require that WTO Members acted explicitly in this sense. In particular, Ernst-Ulrich Petersmann has presented the idea of a WTO Declaration on International Trade and Human Rights. Such a declaration should contain elements of the positive and of the negative approach. Essentially, by such a declaration, WTO Members should commit themselves—and the WTO as an institution—to stricter adherence to human rights. In a WTO Ministerial Declaration, WTO Members could, for example,[67]

(1) renew the commitment of WTO Members to respect universal human rights in all policy areas;
(2) affirm their support for the legal protection of human rights through the competent UN human rights bodies and national institutions;
(3) support the need for harnessing the complementary functions of WTO rules and human rights for welfare-increasing cooperation among free citizens in international trade, in conformity with the worldwide recognition—in the 1993 Vienna Declaration of the UN World Conference on Human Rights—that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing";
(4) acknowledge that the customary rules of international treaty interpretation may require WTO bodies to take into account human rights obligations of WTO Members in the interpretation of WTO rules; and urge WTO dispute settlement bodies, if they are requested by WTO Members to take into account human rights as relevant legal context for the interpretation of WTO rules, to exercise judicial restraint and fully respect the margin of appreciation which every WTO Member may legitimately claim with regard to the domestic implementation of international and national human rights guarantees.[68]

66 In the DSU, we find in art. 3, para.2, an explicit limitation in this regard: "Recommendations and rulings of the DSB [Dispute Settlement Body] cannot add or diminish the rights and obligations provided in the covered agreements." See in this regard: Rutsel Silvestre J. Martha, Precedent in World Trade Law, XLIV NILR (1997), 346; Adrian Chua, The Precedential Effect of WTO Panel and Appellate Body Reports, 11 Leiden JIL (1998), 45; August Reinisch, Richterrecht im Völkerrecht?, 9 Journal für Rechtspolitik 2001 (294); Nathan Miller, An International Jurisprudence? The Operation of "Precedent" across International Tribunals, 15 Leiden JIL (2002), 483; Juscelino F. Colares, A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development, 42 Vanderbilt Journal of Transnational Law (2009), 383. With regard to the—much contested—law-creating role of the ECJ, see Günter Roth and Peter Hilpold, Der EuGH und die Souveräntität der Mitgliedstaaten (2008).

67 See Ernst-Ulrich Petersmann, Human Rights and International Trade Law: Defining and Connecting the Two Fields, in: Thomas Cottier (ed.), Human Rights and International Trade Law (2005), 29 (71).

68 Ibid.

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46. For the time being, however, there is no consensus in sight for the adoption of a declaration of this kind. It is argued here that this is not only the consequence of a respective lack of political will but also—and perhaps prevailingly—the result of a still-outstanding clarification of many concepts coming into play in this context.

47. Professor Petersmann was successful, however, in promoting the adoption of a respective resolution by the ILA in 2008. The text of Resolution No. 5/2008 on International Trade Law, adopted at the 73rd Conference of the International Law Association, held in Rio, Brazil, from 17 to 21 April 2008, reads as follows:

> *Having Considered* the report of the International Trade Law Committee, especially the reasoning on Chapter VIII on International Trade Law and Human Rights;
>
> *Recalling* that by virtue of the UN Charter and human rights conventions and under customary international law and general principles of international law, states have human rights obligations;
>
> *Considering* that it is likely that WTO dispute settlement bodies will be confronted—as has happened in national and regional economic courts and arbitral tribunals—with human rights arguments in support of interpreting trade and economic rules in conformity with the human rights obligation of the countries concerned, or with related requests for "judicial comity" or "judicial deference";
>
> *Declares* WTO members and bodies are legally required to interpret and apply WTO rules in conformity with the human rights obligations of WTO members under international law.[69]

This resolution appears to be far more prudent than the one prepared for adoption by the WTO. Nonetheless, it probably still goes far beyond what the States are prepared to concede. In particular, the last paragraph appears to be ambiguous. It could be read as a plea to both States and WTO institutions to respect WTO obligations as well as human rights obligations. Understood in this sense, however, it does not add anything new. On the other hand, it could be read as an obligation to give preference to HRL. Such a reading is, however, not covered by international consent.

48. For a further development and refinement of positive instruments which should perhaps one day find application also on an universal level, it seems therefore more appropriate to follow a bottom-up approach. The EU has gone great lengths in this endeavour and in the meantime it can present remarkable achievements in this field. It is probably the case that the regional level is more suited for such fundamental experiments. As with the development of human rights standards, the

69 Cited according to Ernst-Ulrich Petersmann, International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation, in: Joseph et al. (eds.), above n.17, at 69 (87).

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regional level offers a higher degree of political cohesion for the creation of highly sophisticated concepts and instruments. Then, at a second stage, it can be examined whether these standards can be transposed to the multilateral level.

IV.E. Synergies between the strengthening of international trade and the promotion of human rights

49. When the synergistic aspects of the relationship between trade and human rights are addressed, one specific perspective often gets lost: the influence of a highly developed human rights protection system on the promotion of free trade. One attempt to tackle this issue again visibly carries the signature of Ernst-Ulrich Petersmann, who tried in many writings to render trade and human rights interests mutually supportive by the identification of a human right to international trade.[70] Summarizing a broad discussion engendered by these proposals, it can be stated that the respective approach is surely intellectually challenging and represents an important contribution for a better understanding of purpose and function of the world trading system as a whole. It does not, however, constitute a description of the existing IEL as it is based on postulates directed at an improvement of this order.[71]

50. Less far-reaching approaches address single aspects of the positive relationship between human rights protection and the promotion of free trade. In fact, in the meantime, it is generally recognized that the protection of at least some human rights has immediate positive repercussions on international trade. This is in particular true for the protection of property. Trade presupposes some form of property protection.[72]

51. Many other human rights have immediate positive consequences for the promotion of international trade. Starting with the protection of core human rights

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70 Among the many writings by Ernst-Ulrich Petersmann on this issue, see only the following recent ones: Human Rights and the Law of the World Trade Organization, 37 Journal of World Trade (2003), 241–281; Constitutional Approaches to International Law: Interrelationships between National, International and Cosmopolitan Constitutional Rules, in: Jürgen Bröhmer et al. (eds.), Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress (2005), 207; Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in: Ernst-Ulrich Petersmann (ed.), Human Rights and International Trade Law: Defining and Connecting the Two Fields (2005), 29; Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in: Frederick M. Abbott et al. (eds.), International Trade and Human Rights (2006), 29.

71 See Peter Hilpold, Die WTO im Legitimationskonflikt - unter besonderer Berücksichtigung der Herausforderungen im Bereich des Menschenrechtsschutzes, 109 Zeitschrift für Vergleichende Rechtswissenschaft (2010), 135 (140) and below n.156.

72 This even holds true for State trading countries which have to grant property protection at least to the foreign trading partner, independently of the fact whether this is a private or a public subject. For an in-depth-analysis of the relationship between property protection and economic growth, see Hernando de Soto, The Mystery of Capital (2000). See also Jagdish Bahgwati, In Defense of Globalization (2004).

ranging from the right to life to the right to fair trial and the right to assembly, there is no human rights provision that could not be brought positively into relationship with the furtherance of free trade. Therefore, there is generally a positive correlation between human rights protection and international trade.[73] From a more general point of view, it can be stated that human rights protection is an important, if not the most important, element to define the legitimacy of a legal system. Legitimacy, on the other hand, is conducive to the acceptance and effectiveness of a norm.[74]

52. If the old saying is true that with the law comes the trader, the inverse relationship is also true. The order established by the traders will be the more resilient the more it is based on fundamental legitimacy requirements and, therefore, on responsiveness to human rights needs.

V. The negative perspective

V.A. Limiting the reach of WTO law

53. This perspective is the most broadly discussed one. When the linkage between trade and human rights is addressed, usually this negative perspective first comes to mind. As already hinted at above, this subject has come to life primarily as a consequence of the enormous extension of coverage of the WTO in comparison to the GATT.

54. There are now significant areas of overlap and—as argued by some—also of conflict between international trade law and HRL. This is the case in the field of social and economic rights but also with regard to civil and political rights. When addressing this issue, two basic questions have to be confronted: who is to decide, and how is a possible conflict to be resolved?

55. With regard to the first question, several options are at hand, even though not all available in theory are feasible in practice[75]:

(1) The UN human rights bodies could take up the initiative and solve possible disputes. This option seems, at first sight, unrealistic. Already the implementation of human rights in the stricter sense suffers from many flaws. There is no point in augmenting further the working load of these bodies, and all the more so if the new set of rights to be dealt with poses new formidable

73 Only in highly developed human rights protection systems where different human rights are entering reciprocally into conflict (this may be the case, in particular, between rights of the various "human rights generations"), a balancing may be needed that could lead, in the final consequence, also to negative consequences on international trade.

74 See extensively on this issue: Thomas M. Franck, The Power of Legitimacy among Nations (1990).

75 With regard to these and more options to reconcile trade with human rights, see Maria Green, above n.25, at 238.

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challenges. This is not to say that the UN should generally leave the initiative in this field to the WTO or to other trade and finance institutions. The conceptual contributions by the UN are of a pivotal importance to shed further light on the many conundrums posed by this subject. Furthermore, the active participation by the UN in this discussion is of immense value for the legitimacy and the general acceptance of the outcome of this clarification process as a whole. The Office of the High Commissioner for Human Rights (OHCHR) has already issued some interesting papers and reports with regard to this subject.[76] Since the first pronouncements on this issue, the attitude of the OHCHR has considerably changed: it is far more open to the perspective of the trade community and there is the sensation that first of all, a better understanding of this difficult subject is aimed at.[77]

(2) A second option would be to ask an institution outside the closer circle of both trade and human rights to act as a neutral referee. This role could be assumed, first of all, by the International Court of Justice. While this proposal has met with scepticism in literature,[78] in a more nuanced perspective probably the following distinction has to be made: while there can be no doubt that in single cases the ICJ could have jurisdiction on cases involving both human rights and trade, this tribunal is not suited to assume a general jurisdiction in this field.

(3) A third proposal would be to transform the WTO dispute settlement process in such a way that it can become a forum to discuss also trade-related human rights questions. To achieve such a result, it has been proposed to draft a new Trade Related Human Rights Agreement and to add it to the existing WTO framework. Viewed realistically, this does not seem to be a practical option.

56. According to a recent current of thought, it is, however, not even necessary to change the WTO "constitution". As argued vigorously by Joost Pauwelyn in particular, the WTO order has not been conceived as a closed, self-containing regime which would be sealed off hermetically from other international subsystems. It is rather the case, according to him, that this order also integrates non-WTO law.

76 www.unhchr.ch/html/menu2/trade/index.htm (last visited 15 October 2010).

77 At the beginning of this attempt to achieve a better reciprocal understanding stands a rather problematic report issued by the Sub-Commission on the Promotion and Protection of Human Rights of 15 June 2000 (E/CN.4/Sub.2/2000/13), entitled "The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights" (preliminary report submitted by Joseph Oloka-Onyango and Deepika Udagama) in which the WTO was characterized as a "veritable nightmare". The report met with harsh criticism from the trade community and was also called the "nightmare report".

78 See Maria Green, above n.25, at 239.

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His line of reasoning goes as follows: a distinction has to be made between the jurisdiction of the WTO panels and the applicable law.[79] While it is undisputed that WTO panels have jurisdiction only to decide claims under WTO-covered agreements,[80] the question of applicable law is addressed in Article 7 of the DSU. This article, at first sight, does not seem to corroborate Professor Pauwelyn's thesis. In fact, this provision requires panels to examine the matter referred to them "in the light of the relevant provisions" of the covered agreements cited by the parties to the dispute and to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

V.B. Re-interpreting the meaning of WTO law

57. According to Pauwelyn, in this process the panels can also apply non-WTO rules in particular circumstances. Why? Because Article 3, paragraph 2, of the DSU requires the panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". He then refers to the VCLT, which in Article 31 ("General rules of interpretation") spells out that in the interpretation process account shall be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Human rights provisions pertaining to customary IL or treaty-based HRL applicable between the parties therefore have to be applied in the dispute-settlement process. This is a very interesting line of thinking but, according to this author's opinion, it does not withstand closer scrutiny. In fact, Article 31 of the VCLT refers to interpretation and interpretation always has to respect the wording of the provision at least in its largest possible extension. The *travaux preparatoires* to the VCLT make it clear that it was a firm goal to delimit the dynamic nature of interpretation. This becomes apparent also with regard to another provision of Article 31, contained in paragraph 3 lit (b) and referring to the subsequent practice to a treaty. As is known, a treaty can both be interpreted and changed by the subsequent practice of the parties. Only the former phenomenon was regulated, however, by the VCLT, the latter having seemed far too dangerous to be included in a general instrument on treaty law.[81]

58. Pauwelyn further writes: "Just as private contracts are automatically born into a system of domestic law, so treaties are automatically born into the system of

79 See Joost Pauwelyn, Cooperation in Dispute Settlement, in: Cottier et al. (eds.), above n.25, at 205 (212).

80 See art. 1.1 of the DSU, according to which the DSU applies only to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreement listed in Appendix 1 to that agreement. These are the covered agreements."

81 While the ILC draft 1966 for the VCLT had foreseen art. 38 on the modification of treaties by subsequent practice, this article was the only one which was completely deleted by the Vienna Conference on the Law of Treaties. See Wolfram Karl, Vertrag und spätere Praxis im Völkerrecht (1983), 290.

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international law."[82] As a consequence, human rights provisions should be taken into account when WTO is applied and, under certain circumstances, also given preference. The comparison between the national order and the international one, as convincing as it may appear at first sight, is again misleading. In fact, the national order is vertically structured while the international order is still characterized—to a large extent—by a contractual nature. In their hierarchical structure, national legal systems aim at systematic perfection. At least in principle, each provision makes part of a greater, perfect whole. IL, on the other hand, lacks this perfection. While hierarchy is not totally absent and surely a tendency can be noticed to strengthen the vertical element,[83] coordination of norms is still the rule. Only insofar as the international order is really comparable to the national one, i.e. where we have basic norms which can be imposed generally, does the comparison mentioned hold true. But this is a very particular field; it regards the *jus cogens* provisions.[84] It goes without saying that *jus cogens* provisions have to be taken into consideration also by WTO panels, but it is also known that this category is a very restricted one.[85] Reference to *jus cogens* will offer only in very exceptional circumstances a solution for cases of conflict between trade and human rights provisions, with many questions regarding the material implementation of these rights still open for discussion.[86] On the other hand, it shall not be denied that the very creation of human rights provisions is associated with an implicit claim of moral and legal superiority in this area of law.[87]

59. In cases of conflict, preference should be given to human rights provisions while it is often unclear how this preference should be dogmatically justified and technically achieved.

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82 See Joost Pauwelyn, above n.79, at 213.

83 See, for example, Teraya Koji, Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights, 12 EJIL (2001), 917.

84 See, in the same sense, Paolo Picone and Aldo Ligustro, Diritto dell'Organizzazione Mondiale del Commercio (2002), 627.

85 See, for example, Peter Hilpold, Der Osttimor-Fall (1996), 51; Robert Jennings and Adam Watts, Oppenheim's International Law (1997), 7; Peter Malanczuk, Akehurst's Modern Introduction to International Law (1997), 58.

86 For a recent comprehensive discussion of this issue, see Christian Tomuschat and Jean-Marc Thouvenin (eds.), The Fundamental Rules of the International Legal Order—Jus Cogens and Obligations Erga Omnes (2006).

87 See Philip Alston, Making Space for New Human Rights: The Case of the Right to Development, 1 Harvard Human Rights Yearbook (1988), 3, who wrote the following: "It is now widely accepted that the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge, and generally endows it with an aura of timelessness, absoluteness and universal validity."

V.C. The WTO as part of a broader normative environment

60. How then to define the relationship of WTO law with general IL? What is the specific role WTO panels have to attribute to Article 31.3(c) of the VCLT? Does this provision have any relevance when a conflict between WTO law and HRL appears? According to the position taken here, neither do WTO panels have jurisdiction in the field of human rights nor are human rights provisions—as a matter of principle and insofar as they do not constitute at the same time *jus cogens*—part of the applicable law. The applicable law results from the covered agreements.[88] The problems presented are problems of interpretation, and Article 31 of the VCLT has set clear limits to the interpretative process. On the other hand, it is also true that the dispute settlement body (DSB), from the very beginnings of its jurisprudence, did not want the WTO to be conceived as a self-contained regime.[89]

61. Application of WTO law is therefore always oscillating between Scylla and Charybdis: "Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements"[90] and at the same time care must be taken not to lose sight of the broader context in which WTO law, like all IL, is situated. In other words, the "normative environment" of the agreement has to be taken into due regard.[91]

62. Rather than narrow-minded dogmatism, a pragmatic view on the possibilities and the limits of norm interpretation in the WTO context is needed. To transform norm interpretation within the WTO into a law-creating process and thereby open the door for the entry of obligations from other legal settings would be tantamount to unilaterally rewriting the consent underlying this whole branch of law. Not to take into consideration the normative environment into which WTO law was

88 See art. 1.1 of the DSU. The Appellate Body in 1997 indicated explicitly what was to be understood by the term "covered agreement". See Brazil—Measures Affecting Desiccated Coconut, WTO Doc. WT/DS22/AB/R (1997), at 11: "The 'covered agreements' include the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreements in Annex 4 where its Committee of signatories has taken a decision to apply the DSU."

89 As it is known, in US-Gasoline, the Appellate Body (WT/DS2/AB/R, 29 April 1996, 17) stated that WTO law was not to be "read in clinical isolation from public international law": The "general rule of interpretation" set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general IL. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by art. 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing a World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public IL.

90 See art. 3:2 of the DSU.

91 See the Report of the Study Group of the International Law Commission on Fragmentation, para.447.

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born and with which it further developed would, on the other hand, also run counter to the principle of consent as this legal setting was a factual circumstance on which the consent was built.

63. On closer consideration, it does not need further mentioning that this provision is not only relevant for the coordination of WTO rules with human rights provisions but constitutes a pivotal element in any attempt to come to grips with an IL situation characterized on the one hand by an ever-growing fragmentation and on the other by an ever-denser set of rules which should find general application. The abstract problem here to be discussed is therefore not new. It was rather already anticipated at the time of the drafting of this provision.

64. While it is not purported here to offer final solutions to this question, it may be useful to look at the discussion accompanying the drafting of Article 31.3(c) of the VCLT. Originally, the text of the provision which would afterwards become Article 31 required that the ordinary meaning to be given to the terms of a treaty is to be determined "in the light of the general rules of international law *in force at the time of its conclusion*".[92] In the Commentary to the ILC Final Draft, it is explained that the words in italics were a reflection of the general principle that a juridical fact must be appreciated in the light of the law contemporary with it.[93]

65. This formulation proved to be unsatisfactory as it did not take into due consideration the problem of intertemporal law. In fact, formulated this way, the historic situation at the time an IL provision comes into being would be given too much relevance. In view of this fact, the International Law Commission decided that it should omit the temporal element and revise the reference to IL so as to make it read "any relevant rules of international law applicable in the relations between the parties". At the same time, the relevant provision was restructured in a way to make clear that this interpretative rule was extrinsic both to the text and to the "context" as defined in paragraph 2.[94]

66. It is very probable that the ILC at the time of the drafting of this commentary did not fully grasp the potential laying inside the finally approved provision. The first, most evident consequence was revolutionary enough. In fact, it sustained the overall trend to a dynamic, evolutionary approach to interpretation. In the meantime, this evolutionary approach has received strong support by international practice.[95] Even in the interpretation of WTO provisions, the evolutionary approach is

92 Emphasis added.

93 See Ralf Günter Wetzel/Dietrich Rauschnigg, The Vienna Convention on the Law of Treaties (1978), 254.

94 Ibid. In fact, now this rule was to be found in an independent para.3.

95 See, for example, the statement by the ICJ in the case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) according to which "[. . .The] Treaty is not static, and is open to adapt to emerging norms of international law" (Advisory Opinion, ICJ Reports 1971, at 31) and the famous statement by the European Court of Human Rights according to which the EHRC is "[. . .] a living instrument which must be interpreted in the light of present-day

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now firmly established as results from the *US-Shrimps* case, where the Appellate Body sustained that the term "exhaustible natural resources" in Article XX(g) has to be interpreted in an evolutionary way.[96]

67. It should, however, be highlighted again that Article 31.3(c) of the VCLT contains an interpretative rule and does not constitute a door through which general IL becomes directly applicable. In other words, Article 31.3(c) does not state that in IL all judiciary decisions—by whomever taken—have to be based on all the IL in force at the moment of decision taking.[97] The voluntaristic principle which dominates both the creation and the further development of IL requires that in principle the parties themselves decide which rules should govern their behaviour. In this respect, Article 38 of the ICJ Statute with its broad definition of the applicable law represents rather an exception justified by the fact that the ICJ constitutes the international tribunal par excellence, being able to deal potentially with a very large range of issues, and furthermore by the consideration that anyway the jurisdiction of the ICJ is not compulsory and can furthermore be restricted.[98] All other tribunals and dispute settlement bodies in the ever-expanding landscape of judicial fora in IL face clearer restrictions with regard to the set of rules they can apply.

68. In this sense, the situation WTO panels are confronted with is not different from that of other judicial bodies in IL. WTO law sets clear limits to the reach of its jurisdiction, both in a static and in a dynamic perspective. With regard to the first perspective, Article 11 of the DSU refers—as already mentioned—to the "relevant covered agreements" when delimitating the basis of the assessments this body has to make (i.e. the applicable law). Furthermore, Articles 3.2 and 19.1 make sure that in

conditions". See Tyrer, Serie A, Vol. 26, adopted on 28 April 1978, at para.31; Marcks, Serie A, Vol. 31, adopted on 31 June 1979, para.41. See for these cases, G. Marceau, The WTO Dispute Settlement and Human Rights, in: Abbott (ed.), International Trade and Human Rights (2006), 181.

96 "The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to the Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges 'the objective of sustainable development...'". Appellate Body report on US-Shrimp at para.129.

97 This was in substance also the position taken by Judge Higgins in the Oil Platforms case (Iran v. United States of America) (Merits), ICJ Reports 2003 (separate opinion of Judge Higgins), paras.40–54. Recourse to art. 31(3)(c) of the VCLT in the interpretative process should not lead to the incorporation of the entire substance of IL on each and every topic. Ibid., para.46.

98 See with regard to art. 38 of the Statute of the ICJ Alain Pellet, Commentary to Art. 38, in: Andreas Zimmermann et al. (eds.), The Statute of the International Court of Justice (2006), 677.

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a dynamic perspective, the jurisprudence does not develop WTO law beyond the limits set by the WTO Members. In fact, the already mentioned Article 3.2 states that "[...] Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." On the basis of Article 19.1 of the DSU, "[...] in their findings and recommendations, panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

69. It has to be remembered that in the *EC-Biotech* case,[99] the competent panel had adopted a restrictive view of what shall be understood by the "applicable law". Contrary to the requests by the EC, the panel found no basis to justify the EC ban on genetically modified organisms by a reference to the precautionary principle mentioned in the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity. According to the panel, these rules would constitute "applicable law" on the basis of Article 31, paragraph 3 lit. (c) of the VCLT if all the parties involved were also parties to the Protocol. As this was not the case for any of the complainants (United States, Canada, Argentina), the panel did not consider the protocol.[100] Thereby, the panel put a brake to any attempt to merge HRL and IEL by an extensive interpretation of the VCLT.[101]

70. Although the findings of the panel in the *EC-Biotech* case may have been somewhat too restrictive,[102] they confirm a general tendency by the WTO jurisprudence. In fact, even though the WTO jurisprudence has made broad reference to principles of IL, going far beyond a mere reference to the rules of interpretation according to the Articles 31 and 32 of the VCLT[103] this should not be interpreted

99 See Panel Report, European Communities—Measures Affecting the Approval and Marketing of Biotech Products, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr. 1 and Add. 1, 2, 3, 4, 5, 6, 7, 8 and 9.

100 See on this case also: S. Cho, The WTO Panel on the EC-Biotech Dispute Releases Its Final Report, 10 ASIL Insights, 26 October 2006.

101 On the whole, however, the exact meaning of the "applicable law" according to art. 31, para.3 lit. (c), of the VCLT has yet to be determined. The only thing that can be taken for certain is that extreme positions in whatever direction are most probably wrong.

102 In fact, no treaty exists to which all WTO Members are party as WTO membership has been extended also to non-States such as Hong Kong, the EC and Chinese Taipei. See Sarah Joseph, Democratic Deficit, Participation and the WTO, in: Joseph et al. (eds.), above n.17, at 313 (319).

103 It has been shown in literature that the WTO jurisprudence has made use, first of all, of many interpretative rules not mentioned in the VCLT, such as the principle of effectiveness, in dubio mitius, legitimate expectations and lex specialis. Furthermore, the WTO jurisprudence has not limited its reference to the interpretative rules of the VCLT but has taken avail, instead, of a vast array of rules contained in this treaty, such as art. 28 on non-retroactivity, art. 30 on successive treaties, art. 41 on modification, art. 48 on error, art. 59 on termination or suspension of a latter treaty, art. 60 on termination as a consequence of breach and art. 70 on consequences of termination. Finally, also many rules and principles of general IL have found their way into the WTO jurisprudence. See Anja Lindroos and Michael Mehling,

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as a general opening of the door to every rule of IL. The rules and principles the WTO jurisprudence has drawn from general IL were, first of all, of a procedural nature and they could therefore be seen as already inherent in the WTO law as part of IL.[104]

71. An exception could be seen as far as the rules on State responsibility are concerned, but it may be no coincidence that these rules make part of the so-called secondary rules of IL which do not touch upon the main substantive conflicts in IL. As any decision on the consideration of human rights rules and principles as "applicable law" within the WTO would involve substantive consequences for the material position of the WTO Members, no such solution can be found through an interpretative approach not based on explicit consent by these Members.

VI. Dealing with conflict in the relationship between IEL and HRL

VI.A. The obligation to coordinate

72. At first sight, it might seem that we are approaching contentious times. With both WTO law and HRL becoming ever more detailed and far-reaching, situations of conflicts could—according to some observers—become pervasive. This pessimistic outlook might have prompted some writers to look for extreme solutions that would *de facto* re-write the consensus found by the original WTO Members. As it is argued here, such extreme solutions are, first of all, irreconcilable with a *de lege lata* interpretation of WTO law. They also constitute in themselves a wrong approach to interpretation in general. As has been demonstrated convincingly in a contribution by Jan Klabbers, the Vienna Convention's rules of interpretation are often applied all too mechanically, in a way that seems to follow a precisely predetermined path which in reality does not exist.[105] As a result, "the rules on interpretation are [...] ignored, distorted or manipulated in actual use, either by design or out of ignorance".[106] He makes in the essence a plea for a pragmatic approach to interpretation.[107]

Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO, 16 EJIL (2006), 857 (869).

104 Ibid., 876.

105 Jan Klabbers, On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization, 74 Nordic JIL (2005), 404.

106 Ibid., at 416. Klabbers offers several examples for an openly contradictory approach to interpretation by WTO panels and the WTO Appellate Body.

107 This seems to be also the overall attitude by Ian M. Sinclair, The Vienna Convention on the Law of Treaties (Manchester University Press, Manchester 1973), 69ss. Also the ILC maintained that "the interpretation of documents is to some extent an art, not an exact science". See II ILCYB (1966), 38, para.4.

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73. "Innovative" or "creative" attitudes to interpretation are, furthermore, unnecessary as real conflict between WTO law and human rights provisions is rather rare and should be manageable for the foreseeable future in a satisfactory way. First of all, it is to say that WTO law itself contains several provisions that are of direct or indirect relevance for human rights protection. Most important of all is Article XX of the GATT which allows, *inter alia*, the adoption of measures to protect public morals (lit (a)); human or plant life or health (lit (b)); relating to the products of prison labour (lit (e)) and relating to the conservation of exhaustible natural resources (lit (g)). Some further consideration shall be given to these exceptions in the following paragraph.

74. A solution to a possible conflict between WTO law and human rights provisions could be brought about immediately by IL itself, in case it directly attributes prevalence to the human rights provision. This would be the case if the already mentioned *jus cogens* provisions are at issue. While in academic writings much importance is usually attributed to this specific situation, in real life the relevance of this concept as a conflict solution concept is rather modest. This is attributable not only to the fact that conflicts of this kind are hardly imaginable but also—and even more so—to the fact that this concept is still evolving and as of yet does not evidence clear contours.[108] It is probably the case that the concept of *jus cogens* is more important as an argumentative tool and as a philosophical concept needed to explain some characteristic features of the international order than as an operative instrument or even a specific set of norms on which to rely.[109]

75. On the other hand, as already mentioned above, a clear tendency can be noted in IL to attribute a preference to core human rights provisions in cases of conflict with norms not having this qualification. To explain this phenomenon, various attempts have been made in literature whereby either the concept of *jus cogens* has been considerably extended in order to also cover these developments or reference to hierarchy has been made in a way similar to that finding application in municipal law.

76. Both approaches are, in the end, not really convincing.[110] For the time being, however, the most important road for the solution of (actual or potential) conflicts

108 For an overview, see Robert Kolb, Théorie du ius cogens international, Revue belge de droit international (2003), 5.

109 For an insightful overview on the discussion on jus cogens in the field of human rights, see Wolfram Karl, Menschenrechtliches ius cogens - Eine Analyse von "Barcelona Traction" und nachfolgender Entwicklungen, in: Eckart Klein (ed.), Menschenrechtsschutz durch Gewohnheitsrecht (2003), 102. See also Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law (1988); Giorgio Gaja, Jus Cogens beyond the Vienna Convention, 172 Recueil des cours (1981), 271; Stefan Kadelbach, Zwingendes Völkerrecht (1992) and Paolo Picone, La distinzione tra norme internazionali di jus cogens e norme che producono obblighi erga omnes, XCI RDI (2008), 5; Andrea Bianchi, Human Rights and the Magic of Jus Cogens, 19 EJIL (2008), 491; Peter Hilpold, EU Law and UN Law in Conflict: The Kadi Case, 13 Max Planck UNYB (2009), 141.

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between trade law and HRL will not go through derogation but through coordination.[111]

77. At least an implicit obligation to coordinate potentially conflicting meanings can be deduced already from the VCLT. There is, first of all, the obligation to interpret the treaty in good faith. Accordingly, a solution should be looked for, which would allow for avoidance of incurring State responsibility—an otherwise natural consequence of conflicting obligations which cannot be fulfilled simultaneously. There is a presumption against conflict as parties normally do not want to create conflicting obligations and thereby possibly incur State responsibility.[112] A similar reasoning stands behind the old maxim *ut res magis valeat quam pereat*, in the reference to "good faith" and "the object and purpose of a treaty" by the ILC:

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purpose of the treaty demand that the former interpretation should be adopted.[113]

78. An explicit obligation to at least attempt to reconcile conflicting results of interpretation can be deduced from Article 33, paragraph 4, of the VCLT:

> Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

79. There are, of course, also more general IL concepts, such as the duty to cooperate[114] or even an emerging right to international solidarity,[115] from which an obligation to reconcile conflicting norms and interpretations can be derived.[116]

110 Arguing also for a careful approach, see Paul Tavernier, L'identification des règles fondamentales, un problème résolu?, in: Tomuschat and Thouvenin (eds.), The Fundamental Rules of the International Legal Order (2006), 1.

111 A derogatory relationship would be difficult to conceive as the concept of core human rights itself has given rise to interpretative difficulties. See Gudrun Zagel, The WTO and Trade-related Human Rights Measures: Trade Sanctions vs. Trade Incentives, 9 Austrian RIEL 2004 (2006), 119 (138). However, these difficulties do not render the concept of core human rights futile. They call only for a prudent approach which has to be conformed to the particularities of this concept. On the concept of "core human rights", see also Frederick M. Abbott, The "Rule of Reason" and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS, in: Cottier et al. (eds.), above n.25, at 279 (280s).

112 See Wolfram Karl, Treaties, Conflicts between, IV EPIL (2000), 935 (938).

113 See Ian M. Sinclair, The Vienna Convention on the Law of Treaties, above n.107, at 75, referring to II ILCYB 1966, at 50.

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80. In general, it can therefore be stated that there is a presumption against conflict between WTO and human rights provisions.[117] In view of the often rather broad leeway for interpretation IL provisions regularly offer, there should be a possibility to find a common denominator. In case of an apparent conflict, however, the obligations mentioned before require the parties not to stand idly by until a solution comes about automatically but these parties have to pursue such a solution actively. Often, possible conflicts can be anticipated and they have to be avoided through coordination. To achieve such an end, all the parties involved are subject to a best-endeavour obligation.

VI.B. Existing and proposed instruments to promote coordination between WTO law and HRL

81. Already, for the time being, it would be wrong to understand IEL and HRL as two planets from two different universes. The relationship between IEL and HRL is often portrayed as an expression of the more general problem of the fragmentation of IL. One must be careful, however, not to overstate this concept and to attribute to it a life on its own, independently from the real complexities of IL.[118] With respect to the relationship between IEL and HRL, if we use the term "fragmentation", we should not understand it as "strict separation". In fact, even though it might be widely unnoticed, several instruments have been created within the WTO system through which human rights issues can be considered on an institutional level and there seems to be space to create further ones.[119]

114 See the famous study in this field by Wolfgang Friedman, The Changing Structure of International Law (London, 1964). See also Rüdiger Wolfrum, International Law of Cooperation, II EPIL (1995), 1242.

115 See, in this regard, Ronald St. John MacDonald, The Principle of Solidarity in Public International Law, Études de droit international en l'honneur de Pierre Lalive (1993), 275; Karel Wellens, Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations, in: Ronald St. John MacDonald and Douglas M. Johnston (eds.), Towards World Constitutionalism (2005), 775; Peter Hilpold, Solidarität als Rechtsprinzip - völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen, in: Jahrbuch des öffentlichen Rechts (2007), 195.

116 It must, however, also be mentioned that the material content of these obligations is, with regard to the present question, not unequivocal. A duty to cooperate and a principle of solidarity could be interpreted both in the sense that preference should be given to human rights provision in respect to trade norms and vice versa.

117 See, in this regard, Marceau, The WTO Dispute Settlement and Human Rights, in: Abbott et al. (eds.), International Trade and Human Rights (2006), 181 (215).

118 As has been stated by Martti Koskenniemi, fragmentation is a matter of narrative perspective: what could be seen from one viewpoint as fragmentation looks like unity from a different one. See Jan Klabbers, Foreword, in: Martti Koskenniemi (ed.), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, The Erik Castrén Institute Research Reports (21, 2007), ii, referring to Martti Koskenniemi, The Fate of Public International Law: Between Technique and Politics, 70 Modern LR (2007), 1.

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VI.B.i. The accession procedure

82. During the accession process, it would already theoretically be possible to make agreement dependent on the fulfilment of specific human rights criteria. Although positive WTO law does not provide for such a conditionality, accession is, to a large extent, a political process and therefore it is not *ex ante* prohibited to pose political conditions. A comparison with the EU accession procedure seems at hand where conditionality also developed *de facto* and only subsequently found reflection in positive law.

83. This comparison has its limits, however. As shown above, the institutional functions of EU law diverge widely from those of WTO law. The EU Member States, starting from a broad set of political and cultural commonalities pursued a far more intensive integration aim and were therefore compelled and also technically able to impose strict criteria of conditionality. In the case of the WTO, though, the lack of a political programme and the potentially universal reach of the WTO stand in the way of such an approach. As a consequence, within the WTO, recourse to human rights conditionality was made, in the past, half-heartedly if at all.[120] On the other hand, even taking into account the elements that stand in the way of such a conditionality policy, other arguments could be found that would plead in favour. In fact, if we assume that market economies can better thrive in legal settings based on the rule of law and the recognition of human rights,[121] it would be in the immediate interest of the WTO system to ensure respect for good governance. On the other hand, it is known that there is much resistance against such instruments and that their imposition could be felt as an interference in internal affairs.[122]

VI.B.ii. The trade policy review mechanism

84. Similar considerations hold true for the trade policy review mechanism within the WTO system. The findings of political economy, according to which the constitutional guarantee of the rule of law principle will strengthen the legal order as such and create thereby a solid foundation for doing business, are widely ignored in this review process.[123] However, this comes as no surprise, as any approach to the contrary would require a far more intensive integration of human rights provisions in IEL than is the case at present.

119 See Aaronson, above n.21, at 422 ss.

120 Ibid., at 427.

121 This is essentially the assumption on the basis of which international organizations operating in the field of IEL and development cooperation are ever more intensively requiring respect for “good governance” criteria.

122 See Hilpold, EU Development Cooperation at a Crossroads, above n.52.

123 See Aaronson, above n.21, at 434 ss.

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VI.B.iii. Enhancing dialogue by the concession of participatory rights

85. Both the human rights community and the international trade community have to approach each other. When new norms are drafted in the respective fields, it has to be considered that acceptance, legitimacy and also usefulness of the new provisions will largely depend on the degree to which the needs and aspirations of the other community have been respected. No simple solution is at hand to achieve this aim; rather a multi-level approach has to be chosen. Better coordination can be achieved, for example, through appropriate institutional arrangements, aiming at a "cross-institutional dialogue".[124] For example, representatives of the other community can be given a consultative vote in the norm-setting organs. They can cooperate in third institutions offering a neutral forum for an exchange of opinions. The WTO has already gone to great lengths to open up to other international organizations[125] and to the civil society.[126] The human rights community has an even longer record of approaching issues of IEL. Already towards the end of the 1990s, the UN High Commission for Human Rights had begun to consider trade issues in its statements and reports.[127] In the following years the competent UN organs drafted a series of reports on this subject which became highly influential.[128]

124 See Sungjoon Cho, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, 5 World Trade Review (2006), 298 (307).

125 In particular, the WTO Committee on Trade and Environment, established as a result of the Uruguay Round, is composed also of observers from inter-governmental organizations operating in the field of environmental protection. The cooperation agreements with the IMF and the World Bank (concluded in 1996 and in 1997) aim at achieving greater coherence in global economic policy. The WTO and World Bank as well as the WTO and the IMF grant each other observer status in their decision-making bodies. See also art. 3, paras.4 and 5, of SPS Agreement.

126 Cooperation with civil society takes many forms, among which two stand out: the holding of regular conferences where representatives of NGOs can directly present their views to trade lawyers and the admission of so-called amicus curiae briefs by the WTO dispute settlement institutions whereby members of the civil society can voice their opinion on pending procedures. See D.P. Steger, Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience, in: Armin von Bogdandy et al. (eds.), European Integration and International Co-ordination (2002), 419.

127 In 2001, two independent experts appointed by the Sub-Commission on Human Rights presented a highly critical study. See Joseph Oloka-Onyango and Deepika Udagama, Globalization and Its Impact on the Full Enjoyment of Human Rights, UN Doc. E/CN.4/Sub.2/2001/10 (2 July 2001). See also above n.77 and accompanying text.

128 Among the relevant document of the High Commissioner for Human Rights, see "Human Rights, trade and investment" (C/CN.4/Sub2/2003/9); "Liberalization of trade in services and human rights" (E/CN.4/Sub.2/2002/9); "Globalization and its impact on the full enjoyment of human rights" (E/CN.4/2002/54); "The impact of the TRIPS Agreement on the Enjoyment of all Human Rights" (E/CN.4/Sub.2/2001/13); An analytical study on the fundamental principle of non-discrimination in the context of globalization (E/CN.4/2005/41) and Human Rights and World Trade Agreements: Using General Exceptions Clauses to Protect Human Rights (United Nations Press, New York, 2005). Among

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86. Care must be taken, however, that a true dialogue is offered and that a "dialogue of the deaf" is avoided. As was already shown, especially at the initial stage of this discussion, the UN human rights institutions have taken a rather confrontational stance.[129]

87. It becomes again evident that the single linkages of "trade and _" are interlinked with each other.[130] As a general recipe for human rights to be sufficiently taken into consideration in the WTO system, it could be stated that this order has to open up, it has to become more transparent, more participatory, more democratic, although some related pitfalls have to be avoided, such as over-generalization and the attitude to address an extremely complicated issue in a too simplistic way. First of all, the WTO system, as it stands now, is neither opaque nor undemocratic even though the challenges ahead make it clear that still more can be done in this field. The ongoing Doha Round offers a unique opportunity to render the dispute settlement procedure more transparent and more inclusive, in particular with regard to the developing countries.[131] Whether it would make sense to render the decision-taking process in the WTO more democratic by the adoption of institutional elements from the UN or even by the creation of a Parliamentary Assembly is open to debate.[132]

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the documents of the Committee on Economic, Social and Cultural Rights, see the "General Comment on the right to water" (E./C.12/2002/11); the "General Comment on the right to health" (E/C.12/2000/4); the "General Comment on the right to food" (E.C.12/1999/5); the "General Comment on the right to education" (E.C.12/1999/10) and the Statement of the Committee on Economic, Social and Cultural Rights on "Intellectual property and human right" (E/C.12/2001/15). See also recently the Report of the Special Rapporteur on the right to food, Olivier De Schutter, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the Right to Development" (A/HRC/10/5/add.2). See Lang, above n.17, at 171.

129 See above nn.77 and 127.

130 The concept of "trade and _" is used to denote all forms of linkages between trade issues and subjects such as human rights, democracy, social standards, labour standards and so on. It should be kept in mind that the linkage issue is not restricted to the trade and _ area. A holistic approach to the many problems assailing our modern international society is rather considered to be a general necessity. This was very well recognized in the context of the recent debate about a possible reform of the UN. On the reach and the limits of this approach, see Hilpold, Reforming the United Nations: New Proposals in a Long-lasting Endeavour, LII NILR (2005), 389.

131 There is an enormously rich literature on this subject. See, for example, Jacques H.J. Bourgeois, Some Reflections on the WTO Dispute Settlement System from a Practitioner's Perspective, 4 JIEL 2001, 145–154; Wolfgang Weiss, Reform of the Dispute Settlement Understanding, 1 Manchester JIEL (2004), 96; Peter van den Bossche, Reform of the WTO Dispute Settlement System: What to Expect from the Doha Development Round?, in: Steve Charnovitz et al. (eds.), Law in the Service of Human Dignity, Essays in Honour of Florentino Feliciano (2005), 103.

132 See on this issue: Mini Symposium: WTO Negotiations Meet the Academics—Challenges to the Legitimacy and Efficiency of the World Trading System, 7 JIEL (2004), 585.

88. According to this author's view, it would be a wrong choice to follow a path that has already shown its clear limitations within the UN and which might be even more hurtful if transposed to a technocratic institution like the WTO. The transfer of a parliamentarian mechanism comparable to that of national democratic constitutional orders to the international level is simply not feasible, as the way representation operates on the national level is not reproducible at the international one.[133] To call such an institutional setting an international democracy would be a misnomer as it would surely not suffice to achieve even part of the aims a national democratic system is purported to realize.

89. It is also highly doubtful whether the concession of larger participatory rights to NGOs could make the WTO more representative and enhance its legitimacy. In fact, it is known that civil society is far from constituting a cohesive reality. A closer look at the world of NGOs rather reveals that they are subdivided by a myriad of conflicting interests. The North–South conflict divides them in an even more incisive way than is the case for the State community as a whole. Furthermore, it should not be overlooked that there are NGOs representing business interests as much as there are entities defending the interests of developing countries.[134] It is an unresolved question how to make representation of NGOs really representative of civil society as such.

VI.B.iv. The waiver provision

90. On the level of the material law, great achievements have been made in one field where the WTO system was heavily exposed to international criticism by human rights activists: the protection of intellectual property through the TRIPS agreement. In particular, as a consequence of the AIDS/HIV epidemic, the imposition of patent protection for life-saving pharmaceuticals also in developing countries—where no sufficient purchasing power was in any way present—was considered to be immoral to say the least. In the meantime, as is known, a partial solution to this problem has been found by the Doha Declaration on TRIPS and Public

133 See, however, with regard to the proposal to create a United Nations second assembly: Derk Bienen, Volker Rittberger and Wolfgang Wagner, Democracy in the United Nations System: Cosmopolitan and Communitarian Principles, in: Daniele Archibugi, Daniel Held and Martin Köhler (eds.), Re-imagining Political Community (1998), 287 (295). For proposals to introduce a "cosmopolitan democracy" in the WTO system, see Americo Beviglia Zampetti, Democratic Legitimacy in the World Trade Organization: The Justice Dimension, 37 Journal of World Trade (2003), 105; and Ernst-Ulrich Petersmann, Human Rights and International Trade Law: Defining and Connecting the Two Fields (n.67). For a detailed discussion of the conceptual challenges associated with the attempt to "democratize the WTO", see Wolfgang Benedek, Demokratisierung internationaler Wirtschaftsorganisationen am Beispiel der WTO, in: Hedwig Kopetz et al. (eds.), Festschrift Wolfgang Mantl (2004), 225.

134 See Caroline Dommen, The WTO, International Trade, and Human Rights, in: M. Windfuhr (ed.), Mainstreaming Human Rights in Multilateral Institutions (www.3dthree.org/pdf_3D/WTOmainstreamingHR (last visited 15 October 2010)).

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Health[135] and the 30 August 2003 decision to implement paragraph 6 of this declaration.[136] Of course, even this solution is criticized as not going far enough. In fact, it has only improved the accessibility to life-saving medicines and drugs, not to all kinds of medicines; it requires paying adequate remuneration to the patent holder according to Article 31(h) of the TRIPS Agreement and it applies only in cases of national emergency or extreme urgency.[137] On the other hand, however, the interests of the trade community also have to be taken into consideration. Without patent protection, there will be no research and ultimately people in developing countries will suffer from the lack of medical progress.[138]

91. Another case where the WTO has taken due regard of human rights consideration is the so-called Kimberley (Conflict Diamonds) Waiver.[139] As is known, the Kimberley Process Certification Scheme for Rough Diamonds[140] was adopted in 2002 to restrict trade in so-called conflict diamonds[141] as it was noticed that this trade fuels violence and bloodshed. As this Scheme calls on all Participants to "ensure that no shipment of rough diamonds is imported or exported to a non-Participant", a possible conflict with WTO law results in those cases in which trade is restricted to countries which are WTO Members but non-Participants to the Scheme. After various considerations either to not act or to rely on existing WTO exceptions (in particular Article XX of the GATT), finally a waiver was requested on 11 November 2002 and granted by the General Council on 15

135 See WT/MIN(01)/DEC/2 (www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm).

136 In practice, the 2003 waiver created a permanent amendment of the TRIPS Agreement. See S.P. Subedi, The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level Is the "Level Playing Field"?, LIII Netherlands ILR (2006), 273 (284).

137 With regard to this criticism, see Prabhash Ranjan, International Trade and Human Rights: Conflicting Obligations, in: Cottier et al. (eds.), above n.25, 311.

138 As Alan O. Sykes, above n.31, at 83, has pointed out, economists generally believe that some degree of IP protection is necessary. On the other hand, sufficient data are lacking on whether the existing IP protection is excessive or inadequate from an economic point of view. Therefore, the question whether the TRIPS Agreement has to be changed and to what degree has to remain a political one.

139 See WTO Doc. WT/L/676 (19 December 2006) (www.kimberleyprocess.com/download/getfile/359 (last visited 23 March 2010)). For a detailed account on this subject, see Krista Nadakavukaren Schefer, Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process, in: Cottier et al. (eds.), Human Rights and International Trade (2005), 391; Joost Pauwelyn, WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for "Conflict Diamonds", 24 Michigan JIL (2003), 1177; and Isabel Feichtner, The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests, 20 EJIL (2009), 615.

140 See www.kimberleyprocess.com/documents/basic_core_documents_en.html (last visited 23 March 2010).

141 Conflict diamonds were defined as "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments."

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May 2003. It was first granted until 31 December 2006 and afterwards extended until 31 December 2012.[142]

92. This waiver met with harsh criticism, both on technical grounds (as the underlying problem could hardly be defined as an "exception") and in the view of the fact that thereby potential WTO non-trade confrontations were "waived away".[143] Seen from another perspective, it could be said that thereby less a dogmatic than a pragmatic approach was adopted, which can be seen as typical for WTO practice in general. An immediate, albeit transitional, solution to an urgent problem was found.[144] The definite answer to this challenge has to await further discussion and will probably need more clarification with regard to the relationship between IEL and HRL. Exceptional though it may be, from a technical point of view, this waiver may nonetheless gain precedential value for how to solve conflicts of this kind politically. It can be seen as an important step towards a broader recognition of human rights issues within WTO law.[145]

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VII. Coordination of the communities and the application of sanctions

93. Conflicts between trade and human rights become most evident when sanctions are applied. Here the accusation is often heard that human rights are overruled by trade interests. At a closer look, however, it becomes clear that much has been done in the last few years to lessen this problem. In many cases now coordination takes place where in the past conflict has prevailed. First of all, the instrument of conditionality has been very useful in this regard. Already in the case of negative conditionality, it has to be remembered that sanctions are applied not to further trade interests but, on the contrary, human rights aims. Positive conditionality develops this idea further. The instrument of sanctions is reverted into its contrary. In case of particular achievements, benefits are given in the form of something like a positive sanction.

94. But there is more. Article XX of the GATT, an instrument much criticized by the human rights community for seemingly granting insufficient scope to human rights considerations when a deviation is sought from the strict GATT rules, has been re-interpreted in a way that gives much more leeway to human rights interests (so-called consistent interpretation). As is known, in *Shrimp/Turtle I*, the Appellate

142 General Council Decision of 15 December 2006. WT/L/676.

143 See Krista Nadakavukaren Schefer, above n.139, at 449.

144 See in this sense also Isabel Feichtner, above n.139, at 644.

145 Could this waiver be seen as an expression of a "superiority complex" by the WTO, as it was stated by Joost Pauwelyn, above n.139, at 1198 ss? Likely the problem is exactly to the contrary. Only if we assume that HRL as such is superior to IEL, such a waiver would not be needed. However, such an assumption does not appear to be justified.

Body held that Article XX(g) (regarding exhaustible natural resources) must be read by a treaty interpreter "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment".[146] The Appellate Body concluded on the basis of an analysis of recent international environmental treaties that "the generic term 'natural resources' in Article XX(g) is not 'static' but 'evolutionary' and its interpretation cannot remain unaffected by the subsequent development of law."[147] It is argued here that the evolutionary approach must apply also to those provisions of Article XX which are of immediate interest for the protection of human rights such as lit (a), (b) and (e).[148]

95. With regard to Article XX lit (a) providing for an exception "necessary to protect public morals", this provision holds enormous potential. This provision is similar to that in Article XIV of the GATS, although, at first sight, differences between these two provisions can also be discerned. While the former provision only addresses the aspect of public morals, the second provision refers to both public morals and public order. The wording of the second provision is—without doubt—broader, and also more easily covers human rights interests. It has also been argued in the past, however, that in a teleological reading the coverage of both provisions is coextensive.[149] This reading has been confirmed by the most recent WTO jurisprudence. In the *Gambling and Betting Services* case, both the competent Panel and the Appellate Body started the examination of Article XIV of the GATS under the assumption that this provision is comparable to Article XX of the GATT. They provided at the same time a reading of these provisions that would also possibly cover the protection of core human rights:

> We are well aware that there may be sensitivities associated with the interpretation of the term "public morals" and "public order" in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate. Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals and public order under Article XVI of the GATS. More particularly, Members should be given

146 WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998 (adopted 6 November 1998).

147 See Sarah H. Cleveland, Human Rights Sanctions and International Trade: A Theory of Compatibility, 5 JIEL (2002), 133 (159).

148 See Cleveland, above n.147.

149 See in this sense: Petros C. Mavroidis, above n.42, at 256, with reference to Steve Charnovitz, The Moral Exception in Trade, 38 Virginia JIL (1998), 689.

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some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.[150]

96. By reference, *inter alia*, to footnote 5 of the GATS according to which "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society", the panel came to the conclusion that "public order" "refers to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, i.a., to standards of law, security and morality".[151] These findings were upheld by the Appellate Body.[152]

97. At the same time, the traditional obligation to restrict the effects of national policies (in the relevant case: environmental policies) has also been interpreted in a more flexible way: while in *Tuna/Dolphin I*[153] the Appellate Body still adhered to a very traditional, restrictive interpretation of jurisdiction, rendering measures reaching beyond national borders automatically illegal, in *Shrimps/Turtle I* the concept of extraterritoriality was re-interpreted. It can be argued that human rights protection is based on similar conditions and prerequisites to the protection of the environment. Just as it is not possible to protect the environment effectively if all relevant measures have to stop at national borders, human rights protection requires international, trans-border action. The exceptions mentioned in Article XX of the GATT have already been interpreted in a way that opens considerable space for action to protect environmental goods. An extension of this jurisprudence to the area of human rights protection seems possible, although the following caveat has to be added: Reliance on Article XX as a justification for environmental protection measures was never granted straightforwardly but had to undergo a restrictive necessity and proportionality test required by the chapeau and the text of this article. It can be argued that a similar balancing test would have to take place once Article XX is taken as a justification for human rights exceptions.[154] At the same time, however,

150 See United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Panel Report, circulated on 10 November 2004, WT/DS285, para.6.461.

151 Ibid., para.6.467.

152 See United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, AB-2005-1, WT/DS285/AB/R, 7 April 2005, para.291 ss. See also footnote 351: "In this respect, we observe that this case is not only the first where the Appellate Body is called upon to address the general exceptions provision of the GATS, but also the first under any of the covered agreements where the Appellate Body is requested to address exceptions relating to 'public morals'", thereby indirectly confirming the large overlap between these two provisions.

153 See GATT Dispute Panel Report on United States—Restrictions on Imports of Tuna (3 September 1991 unadopted), DS21/R-39S/155. As is known, this approach was somewhat relativized, but not really abandoned, in Tuna/Dolphin II. See GATT Dispute Panel Report on United States—Restrictions on Imports of Tuna (16 June 1994 unadopted), D529/R.

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it has also to be taken into consideration that human rights are far more differentiated both as to their material content and with regard to their status in IL. A balancing test will, therefore, be very demanding and also has to continuously re-adapt to the rapid evolution of this corpus of law.

VIII. A plea both for autonomy and interconnection

98. The whole discussion about real or potential conflicts between WTO law and the international human rights system is reflective of a broader discourse in IL which evidences that in many cases the narrative about conflict is not appropriate for the solution of the respective challenges in IL. In IL, obligations which appear to be mutually incompatible, at least at first sight, are rather the rule than the exception. Often, in presence of such a situation it would be wrong to look for some sort of hierarchy or for a relationship of preference, priority or derogation. It is rather the case that such diverging obligations can coexist. What seems to be a conflict at first sight, in particular in the eyes of lawyers primarily trained in domestic law, becomes mere tension when looked at from the perspective and the needs of IL. This different attitude has a vast range of consequences on how the actual content of State obligations should be interpreted in their mutual interaction. This change of perspective can furthermore be helpful in any attempt to change existing law. While it may often not be possible to set aside provisions that stand in the way of the attainment of some valuable goals, it should be considered that in IL normative change follows different paths from that in national law. There are uncountable norm-setting agents, and a better understanding of the ways they interact can facilitate enormously the achievement of specific legislative goals. What seems to be, at first sight, an intractable conflict might appear to be, at closer look, a mere tension suitable for mitigation. What is sought for is not strict partition between the various norm-setting international organizations along lines of competences but rather ways to improve cooperation between them in order to improve their problem-solving capacity beyond strict lines of treaty-based responsibilities. As is known, in general IL, this discussion runs under the heading of "From government to governance".[155]

99. Subsequent to this preliminary statement and keeping in mind the considerations developed previously, two main conclusions can be drawn:

- It would be wrong to qualify the WTO as a human rights organization, and it would also be wrong to attempt to transform this institution into such a type of organization. As far as it is safe to make a bet on future developments on the

154 See, for an extensive examination of this issue, Cleveland, above n.147.

155 For a collection of leading essays on this subject, see "The library of contemporary essays in political theory and public policy. From government to governance" (2010).

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basis of present knowledge, it can be stated that the WTO will never be a human rights organization.

– The second conclusion is that human rights aspects have to be taken into closer consideration by the WTO in the future. Nothing can be gained by an attempt to more neatly demark the competences of the WTO on the one hand and that of human rights organizations on the other. On the contrary, closer cooperation between these institutions is needed.

100. With regard to the first consideration, there is one principal reason why the WTO will never be a human rights organization in the proper sense: division of labour does not only make sense in the economy but is also a useful principle for the distribution of functions between international institutions. The WTO is the main trustee for international free trade and therefore the first custodian of a principle that has created enormous wealth and that is thereby conducive to the realization of human rights in the social and economic field, but also with regard to civil and political rights, at least as they are associated with costs.[156] Nothing would be gained if the WTO were radically re-oriented towards new goals whereby it had to neglect its traditional aims already hard to achieve in its daily struggle against a continuously resurfacing protectionism.[157] As has been said, the WTO "must maintain its autonomy or 'autopoietic' status by upholding its legal integrity or 'operative closure'".[158]

156 And this is most often the case. See generally on the costs and difficulties of norm production in the field of human rights: Hans Peter Schmitz and Kathryn Sikkink, International Human Rights, in: Walter Carlsnaes et al. (eds.), Handbook of International Relations (2002), 517.

157 Of course, there are many other reasons why the transformation of the WTO into a human rights organization is not realistic. In particular, the discussion about a possible need to introduce a human right to free trade has revealed that the relationship between human rights and marked freedoms is a very complex one and that the qualification of free trade as a human right, far from solving the dissent between the free trade and the human rights community, would create new conflict lines, probably even exacerbating the existing divisions. On the other hand, this discussion initiated by Professor Ernst-Ulrich Petersmann has given ground-breaking insights into the relevance of free trade for the further development of democratic rights and the overall protection of human rights. Seen from another perspective, this discussion has shed light on the far-reaching redistributional effects of protectionism which poses thereby a serious challenge to democratic rights in general and to participatory human rights in particular. See on this discussion: Ernst-Ulrich Petersmann, Time for United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organization: Lessons from European Integration, 13 EJIL (2002), 621; Philip Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 EJIL (2002), 815; and Robert Howse, Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann, 13 EJIL (2002), 651.

158 See Sungjoon Cho, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, 5 World Trade Review (2006), 298 (304), referring to Richard Nobles and David Schiff, Introduction, in: Niklas Luhmann (ed.), Law as a Social System 8 (2004).

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101. It would also be counter-productive to assign the job of further developing human rights to an organization which has not been created for this task and which lacks both sufficient resources and competences for it. Although the achievements by the UN in the area of human rights are often decried as patchy and insufficient, in a fair evaluation it has to be admitted that on a whole the results are impressive. This is even more the case if we consider that much of this success has been achieved in times when the world was an ideologically divided one. In a State Community composed for a long time of a majority of non-democratically governed members which often violated basic human rights, a large consensus for very far-reaching guarantees satisfying the highest aspirations of the modern *Rechtsstaat* has been achieved. Compliance may still be unsatisfactory but, on the other hand, dissatisfaction often results from unrealistic expectations. On the whole, the existence of a strong compliance pull cannot be denied. It would be wrong to compare effectively working technical organizations such as the WTO (or also, for example, the Organization for Security and Co-operation in Europe—OSCE) to the purportedly ineffective UN human rights institutions. The relative tasks are simply not comparable. It is far easier to achieve consensus on provisions of a reciprocal nature attributing immediate rights (and corresponding duties) to specific subjects than on norms primarily of moral and ideological appeal and in relation to which the benefits of compliance are of a general nature at the internal level.[159] Inefficiencies of the UN human rights institutions are therefore not (or not only) innate. It is argued here that the transfer of human rights tasks proper to the WTO would therefore create similar problems. The creation of new human rights standards takes time and presupposes difficult compromises.[160] The implementation of these standards most often cannot happen by their unilateral imposition but requires a lot of work of convincing.

102. On the other hand, in this contribution it has also been evidenced that trade issues are closely interlinked with human rights questions and this linkage can be expected to grow even more in the years to come.

103. It may have been the practice both in literature and in the political discussion to side with one community against the other, the underlying assumption having been the conviction that in the end a "government" decision has to be taken. The result was real or potential conflict that seemed to be unsolvable. It has been a misguided attempt to solve this conflict by the importation of the whole body of human rights into WTO law through the interpretative process, in

159 Hereby, the so-called Erfüllungsstruktur (compliance structure) of human rights provisions—so different from that of provisions governed by the principle of reciprocity—is addressed. For an exhaustive discussion of this issue, see: Bruno Simma, Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge (1972).

160 See Makau Mutua, Standard Setting in Human Rights: Critique and Prognosis, 29 Human Rights Quarterly (2007), 547.

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particular via reference to Article 31(3)(c) of the VCLT. In fact, care must be taken not to violate the principle of consent. At the same time, it is not even necessary to adopt a daring interpretation approach which contrasts openly with the principle of consent. In fact, general IL applies in any case[161] and will remain binding on the parties insofar as it is not superseded by the respective treaty provisions (where this is possible in the first place). Of course, such an approach will lead to a far more demanding balancing process than would be the case for a simple requirement to take sides in a situation of conflict with international human rights norms. A new approach is needed.

104. A "governance" approach accepts possible tensions between different sets of IL norms as a given and tries to cultivate transparency and understanding in order to promote a reciprocal approaching of the different sides.

105. Self-consciousness about the proper role and strengths will also make admittance of deficits easier. The WTO and the human rights system are "imperfect" or "incomplete" orders in the sense that, taken in isolation, they can furnish only a rather narrow perspective on an international social reality composed of a large set of interdependent sub-systems. It is only through their interaction in a dialectic process that this process as a whole can be better grasped. Nothing would be gained by a renunciation of identity by each of the involved institutions and orders. It is not only the transformation of the WTO into a human rights organization that has to be avoided but also the attribution of a preponderant role to economic rights within the overall human rights system as they are ill-suited to substitute classical civil and political rights as the foundations of general human rights order.

106. An improved interconnection between these orders will therefore lead to changes, for the most part, not at the core of the various involved orders but rather at the fringes, while the overall outcome of this process of interaction, contestation and admittance[162] may be a fairly different international legal system which should be highly responsive to new social needs.

107. This broader perspective will evidence that the welfare-enhancing capacity of the WTO system provides no immunity from criticism against this order, as the respective gains are often unevenly distributed and market failures may have as a consequence that considerable parts of the world population are largely excluded from the benefits generated by this process. In other words: distributive elements

161 See Martti Koskenniemi (ed.), Fragmentation of International Law (n.118), para.459.

162 In this, recourse can be made to the "New Haven Approach" as a model to explain how IL can come into being as the result of an interactive process among a vast number of authoritative institutions taking into consideration a highly complex and variegated set of norms. See, with regard to this approach, Richard A. Falk, The New Haven School of International Law, 104 Yale LJ (1995), 1991.

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cannot be totally ignored by the world trade system if this system justifies its legitimacy by recourse to the welfare argument.

108. As has been explained above, trade also plays an important instrumental role for the enforcement of human rights, both with regard to traditional, "negative" sanctions and with regard to more modern approaches emphasizing the role of "positive" measures. With regard to both areas, the increasing understanding of human rights needs by the international trade community has induced a re-balancing of the interests involved in a way that is more favourable to a broader respect for human rights considerations. With regard to the first area, the old fear that such sanctions could be abused for protectionist goals, a fear that finds immediate reflection in the restrictive formulation of Article XX of the GATT, has been somewhat softened but surely the respective discussion has to continue. With regard to the second field, the EU in particular has demonstrated that it is possible to develop very far-reaching, "positive" instruments of intervention for human rights purposes without losing sight of preponderant economic goals and without ending up with undue interferences.

IX. Conclusions

109. As a final stock-taking, it is submitted that, up to a certain point, the trade community has to contribute to the task to give fullest possible implementation to human rights provisions, which, as we have seen, enjoy in various ways a higher-ranking status. This happens through the accommodation of human rights interests by the WTO—an accommodation already taking place to a considerable extent.[163] This is the essence of the coordination which has to occur between the two communities: to take their respective interests into due regard. There is no need to radically transform the WTO, to take recourse to a conflict model, to establish a preference criterion for one set of provisions over the other or to look for new criteria of interpretation which would set again in place a disguised derogation rule—ignoring the clear will of the WTO Members. Rather, an "equilibrium line"[164] between these two sets of goals which are partially mutually supportive, partially competing, has to be found.

110. Important contributions have to come—to this avail—also from the human rights community. There, a better understanding of the rules governing the

163 As recent practice has shown, even waivers for human rights purposes are within reach. Here, the TRIPS waiver for the exportation of essential drugs under compulsory licensing (Decision of 30 August 2003, WT/MIN(01)DEC/2) and the Waiver concerning Kimberley Process Certification Scheme for Rough Diamonds (Decision of 15 May 2003, WT/L/518 of 27 May 2003) have to be mentioned.

164 See Adelle Blackett, Mapping the Equilibrium Line: Fundamental Principles and Rights at Work and the Interpretative Universe of the World Trade Organization, 65 Saskatchewan LR (2002), 369.

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functioning of the WTO as well as of the positive effects freer trade can exert on the human rights situation must be found. The success of coordination largely depends on the ability of both communities to identify synergistic elements within the other field. A presumption of conflict will prompt both communities to hide behind their own principles and to strongly defend them. It goes without saying that, notwithstanding all the efforts of coordination, some areas of conflict will remain.

111. On the other side, the human rights community also has to become more flexible. It does not make sense to level fundamental criticism at an institution creating the very pre-conditions for world-wide economic growth, which is an important element for making the protection of a highly developed system of human rights affordable. The right choice can only be to make pragmatic contributions for the further opening of WTO law to interests that have no immediate market value. Notwithstanding all the strident voices that can be heard and the conceptual aberrations that continuously come up, civil society and the scientific community are giving pivotal contributions to make the rapprochement between trade and human rights succeed. Neither HRL nor WTO law are "self-contained-regimes" operating in isolation from general IL, they are rather "special regimes".[165] Together with many other special regimes, they are also defining what general IL means. The task is therefore not to decide which rule should trump the other and to thereby solve conflicts in a way similar to that in municipal law. While in municipal law the lawmaker is not a monolithic one, he aspires at least ideally to creating a homogenous and systematically perfect order. In IL, on the other hand, specialty is not to be seen as the undesired outcome of a badly working lawmaking process but a condition directly aspired towards by the relevant actors which regroup themselves continuously anew in uncountable centres of interests. Different interests are not only dividing single, clearly identified groups of States but are cutting through the State Community and through the States themselves in a myriad of ways.[166] Compromises have to be found continuously anew. What is needed is the creation of international institutions and procedures[167] for the management of these conflicts, not for their definite settlement but to offer a forum for the balancing of interests according to ever-changing national and international political ambitions and goals.[168] This is a far more demanding approach than the rude and crude side-

165 See in this sense: Martti Koskenniemi, Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained-Regimes", UN Doc. ILC(LVI)SG/FIL/CRD.1/Add.1 (2004), para.134. See also Bruno Simma and Dirk Pulkowski, Of Planets and Universe: Self-Contained Regimes in International Law, 17 EJIL (2006), 483.

166 See Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi, Linking Trade Regulation and Human Rights in International Law: An Overview, in: Cottier et al. (eds.), above n.25, at 1 (10).

167 Some of these procedures are already in place but could be improved, such as the WTO Trade Policy Review Mechanism. See Michael J. Trebilcock and Robert Howse, The Regulation of International Trade (2005), 584.

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taking for one or the other position, but it is the only one that does justice to the realities of the international society on the one hand and the complexity of the primarily political problem to solve on the other.[169]

112. WTO law and international human rights will and should remain autopoeitic orders. In this way they will acquire and maintain the strength for a synergetic cooperation without losing the capacity to fulfil the many ulterior functions with which they are endowed. As has been shown, these functions are supportive of the task to make cooperation happen and to be successful in the end.

168 As a result, the international legal order will remain highly fragmented but this fragmentation is nothing else than a reflection of an uneven distribution of power. See C.P.R. Romano, Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts, in: Russell A. Miller and Rebecca M. Bratspies (eds.), Progress in International Law (2008), 433, referring to José E. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences, 38 Texas ILJ (2003), 405.

169 Thereby, it should also be avoided that so-called wrong cases, i.e. politically highly sensitive issues, threaten the functionability of the entire dispute settlement system. On this issue, see Robert E. Hudec, GATT Dispute Settlement after the Tokyo Round: An Unfinished Business, 13 Cornell ILJ (1980), 145.

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