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HUMAN RIGHTS AND TRADE

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INTRODUCTION

In its resolution 2002/11, the Sub-Commission on the Promotion and Protection of Human Rights requested “The High Commissioner for Human Rights to make a comprehensive submission on human rights, trade and investment to the Fifth Ministerial Conference of the World Trade Organization, due to take place in Cancún Mexico, in September 2003”.

The present document is presented by the Office of the High Commissioner for Human Rights (OHCHR) in response to that request.

OHCHR has drafted this document in order to assist policy makers and civil society to understand the links between human rights law and trade law. To do so, the paper is divided into three sections.

- The first section briefly sets out why we talk of the promotion and protection of human rights in the context of trade rules and policies and explains some of the resulting implications.
- The second section takes eight trade issues to indicate in a simple way the human rights link.
- The third section provides a glossary of terms to help explain the international human rights system.
- The fourth section sets out a list of resolutions and reports adopted by expert and political bodies of the UN human rights system of relevance to international trade.

The whole document therefore need not be read through from beginning to end – headings are used to guide the reader to issues of interest.

OHCHR presents this document as an illustration of the links between human rights and trade to assist policy makers who might not be familiar with the international human rights system. The approach is therefore illustrative rather than analytical. For a closer analysis of a human rights approach to trade rules and policies, the reader is referred to the reports of the High Commissioner for Human Rights referred to in Section Four.

SECTION ONE: HUMAN RIGHTS AND TRADE

Why talk about human rights and trade?

First, it is a question of **law**. All WTO Members have undertaken obligations under international human rights law. This means that WTO Members should promote and protect human rights in the processes of negotiating and implementing trade law and policy. For example, of 146 members of the WTO, all have ratified at least one human rights instrument. 113 WTO Members have ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and all but one have ratified the *Convention on the Rights of the Child*. Further, those areas of human rights law recognized as customary international law take on universal application, which means that trade rules should be interpreted as consistent with those norms and standards whatever the treaty commitments of States in trade matters.

Second, it makes **sense**. Increasingly, promoting respect for human rights, democracy and the rule of law – both nationally and through international cooperation - are not only ends in themselves, they can help make the economic growth and prosperity promised by trade a reality. In particular, respect for the human rights principle of non-discrimination should promote greater equality and equality of opportunity which in turn can influence positively the dynamics of growth and poverty reduction.¹

What do we mean by a human rights approach to trade?

A rights-based approach to trade is a conceptual framework for the processes of trade reform that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.

Human rights law is **neutral** with regard to trade liberalization or trade protectionism. Instead, a human rights approach to trade focuses on processes and outcomes – how trade affects the enjoyment of human rights – and places the promotion and protection of human rights among the objectives of trade reform.

In short, adopting a human rights approach to trade brings individuals and communities squarely into the processes of negotiating and implementing trade law. This means:

- **Respecting the principle of non-discrimination** by avoiding any distinction, exclusion, restriction or preference made on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, economic status, property, birth or other status and which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by someone of his or her human rights and fundamental freedoms. Not only does this mean protecting individuals and groups against overt discrimination, but *also* not leaving certain individuals and groups out of the trade picture.

¹ World Bank, *World Development Report 2000/2001: Attacking Poverty*, Oxford University Press, Oxford, 2001, p.56. The World Bank stated for example that “lower inequality can increase efficiency and economic growth through a variety of channels”.

- **Promoting popular participation** in the development of trade rules and policies. In particular, trade policies are more likely to take into account the needs of individuals and communities if there is consultation in the process of policy development.
- Monitoring the potential and real impacts of trade rules and policies on the enjoyment of human rights by individuals and groups – in particular the vulnerable, marginalized and socially excluded – through the use of **human rights impact assessments**.
- Using human rights impact assessments and consultations with individuals and communities to guide trade rule and policy making so that the **progressive liberalization of trade promotes the progressive realization of human rights**. As with any reform process, trade liberalization can result in “losers” if the right form, pace and sequencing of trade reform is not chosen. Consequently, a human rights approach seeks the progressive introduction of trade policies that take into account the needs and rights of individuals and communities, particularly those who could lose out as a result of the reform process – for example, people working in non-competitive industries, or living in outlying areas.
- **Promoting accountability** in the processes of trade liberalization. As investors increasingly have recourse to international arbitration and States can resolve trade disputes through the WTO’s Dispute Settlement Body, it is important that individuals also have recourse to judicial and administrative accountability mechanisms. Recognizing the justiciability of economic, social and cultural rights is an integral part in this process.
- Ensuring the promotion of **corporate social responsibility** initiatives as an integral part of trade and investment liberalization. As traders and investors benefit from freer trade, it is important to ensure that free trade is also fair and that business enterprises respect human rights, labour standards and environmental standards when trading and investing.
- Encouraging **international cooperation and assistance** so that poorer countries can adjust to – and therefore benefit from - the trade reform process. While ODA is important, the transfer of the know-how and technology concentrated in wealthier countries is equally important so that the people living in poorer countries can be empowered to reap the potential offered by trade. Similarly, ensuring good governance, not only at the national level, but also at the international level, is an important element of international cooperation and assistance to promote human rights.

What the General Assembly says

Reaffirms also the commitment to creating an environment at both the national and the global level that is conducive to development and to the elimination of poverty through, inter alia, good governance within each country and at the international level, transparency in the financial, monetary and trading systems and commitment to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system.

General Assembly resolution “Globalization and its impact on the full enjoyment of all human rights” (A/RES/57/205).

SECTION TWO: ILLUSTRATIONS OF THE LINKS BETWEEN HUMAN RIGHTS AND TRADE

ILLUSTRATION ONE: TRADE AND NON-DISCRIMINATION

Introduction: The human rights principle of non-discrimination seeks to promote greater equality and fairness in society by protecting the socially excluded, the marginalized, the vulnerable and minorities. Greater respect for the human rights principle of non-discrimination can be particularly important for women, indigenous peoples and rural populations amongst other categories of individuals. The following example looks at the case of trade and gender equality.

Observations: Trade can affect men and women differently and the different status and roles of men and women can also affect trade. To take the example of the health sector, women often take the role of caretakers of families and communities and in many societies dominate caring roles as nurses and nursing aides. Similarly, women and men might have different needs for health services, particularly with regard to reproductive rights. In relation to HIV/AIDS, women often face a disproportionate burden of caring for family members with HIV/AIDS and, very often, assume the responsibility of children orphaned by AIDS. At the same time, access to medication for women can prevent mother-to-child transmission of HIV. Thus trade rules and policies affecting trade in health services or access to medicines could affect women differently to men.

The human rights angle: Article 2 of the *Universal Declaration on Human Rights* states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religions, political or other opinion, national or social origin, property birth or other status.

For the purposes of the *Convention on the Elimination of All Forms of Discrimination Against Women*, article 1 states that the term “discrimination against women” means:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms ...

Effect of trade policies on the principle of non-discrimination: Given women’s (often) greater care-giving role and their different needs for medical services, trade policies – including policies relevant to intellectual property protection - that are geared to promoting access to affordable medicines could help relieve the relative health burden of women. For example, access to affordable medicines can help reduce mother to child transmissions of HIV while releasing women caring for people living with HIV so that they can focus on other activities – for example, paid employment. Trade policies in relation to services liberalization could also have gendered effects. For example:

- *Potential positive effects* -Liberalization that leads to higher levels of FDI might lead to higher levels of women’s employment which in turn might increase women’s financial autonomy in the home and in society. Similarly, the opening of borders in wealthier countries for the temporary movement of persons such as nurses can help

women in poorer countries improve their earning capacity as well as the standard of living of their families where they chose to send home remittances.

- *Potential negative effects* – Where liberalization leads to a higher presence of the private sector in service provision, and where this in turn leads to greater focus of health services on the wealthy and healthy rather than the poor and sick, women, particularly poor women, might have to bear a greater burden as a result of liberalization. Similarly, liberalization of movement of skilled persons might lead to brain drain of doctors and nurses, which might affect women patients disproportionately where women rely more on health services.

A human rights approach to trade rules: Designing trade policies that take into account disparate gender effects could help redress discrimination in society. However, a failure to take into account the gendered nature of trade could have the reverse effect. OHCHR encourages States to pay greater attention to the gender impacts of their trade policies. To do so, OHCHR encourages States to:

- Undertake gender impact assessments of existing and potential trade policies
- Consult with women’s groups in the formulation of trade policies
- Ensure equal representation of men and women among trade decision-makers

What the Commission on Human Rights says ...

“Globalization should be guided by the fundamental principles that underpin the corpus of human rights, such as equality, participation, accountability, non-discrimination, at both the national and international levels, respect for diversity and international cooperation and solidarity”.

Commission on Human Rights resolution “Globalization and its impact on the full enjoyment of human rights” (E/CN.4/RES/2003/23)

ILLUSTRATION TWO: TRIPS AND PUBLIC HEALTH

NEGLECTED DISEASES

Introduction: In the Declaration on TRIPS and Public Health, WTO Members stated that the TRIPS Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all. Since that time, discussion has focused on finding a solution to paragraph 6 of that Declaration so that countries without a pharmaceutical manufacturing capacity can benefit from the compulsory licensing provisions of the TRIPS Agreement. However, the discussions in the TRIPS Council have overshadowed another real problem for the promotion of medicines for all, namely the lack of research into medicines to treat neglected diseases – those diseases occurring overwhelmingly or exclusively in developing countries. Examples of neglected diseases are river blindness and sleeping sickness.

Observations: According to the World Health Organization, questions remain as to whether the patent system will ensure investment in medicines needed by the poor – of the 1,233 new chemical entities developed between 1975 and 1996, only 11 were for the

treatment of tropical disease.² The UN Special Rapporteur on the Right to Health has noted that only 10 per cent of research and development spending is directed at the health problems of 90 per cent of the world's population (E/CN.4/2003/58).

The human rights angle: Article 12 of the *International Covenant on Economic, Social and Cultural Rights* recognizes:

The right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

States have agreed to take steps towards the full realization of the right for:

The prevention, treatment and control of epidemic, endemic, occupational and other diseases.

The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The effect on the right to health: The adoption of the TRIPS Agreement within the framework of the WTO has brought the intellectual property protection and incentives for medical research squarely onto the trade agenda. However, the commercial nature of intellectual property protection – rights to exclude competitors from the market place for a limited time - means that patents provide incentives for research that are first and foremost directed towards “profitable” disease. In other words, patents create opportunities for economic reward that are optimized when market conditions are right. Logically, in the absence of other incentives, this leads researchers away from “unprofitable” diseases to diseases that affect people in markets where the return is likely to be greater.

Alternative initiatives to the TRIPS Agreement are needed to promote research into unprofitable disease. However, for these alternatives to succeed, they need the same force as the TRIPS Agreement. While voluntary initiatives such as the Global Fund to Fight AIDS, Tuberculosis and Malaria are important to help promote the right to health for people living in poorer countries, the legally enforceable nature of the TRIPS Agreement due to the WTO's dispute settlement mechanism currently helps to skew incentives towards “profitable” research. Given that the pool of resources for research and development are not endless, more needs to be done to redress this disequilibrium so that States meet their commitment to take steps towards the full realization of the right to health through the prevention, treatment and control of disease.

A human rights approach to intellectual property protection: OHCHR promotes a balancing of the TRIPS Agreement to ensure an alternative incentive to promote research into neglected diseases. Such incentives should be of comparable legitimacy and force to the TRIPS Agreement.

² WHO, “Globalization, TRIPS and access to pharmaceuticals”, *WHO Policy Perspectives on Medicines: WHO Medicines Strategy: 2000-2003*, No. 3, March 2001 (WHO/EDM/2001.2).

What the Special Rapporteur on the Right to Health says

“Very neglected diseases receive extremely little research and development, and essentially no commercially based research and development in the rich countries. Because of poverty, the market mechanism fails. Moreover, poor-country Governments lack the means to subsidize the needed research and development. Thus, research and development for diseases specific to poor countries tends to be grossly underfinanced.”

Report of the Special Rapporteur on the Right to Health to the Commission on Human Rights, “The right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (E/CN.4/2003/58).

ILLUSTRATION THREE: AGRICULTURE NEGOTIATIONS

AGRICULTURAL TRADE AND THE RIGHT TO FOOD

Observations: An FAO study in 1999 found that in one country, policy reforms and the associated increase in food imports have put pressure on some domestic sectors, affecting rural employment. The study cited one instance where roughly 300,000 persons involved in the production and marketing of onions and potatoes were adversely affected when tariff reductions resulted in a surge of imports of these products. The case study noted that the possibility of diversification away from these crops is limited.³

The human rights angle: The *International Covenant on Economic, Social and Cultural Rights* recognizes the fundamental right of everyone to be free from hunger and the right to adequate food.

The Committee on Economic, Social and Cultural Rights has stated that the right to *adequate* food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means of its procurement (para 6).

The term *adequate* food encompasses the notion of “sustainability” of food – in other words, long term availability and accessibility.

- *Availability* of food refers to the possibilities either of feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed.
- *Accessibility* of food refers to both economic and physical accessibility.

Effect on the right to food: The fact that food imports have increased might indicate a positive correlation between the tariff reductions and the enjoyment of the right to food – in other words, there is more food. However, other issues arise, namely:

- The loss of local production through the replacement by imports could reduce the *availability* of food in the long term, particularly if the import levels recede. In that case, the loss of local production would make it difficult to supplement import losses with local products.

³ FAO, *Agriculture, Trade and Food Security: Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*, Vol.II Country Case Studies, Rome 2000.

- The losses to local employment could increase poverty levels, particularly where few social safety nets exist. Increased poverty could negatively affect the *economic accessibility* of food.
- Depending on several factors, import surges might benefit urban populations over rural populations, raising issues of *physical accessibility* of food and even discrimination.

A human rights approach to trade rules: The WTO's Agreement on Agriculture sets out to provide a fair and market-oriented trading system, including through the reduction of tariffs on agricultural imports. The notion of fairness provides an important entry point for a human rights approach to agricultural trade, which is based particularly on human rights notions of equality, equal opportunity and the principle of non-discrimination. A human rights approach would seek responses to the following questions.

- To what extent can special safeguard provisions in the AoA be used in this and similar situations which could protect against import surges?
- What additional mechanisms are needed in the AoA to deal with these sorts of situations – for example, a mechanism setting different rates of liberalization for crops fundamental to rural employment or national food security?
- What social safety nets would be appropriate to deal with the shocks (eg on rural employment, poverty and so on) that can have a negative effect on the enjoyment of the right to food?
- What forms of international cooperation (financial aid, food aid, transfer of know-how) would be necessary, particularly in the establishment of adequate social safety nets?⁴

ILLUSTRATION FOUR: AGRICULTURE NEGOTIATIONS

MARKET ACCESS AND HUMAN RIGHTS

Observations: An OECD study in 2001 concluded that agricultural tariffs on some products in some wealthy countries are still high, with prohibitively high tariffs on some products that are considered “sensitive” to developing countries. Further, trade-distorting domestic support remains highly skewed with over 90 per cent concentration in developed countries. In particular, over 60 per cent of domestic agricultural support in OECD countries is excluded from reduction commitments under the Agreement on Agriculture.⁵

The human rights angle: Article 11(2) of the *International Covenant on Economic, Social and Cultural Rights* obliges States to:

take, individually and through international cooperation, the measures, including specific programmes which are needed:

(a)

⁴ See e.g., the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and net Food-Importing Developing Countries* of the WTO although implementation of the Decision has been unsatisfactory.

⁵ OECD, *The Uruguay Round Agreement on Agriculture: An Evaluation of its Implementation in OECD Countries*, OECD, Paris, 2001.

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Further, article 3(3) of the *Declaration on the Right to Development* recognizes that:

States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.

The effect of market access on the right to food and the right to development:

There are a number of possible consequences flowing from continuing protectionism in some wealthy countries in the field of agricultural trade:

- High tariffs can restrict market access for agricultural products from poorer countries – which can cut off a potential means to replace aid by trade as a long term development strategy. Thus high tariffs might be an obstacle to development which the international community has agreed to work together to reduce as a means of realizing the right to development.
- Overly high domestic support in some wealthy countries does not take into account the needs of food importing and food exporting countries and can be particularly harmful to the needs of small farmers. For example, a study in a country noted that increasing imports of fruit juices from larger producers in wealthy countries have displaced much domestic production and underlined a growing dependency of the country on imported foods.⁶

A human rights approach to agricultural trade liberalization: A human rights approach to agricultural trade liberalization reminds States of their commitment to a just international and social order and encourages more concerted efforts on behalf of wealthy countries to reduce and remove distortions to trade given the inability of most other countries to offer similar protections to promote the right to food and the right to development of their populations.

ILLUSTRATION FIVE: SERVICES NEGOTIATIONS

HUMAN RIGHTS IMPACT ASSESSMENTS

Introduction: The Preamble to the General Agreement on Trade in Services (GATS) seeks to establish a multilateral framework of principles and rules for trade in services with a view to the progressive liberalization and expansion of this trade. Article XIX of GATS states that “the process of progressive liberalization shall be advanced in each such found (of negotiations) through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members”.

⁶ FAO, *op.cit.*, p. 167.

Those commitments to the liberalization of trade in services are made in relation to 11 service sectors, ranging from transport and communications services to health, education, environmental and tourism services. GATS therefore covers service sectors relevant to the enjoyment of economic, social and cultural rights such as the health sector (the right to health), the education sector (the right to education) and the environmental services sector (eg sanitation services are relevant to the right to water).

States achieve the progressive liberalization of trade in services by committing to reduce barriers to that trade. Once those commitments are made, a country can withdraw commitments only after a three year period and the country might have to enter negotiations with another WTO Member affected by the withdrawal with a view to agreeing on compensation.

The human rights angle: Economic, social and cultural rights carry obligations of immediate application – obligations such as the protection against discrimination that States should respect immediately - as well as obligations to be realized progressively according to the availability of resources.

Thus, to demonstrate immediate obligations that are relevant to trade in services, the Committee on Economic, Social and Cultural Rights has indicated that a State might be in violation of the right to health through its direct action or the action of other entities as a result of (E/C.12/2000/4):

- (a) The suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health;
- (b) The failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational corporations;
- (c) The failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others;
- (d) The failure to take measures to reduce the inequitable distribution of health facilities, goods and services.

In relation to progressive realization of economic, social and cultural rights, Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* expresses the notion as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of (economic, social and cultural rights) by all appropriate means, including particularly the adoption of legislative measures.

Progressive liberalization and economic, social and cultural rights: While the liberalization of trade in services can lead to economic growth, increased competition and improved services, this is not always the case. Some barriers to trade might be important for the promotion and protection of human rights – for example, closely regulating the entry of essential service providers to ensure effective service provision to the poor.

Thus, it will be important that each WTO Member makes commitments to liberalize trade in services which take into account the consequences – both positive and negative – for essential service provision. To do so, human rights assessments at the national and international level are important.

A human rights approach to the liberalization of trade in services: Undertaking human rights impact assessments of trade-related policies should assist in promoting progressive trade liberalization that promotes the progressive realization of human rights in two main ways:

- *By choosing the right policy* - the expansion of trade in services through the reduction of barriers to trade is not an end in itself. Its success depends on achieving the right form, pace and sequencing of liberalization. Undertaking human rights impact assessments prior to and during negotiations and after a period of implementation could help in the choice of the right trade policy that achieves the progressive liberalization of trade in services as well as progressive realization of human rights. The health, education, environmental and water sections are of immediate relevance to economic, social and cultural rights. But other sectors, such as electricity, transport and telecommunications can also provide the means to promote human rights and should also be subject to assessment.
- *By avoiding the wrong policy* – At times, economic and social conditions change and the policies needed to respond to new conditions might have to change accordingly. Given the difficulties in withdrawing commitments under GATS – including the possibility of having to compensate other WTO Members as a result – it will be important to avoid undertaking commitments to open services sectors which are unsustainable from the perspective of the promotion and protection of human rights. Human rights impact assessments will not be able to foresee all possible scenarios in advance, however they will help a country to avoid as much as possible unsustainable trade policies which could negatively effect the enjoyment of human rights.

International cooperation to assist in formulating and undertaking human rights impact assessments will be an essential factor in ensuring their success.

What the High Commissioner for Human Rights said

“The High Commissioner highlights the voluntary nature of commitments to liberalize trade in services and stresses the need to make commitments on the basis of sound empirical evidence. To this end, the High Commissioner encourages States to undertake public, independent and transparent human rights assessments of the impact of liberalization policies – both past policies and future options – on the enjoyment of human rights, through a participatory and consultative process with concerned individuals and groups. The High Commissioner encourages States to use these assessments as the basis for WTO negotiations on progressive liberalization.”

Report of the High Commissioner to the Sub-Commission on the Promotion and Protection of Human Rights, “Liberalization of trade in services and human rights” (E/CN.4/Sub.2/2002/9).

ILLUSTRATION SIX: TRIPS NEGOTIATIONS

TRADE AND INDIGENOUS PEOPLES' HUMAN RIGHTS

Observations: While some forms of intellectual property protection in the TRIPS Agreement have been used by indigenous authors to protect their heritage and knowledge, other forms of intellectual property protection such as patents are more problematic and have been used to misappropriate the cultural heritage and traditional knowledge of indigenous peoples. Specifically, non-indigenous researchers have adapted indigenous peoples' knowledge in genetic resources into new innovations, or simply reproduced them in a more easily marketable or synthetic form and protected them with patents without the prior informed consent of the community or the equitable sharing of the arising benefits. For example, patents have been granted over products derived from indigenous and local community knowledge such as: basmati rice (a product associated with South Asia); a process of extracting oil from the neem tree (used over generations in India); a process of healing a wound by administering turmeric (a culinary ingredient and traditional medicine used in India); and the highly nutritious drought-resistant food crop, Quinoa (bred by indigenous communities in Bolivia and Peru).⁷

The human rights angle: Article 2 of the *Universal Declaration on Human Rights* states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religions, political or other opinion, national or social origin, property birth or other status.

Similarly, article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* states that:

The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

It is generally understood that an act is discriminatory if it amounts to a distinction, exclusion, restriction or preference made on the basis of sex, race, colour, language, religion and so on which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by someone of his or her human rights and fundamental freedoms.

Article 15(1) of the *International Covenant on Economic, Social and Cultural Rights* states that:

The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

⁷ Dutfield, G., "Intellectual Property Rights, Trade and Biodiversity", International Union for Conservation of Nature and Natural Resources, Earthscan Publications Ltd, UK, 2000: and, (WWF) Gonzales, A. and C. Monagle, "Biodiversity & Intellectual Property Rights: Reviewing Intellectual Property Rights in Light of the Objectives of the Convention on Biological Diversity", Joint Discussion Paper, November, 2000.

- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 12 of the Draft UN Declaration on the Rights of Indigenous Peoples states that “Indigenous peoples have the right to practice and revitalize their cultural traditions and customs as well as the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs”. Article 29 of the Draft Declaration further states that “Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property”.

Effect of trade rules on indigenous peoples’ human rights: There are currently national and international efforts that are seeking to strengthen the protection of indigenous knowledge. For example, in 2002, one country established a comprehensive legal system for the protection specifically of indigenous peoples’ traditional knowledge associated with biological diversity. The law, amongst other things, requires written consent of indigenous peoples for the use of their knowledge. Internationally, States have been working in the FAO and WIPO and in the framework of the *Convention on Biological Diversity* to promote positive measures for the protection of traditional knowledge, the protection of such knowledge within existing intellectual property systems against misappropriation, and the facilitation of access to genetic resources on mutually agreed terms and on the basis of the country of origin’s prior informed consent.

However, the only system that is legally enforceable at the international level through an effective dispute settlement procedure is still the TRIPS Agreement. The other initiatives are only nationally-based, voluntary or treaty-based without sanction-oriented enforcement procedures for violations. The internationally binding protection of modern industrial forms of intellectual property that is only indirectly relevant and at times disadvantageous to traditional indigenous knowledge is a preference that could impair the enjoyment of some indigenous communities of their cultural rights.

Specifically, under article 15(1)(c), States have undertaken to protect the moral and material interests of authors, including indigenous authors. The protection of some forms of intellectual property but not of others could amount to discrimination in relation to article 15(1)(c). Strategies and efforts are needed to address this imbalance in the international trading system so that indigenous peoples’ cultural rights receive equal protection.

A human rights approach to intellectual property protection: A human rights approach to intellectual property protection based on article 15(1)(c) seeks the effective protection of all forms of intellectual property – including the moral and material interests of indigenous authors – with the aim of promoting the enjoyment of all human rights.

To that end, it is important to note that both the Doha Declaration and the Plan of Implementation from the World Summit on Sustainable Development both encourage greater efforts to protect traditional knowledge and folklore and to promote equitable sharing of benefits arising from the use of genetic resources.

Paragraph 19 of the Ministerial Declaration of the WTO's 4th Ministerial Conference at Doha in 2001 instructs the Council for TRIPS to examine the relationship between the TRIPS Agreement and the *Convention on Biological Diversity* and the protection of traditional knowledge and folklore.

In paragraph 42(o) of the Plan of Implementation of the World Summit on Sustainable Development, States agreed to negotiate an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resource within the framework of the *Convention on Biological Diversity*, bearing in mind the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.

OHCHR encourages the full implementation of these paragraphs, including through the full participation of indigenous communities in this and other processes concerning the protection of their cultural heritage and rights. Further, OHCHR encourages the compensation for the intellectual property taken from indigenous authors and peoples in the past.

What the Committee on Economic, Social and Cultural Rights says

“A human rights-based approach (to intellectual property protection) focuses particularly on the needs of the most disadvantaged and marginalized individuals and communities. Because a human right is a universal entitlement, its implementation is evaluated particularly by the degree to which it benefits those who hitherto have been the most disadvantaged and marginalized and brings them up to the mainstream level of protection. Thus, in adopting intellectual property regimes, States and other actors must give particular attention at the national and international levels to the adequate protection of the human rights of disadvantaged and marginalized individuals and groups, such as indigenous peoples.”

Committee on Economic, Social and Cultural Rights statement on “Human rights and intellectual property” (E/C.12/2001/15).

ILLUSTRATION SEVEN: INVESTMENT

EXPROPRIATION

Observations: As WTO Members discuss the form and benefits of a possible future international investment agreement within in the framework of the WTO, issues of concern to human rights have arisen in relation to investment liberalization in the context of bilateral and regional investment agreements. One of these issues concerns the protection of investors against expropriation. Investment agreements typically protect investors and their investments against expropriation unless expropriation is subject to compensation by the host Government for the loss of the investment. However, broad interpretations of these provisions by *investor-to-state* arbitration panels have called into question whether health and environmental regulations – of significant importance to the protection of the right to health and other human rights – might be considered measures tantamount to the expropriation of an investment where such measures reduce the value of an investor's investment.⁸

⁸ In the appeal from the original arbitration tribunal decision in *The United Mexican States v. Metalclad Corporation*, Tysoe J., Supreme Court of British Columbia, judgement, 22 May 2001, at para. 99 stated that

The human rights angle: The Committee on Economic, Social and Cultural Rights has classified State obligations in relation to economic, social and cultural rights as obligations to respect, obligations to protect and obligations to fulfil human rights. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights explain that:

The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.

In relation to the right to health, the Committee on Economic, Social and Cultural Rights has clarified that the obligation on states to fulfil the right to health means that:

States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals.

Importantly, States have undertaken not to lessen standards of respect for human rights once achieved. This is known as the *principle of non-retrogression*. Article 5(1) of the *International Covenant on Economic, Social and Cultural Rights* states that:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent that is provided for in the present Covenant.

Potential effect of broadly interpreted expropriation provisions on human rights:

Broad interpretations of expropriation provisions could have direct consequences for regulations intended to promote and protect human rights. Governmental regulations in relation to chemicals and toxic wastes have flow-on effects in relation to the enjoyment of human rights such as the right to health or the right to water and provide an important instance of fulfillment of States obligation to *fulfil* human rights. Further, recent broad interpretations of expropriation provisions raise questions about the assumptions of responsibility - moral or legal - for actions that could negatively affect human rights or the environment. If investors use expropriation provisions to wind back environmental or human rights regulations, this could violate the human rights principle of non-retrogression.

To the extent that broad interpretations of expropriation provisions could affect States' willingness or capacity to introduce new measures to promote and protect human rights, then the use and interpretation of expropriation provisions is a cause of concern. Specifically, it will be important to avoid a situation where the threat of litigation on the basis of broadly interpreted expropriation provisions has a "chilling effect" on

the original arbitration tribunal had employed "... an extremely broad definition of expropriation for the purposes of article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part, of the use or reasonably-to-be expected economic benefits of property. This definition is sufficiently broad to include a legitimate zoning of property by a municipality or other zoning authority."

government regulatory capacity, conditioning State action to promote human rights and a healthy environment by the commercial concerns of foreign investors.

A human rights approach to investment: While human rights should not provide a shield to protect unwarranted protectionism, administrative failures or unfair treatment, neither should they be made subject solely to an economic calculus. Consequently, it will be important to ensure that all discussions concerning a WTO investment agreement place human rights and environmental considerations centrally within their objectives and outcomes.

What the Sub-Commission on the Promotion and Protection of Human Rights says ...

Considering that when not carefully regulated, foreign direct investment – as a key element of the globalization process, one of the main modes of delivering trade in services and a central activity of transnational corporations – can have a detrimental effect with regard to the enjoyment of human rights.

Sub-Commission resolution on “Human rights, trade and investment” (E/CN.4/Sub.2/RES/2002/11)

ILLUSTRATION EIGHT: INVESTMENT

INVESTORS’ OBLIGATIONS WITH REGARD TO HUMAN RIGHTS

Observations: While investment can often be an important engine for growth, recent cases indicate that some investors are willing to sacrifice respect for human rights in the process of investment. The case of the Ogoni people (Communication No.155/96) which came before the African Commission on Human and Peoples’ Rights indicates how investors were complicit in abuses of human rights, including the right to health, the right to a generally satisfactory environment and other rights recognized in the African Charter on Human and Peoples’ Rights. There, the actions of private companies and the national security forces had led to serious environmental pollution through oil spills, the contamination of water, soil and air and the destruction of crops and livelihoods of the Ogoni people.

The human rights angle: States are the primary duty bearers of human rights. States’ obligations with regard to human rights include the obligation to protect individuals against violations of their human rights by third parties such as investors.

The Secretary-General’s Global Compact provides a platform for encouraging and promoting good corporate practices and learning experiences in the areas of human rights, labour and the environment. The Sub-Commission on the Promotion and Protection of Human Rights has been considering how to hold business enterprises more directly responsible for their actions which have negative consequences for the protection of human rights.

To this end, on 13 August 2003, the Sub-Commission adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev.2). The norms set out particular obligations on business enterprises (investors) including the obligation to respect the right to equal opportunity and non-discrimination, the right to security of the person, workers’ human rights, national sovereignty, environmental protection and consumer protection.

Investors' rights and human rights: Investors' rights as defined in investment liberalization agreements – bilateral, regional and possibly a WTO agreement on investment – are instrumental rights. In other words, investors' rights are defined in order to meet some wider goal such as sustainable human development, economic growth, stability, indeed the promotion and protection of human rights. The conditional nature of investors' rights indicates that they should be balanced with corresponding checks, balances and obligations - towards individuals, the State or the environment. While investment liberalization has focused on the definition of investors' rights, balancing those rights with States' "right to regulate", discussions over investment liberalization have paid less attention to articulating investors obligations. Yet this risks skewing investment liberalization in favour of investors' rights, losing sight of their conditional nature, possibly to the detriment of the rights and interests of other actors.

A human rights approach to investment negotiations: The articulation of investors' rights through investment liberalization agreements should take note of the conditional nature of investors' rights and balance those rights with the articulation of investors' obligations towards individuals and communities.

What the Office of the High Commissioner for Human Rights says

“Voluntary codes of conduct promoting corporate social responsibility are important, yet, as investors' rights are strengthened through investment agreements, so too should their obligations, including towards individuals and communities. To this end, initiatives to clarify and specify the legal responsibility of actors towards individuals and groups in the context of investment are important. Further, States could consider the issue of legal responsibility of investors within discussions concerning continuing investment liberalization and consider acknowledging these responsibilities in investment agreements.”

Report of the High Commissioner to the Sub-Commission on the Promotion and Protection of Human Rights, “Human rights, trade and investment” (E/CN.4/Sub.2/2003/9).

SECTION THREE: GLOSSARY OF TERMS

(Terms are in alphabetical order)

Commission on Human Rights - The United Nations Commission on Human Rights, composed of 53 States, meets each year in regular session in March/April for six weeks in Geneva. The Commission is the main UN body that considers human rights questions. Over 3,000 delegates from member and observer States and from non-governmental organizations participate. During its regular annual session, the Commission adopts about a hundred resolutions, decisions and Chairperson's statements on matters of relevance to the human rights of individuals in all regions and circumstances.

Committee on Economic, Social and Cultural Rights - The primary function of the Committee is to monitor the implementation of the *International Covenant on Economic, Social and Cultural Rights* by States parties. It strives to develop a constructive dialogue with States parties and seeks to determine through a variety of means whether or not the norms contained in the Covenant are being adequately applied in States parties and how the implementation and enforcement of the Covenant could be improved so that all people who are entitled to the rights enshrined in the Covenant can actually enjoy them in full. The Committee can also assist Governments in fulfilling their obligations under the Covenant by issuing specific legislative, policy and other suggestions and recommendations such that economic, social and cultural rights are more effectively secured. The General Comments of the Committee are examples of this.

General Comment – General Comments vary in form and scope according to the body of experts adopting them and the particular human rights of concern – however generally they can be described as expert opinions on the scope and content of particular rights or principles as understood by the treaty body monitoring body in light of their experience in monitoring the particular convention. General Comments do not of themselves create legal commitments on States although they often reflect in part common understandings of international law.

High Commissioner for Human Rights - The High Commissioner for Human Rights is the United Nations official with principal responsibility for United Nations human rights activities, under the direction and authority of the Secretary-General and within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights. The High Commissioner is appointed by the Secretary-General with the approval of the General Assembly, due regard being paid to geographical rotation, for a fixed term of four years with the possibility of renewal for a further term of four years.

International Covenant on Economic, Social and Cultural Rights - The International Covenant on Economic, Social and Cultural Rights was adopted in 1966. It finally gained the force of law a decade later, entering into force on 3 January 1976. The Covenant contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress. 147 States have ratified the Covenant.

Office of the High Commissioner for Human Rights (OHCHR) – the General Assembly created the Office of the High Commissioner for Human Rights to support the High Commissioner for Human Rights. The OHCHR has a number of roles including the promotion of universal respect for human rights and the coordination of human rights action through the United Nations system.

Special rapporteur – Special Rapporteurs are appointed by the Commission on Human Rights to be constantly engaged on an issue of concern to the Commission throughout the year. Although the mandates given to special procedure mechanisms vary, they usually are to examine, monitor, advise, and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates. Various activities can be undertaken by special procedures, including conducting studies, providing advice on technical cooperation, responding to individual complaints, and engaging in general promotional activities.

Sub-Commission on the Promotion and Protection of Human Rights - The Sub-Commission is the main subsidiary body of the Commission on Human Rights. Its functions are: (a) To undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities; (b) To perform any other functions which may be entrusted to it by the Council or the Commission. The Sub-Commission is composed of 26 experts who act in their personal capacity and are elected by the Commission with due regard to equitable geographical distribution. It meets for three weeks every year in August.

Universal Declaration of Human Rights – the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly, gives international recognition to human rights – civil, cultural, economic, political and social. Although the Universal Declaration is not a treaty, its inclusion in the Constitutions of many countries and general acceptance by the community of nations means that at least some of its provisions are now considered part of international customary law.

SECTION FOUR

LIST OF RESOLUTIONS, REPORTS AND DOCUMENTS OF THE INTERNATIONAL HUMAN RIGHTS SYSTEM RELEVANT TO HUMAN RIGHTS AND TRADE

Finding documents on the OHCHR website

The following documents all include a UN document number which can be an easy path to finding them on the OHCHR website. The following sets out some easy steps to help find them.

- OHCHR website address – <http://www.unhchr.ch>
- At the top right hand corner of the homepage, there is a search mechanism.
- If you are looking for a document of a treaty body (for example, a General Comment or statement of the Committee on Economic, Social and Cultural Rights) use the Treaty Bodies Database Search.
- If you are looking for a document of a charter body (such as a resolution or report of the General Assembly, the Commission or the Sub-Commission) then use the Charter Based Bodies Database.
- Type into the box the full number of the document you are looking for.
- Press “Go!”.
- Then click on the blue number corresponding to your document.
- It’s sometimes a bit slow.

Documents of the High Commissioner for Human Rights

- Human rights, trade and investment, Report of the High Commissioner for Human Rights, (E/CN.4/Sub.2/2003/9).
- Liberalization of trade in services and human rights, Report of the High Commissioner for Human Rights (E/CN.4/Sub.2/2002/9).
- Globalization and its impact on the full enjoyment of human rights, Report of the High Commissioner for Human Rights (E/CN.4/2002/54). The report considers the WTO’s Agreement on Agriculture.
- The impact of the TRIPS Agreement on the Enjoyment of all Human Rights, report of the High Commissioner for Human Rights, (E/CN.4/Sub.2/2001/13).

Documents of the Committee on Economic, Social and Cultural Rights

- General Comment on the right to water (E/C.12/2002/11).
- General Comment on the right to health (E/C.12/2000/4).
- General Comment on the right to food (E/C.12/1999/5).
- General Comment on the right to education (E/C.12/1999/10).
- “Intellectual property and human rights”, Statement of the Committee on Economic, Social and Cultural Rights (E/C.12/2001/15).

Resolutions of the General Assembly

- Globalization and its impact on the full enjoyment of all human rights (A/RES/57/205) – adopted by vote.
- Globalization and its impact on the full enjoyment of all human rights (A/RES/56/165) – adopted by vote.

Resolutions of the Commission on Human Rights

- Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria, (E/CN.4/RES/2003/29) – adopted by consensus.
- Globalization and its impact on the full enjoyment of human rights (E/CN.4/RES/2003/239 – adopted by vote.
- Globalization and its impact on the full enjoyment of human rights, (E/CN.4/RES/2002/28) – adopted by vote.

Resolutions of the Sub-Commission on the Promotion and Protection of Human Rights

- Human rights, trade and investment, (E/CN.4/Sub.2/RES/2002/11) – adopted by consensus.
- Liberalization of trade in services, and human rights, (E/CN.4/Sub.2/RES/2001/4) – adopted by consensus.
- Intellectual property and human rights, (E/CN.4/Sub.2/RES/2001/21) – adopted by consensus.
- Intellectual property rights and human rights, (E/CN.4/Sub.2/RES/2000/7) – adopted by consensus.
- Trade liberalization and its impact on human rights, (E/CN.4/Sub.2/RES/1999/30) – adopted by consensus.