

**ACHIEVING SYNERGY BETWEEN INTERNATIONAL TRADE
AND HUMAN RIGHTS: A PROPOSAL FOR MAINSTREAMING
HUMAN RIGHTS IN THE WTO**

by

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Abstract

The integration of trade and human rights is a ubiquitous topic that has dominated academic and policy research in recent years. While it is settled that the fields of trade and human rights are distinct, the relationship between the two have become more prominent especially with the conclusion of the Uruguay Trade Round which introduced trade subjects that diminish policy space of governments. The interactions of trade and human rights have been shown in modern times to affect the realization of some human rights in developing countries and LDCs. This influence of trade liberalization on the realization of human rights has necessitated studies that explore options for integration of trade and human rights in the WTO so that trade obligations do not stymie the fulfilment of human rights obligations.

Bearing in mind the *lex specialis* nature of the WTO and human rights systems, an integration of trade and human rights in the WTO system must be predicated on a concept or norm common to both systems. This concept or norm is development. While development is intrinsic to both the WTO and the human rights systems, there is an urgent need for a shift in perspective in the WTO idea of development from a purely economic process to a human right that inures on individuals and peoples. This shift in perspective will mandate the introduction and enforcement of certain characteristics of the right to development: free, active and inclusive participation of all, both developed and developing countries in the trade process of the WTO, not only in terms of numbers but in terms of meaningful participation and must guarantee benefits for all Members. The human right to development approach will also entail a strengthening of existing special and differential treatment provisions.

It is the argument of this thesis that a shift to a human right to development approach in the WTO space will contribute to the possibility of integrating trade and human rights. The ongoing Doha Trade Round provides the very forum for such shift. The problem however is whether the WTO Members have the political will to do this.

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List of Abbreviations

AEC	African Economic Community
AGOA	Africa Growth Opportunity Act
AMS	Aggregate Measure of Support
AMU	Arab Maghreb Union
AoA	Agreement on Agriculture
ASPM	Agreement on Sanitary and Phytosanitary Measures
AU	African Union
COMESA	Common Market for East and Southern Africa
DDA	Doha Development Agenda
DFQF	Duty- Free and Quota-Free
DSB	Dispute Settlement Body
EAC	East African Community
EBA	Everything But Arms
ECOSOC	ECOWAS Economic and Social Council
ECOMOG	ECOWAS Monitoring Group
ECOWAS	Economic Community of West African States

EU	European Union
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Product
FAO	Food Agriculture Organization
GSP	General System of Preferences
HDI	Human Development Index
HRIA	Human Rights Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IMF	International Monetary Fund
LDCS	Least Developed Countries
MDGs	Millennium Development Goals
MFN	Most Favoured Nation
MRU	Mano River Union
MS	Mutual Supportiveness
UEMOA	Union Economique et Monetaire Ouest Africaine (West African Economic and Monetary Union)

NAMA	Non Agricultural Market Access
NGOs	Non-Governmental Organizations
ODA	Official Development Assistance
R&D	Research and Development
RECs	Regional Economic Communities
RoO	Rules of Origin
RtD	Right to Development
SADC	Southern African Development Community
SD	Sustainable Development
SDT	Special and differential Treatment
SPS	Agreement on Sanitary and Phytosanitary Standards
TBT	Agreement on Technical Barriers to Trade
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TRIPs	Trade Related Aspects of Intellectual Property
UDHR	Universal Declaration on Human Rights
UN	United Nations

UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNCTAD	United Nations Commission on Trade and Development
WHO	World Health Organization
WTO	World Trade Organization

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Dedication

To the memory of my sister- Ibifuro Tamuno Iyowuna and my "mother"- Mrs. Gloria Ngozi

Uzonwanne

CHAPTER 1 INTRODUCTION

1.1 *Background to Study*

The year 2000 marked the end of an epoch in global political and economic relations with the adoption, by world leaders, of the United Nations Millennium Declaration also known as the Millennium Development Goals (MDGs).¹ The UN Millennium Declaration represents a historic occasion in international political efforts to realize a shared future of peace, cooperation and development by reaffirming the principles of human dignity, equality and equity as the common strand of humanity, and expresses the commitment by States to ensure that the benefits and costs of globalization are evenly distributed with special and differential treatment accorded to developing countries.

A notable feature of the UN Millennium Declaration is the undertaking by States to making the *right to development* a reality for the entire human race by eliminating poverty and want. Interestingly, the UN Millennium Declaration recognizes that the realization of the right to development, as fundamental to poverty eradication entails: good governance, transparency, equitability, predictability and non-discrimination in the multilateral trading system,² thus engaging the World Trade Organization (WTO) as a vital force for the realization of the right to development and the MDGs. Little wonder

¹ The MDGs are broken down into 8 measurable targets to be realized by 2015 and 2020 respectively See generally UNGA 55th Year, 8th Plen Mtg, UN Doc A/55/L.2 (2000). online: <<http://www.un.org/millennium/declaration/ares552e.htm>> paragraph 2, 5 and 19 respectively [hereinafter United Nations Millennium Declaration]

² *Ibid* para 13

³ World Trade Organization *The Doha Round*, online:<http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development>

⁴ WTO, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/Dec/2, 20 November 2001 online: < http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm>

⁵ WTO News, Press Release, Press/350/rev.1, “Decision Removes Final Patent Obstacle to Cheap Drugs” (30 August 2000) online: < http://www.wto.org/english/news_e/pr350_e/pr350_e.htm>; in the subsequent

approximately one year after the UN Millennium Declaration, the WTO launched what can arguably be described as the most ambitious negotiation round since the Uruguay Round- The Doha Development Agenda (DDA) with the objective of improving the trading prospects of developing countries and placing their developmental needs at the heart of the WTO.³

On November 14 of the same year, the WTO adopted the Doha Declaration which amended the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) to reflect public health concerns and access to medicines in developing countries,⁴ hitherto threatened by patent rights granted in the Agreement.⁵

In its 2005 Ministerial Conference, the WTO established the Aid for Trade Initiative and in 2006, it set up a task force for “operationalizing” the Initiative by- encouraging the mainstreaming of trade into domestic development strategies; and evaluating the implementation and effectiveness of the Initiative in actualizing development.⁶

Recently, in response to the concept document⁷ prepared by the Working Group and Task Force on the Right to Development of the Office of the High Commissioner on Human Rights, the WTO released a statement detailing its activities and contributions to

³ World Trade Organization *The Doha Round*,
online:<http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development>

⁴ WTO, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/Dec/2, 20 November 2001
online: < http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm>

⁵ WTO News, Press Release, Press/350/rev.1, “Decision Removes Final Patent Obstacle to Cheap Drugs” (30 August 2000) online: < http://www.wto.org/english/news_e/pres03_e/pr350_e.htm>; in the subsequent years also, the WTO extended the time frame for protection of pharmaceuticals for LDCs and adopted a waiver that eliminated export limitations under compulsory licensing.

⁶ World Trade Organization *Aid for Trade, Aid- for- Trade Work Program 2010-2011*, online: World Trade Organization < http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm>

⁷ Reports Office of the High Commissioner for Human Rights, *The Right to Development Report of the Secretary General*, UNGAOR, 59th Sess, Supp No 107, UN Doc A/59/255 (2004) 1 at 5.

the realization of the right to development.⁸ The Doha amendment, compelled arguably by human rights dictates, and the recent “developmentification”⁹ of the WTO portends a lot for the discourse on the relationship between trade and human rights in general and trade and human rights in the WTO.

The global discourse on the relationship between trade and human rights in the WTO, which has acquired a ubiquitous character in recent times, hinges on how to mainstream human rights provisions in the WTO system considering the fact that the WTO operates as a sort of “self-contained regime”¹⁰ a peculiar *lex specialis* recognized in public international law with specific rules that govern its operations.

For WTO Members, the ultimate binding obligation that determines their duties and responsibilities in international trade relations are the Marrakesh Agreement establishing the WTO and the Covered Agreements. The inclusion of extraneous matters for example human rights, are non-trade related issues,¹¹ and are not within the ambit of the WTO. The WTO it has been argued, is primarily a multilateral institution that provides predictability in international trade by its unique framework for trade negotiations founded on certain core principles such as equal treatment, non-discrimination amongst

⁸ Submission in follow up to HRC Resolution 15/25 The Right to Development World Trade Organization, online OHCHR

<<http://www.ohchr.org/Documents/Issues/Development/Session12/WTO.pdf>>

⁹ Tomer Brode, “the Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO” (2006) 27: 4 Col J Tran L 266 at 271.

¹⁰ Gabrielle Marceau “The WTO Dispute Settlement and Human Rights” (2002) 13 EJIL 754 at 770; *c.f. United States—Standards for Reformulated and Conventional Gasoline(Complaint by US)*, (1996) WTO Doc. WT/DS2/AB/R, at 17 Appellate Body where the Appellate Body opined that *General Agreement [GATT]* is not to be read in clinical isolation from public international law; see also

¹¹ Jagdish Bhagwati, “Afterword the Question of Linkage: Symposium the Boundaries of the WTO” (2002) 96:126 AJIL 126 at 127.

its Members and the highly celebrated most favoured nation (MFN) principle.¹² Its central objective is to enhance the economic growth of its Members by maximizing market forces.

The realization however that trade liberalization and free market policies have not yielded golden pathways out of poverty or corrected the inequities and imbalances in global trade relations has necessitated a rethinking of the normative foundation of international economic relations and in particular international trade under the auspices of the WTO. This rethinking has generated much scholarly discourse on ways to introduce a “human face” to international trade bearing in mind the effects of trade on the realization of human rights which was exemplified not only in the access to medicines and the TRIPS saga but also more recently the agriculture subsidies allowed under the WTO Agreement on Agriculture and the threat to the right to food and food security in developing countries.¹³

The understanding that the preambles of the General Agreement on Tariff and Trade (GATT) 1947 and the WTO Agreement are founded on a presumption that states ought to conduct their trading and economic relations with a view to *raising standards of living*¹⁴ and the overwhelming support by governments and non-governmental actors to the realization of the MDGs, has placed the WTO at the center stage of the discourse.¹⁵

¹² *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, Can TS 1947 No 27, (entered into force 1 January 1948) [hereinafter GATT 1947] Article 1

¹³ “WTO Agreement on Agriculture: The Implementation Experience – Developing Country Case Studies” (2003) online: Food and Agricultural organization of the UN <http://www.ppl.nl/bibliographies/wto/files/2548.pdf>

¹⁴ GATT 1947 *supra* note 12

¹⁵ In view of the recent developments, the WTO can no longer shy away from the trade and human rights linkages discourse See generally statement by Dr. Supachai Panitchpakdi, former Director – General WTO,

1.2 *Research Questions*

How can the WTO system integrate with human rights such that Members' trade obligations under the WTO covered agreements do not conflict or inhibit their ability to fulfil their human rights obligations, particularly the human right to development and economic, social and cultural rights? As a follow up to this general question this thesis attempts to answer three questions which are pivotal to this discourse on achieving synergy between trade and human rights in the WTO.

- Are trade and human rights mutually exclusive under the WTO framework? In other words, does the WTO framework support or stymie human rights obligations?
- If so, how does the concept of Mutual Supportiveness bridge the gap? And finally
- How does development as a right provide a platform for the integration of trade and human rights in the WTO?

The answers to these questions are vital to the discourse on the possibility of integrating trade and human rights in the WTO.

It is important to emphasize here that the WTO system in and of itself does not contravene or conflict with human rights as there is no provision in the WTO covered

then Deputy Prime Minister and Minister of Commerce for Thailand , WT/MIN (99) ST/31/31 December 1999 (99-5246) *c.f.* speech by Pascal Lamy, WTO, News Release, “Lamy Calls for a Mindset Change to align Trade and Human Rights” (13 January 2010) online:
<http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm.>

agreements that obliges States not to fulfil their human rights commitments. However, in implementing the obligations undertaken under the covered agreements, States have found themselves in situations where executing the WTO rules runs contrary or inhibits their ability to realize their human rights commitments (development policies) as was exemplified in the India Quantitative Restriction case.¹⁶

Thus a dilemma already exists. This dilemma is further compounded by the fact that the Dispute Settlement Body (DSB) of the WTO is empowered to only adjudicate disputes brought under the covered agreements and cannot interpret the WTO Agreements to add to or diminish the external rights of the parties.¹⁷

Thus the question is how can we achieve synergy between trade and human rights in the WTO system such that there is a working together of both regimes to achieve the stated objectives in the preamble of the GATT 1947, the Marrakesh Agreement establishing the WTO and the objective of UN Millennium Declaration on the right to development?

¹⁶ *India- Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complaint by India)* (1999) WT/DS90/AB/R at para 36-37& 126-129 (Appellate Body Report), it is important to note here that India did not raise the right to development as a defence in the dispute before the Appellate Body, India's claim before the panel was that a removal of its balance of payment restrictions would require substantial changes in its development policy and a drastic reduction in its reserve which would ultimately affect the livelihood of its citizens. ; see also Joost Pauwelyn, "The Role of Public International Law in the WTO: How far Can We Go?" (2001) 95: 535 AJIL 535 at 551 who argues that WTO rules may not run foul to other rules in international law e.g. human rights resulting in a conflict however complying with WTO rules may sometimes make it impracticable for States to fulfil their human rights obligations.

¹⁷ See Article 3:2 & 19:2 Dispute Settlement Understanding; it is important to note here that the Appellate Body has had recourse to environmental agreements and treaties in determining and interpreting Members' obligation to further sustainable development.

1.3 *Scholarly Significance*

The term achieving synergy is the essential theme in this thesis and it is necessary to distinguish this from other related terms in the literature.

Synergy as used in this thesis connotes the idea suggested in the Oxford English dictionary of “the interaction or cooperation of two or more organizations, substances, or other agents to produce a combined effect greater than the sum of their separate effects.”¹⁸ This in its simplest forms means a working together of both trade and human rights to actualize human rights obligations via the right to development which according to the UN Declaration of 1986 is the sum of both civil, political, economic, social and cultural rights and the right of a people to participate in the development process.¹⁹ Synergy here is different from coherence. Coherence between trade and human rights in the WTO may necessitate an amendment of the WTO covered agreements to incorporate human rights provisions, or the empowerment of the DSB to adjudicate conflicts between human rights and trade obligations, falling under the covered agreements, to reflect States assumed obligations under the international human rights system. While this will be commendable and may lead to a total integration of trade and human rights, the willingness of the WTO Members to do this is doubtful bearing in mind that the WTO Members would like to preserve the WTO as it is- an institution focused on world trade.

¹⁸ *The Oxford English Dictionary* online: sub verb “synergy”
<http://oxforddictionaries.com/definition/synergy>.

¹⁹ *Declaration on the Right to Development*, GA Res 41/128, UNGAOR, 1986, UN Doc A/RES/41/128 (1986)

Thus the term synergy provides a way out by not advocating for an amendment but a working together – a combination of the powers and models similar to both the WTO and the human rights system to realize the goals of the UN Millennium Declaration and the objective of raising standards of living using the human right to development as a platform. The term synergy also fulfils the requirement of good faith interpretation and performance of treaty obligations summed up in article 26 the Vienna Convention on the Law of Treaties.

1.4 *Theoretical Framework and Research Methodology*

Three basic theories underscore this thesis. However, the singular theory which forms the crux and is the outstanding thread that runs through all the chapters is the theory of humanity. This theory of humanity as a normative theory is the underpinning structure of the right to development, the MDGs and finds reflection in the WTO system as is argued in this thesis. The theory of justice and more specifically *justice as fairness* as propounded by John Rawls also finds expression in this thesis and forms the bedrock upon which the argument on the possibility of integration between trade and human rights in the WTO is founded. This theory of justice as fairness, particularly the differential principle, is reflected in the GATT and WTO Agreement and finds vivid expression in the human right to development. Building on these similarities in theories, this thesis argues that a synergy between trade and human rights in the WTO is realizable. Another similar theory between the WTO system and the human rights system discussed briefly in this thesis is the theory of non-discrimination and equality

which also points to a convergence of norms between the human rights and the WTO systems.

The methodology adopted in this thesis is a textual analysis of primary sources; particularly the WTO Treaty and the relevant human rights treaties and working documents. The thesis also employs a doctrinal approach to legal scholarship through a review of relevant cases of the WTO Dispute Settlement Body. It adopts a comparative approach in its examination of the ECOWAS and SADC experience at integrating trade and human rights. Finally the thesis refers to secondary sources to justify or contrast arguments proposed with a view to producing an in depth analysis of the pertinent issues.

1.5 *Framework*

In terms of framework, this thesis is divided into five chapters. Chapter 1 highlights the necessary background and context for the thesis. It covers the objective, methodology and structure of the thesis.

Chapter 2 serves as the theoretical and normative foundation of the thesis. The discourse examines the normative theory of humanity and the Rawlsian theory of justice,²⁰ as similar theories that underpin the WTO and the human rights systems. A cursory discourse of the principles of non-discrimination and equality is also examined to

²⁰ John Rawls' idea of justice as fairness is the Difference Principle. The principle argues that equality and fairness should be the basis of the distribution of all social primary goods except an unequal distribution is beneficial to the least advantaged. See generally John Rawls, *A Theory of Justice* Rev ed (Cambridge, Massachusetts: The Belknap press of Harvard University Press, 1971) 65; see also Jerome J. Shestack "The Jurisprudence of Human Rights" in Theodor Meron ed, *Human Rights in International law* (New York: Oxford University Press, 1984) 70 at 94. Thus while the core of justice supposes equal treatment for

reinforce the argument of a convergence between trade and human rights. On the strength of these shared normative theories, the chapter argues that the concept of Mutual Supportiveness building on Riccardo Pavoni's argument on the emergence of mutual supportiveness as a principle of international law ²¹ bridges the gap of mutual exclusivity of trade and human rights in the WTO framework.

Chapter 3 looks specifically at how development as a right provides a platform for the integration of trade and human rights in the WTO. It argues that a right to development approach provides a context for rethinking the trade and human rights linkage discourse in the WTO. It notes that the development dimensions of the WTO must be contextualized from a human rights perspective. This contextualization of development as a right in the WTO system would entail adopting stronger differential treatment as an aspect of the right to development. It will also involve the establishment of models for effective participation and guaranteed benefits for developing countries.

In chapter 4 "Moving Forward from Doha using a Right to Development Approach" the current Doha Round negotiations are examined to ascertain the practical application of development viewed as a human right and not merely as an economic process. In particular, this chapter suggest that there is a strong need for a strengthened emphasis on differential treatment as the core of the negotiation process; to ensure that the Doha Round lives up to its acclaimed expectations and that the concerns of developing countries are adequately reflected not just in rhetoric but in visible tangible results.

²¹ Riccardo Pavoni, "Mutual Supportiveness as a principle of Interpretation and Law Making: A Watershed for the WTO –and- Competing Regimes Debate (2010) 21:3 EJIL 649

Moving on from the experiences of the Doha Round negotiations, chapter 5 examines the integration of trade and human rights in Africa focusing on two regional trade blocs: the ECOWAS and SADC. It employs a comparative approach to analyze how the introduction of human rights principles and language is changing the dynamics of regional economic integration from a solely economic process to a process that aims at the development of individuals and peoples. This introduction of human rights generally and the right to development specifically is gradually creating an integration of trade and human rights in the RECs leading to a system where trade is responsive to human rights demands.

In conclusion, this thesis argues that while the current developmental activities in the WTO and the existing special and differential treatment provisions are commendable; the realization of development and the eradication of poverty and want envisaged under the UN Millennium declaration requires an approach to development in the framework of the WTO that moves away from economic imperatives to adopting a right based approach to development. The principles and standards of this right based approach to development have already been enunciated in the UN declaration on the right to development. This approach to development is more than developmental assistance or longer time frames to implement existing WTO covered agreement obligations.

It argues that effective and inclusive participation of all peoples in negotiation and decision making and a system that guarantees benefits for all are essentials of a right based approach to development. Adopting these methods of development in the WTO will ensure that the esteemed ideals set forth in the Doha 2001 mandate are realized.

CHAPTER 2 TRADE AND HUMAN RIGHTS: A STORY OF CONVERGENCE

2.1 Seeking a Convergence

One of the foremost arguments put forth to justify the parallelism between international trade and human rights is the supposed difference in theoretical foundations underpinning the two systems.²²

This supposition is replete in the literature on the foundation and structural basis of international trade, particularly the multilateral trading system.²³ This is the belief that the maximization of economic gains through the theory of comparative advantage is the sole objective of the international trading system. Thus, a justification is usually put forth that the divergence in the provisional and procedural system of international trade and human rights is rational on the basis that the former is governed solely by an economic theory while the theory of “humanity” underpins the human rights system.

There however appears to be a reflection of the natural rights theory of a *common humanity*, which is the bedrock of the human rights system based on the teachings of the natural rights school, in the WTO system. This theory of a common humanity questions

²² Christopher Mc Crudden & Anne Davies, “A Perspective on Trade and Labour Rights” (2000) 3 JIEL 43 at 49

²³ Tomer Broude, *supra* note 9 at 281.

the idea that the maximization of economic gains is the principal objective of the multilateral trading system.

The ensuing discourse examines shared theories and principles in the WTO and human rights system.

2.2 *Humanity: A Shared Normative Theory*

The natural law theory of human rights hinges on the bedrock of a common humanity. The basis for the recognition and promotion of human rights is grounded in this common humanity.²⁴ This common humanity is the heritage of all humans. Human beings according to the natural law theorists are rational beings vested with the “capacity for deliberation, judgment and choice.”²⁵ These “awesome powers” of reason and freedom of choice are what makes humans the bearers of a profound dignity that is protected by basic rights.²⁶

It is this rationality, defined more explicitly as capacity for deliberation, judgment and choice that provides a basis for the recognition and respect of human dignity; the foundation of the human rights institution and instruments.²⁷ It is also this inherent

²⁴ See generally Myres S. McDougal, Harold D. Lasswell & Lung-Chu Chen, *Human Rights and the World Public Order* (New Haven & London: Yale University Press, 1980) at 68-69; see also The Foundations of International Human Rights Law, online: available at <http://fds.oup.com/www.oup.com/pdf/13/9780199565207.pdf> page 8

²⁵ Robert P. George, “Natural Law” online: 31:1 *Harvard J Law & Pub Pol’y* 171 at 181 <http://www.law.harvard.edu/students/orgs/jlpp/Vol31_No1_Georgeonline.pdf>

²⁶ *Ibid* 182

²⁷ The UN Charter is founded on this premise and provides that the subsequent obligations borne by states in the Charter are based upon recognition and reaffirmation of fundamental human rights and the dignity and worth of the human person. See generally paragraph 2 preamble United Nations Charter; similarly also the Universal Declaration of Human Rights recognizes that the rights, freedoms and obligations entrenched in the Declaration is founded upon a recognition of the inherent dignity and the equal and inalienable right of Members of the human race. See generally preamble UDHR 1948.

rationality and judgment that propels humans to make choices or decisions towards preserving or protecting human dignity.

According to the natural law theory, decisions or judgments that degrade human dignity are instinctively prohibited.²⁸ The idea of a common humanity enable people make choices and decisions that protect or lead to the full and better enjoyment of human rights. This is the foundation of the human rights system.²⁹

2.3 Humanity in the GATT/WTO and the Human Rights System

The Preamble of the General Agreement on Tariffs and Trade (GATT) 1947 connotes this idea of a common humanity by seeking to guarantee to all the enjoyment of benefits ensuing from trade and economic relations. It suggests that trade ought to be conducted in a manner that promotes and contributes to the better enjoyment of human dignity.

²⁸ It is important to state here that while the natural law admits the rationality of humans and a motivation to seek the good, natural law recognizes the role of choice thus though there is inherent in every human an inherent rationality that seeks the good or ontological ends, not all humans follow this because of the exercise of the freedom of choice.

²⁹ Jack Donnelly, ``The Social Construction of International Human Rights`` in Tim Dunne & Nicholas J. Wheeler eds, *Human Rights in Global Politics* (New York: Cambridge University Press, 1999) 71 at 95; It is important to distinguish between the natural law theory of human rights upon which the arguments in this thesis is founded and legal positivism. Legal positivism is opposed to the idea of human rights as something inherent and endowed by the God to humanity rather the positivist school is of the opinion that the source of human rights is the sovereign i.e. the state and that the recognition by the state of human rights is what gives human rights its authority. I however disagree with this view based on the fact that certain human rights e.g. the freedom of expression is restricted by the some governments (who in this instance are the sovereign in the positivist school). Does the non-recognition of this right by the sovereign make it any less a human right? C.f. Arjun Sengupta, ``On the Theory and Practice of the Right to Development`` (2002) 24:2 H R Quarterly 837 at 842; see also Myres S. McDougal, Harold D. Lasswell & Lung-Chu Chen *supra* note 4 at 75

The preamble of the GATT begins with an interesting opening. It provides that the State parties recognize that “their relations in the field of trade and economic endeavour should be conducted with a view to *raising standards of living, ensuring full employment....*”³⁰ The phrase “raising standards of living” suggests an inference that the drafters of the GATT tacitly acknowledged the underlying foundation of a common humanity as the standpoint for the conduct of trading relations. This recognition of a common humanity then spurred the desire to enter into contractual relations that will promote and enhance the enjoyment of benefits that contribute to raising human living standards. This inference is supported by the succeeding paragraphs. To illustrate further, the subsequent paragraph of the GATT preamble recognizes that *raising living standards and ensuring full employment* are objectives of the GATT parties in other words, they are goals which the GATT parties ought to strive to realize.

It is particularly noteworthy to point out that the phrase *raising standards of living* as used in the GATT 1947 and its connotation to humanity is akin to a similar phrase used in the United Nations Charter to emphasize a common humanity as the rational for the investiture of human rights. The UN Charter illustrates this idea of a common humanity similar to that in the GATT albeit slightly different but with the same foundational basis. The preamble of the UN Charter provides that one of the purposes of the UN is to promote social progress and *better standards of life* in larger freedoms.³¹

³⁰ GATT 1947 *supra* note 12 preamble

³¹ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7. Preamble para 4 [hereinafter UN Charter]

This idea is again reflected in Article 55 (a) of the Charter which provides for international economic and social cooperation.³²

This idea of promoting better standards of living founded on the recognition of humanity and human dignity is similar to the ideal of “raising standards of living” in the GATT 1947. To emphasize further, the objective of *ensuring full employment* in the GATT 1947 has a correlation to article 23 of the Universal Declaration of Human Rights (UDHR)³³ which provides for the right to work and the protection against unemployment. These similarities in objectives and provisions in the WTO and UN human rights system suggest a similar foundation- a common humanity.³⁴

2.3.1 Normative Undertone

It is imperative in discussing this idea of humanity as a shared foundation of both the WTO system and the UN human rights system to note the significance of the word *should* in the preamble of the GATT/ WTO and the inferred normative obligation that the word suggests.

Classical legal theorists have drawn a distinction between the use of the word *should* as describing the normal occurrence of events and the use of the word *should* to convey an occurrence which is the proper end or goal of the thing concerned.³⁵ According to

³² *Ibid* Article 55 (a) UN Charter.

³³ *Universal Declaration of Human Rights*, GA Res 217(III) UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) [hereinafter UDHR] Article 23

³⁴ See also UNESCOR, 25t Sess, E/C.12/2001/WP.2 (2001) [provisional] online: <<http://www.unhchr.ch/tbs/doc.nsf/0/907f88e4d28e4cb9c1256a63003069fd?Opendocument>>

³⁵ Christobal Orrego, “H.L.A Hart’s Understanding of Classical Natural Law Theory” (2004) 24:2 Oxford J L Studies 287 at 292.

classical legal theory the phrase *the sun should rise tomorrow*³⁶ does not suggest a normative underlying essence of good but the normal occurrence of events based on physical law.³⁷ There is however the use of the word *should* which implies “an appealing to a being’s self-determination and choice”³⁸ this is the connotation that the use of the word *should* in the GATT preamble suggests.

It was within the choice of the GATT parties to decide the objectives or end goal of their trade and economic relations. In furtherance of this “choice” they decided that trade and economic relations should be conducted with a view to raising living standards and ensuring full employment, it was a decision of their *choice*. This expression of choice also indicates an understanding that the normative role that trade and economic relations ought to fulfil in human relations is to *raise standards of living and ensure full employment*, which by extension implies that the benefits that should accrue from trade ought to contribute to the total and complete well-being of humanity. This suggests an obligation, this is the proper end, and this is the good that the GATT/WTO system ought to achieve.

It may be argued that the ideal of *raising standards of living* was inserted in the GATT 1947 because the GATT was established in the aftermath of World War II. It is however useful to point out that upon the revision and legal concretization of the GATT

³⁶ *Ibid*

³⁷ *Ibid.*

³⁸ *Ibid* 294.

into the WTO system, this ideal was reaffirmed and reiterated in the preamble of the Marrakesh Agreement establishing the WTO.³⁹

2.4 Preambular Reference: Normative Obligation or Hortatory Aspiration

What then is the legal significance and implication of the inclusion of this normative obligation in the preamble of the GATT and WTO Agreement bearing in mind that the status of preambles in constitutions and treaties is a contested issue?⁴⁰ Firstly, it is necessary to highlight a few things about preambles. Generally it is agreed that preamble provisions do not form binding obligations and can only be referred to when an ambiguity exists in the body of legislations.⁴¹ Courts have over the years referred to preambles to clarify ambiguities in substantive provisions, to determine the objective or core essence of a treaty and most importantly, to discover the intent of the legislators or drafters and the mischief the statute is to cure.

Very recently, the German *Bundestag* held on the strength of the preamble of the German Basic Law and articles 23 and 25 of the Basic Law that there was no issue of a violation of sovereign statehood by the Treaty of Lisbon on the grounds that the Preamble of the Basic Law calls for an European integration and an international peaceful order.⁴²

³⁹ See generally *Marrakesh Agreement Establishing the WTO*, 15 April 1994, 1867 UNTS 187, 33 I.L.M. 1153, (entered into force 1 January 1995) [hereinafter WTO Agreement] Preamble.

⁴⁰ Mihir Y. Kanade, "A Pragmatic Approach to International Trade- Human Rights Linkages (Paper delivered at the United Nations University Workshop on WTO Agreements, United Nations and Human Security, November 2009), [forthcoming]

⁴¹ See generally *Powell v Kempton Park Racecourse Co Ltd* (1897), 2 QB 242, 299 Chitty L.J.

⁴² See *Entscheidungen* Zitierung: BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421) online: <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html para 143,225, 227 & 232.>

According to the English jurist Lord Edward Coke, preambles are “a good mean to find out the meaning of the statute, and as it were a key to open the understanding thereof.”⁴³

Essentially, preambles serve four basic functions in constitutions and treaties: they explain the reason, purpose, object and scope of the legislation; they serve as interpretative guides by providing contextual and constructive meaning to substantive provisions;⁴⁴ they reflect the history and supreme goals of a treaty or statute;⁴⁵ and preambles are used to reflect the moral spirit of a people. This last function is by far the most common use of preambles and is amply reflected in various national constitutions.

Since preambles do not form binding obligations and can only be referred to in order to clarify ambiguities in the substantive provisions, can it be rightly argued that the phrase *with a view to raising standards of living and ensuring full employment* in the preamble of the GATT imposes a normative obligation upon the WTO Members? Hans Kelsen provides a good argument to suggest that it is possible for preambles to impose normative obligations. Kelsen argues that though preambles do not usually stipulate any specific norm for human behaviour, they sometimes convey a normative character which is discerned by a scrutiny of the statement and content of the preamble.⁴⁶ He provides an instructive framework for understanding and determining when a preambular provision provides a normative obligation or serves an ideological purpose. He proposes that a

⁴³ Lord Edward Coke, *Institutes of the Laws of England* (1628, Co Litt) 79 cited in Anne Winckel, “The Contextual Role of a Preamble in Statutory Interpretation” online: (1999) Melbourne U L Rev 7 <<http://www.austlii.edu.au/au/journals/MULR/1999/7.html#fn13>

⁴⁴ Anne Winckel, “The Contextual Role of a Preamble in Statutory Interpretation” online: (1999) Melbourne U L Rev 7 <<http://www.austlii.edu.au/au/journals/MULR/1999/7.html#fn13>

⁴⁵ Liav Orgad, “The Preamble in Constitutional Interpretation” (2010) 8 I. CON 714 at 721

⁴⁶ Hans Kelsen, *General Theory of Law and State* (Cambridge Massachusetts: Harvard University Press, 2009) 260-61.

preamble will have normative value or character when “its meaning is to establish ...an obligation.”⁴⁷ According to him, a statement whose meaning establishes an obligation qualifies as a norm.

The pertinent question is this- does the phrase *should be conducted with a view to raising standards of living* establish an obligation? To determine whether the above phrase in the preamble of the GATT 1947 and the WTO Agreement establishes an obligation would require an examination of the decisions of the WTO DSB as to the meaning and implication of the phrase or a recourse to other provisions of the WTO covered agreements for a reflection of the idea conveyed in the preamble. Unfortunately, the DSB has not been confronted with the opportunity to interpret whether or not the phrase connotes a normative obligation but the decision of the Panel and the Appellate Body in *US – Shrimp* suggests that the adjudicatory body has had to refer to the preamble of the WTO Agreement to determine the guiding objective for the conduct of trading relations under the WTO.⁴⁸ In the *US –Shrimp* the panel noted that the **preamble** of the WTO Agreement acknowledges that the rules of trade should be in accordance with the objective of sustainable development.⁴⁹

The Appellate Body in affirming that sustainable development was an integral part of trading relations under the WTO noted that “the *preamble* of the *WTO Agreement* - which

⁴⁷ *Ibid* at 142.

⁴⁸ *United States- Import Prohibition on Certain Shrimps and Shrimp Products (Complaint by the United States)* (1998), WT/DS58/AB/R (Appellate Body Report) online:
<http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS58%FCAB%FCR%2A+and+not+RW%2A%29&language=1>

⁴⁹ *Ibid* para 12.

informs not only the GATT 1994, but also ... other covered agreements explicitly, acknowledges the objective of sustainable development [emphasis added].”⁵⁰

It is important to highlight that the Appellate Body acknowledged that the preamble of the WTO Agreement informs the objectives and obligations undertaken not only in the GATT 1994 but also the other covered agreements. In particular, the Appellate Body in emphasizing the integral role of the WTO preamble to the determination and implementation of the goals and objectives of the multilateral trading system held that the preamble of the WTO Agreement was appropriately fashioned by negotiators at the conclusion of the Uruguay round “to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round.”⁵¹ It went further to highlight that though the preamble of the GATT 1947 was used as a template for the preamble of the WTO Agreement, there was a major reformulation in the preamble of the WTO Agreement in the sense that the phrase “full use of the resources of the world”⁵² in the preamble of the GATT 1947 was replaced with the phrase “optimal use of the world's resources in accordance with the objective of sustainable development.”⁵³ The Appellate Body was of the opinion that the change in the language of the preamble of the WTO Agreement demonstrates recognition by WTO negotiators that the phrase full use of the world’s resources was no longer relevant in the world of the 1990s. On the strength of this, the Appellate Body held that the “preambular language reflects the intentions of negotiators

⁵⁰ *Ibid* para 129-130.

⁵¹ *Ibid* para 152

⁵² *Ibid*

⁵³ *Ibid*

of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994.”⁵⁴ Though the Appellate Body was in the specific instance dealing with the meaning and import of the phrase sustainable development in the WTO Agreement, its analysis on the import of the preamble of the WTO Agreement to the interpretation of rights and obligations arising from the WTO Agreement and the its annexures cannot be disregarded. It is thus safe to argue on the strength of this decision by the Appellate Body that the preamble of the WTO Agreement is the guiding light for the conduct of trading relations. If the preamble, which informs the GATT and other WTO covered agreements, provides that trade and economic relations should be conducted with a view to raising standards of living and ensuring full employment, then, there is a normative obligation imposed upon the WTO Members to raise living standards via trade.

In support of the above inference, Article XXXVI of the GATT 1947 which is titled “principles and objectives” reiterates this conclusion by providing that the objectives of the GATT Agreement and by extension the WTO “include raising of standards of living and the progressive development of the economies of all contracting parties.”⁵⁵

It is also noteworthy to recall that the multilateral trading system and the human rights system were part of the institutional frameworks⁵⁶ upon which the post war

⁵⁴ *Ibid* para 153

⁵⁵ GATT 1947 *supra* note 12 Article XXXVI (1) (a)

⁵⁶ It is reported that two core issues dominated post war reconstruction rethinking efforts- to avoid another catastrophic war and another global economic depression. See e.g. The UN & Bretton Woods Institutes: New Challenges for the Twenty- first Century, online: <http://ns<rt.org/books/The%20UN%20and%20the%20Bretton%20Woods%20Institutions.pdf>>; the

reconstruction efforts were founded, the founding spirit of the post war reconstruction initiative was this understanding of a common humanity.⁵⁷

On the strength of this idea of a common humanity as a shared foundational basis for both international trade and human rights, it is necessary to move on to other theories that underpin the two systems.

2.5 Reflecting the Rawlsian Theory of Justice: the WTO System and Human Rights

International trade from its inception evolved under many theories, from the theory of absolute advantage propounded by Adam Smith to David Ricardo's theory of comparative advantage. The singular theme underlying these theories can be summed up as follows: international trade is beneficial because it enables countries to maximize the efficient use of resources which in turn results in increased wealth generation.⁵⁸ It was generally never thought that a theory of justice has any reflection in international trade; the realm was governed by market forces and profit maximization.

United Nations Monetary and Financial Conference at Bretton Woods. Summary of Agreements (July 22, 1944), also acknowledged that trade affects the standard of life of every people and that protectionist and discriminatory treatments which characterized post world war II trading relations resulted in the instability, reduced volume of international trade, and damaged national economies which ultimately led to economic warfare and endangered world peace, online: Pamphlet No. 4, Pillars of Peace <<http://www.ibiblio.org/pha/policy/1944/440722a.html>> ;

⁵⁷ UN Charter *supra* note 31 preamble

⁵⁸ See generally Adam Smith *Wealth of Nations* (1776); David Ricardo *Principles of Political Economy* (1817)

In recent times however, especially with the emergence of the WTO system, this theory of comparative advantage as the underlying framework for international trade is evolving a more nuanced theory which incorporates the general principles of justice and the utilitarian theory of justice.⁵⁹ While this thesis does not propose to provide a detailed philosophical analysis of utilitarianism or the general principles of justice reflected in international trade and human rights; it attempts to provide a simplistic and general overview of the philosophical concepts of justice that are similar to both the WTO and the human rights systems.

As a starting point, the general principles of justice such as the rule of law, access to dispute settlement mechanisms, fair procedures, non-discrimination and a restraint on unilateral State action are evident both in the WTO system and the human rights system.⁶⁰ Apart from these general principles of justice, the multilateral trading system also evinces a utilitarian theory of justice.

2.5.1 *Utilitarianism vs. Deontology*

Utilitarianism as a consequentialist theory focuses on the end result of an act. Simply put, utilitarianism opines that an act is good if it causes “the greatest happiness for the greatest number.”⁶¹ In relational to international trade, it has been argued that the

⁵⁹ See generally Frank Garcia, “Why Trade Law Needs A Theory of Justice” (2006) 100 ASIL 376 at 378 online: <<http://www.jstor.org/stable/25660129>>

⁶⁰ See generally Thomas Cottier “Trade and Human Rights: A Relationship to Discover” (2002) JIEL 111 at 115 ; Ernst-Ulrich Petersmann , “De-Fragmentation of International Economic Law through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement” 6:1 Loyola University Chicago Int’l L Rev 209 at 230

⁶¹ See generally Consequentialism, online: Stanford Encyclopaedia of Philosophy <<http://plato.stanford.edu/entries/consequentialism/>>

classical economic theories of trade were founded on theories of utilitarianism.⁶² Thus for instance, trade was promoted and advanced on the basis that it will result in increased wealth generation for the greater number of people (nations). Trade liberalization efforts were encouraged because of the consequence- maximization of happiness and pleasure.

Utilitarianism is directly opposed to deontology which suggests that an act should be promoted because of its inherent morality or goodness. A classic example of utilitarian justice in international trade was the tariff reduction and elimination of quantitative restrictions negotiations that dominated the early years of the GATT. The rationale was- trade liberalization had an important supporting role in achieving the principal economic goals of monetary stability and full employment.⁶³

Going back to the preamble of the GATT 1947, paragraph 3 is couched in such a way as to suggest an inference of utilitarian consequential justice. It provides that the parties in order to achieve the *objectives* enumerated in the preceding paragraph have agreed to enter into:

...mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.⁶⁴

⁶² Razen Sally, "Natural Law and International Trade: What Lessons for Trade Policy Today" online: <<http://www.ecipe.org/people/razeen-sally/other-publications/Natural%20law%20and%20international%20trade%20Razeen%20Sally.pdf>> at 1.1; she opines that Adam Smith's theory of absolute advantage has utilitarian underpinnings as his book wealth of nations is replete with empirical substantiations of the benefit of trade in wealth generation.

⁶³ Irwin Douglas, "The GATT in Historical Perspective" (1995) 85:2 Am E Rev 323 at 325 online: <<http://www.jstor.org/stable/2117941>>.

⁶⁴ GATT 1947 *supra* note 12 para 3 Preamble

The reduction of tariff and the elimination of internal restrictions to trade was not an end but a means to an end- the end being the objectives. Tariff reduction and the removal of domestic internal restrictions were adopted as disciplines because of the *consequence* which they would achieve – rising standards of living, full employment and a large and steadily growing volume of real income and effective demand.⁶⁵ This is a reflection of the utilitarian idea of justice.

The Most Favoured Nation Treatment principle,⁶⁶ the “grundnorm” of the multilateral trading system, was embraced not because of its inherent goodness but because it was vital to the realization of the objectives of the contracting parties. Parties were thus obliged to accord the same treatment and privileges to each contracting party as this would further the goal of the GATT; a focus on consequence or end result. In the same vein, the National Treatment clause in article III of GATT 1947 which prohibited parties from discriminating between domestic and foreign goods in internal markets, was also consequential justice the *raison d’etre* of which was that it would contribute to the realization of the objectives of the GATT and the greater good for the greatest number.⁶⁷

It has also being suggested that “the basic WTO principle of progressive liberalization and legal protection of liberal trade can be justified by all liberal theories of justice [especially] ...utilitarian theory.”⁶⁸

⁶⁵ *Ibid* para 2

⁶⁶ *Ibid.* Article 1

⁶⁷ *C.f* Thomas Cottier, *supra* note 56 at 115-118

⁶⁸ Ernst-Ulrich Petersmann, *supra* note 56 at 229

2.5.2 *Philosophies in Human Rights*

In contrast however the human rights system is basically deontological. Under the human rights system, the goodness or rightness of an act is not dependent on its consequences rather the goodness or rightness is inherent to the act. Thus even if an act would result in the greatest happiness for the greater number of people if the act was inherently bad such an act should be prohibited.

A good illustration is the abolition of the slave trade. The abolition of the slave trade in all the British Empire and Europe was motivated by many factors among which are the principles of humanity and the need to recognize the human dignity of peoples subjected to slavery. Bringing this to our discourse on utilitarianism and deontology the question that would have been asked is – is the slave trade bad? For the utilitarian the answer would depend on the consequence that is, does it result in happiness for the greater number of people? If not then it is bad, if it does then it is good.

A utilitarian theory could not have been the basis for the abolition of the slave trade; this is because at the time when slave trade was abolished slavery was a source of income generation for peoples and nations. Apart from this there was the utility of slaves as domestic helps and plantation workers. So for a utilitarian, based on the consequence of the abolition of slavery (i.e. loss of income generation and domestic and plantation workers) the slave trade was just and should not be abolished.

For deontology, on the other hand, the rightness or wrongness of the slave trade should not be based on its consequences (income generation, cheap labour) but on the inherent rightness or wrongness of the practice itself. Thus for the deontologist the

question – should slave trade be abolished would be answered in the affirmative, based on the inherent wrong of slavery. For the deontologist slavery is bad and should be prohibited because it violates the inherent humanity of the individual and is a degradation of human dignity.

The human rights system is founded essentially on deontology as its ethical philosophy, amongst other schools.⁶⁹ It holds that actions and choices should be judged on the basis of their adherence to particular rules or norms, rather than their outcomes.⁷⁰ Thus for instance the right to life⁷¹ and its correlating duty upon the state not to arbitrarily deprive anyone of his/her life, is justified and good because it is founded on certain norms and inherent value that are the essence of a people; devoid of any consequential gain.⁷² This deontological philosophical rationale for human rights is evident in the UN human rights systems.⁷³

It is important to note, however, that utilitarian justice in the multilateral trading system is not without its benefits, a classic example of beneficial utilitarian justice is the Doha 2001 amendment of the TRIPS Agreement to take into consideration public health needs

⁶⁹ Although it is disputed amongst modern theorist, theology and a belief in God and the divine have influenced the belief in a common humanity which is foundation of human rights particularly for natural law theorist. Other schools that have influenced the development of human rights are the Positivist and Realist schools.

⁷⁰ Dan Seymour & Jonathan Pincus, “Human Rights and Economics: The Conceptual Basis for their Complementarity” (2008) 26:4 Dev Pol Rev 387 at 389 online: <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=60691240-3b94-4856-8eb3-c52fd6e8c45f%40sessionmgr13&vid=2&hid=10>

⁷¹ See generally *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, article 6, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter ICCPR]

⁷² See especially Dan Seymour & Jonathan Pincus *supra* note 70 at 396-97.

⁷³ See generally UDHR *supra* note 33 paragraphs 1 preamble; ICCPR *supra* note 71 paragraph 1 & 2 preamble; *International Covenant on Economic, Social and Economic Rights* 19 December 1966, 999 UNTS 3, (entered into force 3 January 1976) [hereinafter ICESCR] paragraphs 1& 2, preamble, .

and access to medicine of the greater number of people in developing countries whose rights to health was being threatened by the patent rights of pharmaceutical companies.⁷⁴

Also while the human rights system is essentially deontological, state parties in some instance are permitted for utilitarian benefits to derogate from deontological obligations. Thus the deontological right to life and the right to enjoyment of civil and political liberties in article 3 of the UDHR and ICCPR respectively may be derogated in times of public emergency which threatens the life of a nation that is, for utilitarian purposes. Likewise the exceptions of Article XX of the GATT 1947 which allows WTO Members, for the furtherance of certain measures, e.g. the protection of human , animal or plant health, to derogate from the general principle of non-discrimination in international trade is an example of deontology in practice in the international trading system. Though there is a fundamental difference between the philosophies that underpin the two systems, it is a fluid difference that allows for complementarity.⁷⁵ The subsequent sections will introduce the Rawlsian theory of justice and the reflection of this theory in the WTO and human rights system.

2.6 Rawlsian Theory of Justice in WTO and the Human Rights System

According to Rawls' idea of justice, justice is the rational choice that men would make as defining the fundamental terms of their association assuming that each was in a

⁷⁴ The Doha Amendment of the TRIPS Agreement in 2001 which modified the compulsory licensing requirement was based on the need to protect the right to health and access to medicines of people particularly in developing countries. It was a demonstration of the need to promote the happiness or good of people in developing countries which was greater than the good of the pharmaceutical companies.

⁷⁵ See e.g. Dan Seymour & Jonathan Pincus *supra* note 66 at 400-403

position of equal liberty.⁷⁶ This idea of justice is what Rawls defines as justice as fairness.

Rawls observes that the principles of justice are characterized in such a way as to govern mainly the structures of society that is its institutions.⁷⁷ He argues that the cardinal principle of justice that should guide institutional interaction is broken down into two basic principles:

1. Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others;
2. Social and economic inequalities are to be arranged so that they are both
 - a) reasonably expected to be to everyone's advantage and
 - b) attached to position and offices open to all.⁷⁸

Rawls' first principle of justice as fairness which he more specifically argues entails "that certain sorts of rules, [especially] those defining basic liberties, apply to everyone equally"⁷⁹ applies to the framework of the human rights institutions covered by the International Bill of Rights. This is because all the rights guaranteed in the UDHR, ICCPR and ICESCR apply to all without distinction or preferential treatment.⁸⁰ Rawls' first principle expresses a narrow scope of justice - e.g. the right to life, which Rawls defines as freedom of person, freedom of association, thought and religion- and may become problematic when applied to trade and economic relations.

⁷⁶ John Rawls, *supra* note 20 at 10.

⁷⁷ *Ibid* at 47

⁷⁸ *Ibid* at 52

⁷⁹ *Ibid* at 56

⁸⁰ See e.g. UDHR *supra* note 33 Article 2; ICESCR *supra* note 48 Article 2(2); ICCPR *supra* note Article 2(1).

It is almost impossible to guarantee an equal distribution of income and economic benefits under a system like the WTO applying Rawls' first principle bearing in mind that such benefits are determined by external factors such as economic/political power, ownership of technical know-how and geographical location. Indeed Rawls himself recognizes this limitation of the first principle and notes that the distribution of income, wealth and economic advantages is not protected by the priority of the first principle.⁸¹

Rawls' second principle of justice on the other hand, entails an arrangement of societal structure such that economic inequalities are organized in a way that they are to everyone's advantage and attached to positions or offices available to all. While there are two possible methods for realizing this idea of justice, the principle of efficiency and the principle of fairness, Rawls observes that these principles do not satisfy the idea of justice as they are fraught with limitations of natural and social contingencies and the endowment of abilities and talents.⁸²

Rawls then suggests that the "Difference Principle" provides an idea of justice as fairness that satisfies the demands of a just and an equal distribution for all.

In simple form, Rawls' "Difference Principle" provides that the "social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate."⁸³ In other words any better advantage or

⁸¹ John Rawls *supra* note 20 at 54-55.

⁸² *Ibid* at 58-64 where Rawls' notes that the fundamental objection to the principle of efficiency is that it allows distribution of economic benefits to be improperly influenced by arbitrary natural factors, while he notes that principle of fairness is like a natural lottery which does not guarantee an equal distribution of societal and economic benefits to all.

⁸³ *Ibid* at 65.

expectation enjoyed by those in favourable circumstance is just if only it improves the expectations of the least advantaged Members of society.

2.7 Difference Principle in the WTO System

The Difference Principle entails a social order where a more attractive benefit or advantage accorded to the more fortunate must be advantageous to the least fortunate in the sense of improving welfare or opportunities. How does the WTO system reflect this? It is imperative to emphasize at this initial stage, that in this thesis, the analysis of the reflection of justice as fairness in the WTO system focuses merely on a provisional reflection i.e. a reflection of the idea of justice as fairness in the WTO rules and covered agreement. An analysis of whether such a reflection fits into the general conception of justice and societal equality is beyond the scope of this research. This research analysis takes as its standpoint a general idea that Rawls' conception of justice obliges the social order to set equal treatment for all and only permits inequality when such is beneficial to the disadvantaged Members.

It is essential that an examination of this analysis commence from the bedrock provision of the WTO system – the principle of Most Favoured Nation (MFN) Treatment. The MFN clause obliges the WTO Members to accord immediately and unconditionally to each Member any advantage, privilege, favour or immunity granted to any goods or services originating from a particular country.⁸⁴

This requirement does not however satisfy the Difference Principle in the sense that granting equal and non- discriminatory treatment to goods or services of each Member of

⁸⁴ GATT 1947 *supra* note 12 Article 1

the WTO may not be to the advantage of the least advantaged Members- in this instance developing countries and least developed countries (LDCs). This is because while developed countries are better placed in terms of possession of factors of production, infrastructure and technology, most developing countries and LDCs are deficient in these areas.

Trade liberalization and unrestrained market access for developed country exports may inhibit the growth of local industry and market access for developing countries. Indeed the MFN principle satisfies the principle of efficiency in the sense described by Rawls as “positions open to all those [who] are able and willing to strive for them.”⁸⁵ It does not guarantee that the added advantage that the MFN provides for developed Member countries concurrently results in advantageous trade benefits for developing countries and LDCs. It merely provides an equal platform and predictability in the conduct of trading relations but it does not satisfy the requirement of being just in Rawls’ conception of justice as fairness.

Although the MFN principle does not reflect this idea of the Difference Principle, there are other provisions of the GATT and the WTO covered agreements that suggest a reflection of the principle; one of such provision is Article XVIII of the GATT 1947.

Article XVIII of the GATT provides for governmental assistance for the attainment of economic development; an objective of the WTO system. While the provision essentially recognizes protective measures and tariff flexibilities for Member countries with economies in early stages of development or low standards of living, the general theme of

⁸⁵ John Rawls *supra* note 20 at 57

the provision is “to enable contracting parties to meet the requirements of their economic development.”⁸⁶

Thus there is in the WTO system a provision that ensures equal advantage for each Member to realize their economic development objectives. But, bearing in mind that this does not necessarily result in justice as fairness there is a further provision that permits less advantaged Members in circumstances where even protective measures and tariff flexibilities are not sufficient for the realization of their economic development objective to deviate temporarily from the other provisions of the GATT.⁸⁷

Article XVIII in this sense, guarantees the advantage of protective measures and tariff flexibilities to Members to enable the realization of their economic development objectives but also provides for special treatment or waivers for the least advantaged such that they are able to benefit from this concession given to the more advantaged thus fulfilling the requirement of the Difference Principle.

Other provisions of the GATT that reflect the idea of Rawls’ Different Principle are Article XXXVI which enjoins the WTO Members in line with the objective of raising standards of living to ensure a framework that contributes to “rapid and sustained expansion of the export earnings of the less-developed contracting parties.”⁸⁸ Paragraph 4 of the Article XXXVI obliges Members to guarantee to the least advantaged Members market access for exports of primary products to ensure that they realize expanding

⁸⁶ GATT 1947 *supra* note 12 Article XVIII:3

⁸⁷ *Ibid* Article XVIII:4

⁸⁸ *Ibid* Article XXXVI:2

resources for their economic development.⁸⁹ Thus while the MFN Principle guarantees equal market access for goods and services for all WTO Members as an advantage, the prerequisite of justice as fairness entails that this access must also be advantageous to the least advantage Members necessitating the inclusion of preferential treatment for less developed Members.⁹⁰

Article 9 of the Agreement on Agriculture⁹¹ also provides a striking illustration of the practical application of the Differential Principle.⁹² This article enables Members to adopt export subsidy commitments as a general advantage or benefit accruing to all WTO Members and also allows developing countries a higher percentage of budgetary subsidy allocation.

Each Member of the WTO is entitled to export subsidies, but developing countries are allowed a much higher export subsidy range such that the benefits or privilege are favourable to the more advantaged and the less advantaged.⁹³ This framework which

⁸⁹ *Ibid* paragraph 4, 5-9; see also

⁹⁰ For other provisions in the WTO covered Agreements that reflect the Differential Principle see generally Article XXXVII (3) (c) & 6; Article XXXVIII (2) (d); Article 9(1) & (2), 10 (1), (2) & (3), Article 14, Annex B (2) of the Agreement on Sanitary and Phytosanitary Measures; Article 6 (2) & (4) (b), Article 15 (1) & (2) and Annex 5 of the Agreement on Agriculture.

⁹¹ *Agreement on Agriculture of the Marrakesh Agreement Establishing the WTO*, 15 April 1994, 1867 UNTS 140, (entered into force 1 January 1995) Annex 1A article 9 [hereinafter Agreement on Agriculture]

⁹² *C.f.* Rafael Rosa Cedro & Bruno Furtado Vieira, "John Rawls' Justice as fairness and the WTO: A Critical Analysis on the Initial Position of the Multilateral Agricultural Negotiation" (2010) 3:2 Law and Dev Rev 120 at 125 & 132-33

online: < <http://www.bepress.com/cgi/viewcontent.cgi?article=1049&context=ldr> > they argue that the WTO Agricultural Agreement was founded on an implicit inequality such that though the abiding structural framework of the WTO may theoretical fit into Rawls' model of justice as fairness, the inequality of the parties with regards to the agreement on agricultural defeats Rawls idea of justice as fairness.

⁹³ Article 9 (2) (b) (iv) Agreement on Agriculture; The provision allows developed countries export subsidy of 64 to 79 per cent while developing countries are allowed 76 to 86 percent export subsidy; Rafeal Rosa Cedro & Bruno Furado Vieira have exemplified in their article the application of the present agricultural subsidy rate does not qualify as justice as fairness under Rawls conception because of the gross inequality in terms of overall benefits accruing to the parties by examining the US and Brazil case study however they agree that Rawls' conception entails a more advantaged benefit for the disadvantaged which

assures to the advantaged that is, developed countries increased benefits also entails a more advantageous benefit for the less advantaged that is, developing countries reflecting Rawls' Difference Principle of justice.⁹⁴ It is important to state here that the above scenarios are not the only structural reflections in the WTO of Rawls' theory of justice as fairness. There is also the preferential tariff rates guaranteed under the WTO general system of Preferences (GSP) and encouraged in bilateral trade relations between Members, there is also the extended time frames to comply with WTO covered agreement obligations accorded to LDCs especially. Apart from these examples, it has been suggested in particular, that the functional systematics of the WTO where Members have equal access to positions in the WTO structure, the concept of predictability, non-discrimination in trade and equal access to the dispute settlement mechanism may be equated with Rawls' conception of justice as fairness.⁹⁵

2.8 *Difference Principle in the Human Rights System*

Though it is not doubtful that the Difference Principle finds vivid reflection in the entire body of the human rights system,⁹⁶ for the purpose of this thesis, the discourse is limited to the reflection of the principle in the UDHR and the UN Declaration on the Right to Development. It is necessary to recall that according to Rawls, the Difference Principle demands that a social order can only establish and secure more attractive prospects for those better off when that is to the advantage of the less fortunate. How is this reflected in the UDHR?

the different rate in subsidies allowed to developed and developing countries exemplify. See generally Rafael Rosa Cedro & Bruno Furtado Vieira *supra* note 92 at 137

⁹⁴ See generally John Rawls *supra* note 20 at 136.

⁹⁵ Rafael Rosa Cedro & Bruno Furtado Vieira *supra* note 92 at 132.

⁹⁶ Jerome J. Shestack, "theories of human rights" in Theodor Meron, ed, *Human Rights in International Law: Legal and Policy Issues* (Oxford, Cambridge: Cambridge University Press 1985) 84 at 91.

Article 28 of the UDHR establishes a general privilege for the community of individuals that make up the human family. It provides that “everyone is entitled to a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully realized.”⁹⁷ A literal interpretation of this provision guarantees to everyone both advantaged and the less fortunate an international system that enables the realization of the human rights and freedoms that the declaration expounds. Everyone is guaranteed the following “prospects” - liberty and security of person,⁹⁸ recognition as a person before the law,⁹⁹ right to judicial remedy,¹⁰⁰ right to own property,¹⁰¹ right to work,¹⁰² right to leisure¹⁰³ and a right to a standard of living adequate for health and well-being of himself and his family *inter alia*.¹⁰⁴ However, the requirement of justice as fairness takes into consideration that the guarantee to all of a standard of living adequate for health and well-being may not be sufficient to cater for the needs of vulnerable Members of the society e.g. women and children. Thus subsection 2 of article 25, provides for making this advantage beneficial to the “less fortunate”, and provides that “motherhood and childhood are entitled to special care and assistance.”¹⁰⁵ This requirement of special care and assistance for women and children enables the realization of the benefit for the advantaged and the less fortunate.

⁹⁷ UDHR *supra* 33 note Article 28

⁹⁸ *Ibid* Article 3

⁹⁹ *Ibid* Article 6

¹⁰⁰ *Ibid* Article 8

¹⁰¹ *Ibid* Article 17

¹⁰² *Ibid* Article 23

¹⁰³ *Ibid* Article 24

¹⁰⁴ *Ibid* Article 25

¹⁰⁵ *Ibid* subsection 2.

The UN Declaration on the Right to Development¹⁰⁶ illustrates even more explicitly Rawls' conception of the Difference Principle. Article 1 of the Declaration on the Right to Development provides that the “right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”¹⁰⁷

This guarantee to all of participation in a process of development that enables the realization of all human rights is further expatiated by the requirement in article 4. Article 4 not only places responsibility on States to formulate developmental policies aimed at facilitating the realization of the right to development but very importantly, provides for effective international cooperation to promote the rapid development of developing countries.¹⁰⁸ The Difference Principle which seeks at establishing a social order that guarantees better advantage to the privileged and the less fortunate is also reinforced by article 8 of the Declaration.

Article 8 obliges States to “ensure... equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.”¹⁰⁹ It provides that “effective measures should be undertaken to ensure that women have an active role in the development process and that appropriate economic and social reforms should be carried out with a view to eradicating all social

¹⁰⁶ Declaration on the Right to Development *supra* note 19 at article 1

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid* Article 4 (1) & (2)

¹⁰⁹ *Ibid* Article 8

injustices.”¹¹⁰ Arjun Segunpta has opined that the right to development and its implication of protecting the worst off, the poorest and most vulnerable is in theory an application of the Rawlsian Difference Principle.¹¹¹

In summary, while the above highlighted theoretical relationships between the WTO and the human rights system may serve only a normative function, it is pivotal to establish a sort of convergence of the foundational core essence of trade and human rights making the realization of an integration of the two systems possible.

Another principle common to the two systems, which is examined peripherally, is non-discrimination and equality.¹¹²

2.9 Non Discrimination and Equality

The principle of non- discrimination and equality is also at the core of the WTO system and finds ample reflection in the MFN principle and the requirement of National treatment.¹¹³ The MFN principle obliges the WTO Members to accord to all Members any benefit or preference accorded to one. In other words, the MFN does not allow for discrimination in the distribution of benefits or preferences. Any duty, charges, or rules and formalities in connection with importation and exportation of goods or services accorded to one must be extended to another.¹¹⁴ In this sense, the MFN principle shows equality and non- discrimination in that all Members of the WTO are entitled to receive the same benefit and enjoy the same privilege as of right accorded by one member to

¹¹⁰ *Ibid*

¹¹¹ Arjun Sengupta *supra* note 29 at 884; see also Dan Seymour and Jonathan Pincus *supra* note 72 at 398

¹¹² Thomas Cottier *supra* note 56 at 126

¹¹³ See generally GATT 1947 *supra* note 12 Article 1 & 3

¹¹⁴ *Ibid*

another. The MFN principle does not permit discriminatory treatment in relation to the extension of benefits or privileges among WTO Members, the recent decision of the WTO Appellate Body in *Brazilian Retreaded Tyres Case* reaffirmed this principle.¹¹⁵ In the *Brazilian Retreaded Tyres case*, the Appellate Body quashed the decision of the WTO Panel which had earlier found that an import ban imposed by Brazil on imported retreaded tyres was justifiable even though Members of MERCOSUR were exempted from the importation ban. The Appellate Body held that even though the decision of Brazil to apply a trade ban on imported retreaded tyres cannot be characterized as capricious, the exemption of Members of MERCOSUR had resulted in unjustifiable and arbitrary discrimination in the application of the importation ban and was contrary to the chapeau requirement of article XX of the GATT 1947.¹¹⁶

In a similar vein the entire framework of the human rights system is founded on this principle of non- discrimination. Article 2 of the UDHR notes that the rights and freedoms provided in the declaration is an entitlement of all without distinction.¹¹⁷ Again in article 7 the UDHR reiterates the principle of the equality of every person and the protection against discrimination. This similarity of principles reaffirms the idea of a sort of coming together between the multilateral trading system and human rights system. In support of this convergence of principles, Joost Pauwelyn notes that the principle of non-

¹¹⁵ See Generally the DSB decision in *Brazil – Measures Affecting Import of Retreaded Tyres (Complainant EU)* (2007), WTO DS/332 (Appellate Body Report) paras 227-233, :online <http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS332%FCAB%FCR%2A+and+not+RW%2A%29&language=1>

¹¹⁶ *Ibid* para 232-233

¹¹⁷ UDHR *supra* not 12 at article 2

discrimination in trade in services under the WTO system has expanded the frontiers of the principle in the corpus of public international law.¹¹⁸

2.10 *Mutual Exclusivity or Inclusivity*

Since there are normative and theoretical similarities in the WTO and human rights systems does this then mean that trade and human rights are mutually inclusive in the WTO framework? In attempting to answer this question, it is necessary to explain briefly the nature of international law and the interaction of treaties, customs and principles in international law. International law like the human body comprises different parts; each is an essential part of the whole and contributes to the proper functioning of the body. The WTO Agreements and human rights treaties are parts of international law and each has a significant role in the effectual working of the international law system. While the WTO system operates as a unique framework with specific rules governing obligations of Members,¹¹⁹ it also operates under the wider purview of international law.¹²⁰ It is subsumed into the body of international law interacting with pre-existing treaties e.g. human rights treaties, and new treaties except to the extent that it specifically contracts out of it.¹²¹ In the absence of an express contracting out of some treaties or rules in international law, there is a presumption of continuity.¹²²

¹¹⁸ Joost Pauwelyn, *supra* note 16 at 540.

¹¹⁹ See especially *Understanding on Rules and Procedures Governing the Settlement of Dispute Marrakesh Agreement Establishing the WTO*, Annex 2, 15 April 1994, 1869 UNTS 401, (entered into force 1 January 1995) [hereinafter DSU] Article 3 (2)

¹²⁰ Joost Pauwelyn *supra* note 16 at 538-540

¹²¹ *Ibid* 542 -45

¹²² *Ibid* 546

Does this presumption of continuity of treaties affect the obligation of the WTO Members under the covered agreements particularly where there is a conflict with the WTO Treaty and another treaty? Based on the *pacta sunt servanda* principle¹²³ which obliges parties to fulfil their treaty obligations in good faith, the presumption of continuity will imply that the WTO Agreements should be interpreted in such a way that they do not conflict with Members pre-existing obligations under human rights instruments.¹²⁴

Can it then be said that the obligation of good faith interpretation of treaties amounts to mutual inclusivity of trade and human rights in the WTO framework? The answer is in the negative, this is because the WTO framework operates as a specific sub system of international law, with specific rights, obligations, claims, causes of actions, specific violations and specific enforcement mechanisms and remedies.¹²⁵ The trade obligations of the WTO Members are gleaned from the covered agreements and there is no reference to human rights provisions or exceptions in the covered agreements.¹²⁶ This non reflection of human rights provisions in the WTO framework has been interpreted to mean that the WTO is a closed regime. However, the decision of the Appellate Body in

¹²³ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, (entered into force 27 January 1980) Article 26 [hereinafter VCLT]

¹²⁴ *C.f.* Gabrielle Marceau notes the complexity of this dichotomy in international law. While recognizing the obligation of States to fulfil their various treaty obligations in good faith she argues that in situations of conflict between e.g. human rights and the WTO treaty the DSB is only empowered to interpret and apply the provisions of the covered agreements and cannot interpret such provisions in a manner that a non WTO treaty supersedes an express provision of the covered agreement as this will amount to the DSB adding to or diminishing to the provisions of the covered agreements. See Gabrielle Marceau, *supra* note 10 at 755; see also Article 3(2) and Appendix 1 of the DSU for powers and jurisdiction of the DSB.

¹²⁵ See generally Chapter 1; Gabrielle Marceau *supra* note 10 at 755

¹²⁶ The only provision with a reference akin to human rights is the Article XX of the GATT 1947 which permits a derogation from the MFN and National Treatment obligations in the GATT to protect human health. It is however important to emphasize that this provision is not framed as a human right to health though it can be argued that the decision of the Appellate Body in the *Asbestos Case* might have considered the necessity to protect the right to health;

*EC Measures Affecting Meat and Meat Products (Hormones)*¹²⁷ suggests that by virtue of article 13 of the DSU a WTO DSB panel is empowered to seek information and advice as they deem appropriate to enable it determine questions or issues of law or facts not covered by the WTO covered agreements. This reasoning appears justified since the WTO Treaty is part of the body of international law and necessarily interacts with it.¹²⁸

2.11 Complementarity: the Concept of Mutual Supportiveness

The complexity of the trade and human rights discourse in the WTO will be elaborated more in chapter 3. In the light of the above scenario of the *lex specialis* nature of the WTO framework is there any way to bridge the gap? That is, is there any possibility of establishing integration between trade and human rights in the WTO system? The answer is in the affirmative. By adopting the concept of mutual supportiveness, a principle of interpretation, which is also a furtherance of the *pacta sunt servanda* rule, harmonized interpretation of treaty obligations can be achieved especially when the treaties' impose intersecting obligations upon Members.

Mutual Supportiveness (MS) as a concept made its debut in international fora in Agenda 21 of the UN Conference on Environment and Development. The Agenda provides in paragraphs 2.3 that:

¹²⁷ *European Communities Measures Affecting Meat and Meat Products (Hormones) (Compliant by Canada)* (1998), WTO WT/ DS/ 48, online: http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS48%FCAB%FCR%2A+and+not+RW%2A%29&language=1

¹²⁸ See generally Appellate Body opinion that the WTO rules should be interpreted in conformity to general international law *United States—Standards for Reformulated and Conventional Gasoline (Complainant United States)* (1996), at page 17 WTO Doc. WT/DS2/AB/R (Appellate Body report) online: www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/als1pl_e.htm - 95k - 2004-10-31; see also Joost Pauwelyn, *supra* note 16 at 542.

the international economy should provide a supportive international climate for achieving environment and development goals by...making trade and environment mutually supportive.¹²⁹

Since then, the phrase MS has been used frequently in multilateral environmental agreements¹³⁰ and declarations¹³¹ to reflect a shared consensus on the need for integrated efforts and synergies by different regimes to actualize common goals of the international community.¹³² This wide embrace of MS has led to conclusions by some that MS may have emerged as a principle of international law that can no longer be neglected in interpreting the relationship between regimes and treaties in international law.¹³³

There is no exact definition of the phrase mutual supportiveness however, the terms of its usage in multilateral environmental agreements and working documents of various governmental organizations suggests that MS is used to reflect the need for

¹²⁹ International Cooperation To Accelerate Sustainable Development In Developing Countries & Related Domestic Policies, online: UN Department of Economic and Social Affairs Division for Sustainable Development <http://www.un.org/esa/dsd/agenda21/res_agenda21_02.shtml> para 2.3(b)

¹³⁰ See *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, Rotterdam, 10 September 1998, 38 ILM 1999 (entered into force 24 February 2004); *International Treaty on Plant Genetic Resources for Food and Agriculture*, 3 November 2001, (entered into force 29 June 2004) online: < www.planttreaty.org/texts_en.htm. Recitals 9–11>

¹³¹ See generally WTO, *Committee on Trade and Environment Report to the Singapore Ministerial Conference* (12 November 1996) WT/CTE/1/ 1996, at para.167

¹³² See UNEP, *Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization* (Synthesis Report 2 November 2001), online: United Nations Environment Programme < <http://www.sidsnet.org/docshare/trade/Synthmea02nov.pdf>> at 6

¹³³ Ricardo Pavoni, “Mutual Supportiveness as a Principle of Interpretation and Law Making: A Watershed for the WTO-and- Competing Regime Debate?” (2010) 21:3 EJIL 649 at 651; Sanwal Mukul, “Trends in Global Economic Governance: The Emergence of a Mutual Supportiveness Approach to Achieve Sustainable Development” online (2004) 4:4 Global Environmental Politics at 21 < muse.jhu.edu/journals/global_environmental_politics/.../4.4sanwal.pdf>

complementarity and synergies to achieve goals which are the ultimate interest of the global community.¹³⁴

Ricardo Pavoni has suggested that the MS has two important interpretative and law making elements- the former leads to a harmonious and consistent interpretive balance of the competing obligations at stake;¹³⁵ while the latter consists of a “duty to cooperate in good faith in order to facilitate law-making processes, including amendment procedures, in respect of agreements which...generate systemic conflicts with other regimes [thus] safeguarding essential values.”¹³⁶ Viewed in this sense, MS provides practical application of the *pacta sunt servanda* rule.

Unfortunately, MS as a principle of interpretation and rule making has mostly been referred to in Multilateral Environmental Agreements (MEAs) and their relationship to the WTO Treaty. Little effort has been made to recognize the application of this principle to the relationship between the WTO and human rights treaties. Indeed the only reference to mutual supportiveness with regards to the WTO and human rights was made recently by the Director General of the WTO in a press release.¹³⁷

If MS is viewed as an interpretative and rule making element of international law that obliges good faith interpretation of conflicting or potentially conflicting regimes in a way

¹³⁴ WTO, *Doha Ministerial Declaration* (adopted on 14 November 2001), WT/MIN(01)/DEC/1, online: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> para 6; *Iron Rhine (“Ijzeren Rijn”) Railway (Belgium/Netherlands)*, (2005) (The Arbitral Tribunal), online: <<http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf>> at para. 59; see also Ricardo Pavoni *supra* note 105 at 657

¹³⁵ *Ibid* at 661

¹³⁶ *Ibid* at 666

¹³⁷ WTO, News Release, “Lamy Calls for a Mindset Change to align Trade and Human Rights” (13 January 2010) online: <http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm>

that promotes synergies and complementarity between competing values, then it is suggested that this “principle” become internal to the relationship between the WTO and human rights. This suggestion is in line with the *pacta sunt servanda* rule and the need for international cooperation which was restated in the UN Declaration on the right to development.

Bringing this to the issue of the *lex specialis* nature of the WTO system and the absence of human rights provisions in the WTO Treaty, MS with its interpretative and rule making element will enable:

1. An interpretation that safeguards human rights concerns when a conflict arises in the implementation of a WTO agreement and human rights provisions;
2. Complementarity and synergies between institutions in treaty making or amendment to reflect shared goals.

Thus, the absence of express reference to human rights provisions in the WTO Treaty does not mean that human rights concerns cannot be raised during negotiations for new WTO rules or at the WTO adjudicatory body particularly when there is a conflict or potential conflict between the regimes. Indeed the obligation of *pacta sunt servanda* and good faith in treaty interpretation requires that treaties work together to achieve the goal of the international community.¹³⁸ In this sense then, MS as a principle fills in the gap left by the absence of a clear reference to human rights clause in the WTO Treaty thus fulfilling its complementarity and synergistic role.

¹³⁸ The Doha Declaration that amended the TRIPS Agreement made a tacit reference to this idea of mutual supportiveness of the TRIPS Agreement and the need to protect public health see Doha Ministerial Declaration *supra* note 106 at para 17.

Conclusion

In conclusion this chapter has sought to establish a convergence of the WTO and the human rights system by examining normative principles and theories that underpin both systems. It has argued that these shared normative principles are not mere coincidences but a reflection of similarity of objectives. It also argued that in specific relation to the trade and human rights discourse in the WTO, MS as a concept or principle of international law bridges the gap and ensures a synergy and complementarity such that common interests and values of the global community are realized and protected.

CHAPTER 3 RETHINKING HUMAN RIGHTS AND TRADE INTEGRATION IN THE WTO: DEVELOPMENT AS A RIGHT

3.1 *WTO and the Human Rights Linkage Dilemma*

The human rights and WTO dilemma essentially commences from this standpoint: how can the framework of the multilateral trading system integrate with human rights under its existing teleos?¹³⁹ In chapter one, this thesis noted that the WTO system is principally a trading institution that provides for its Members a multilateral framework for negotiation and expansion of market access with hopes that this will lead to economic and social development for its Members.

The incursion of trade rules into areas traditionally under the ambit of State control for example agriculture, health and social services, the restraint on State sovereignty, in terms of the right to choose domestic trade and economic policy, and the realization that increased market access have not yielded the golden pathways out of poverty for a majority of the world's poor have necessitated the need to rethink the relationship between trade and human rights¹⁴⁰ and seeks ways of integrating the two especially within the WTO.

Trade and human rights integration in the WTO hinges on two core issues: the existence or non-existence of a provisional or procedural structure inherent to the WTO system that allows for human rights; and where the structures exist, the ability to make

¹³⁹ On the founding teleos of the GATT/ WTO system see generally Tomer Broude, *supra* note 9 at 293

¹⁴⁰ The interconnectedness of socio economic development and human rights was highlighted by President Franklin Roosevelt in his famous four freedom speech. See generally Franklin D. Roosevelt Presidential Library and Museum, "FDR and the Four Freedoms Speech" 6 January, 1941, page 7-8 online: <http://www.fdrlibrary.marist.edu/pdfs/fftext.pdf>

use of these safeguards. Structurally, the question is does the WTO framework allow for human rights? That is are there rules or practices inherent to the WTO system that allow for human rights consistent trade rules, or a derogation from a WTO obligation by Members for the promotion or protection of human rights, since WTO rules in and of itself does not prohibit human rights? An examination of the Marrakesh Agreement establishing the WTO and the annexed agreements answers the above question in the negative.

The reason for this is linked to the *lex specialis* nature of the WTO system. The WTO rules have been crafted solely with economic and trade interests as the overarching goal. For instance the basic principles of the WTO system- National treatment and the MFN rule which are essentially non-discrimination are viewed primarily as abhorring any form of discriminatory measures or policies in international trade and embracing trade liberalization in all its dimensions.

In discussing the *lex specialis* nature of the WTO, Gabrielle Marceau argued, in relation to the WTO DSB, that human rights concerns that may arise as a result of the implementation of the WTO covered agreements fall outside the jurisdiction of the WTO, since the governing law of the WTO, does not in any way refer to human rights concerns.¹⁴¹ The simple implication of this is that a WTO member cannot derogate from his WTO obligations on the grounds of its contradiction to the member's human rights obligation and the DSB cannot entertain human rights concerns as a defence for a breach

¹⁴¹ Gabrielle Marceau, *supra* note 10 at 756

of WTO obligations.¹⁴² The non-existence of a human rights language or provision in the WTO rules appears to make it legally impracticable to introduce human rights concerns as a limitation to trade or for trade enhancement. This lack of an express human rights language in the WTO rules prohibiting the incorporation of human rights is subject to two diverse interpretations: either the WTO system is totally closed to human rights and other fields of international law or the WTO rules can be influenced by other systems of international law when compelling circumstances demand.

The latter view seems to be in line with the provision of article 3(2) of the Dispute Settlement Understanding (DSU) which provides that the WTO covered agreements are to be interpreted in accordance with the customary rules of interpretation of public international law.¹⁴³ This reasoning that the WTO rules can be influenced by rules of international law has been confirmed by the WTO Panel and Appellate body in *Korea-Measures Affecting Government Procurement*¹⁴⁴

The question then is when can reliance be placed on human rights to avoid a WTO obligation or to advance fairer and equitable trade rules? Again Marceau suggests that reliance on provisions of general international law is only necessary to interpret

¹⁴² *United States – Standard for Reformulated and Conventional Gasoline* *supra* note 10; see especially Gabrielle Marceau *supra* note 9 at 761; *c.f.* Joost Pauwelyn, *supra* note 16 at 535

¹⁴³ WTO DSU *supra* note 113 article 3(2); *Korea Measures Affecting Government Procurement (Complaint by the US)* WTO Doc WT/DS163/R para 7.69 (Panel Report) online:http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS163%FCR%2A+and+not+RW%2A%29&language=1; *c.f.* Joost Pauwelyn, *supra* note 16 at 561 to 564 opines that the obligation to interpret the WTO Covered Agreements in line with the customary rules of interpretation of international law is to be interpreted to mean that the DSB has the legal mandate to refer to other treaties in public international law e.g. human rights in interpreting the provisions of the covered agreement

¹⁴⁴ *Ibid* page 181-2.

WTO provisions and assess compliance with WTO law.¹⁴⁵ This view, it is argued, is contrary to the broad objective of international law of which the WTO law is only a branch. The essence of international law is the global coordination and harmony of international activities and relations. This coordination and harmony cannot be achieved without a synergy of the branches that make up the whole body. If international law as a system is built upon a set of inconsistent rules, that inhibits the abilities of states to implement their varying obligations, then the system is bound to self-destroy itself.

Unfortunately, Marceau's suggestion appears to be the practice as assessed from case law jurisprudence of the DSB. While the obligation of good faith interpretation of WTO law as part of general international law inures, reliance on other provisions of general international law to support derogation from a WTO obligation or access benefits in the system by Members or the DSB has been at best minimal.¹⁴⁶

The other prong of the WTO trade and human rights integration dilemma is the ability to take advantage and make use of existing safeguards. Going back to the provision of article 3(2) of the DSU the obligation to interpret WTO law in accordance with customary rules of interpretation of international law provides a gateway for raising human rights concerns in the WTO DSB, especially when a WTO law inhibits the ability of Members to fulfil their human rights obligations. So far, no Member of the WTO has taken advantage of this safeguard. The celebrated *Asbestos*¹⁴⁷ case brought under the

¹⁴⁵ Gabrielle Marceau *supra* note 10 at 784

¹⁴⁶ *Ibid* 787-8, arguably only Mauritius has raised the right to food in the context of food security during the Committee on Agriculture negotiations.

¹⁴⁷ *European Communities- Measures Affecting Asbestos and Asbestos Containing Substances (Complaint by Canada)* (2000), WTO Doc WT/DS135/AB/R (Appellate Body Report) online:

exception to protect human health in article XX was not grounded on the protection of the human right to health. The failure of Members to take advantage of existing safeguards raises jurisdictional limitation for the WTO DSB.

The significance of this jurisdictional limitation is that even when a Panel or Appellate Body considers that a certain provision under general international law may avail one of the parties, it cannot *suo motu* refer to such relevant provision; this position was clearly emphasized by the Appellate Body in *US Standards for reformulated Gasoline*.¹⁴⁸

Bearing in mind the above provisional and procedural gap, is there any possibility of integrating trade and human rights in the WTO framework? Existing literature on the subject provide insightful suggestions on linking trade and human rights,¹⁴⁹ two of such approaches and the difficulties with each approach are highlighted in the ensuing discourse.

http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS135%FCAB%FCR%2A+and+not+RW%2A%29&language=1

¹⁴⁸ *US Reformulated Gasoline supra* note 6 The Appellate Body held that the failure of Venezuela and Brazil to appeal the Panel's finding and non-finding on the two matters relating to clean air by taking advantage of Rules 23(1) or 23(4) of the *Working Procedures* placed a limitation on their jurisdiction to decide on the issue.

¹⁴⁹ Caroline Dommen, "The WTO, International Trade and Human Rights" in Michael Windfuhr ed *Mainstreaming Human Rights in Multilateral Institutions* (London, New York: Zed Books, 2004) 244; Gudrun Monika Zagel, "WTO and Human Rights: Examining Linkages and Suggesting Convergence" (2005) 2:2 VDJ 1 at 30-31

3.1.1 *The Article XX Link*

Article XX of the GATT 1947 is arguably the only substantive provision in the WTO law that may be relied on to introduce a somewhat human right related clause or text.¹⁵⁰ The article which embodies the general exceptions to the GATT rules may allow for the protection of some human rights through the provisions of paragraphs (a), (b), (d), (e) and (g).¹⁵¹ The relevant texts are as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...
- (e) relating to the products of prison labour¹⁵² and
- (g) relating to the conservation of exhaustible natural resources

¹⁵⁰ For an in depth analysis of possible human rights enabling clauses in the WTO law see generally Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford, New York: Oxford University Press, 2011) 92-141.

¹⁵¹ The paragraphs allows Members to adopt trade restricting measures necessary to protect public morals and for the protection of human, animal or plant life or health; see GATT 1947 *supra* note 12 article XX

¹⁵² *Ibid* article XX (a) , (b), (d) & (e)

According to paragraph (a), a WTO member can derogate from his WTO obligations for the protection of public morality. The important question is- is public morality a human right?

The international covenant on civil and political rights (ICCPR) recognizes public morality as one of the exceptions that would permit derogation from human rights obligation.¹⁵³ In this sense public morality would imply the protection of what society or a government deems as appropriate judging by a reasonable man's standards or in certain circumstances may mean the prohibition of offensive materials. Public morality can by extension also imply the protection of the public good and welfare. But the issue of whether public morality constitutes a human right still remains unanswered. The vagueness of the phrase and the varied interpretations that can be given to the phrase make it an unreliable mechanism for introducing human rights requirements in the WTO.¹⁵⁴

¹⁵³ ICCPR *supra* note 67, articles 18 (3), 19 (3) (b) & 21

¹⁵⁴ For instance in determining what constitutes public morality, the Appellate Body has held that public policy is a component to be considered. See generally *China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products (Complaint by China)* (2009) WTO Doc WT/DS363/AB/R at paras 243-45 & 263 (Appellate Body Report) online: http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS363%FCAB%FCR%2A+and+not+RW%2A%29&language=1 [hereinafter China Measures Affecting Trading Rights]

While article XX (b) and (g) incorporates elements of human right protection, the purview is narrow and can only afford protection for a limited range of human rights e.g. the right to health and protection of the environment.¹⁵⁵

The other human rights related protection that can be brought under the Article XX link are – the compliance with other laws and regulations and the protection of products relating to prison labour. The problems with these provisions is the difficulty of proving that a domestic law grounded on human rights concerns is not averse to WTO law and whether human rights can effectively be protected under the need to protect prison labour.

Apart from the above, there is the almost insurmountable chapeau provision of Article XX, prohibiting disguised, unjustified or arbitrary restriction on international trade which has so far been restrictively construed by the DSB till date.¹⁵⁶

The decision of the panel in *Thailand – Restrictions on Importation of Cigarettes*¹⁵⁷ highlights that a WTO Panel or Appellate Body must be convinced that any derogation from the assumed obligations under the WTO rules brought under Article XX must not

¹⁵⁵ While environmental advocates may be totally against the inclusion of the right to the environment as a human right, it is the argument of this thesis that the protection of the environment is well covered under various human rights treaties. E.g. the African Charter on Human and peoples' Right recognizes the right to a healthy environment. See generally *African Charter on Human and Peoples Rights* 27 June 1981, 1520 UNTS 217, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM, (entered into force 21 October 1986) article 24 [hereinafter African Charter]; see also *Asian Human Rights Charter*, 17 May 1998, online: <http://www.unhcr.org/refworld/publisher.ASIA...452678304.0.html> article 2.9 recognizes sustainable development and the protection of the environment.

¹⁵⁶ *Brazil- Measures Affecting Imports of Retreaded Tyres (Complaint by the EU)* (2007) WTO Doc WT/DS332/AB/R (Appellate Body Report) online: http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS332%FCAB%FCR%2A+and+not+RW%2A%29&language=1

¹⁵⁷ *Thailand – Restrictions on Importation of Internal Taxes on Cigarettes (Complaint by the United States)* (1990), WTO Doc DS10/R-37S/200 at para 28, 29, 50-52 (Panel Report)

constitute a disguised restriction to international trade.¹⁵⁸ In the *Thailand* case, the Panel conceded that the method adopted by Thailand was necessary to protect public health under paragraph (b) of article XX but ruled that the method was inconsistent with article XI (i) which prohibits the introduction of quantitative restrictions in international trade.¹⁵⁹

Thus while Article XX of the GATT allows for introducing certain human rights concerns to override trade obligations, the narrowness of its scope and the restrictive interpretation of the chapeau requirements have so far made it an unreliable mechanism for integrating human rights in the WTO framework.

3.1.2 *Human Rights Impact Assessment of WTO Rules*

Another possible method of introducing human rights into the WTO is through what is referred to as human rights impact assessment (HRIA) of WTO rules. This basically means conducting an assessment or evaluation of the impact of implementing a particular WTO covered agreement, for instance liberalization of certain services under the GATS, on a member or a group of Members. The assessment will usually be carried out prior to the negotiation or implementation stage,¹⁶⁰ and will make for a human rights consistent WTO.¹⁶¹

¹⁵⁸ See generally *United States – Import Prohibition on Certain Shrimps and Shrimp Product* *supra* note 49; *Brazil- Measures Affecting Import of Retreaded Tyres* *supra* note 156

¹⁵⁹ *Ibid* para 81; see also *China Measures Affecting Trading Rights* *supra* note 154 at 243-245

¹⁶⁰ Gudrun Monika Zagel, *supra* note 142 at 30- 31

¹⁶¹ *Ibid*; see especially Canadian Council for International Co-operation & Misereor, *Human Rights Impact Assessment for Trade and Investment Agreements*, (23-24 June, 2010), online: Berne Declaration Report

The proponents of this approach suggest that the WTO councils (e.g. the Trade Policy Review Body (TPRB) established under the TPRM) should be empowered to assess the impact of implementing WTO rules on Members' realization of their human rights obligations; a mechanism akin to the current Trade Policy Review Mechanism (TPRM) of the WTO.¹⁶² The possibility of achieving an integration of trade and human rights through this method is doubtful. This is because the mandate of the WTO TPRM is couched in unequivocal terms. The essence of the TPRM is to contribute to Members *improved adherence to the rules and commitments undertaken in the covered agreements*.¹⁶³

Since the covered agreements do not refer to human rights as a guiding principle, the TRPB cannot assess the human rights impact of WTO rules. For the TPRB to be able to conduct human rights impact assessment, their mandate has to be expanded to incorporate assessing human rights suitability of WTO rules.¹⁶⁴ As the WTO TPRB and TPRM stands, it can only carry out a full evaluation of a Members *domestic trade policy* and its impact on the proper functioning of the WTO system. The TPRM is essentially aimed at ensuring that Members comply with WTO rules in their domestic jurisdictions. The human rights impact assessment approach will entail amending the framework of the TPRM and the WTO framework in general to introduce human rights as one of the

of the Expert Seminar, Geneva, Switzerland paras 3.2-3.4

<http://www.ccic.ca/what_we_do/Report_HRIA-seminar_2010_eng%5B1%5D.pdf>

¹⁶² *Trade Policy Review Mechanism* Annex 3 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994) Article A(i) [hereinafter Trade Policy Review]

¹⁶³ *Ibid* Article A (i)

¹⁶⁴ *Ibid* Article C (i) & (ii)

guiding principles for measuring and assessing compliance with WTO rules. It will also require specific training on the methodologies for carrying out HRIA for the primarily trade trained WTO personnel and Council Members. Since the WTO framework is yet to be amended, and human rights have not been introduced as a guiding principle for the conduct of international trade under the WTO, HRIA may not be a feasible mechanism for integrating trade and human rights within the framework of the WTO.

3.2 *Integration via pragmatism*

A more pragmatic approach to linking trade and human rights in the WTO framework has been advocated by Mihir Kanade.¹⁶⁵ The idea of pragmatism as an approach to integrating trade and human rights in the WTO is implicitly founded on the concept of mutual supportiveness and the need for coherence and synergy in international law. Pragmatism takes as its standpoint the benefits of international trade to the realization of human rights and vice versa, the well settled fact that States have invested so much in trade liberalization to retract therefrom¹⁶⁶ and the need to take advantage of existing safeguards and build upon similarity in objectives.

Kanade's approach is parallel to the ultimate objective of the Article XX link and HRIA mechanism but dissimilar in the sense that it recognizes the *lex specialis nature* of the WTO and seeks integration by an enabling human rights inclusive text in the WTO Agreement and not by the introduction of some exogenous law or obligation.¹⁶⁷

¹⁶⁵ Mihir Y. Kanade, *supra* note 40

¹⁶⁶ *Ibid*

¹⁶⁷ *Ibid* page 24-25

According to Kanade, this human right enabling text can be found in the preamble of the WTO Agreement which recognizes *sustainable development*¹⁶⁸ as a central objective of the multilateral trade organization.

To the extent that *sustainable development* equates to the *right to development*,¹⁶⁹ this thesis situates its analysis on Kanade's proposition and argues that development as an intrinsic element to the WTO system, provides a platform for integrating trade and human rights in the WTO; when development is viewed not merely as an economic process but as a human right. Besides this intrinsic WTO *human rights* enabling clause, the obligation for developmental cooperation entrenched in Articles 55 and 56¹⁷⁰ of the UN Charter and reaffirmed in other WTO provisions e.g. the GATT¹⁷¹ holds within it an acknowledgment of the need for affirmative action in relation to developing countries and further lends credence to the argument that by exploring similarities in systems there is a possibility of realizing a synergy between trade and human rights. Development which is the similarity between the systems of trade and human rights provides the mechanism for such integration and consequently a WTO system that does not inhibit the realization of human rights.¹⁷² It is therefore necessary to understand what development as a right entails and the prospects it holds for the WTO and human rights systems.

¹⁶⁸ WTO Agreement *supra* note 39 Preamble

¹⁶⁹ See especially Shadrack Gutto, *The Legal Nature of the Right to Development and Enhancement of its binding nature*, GA Res 41/128 UNESCOR 56 Sess, Supp No 4, UN Doc E/ CN.4/Sub.2/2004/16, (2004) 2-4; it should be borne in mind that the WTO DSB has not interpreted the concept of sustainable development as an aspect of human rights.

¹⁷⁰ UN Charter *supra* note 31 articles 55 and 56

¹⁷¹ See generally WTO Agreement *supra* note 39 at preamble para b; GATT, *supra* note 15 article XXXVIII

¹⁷² See generally United Nations Development Program, Integrating Human Rights with Sustainable Human Development 14-16 online: <http://magnet.undp.org/Docs/policy5.html>; UNDP Report (2000) Human Rights and Human Development online: <http://hdr.undp.org/en/media/hdr_2000_ch1.pdf>

3.3 The Human Right to Development

The economic and political renaissance in the global South in the 1960s and 1970s which culminated in a call for a New International Economic Order (NIEO) may have played a significant role in the emergence of the human right to development.¹⁷³ However, academic and legal conceptualisation of the right owes to the writings of Keba M'baye¹⁷⁴ and subsequently Karel Vasak.¹⁷⁵ Though intricately linked to the NIEO Declaration,¹⁷⁶ the Right to Development differs distinctly from the NIEO and Charter of Economic Rights and Duties of States¹⁷⁷ in the sense that the rationale and obligation of the right to development extends beyond the handout of so called "political sovereignty and economic independence"¹⁷⁸ for the newly decolonized States, it goes beyond the right to nationalize foreign holdings with immediate adequate compensation, it is more than a right to developmental and mutual assistance¹⁷⁹ and finally it is broader than foreign aid administration; the much touted ideals of the NIEO.¹⁸⁰ The right to

¹⁷³ Jianfu Chen, "Fairer Trade and the Human Right to Development – A Perfect Match or Misconceived Twins" (2008) Forum on Public Policy online: ; Isabella D. Bunn, "The Right to Development: Implications for International Economic Law" (2000) 15 AM U Int'l Law Rev 1425 at 1431

¹⁷⁴ Keba M'Baye, "Le Droit du Developpement comme un Droit de l'Homme" (1972) 5 Revue des Droit de L'Homme Hum Rts J 503 at 534

¹⁷⁵ Karel Vasak, "A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights" (1977) UNESCO Courier at 29 & 32

¹⁷⁶ See generally Milan Bulajic "A Changing World Calls for International Development Law" in in Petar Šarčević & Hans van Houtte, eds, *Legal Issues in International Trade* (London, Boston:Graham & Trotman/Martinus Nijhoff, 1990) 1 at 18; *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), UNGAOR, 6th Special Sess, Supp No 6, UN Doc A/3201, (1974)

¹⁷⁷ *Charter of Economic Rights and Duties of States*, G Res 3281 (XXIX), UNGAOR, 1974, Supp No... UN Doc A/3281/29, 14 ILM (1975) at 251

¹⁷⁸ Detlev Christian Dicke, "Public International Law and a New International Economic Order" in Petar Šarčević & Hans van Houtte, eds, *Legal Issues in International Trade* (London, Boston:Graham & Trotman/Martinus Nijhoff, 1990) 23 at 24

¹⁷⁹ *Ibid* at 38

¹⁸⁰ On the troubled practical application of the NIEO see especially Jianfu Chen *supra* note 34 at 4-5

development connotes the intrinsic principle of participation, a realization of all human rights and freedoms, equality, accountability and in particular, differential treatment.¹⁸¹

3.3.1 *Defining the Right to Development*

Before delving into the legal enunciation of the right as contained in Article 1 of the 1986 UN Declaration, an excerpt from the writings of M'baye on the rationale for the recognition of the right is simplistic yet apposite in describing the meaning of the right to development. According M'baye "every man has a right to live and a right to live better."¹⁸² This suggestion of the right to development connoting better standards of life for every human person has found acclaimed expression in the work of Amartya Sen where he defines development as expanding the real freedoms that people enjoy where freedom is more specifically understood as – political freedom; economic facilities; social opportunities; transparency guarantees and protective security.¹⁸³

The UN declaration of 1986 defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized"¹⁸⁴

¹⁸¹ See especially Isabella D. Bunn *supra* note 165 at 1443-51

¹⁸² Keba M'Baye *supra* note 166 cited in Isabella Bunn *supra* note 165 at 1433; see also Monique Chemillier- Gendreau, "Relations Between the Ideology of Development and Development Law" in Francis Snyder & Peter Slinn, *International Law of Development: Comparative Perspectives* (Abingdon, Oxon: Professional Books Limited, 1987) 57 at 65 where she defines the right to development as the right to subsistence and to secure life.

¹⁸³ Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) pg 36

¹⁸⁴ See Declaration on RtD *supra* note 19

The idea gleaned from the UN Declaration is that development is “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals.”¹⁸⁵ These significant definitions serve as the background for a legal exposition of the right to development.

3.3.2 *Legal Recognition of the Right to Development*

The right to development was first expressed as a human right in the African Charter on Human and Peoples’ Rights in 1981. Article 22 (1) of the Charter states that the African people have a right to economic, social and cultural development that takes due regard of their freedom, identity and their right to the equal enjoyment of the common heritage of mankind,¹⁸⁶ and the subsequent paragraph expressly provides that States have the duty individually and collectively to ensure the realization of the right to development.¹⁸⁷ Five years after, the UN General Assembly proclaimed the Declaration on the Right to Development (hereinafter RtD) which recognized the right as an “inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”¹⁸⁸

¹⁸⁵ *Ibid* preamble para 2

¹⁸⁶ African Charter *supra* note 148 Article 22 (1)

¹⁸⁷ *Ibid* article 22 (2)

¹⁸⁸ Declaration RtD *supra* note 19 article 1; The Asian Charter on Human rights also recognizes the right to development and social justice and provides that the right belongs to individuals and states. See generally *Asian Human Rights Charter*, 17 May 1998, <http://www.unhcr.org/refworld/docid/452678304.html> note 17 article 7.1

There is a distinction in the communication of the right in the African Charter and the UN Declaration. The African Charter recognizes the right as belonging to the people whereas in the UN Declaration the right belongs first to the human person and then to the people.¹⁸⁹ This difference in articulation is particularly pivotal and raises varied issues such as- the “rightness” of the recognition of the right as a human right¹⁹⁰ and the relevance of the right to the WTO system.

3.4 *Right to Development- Human Rights Properly So Called*

The human rightness of the RtD, the right of a people, is questioned by the Western (traditional) conception of human rights which views human rights as vesting in the individual.¹⁹¹

The idea of the right to development belonging to a people connotes collectiveness of human rights and is the view evinced from the African Charter and confirmed by the African Commission.¹⁹² This idea of collective human rights stretches the traditional

¹⁸⁹ See generally Declaration *supra* note 19 article 1; African Charter *supra* note 148 at 16 Article 22 (1)

¹⁹⁰ See generally Milan Bulajac *supra* note 168 at 21-22; see especially Arjun Sengupta, “The Right to Development as a Human Right” (Paper delivered at François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, December 1999), [unpublished] [hereinafter RtD as a human Right] pg 9

¹⁹¹ See especially Philip Alston, “Making Space for New Human Rights: The Case of the Right to Development” (1988) 1 Hum Rts Yearbook 3 at 5, 22 & 26-27; see also Jack Donnelly, “Human Rights as Natural Rights” (1982) 4 Hum Rts Q 391 at 401

¹⁹² See especially African Charter *supra* note 148 articles 20-24; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council vs. Kenya*, (2003) Communication No 276/2003 African Commission on Human Rights at paras 150-162 online: <http://www.worldcourts.com/achpr/eng/decisions/2009.11_CM RD_v_Kenya.htm>

Western view of the individuality of human rights, that is, human rights are so called because they vest in a human person.¹⁹³

However the very conception of human rights has over the years being amenable to change and cultural influences such that the traditional Western boundaries are gradually being eroded to make room for new human rights reflecting cultural ideals held by various societies.¹⁹⁴ For instance the African Charter recognizes individual rights as stemming from the inherent characteristics of human beings which justifies their international protection;¹⁹⁵ this view supports the Western and natural rights philosophical rationale for human rights.

However, the Charter recognizes also the reality of a people's right as forming the bedrock that guarantees individual rights.¹⁹⁶ The notion of an abstract conception of individual human rights as separate from a people's right, is foreign to the African consciousness and is totally averse to the spirit of the African Charter.¹⁹⁷ Other human rights instruments e.g. the Asian Charter on Human Rights also recognizes certain human rights which do not traditionally vests in individuals but in a people.¹⁹⁸ Thus the issue as to whether the RtD as a people's right qualifies to be recognized as a human right

¹⁹³ See generally Xigen Wang, "On the Right to Sustainable Development: Foundation in Legal Philosophy and Legislative Process" in Stephen P. Marks ed, *Implementing the Right to Development* (Geneva, Switzerland: Friedrich-Ebert Stiftung, 2008) 39 at 41. I draw upon his analysis on the benefit of viewing sustainable development as a human right on the basis that traditionally humans are the subjects of human rights.

¹⁹⁴ See Philip Alston, *supra* note 51; See Asian Charter *supra* note 17 the Asian Charter on Human Rights recognizes the right to development, the right to peace, right of vulnerable groups etcetera. See articles, 4.1, 7.1 & 8.1

¹⁹⁵ African Charter *supra* note 17 preamble

¹⁹⁶ *Ibid*

¹⁹⁷ See especially Nneoma Nwogu, "Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS" (2007) 6:3 Journal of Human Rights 345 at 347

¹⁹⁸ Asian Charter *supra* note 17 articles 4.1, & 8.1

becomes inconsequential because of the changing conception of what qualifies as human rights.

The recognition of a peoples' right is not new in international law and as Margot Salomon rightly put it, the global community has in prior times been forced to recognize the collective rights of people in the agitation of the colonized world for self-determination.¹⁹⁹ The recognition of self-determination, a right accruing to a people, as a human right was compelled by the need for independence, sovereignty and self-governance of former colonies that characterized the post-World War II era, such that though it did not fit into the Western conception of human rights, it acquired the status of what is known as a "meta right."²⁰⁰ More recently, the recognition of the rights of indigenous people by the United Nation in the Declaration on the Rights of Indigenous Peoples²⁰¹ supports the argument that collective rights are gradually acquiring the status of recognized human rights changing the dynamics of the international community.

It is also important to bear in mind that the right to self-determination, did not materialize as a recognized human right immediately after the post war era, indeed the recognition of the right to self-determination was only enunciated as a human right in article 1 of the ICCPR and ICESCR, eighteen years after the UDHR was proclaimed,²⁰² and thereafter it took another ten years for the Covenants to come into force making a total of twenty eight years of struggle for the recognition of a right to self-

¹⁹⁹ Margot E. Salomon, "Legal Cosmopolitanism and Normative Contribution of the Right to Development" in Stephen P.Marks, ed, *Implementing the Right to Development: The Role of International Law* (Geneva, Switzerland: Friedrich- Ebert-Stiftung, 2008) 17 at 25

²⁰⁰ *Ibid*

²⁰¹ *Declaration on the Rights of Indigenous People* GA Res 10612, UNGAOR, 107 Plen Sess, UN Doc 61/295,(2007),

²⁰² See generally ICCPR *supra* note 67 article 1 and ICESCR *supra* note 69 article 1

determination.²⁰³ In the meantime, many former colonies especially in Africa had continued the campaign and struggle for self-governance and many were granted independence between the late 1950s to the mid-1970s. The fact that the right to self-determination was not recognized as a human right did not diminish the rightness of the right to self-determination, it was still a human right even though it had not been acceded to or ratified by then governments of the world.

In a similar vein, the right to development a “peoples’ right”, has been described as a corollary of the right to self-determination²⁰⁴ and acquiring the status of the “meta right” of the twenty first century.²⁰⁵ Though it does not qualify to be denominated as hard law like the international covenants, it is still a human right of individuals and peoples worthy of recognition, and as Mohammed Bedjaoui has argued, the effectiveness and relevance of the right to development in our present world lies in the recognition of the right as a right accruing to a people and then as an individual human right.²⁰⁶ It is only this recognition of the “collectiveness” and “people approach” to the right to development that enables an identification of the real problems involved in the global

²⁰³ The International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights came into force respectively on 23 march 1976 and 3 January 1976 respectively.

²⁰⁴ Milan Bulajic *supra* note 168 at 17

²⁰⁵ Margot E. Salomon *supra* note 191 at 25

²⁰⁶ Mohammed Bedjaoui, “ Some Unorthodox Reflections on the Right to Development” in Francis Snyder & Peter Slinn, eds, *International Law of Development: Comparative Perspectives* (Abingdon, Oxon: Professional Books Limited, 1987) 87 at 90; see also Arjun Sengupta, “On the Theory and Practice of the Right to Development” (2002) 24:4 Hum Rts Q 837 at 859 who suggests that the fact that the right to development accrues to a people or group does not in any way detract from its being a human right. [hereinafter Theory of RtD or Theory of the Right to Development]

context and the solutions available, which will ultimately be to the benefit of the individual.²⁰⁷

3.5 *The WTO Context*

The recognition of the right to development as a peoples' right is particularly relevant in the context of the WTO. This is because of the framework of international law in which the WTO operates where individuals are rarely subjects or duty bearers. The WTO system envisages only independent States as Members;²⁰⁸ there is no recognition of individual citizens as parties in the WTO system. This is not an absurd situation and is in fact a unique feature of international law. Bedjaoui has rightly noted that "[we] can hardly speak of international law in the sense of a law of the universal human community of which individuals are direct beneficiaries, and one must therefore refer to inter-State law."²⁰⁹

Viewing the right to development as an individual right only raises the problem of *locus standi* of individuals in the WTO system; a similar difficulty identified by Obiora Okafor in his discussion on the implementation of the right to development under the African Charter in relation to transnational corporations operating in Africa.²¹⁰ The WTO system only recognizes three categories of peoples: developed countries, developing

²⁰⁷ Mohammed Bedjaoui, *supra* note 206 at 89- 92; It is also useful to point out that the right to development was part of the considerations the drafters of the international bill of rights considered.

²⁰⁸ For a full list of the current WTO Membership see generally The World Trade Organization, *Members and Observers* online: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

²⁰⁹ Mohammed Bedjaoui *supra* note 206 at 90

²¹⁰ Obiora Chinedu Okafor, "'Righting' The Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Right" in Stephen P. Marks ed, *Implementing the Right to Development: The Role of International Law* (Geneva, Switzerland: Friedrich-Ebert-Stiftung, 2008) 62 at 59.

countries and LDCs.²¹¹ On the basis of the conceptualisation of these three categories of peoples in the WTO system, particularly the latter two, the right to development as a peoples' right, finds expression in the WTO space and can be claimed as a sort of binding obligation by the respective "peoples" envisioned in the WTO system. Indeed this suggestion is not incongruous seeing that the WTO system anticipates the possibility of such a claim and provides for the special claim of these categories of "peoples" in the various special and differential treatment provision and in the obligation for positive and integrated efforts for the economic development of these "peoples."²¹²

In the WTO framework, the right to development and its particular connotation to special and differential treatment can only be accessed and enjoyed as a peoples' right, this is thereafter transmitted by the "people" envisaged in the WTO framework to the individual citizens. The Member state driven orientation of the WTO system makes it almost impracticable to raise the individual's right to development in the WTO framework.

This does not detract in any way from the inherent recognition of an individual's right to development. The individual's right to development is expressly recognized as an inalienable right in the UN declaration²¹³ and the Declaration clearly provides that the ultimate beneficiary of the process of development is the individual.²¹⁴ The obligation to provide domestic policies that will ensure an individual's realization of the right to

²¹¹ See generally Marrakesh Agreement Establishing the WTO *supra* note 39 preamble & Article XI (2),
²¹² *Ibid* Preamble para 2; GATT *supra* note 13 articles XVIII, XXXVI(4); *Agreement on Agriculture* 15 April 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, 1867 UNTS 410 article 9; Doha WTO Ministerial Declaration 2001: WTO Doc WT/MIN(01)/DEC/1 Declaration amendment for LDCs adopted 14 November 2001 online: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

²¹³ See generally Declaration on RtD *supra* note 19 at article 1; see also Asian Charter *supra* note 180 article 7.1

²¹⁴ Declaration on RtD *supra* note 19 article 2(1)

development primarily rests on States.²¹⁵ However at the international sphere, that is, in the WTO, States acting as the recognized “peoples” have the legal standing to claim and appropriate this right for their benefit.

This “peoples” approach to the right to development helps avoid reducing the content of the right to development to mere “pious aspiration which pacifies (the) conscience”²¹⁶ but fails to address the “fundamental international problems” of inequities.²¹⁷ The right to development as a peoples’ right invariably benefits the individual since individuals are the end beneficiaries of the development process and as Arjun Sengupta put it, when States claim the right, they make the claim on behalf of the citizens and the entire population and not for the benefit of the State so to speak.²¹⁸

²¹⁵ *Ibid* article 2(3) & 3 (1).

²¹⁶ Mohammed Bedajoui *supra* note 194 at 90-91

²¹⁷ *Ibid*.

²¹⁸ Arjun Sengupta, “The Human Right to Development” (2004) 32 Oxford Development Studies, 183 at 192; see also Arjun Sengupta, Theory of Right to Development *supra* note 29 at 858-59

3.6 *Status of the Right*

The obligation to adopt a right to development approach in the WTO system hinges on the status of the right in international law. While the Vienna Declaration settled the RtD as a universal and inalienable human right and an integral part of the fundamental human rights system,²¹⁹ the international binding obligation of the right is still a subject of dispute.²²⁰ Apart from the African Charter, the only other treaty provision that recognizes the right to development as a binding legal obligation is the Asian Charter on Human Rights.²²¹ While a majority of the WTO Members fall under the geographical categorization subject to these treaties the same cannot be said for all the Members of the WTO so as to bring them under an obligation to fulfil the RtD. It is therefore necessary to determine the status of the UN declaration which represents a wider consensus of the international community in advocating a right to development approach in the WTO.

It is important to emphasize that the UN Declaration on the RtD is a General Assembly resolution.²²² As a General Assembly resolution it does not command the same legal status as a treaty but, it represents the aspirations and ideals of the global community. In terms of status, the Declaration on RtD is similar to the UDHR though the

²¹⁹ *Vienna Declaration and Program of Action*, GA Conf, UNGAOR, 1993, A/CONF.157/23 para 10

²²⁰ See generally Laure-Hélène Piron, "The Right to Development A Review of the Current State of the Debate for the Department for International Development" (April 2002) online: <<http://www.odi.org.uk/resources/download/1562.pdf>>; Felix Kirchmeier, "The Right to Development: Where do we Stand? State of the Debate on the Right to Development" (Paper delivered at the Dialogue on Globalisation of the Geneva Office of the Friedrich Ebert-Stiftung Institute, July 2006) p 11; Shadrack Gutto *supra* note 161 at para 38-39

²²¹ See generally Asian Human Rights Charter *supra* note 180 article 7.1

²²² See UN Declaration on RtD *supra* note 45; Arjun Sengupta, RtD as Human right *supra* note 50 at 7; Isabella Bunn, *supra* not 165 at 1445; Felix Kirchmeier, *supra* note 208; Stephen Marks, "The Human Right to Development: Between Rhetoric and Reality" (2004) 17 Har Hum Rts J 137 at 144

UDHR is generally now regarded as constituting customary international law. The provisions of the Declaration on RtD are meant to inform state action towards a binding legal instrument e.g. a Treaty on RtD like the UDHR informed the international covenants.

While negotiations and consultations are on-going for such a treaty, states are under an obligation to bear in mind and take meaningful steps towards the realization of the ideals stipulated in the declaration which represents the consensus of the global community.²²³

3.6.1 State Practice and RtD

The status of the RtD can also be examined by looking at state practice. State practice in relation to the right to development cannot be assessed without recourse to the UN Millennium Declaration. After the reaffirmation of RtD as a human right in the Vienna Declaration, the next major global consensus on RtD was the UN Millennium Declaration. The relevant texts of the Millennium Declaration are paragraphs 11 and 12 which embody a commitment by the heads of States and governments to making the “right to development a reality for everyone”²²⁴ and creating an environment at the national and global level conducive to development and elimination of poverty.²²⁵

²²³ See Diane Desierto, “Development as an International Right: Investment in the New Trade based IIAs” (2011) 3:2 Trade, Law & Development 296 at 299; a similar idea is also advanced with regards to the UN Millennium Declaration, though not a binding legal instrument, the Millennium Declaration has informed state practices and actions towards the realization of the goals enumerated in the Declaration.

²²⁴ United Nations Millennium Declaration *supra* note 1

²²⁵ *Ibid.*

In terms of state practice tilting evidence in support of an obligation to observe the right to development, it is important to emphasize that approximately 189 States²²⁶ pledged their commitment to realizing the objectives enumerated in the Millennium Declaration and consequently the right to development.

Since the Declaration was reduced into measurable targets itemized in the MDGs, state practice in relation to Goal 8²²⁷ not only points to an acceptance of the right to development but also places the WTO system as integral to realizing the goal.²²⁸ In relation to state practice, the growing number of states from developed and developing countries incorporating the objectives of Goal 8, which mandates international partnership for development, in their domestic policies seem to suggest that the RtD is acquiring the characteristic of an international custom. For instance Germany, South Africa, Sweden, Bosnia, the UK, Nigeria²²⁹ and Uganda have domestic policies aimed at mainstreaming the MDGs into their national domestic development policies.²³⁰

Also, in support of state practice as evidence of the evolving custom of the RtD, the recent WTO submission, pursuant to the Human Rights Commission Working Group and

²²⁶ *United Nations Millennium Summit* online: The Acronym Institute for Disarmament Diplomacy online: <<http://www.acronym.org.uk/un/unmilsum.htm>> ; *Millennium Declaration, The Millennium Declaration Goals*, online: <http://www.un.org/millennium/declaration/ares552e.htm> effective 8 September 2003

²²⁷ Goal 8 is titled Global Partnership for Development see MDGs online;; see also Felix Kirchmeier *supra* note 208 at 13-14

²²⁸ Target 12 restates the commitment to develop an open, rule-based, predictable, non-discriminatory trading and financial system and includes a commitment to good governance, development and poverty reduction – both nationally and internationally. Target 13 seeks to address the special needs of the least developed countries. See generally

²²⁹ *MDGs Needs Assessment and Financing Strategy for Nigeria* online: UNDP http://www.ng.undp.org/mdgs/policy_brief.pdf

²³⁰ See generally *Millennium Development Goals Indicators* online UN Department of Economic and Social Affairs <http://unstats.un.org/unsd/mdg/Metadata.aspx?IndicatorId=33&SeriesId=0>; see especially Shadrack Gutto, *supra* note 30 para 27 & 40; Felix Kirchmeier, *supra* note 77 at 13-15.

Task Force on the Right to Development concept document,²³¹ which enumerated the contribution of the WTO to the realization of the right to development may point to the fact that the WTO takes seriously the relationship between realizing the right to development and the international trading system highlighted in the Millennium Declaration.²³²

While a treaty on the RtD will finally settle the controversy on the binding obligation of the RtD it is important to reemphasize that as a General Assembly resolution, the RtD possess moral political force.²³³ It is also helpful to keep in mind that the very States who will be subjected to evaluation by 2015 based on the targets and pledge made in the MDGs especially the pledge *to making the right to development a reality* are the same governments that make up the WTO system.

²³¹ See generally Working Group and Task Force on the Right to Development, UN Doc A/HRC/15/WG.2/TF/2/Add.1)

²³² The Millennium Declaration provides in paragraph 13 that the objective of making the right to development a reality for everyone entails good governance at the international level and transparency in the monetary, financial and trading system.

²³³ Laure-Hélène Piron, *supra* note 211 at 14.

3.7 *Content of the Right to Development*

Understanding the core content of the RtD is essential in determining the obligation incumbent on the WTO and States operating at the international level. According to the UN Declaration, the right to development is an inalienable human right of individuals and peoples which entitle them to participate in, contribute to, and enjoy a process of economic, social, cultural and political development in which all human rights and fundamental freedoms can be realized.²³⁴

From the above description four basic elements must be present in any RtD approach- participation, contribution, guaranteed benefits for all and the realization of human rights. The RtD also entails the creation of conditions at the *international level* that is favourable to the realization of development as a right,²³⁵ and the process of creating those conditions must fulfil the core elements enumerated above. In other words in the WTO, there is an obligation to ensure that the existing conditions are favourable to realizing development as a right of peoples and the individual, and if such conditions do not exist, they have to be created. The creation of the process must involve the active participation and contribution of the end beneficiary of development, that is, the individual,²³⁶ in this instance acting through its recognized representative in the WTO system, that is, States and the conditions must guarantee to all the enjoyment of benefits. This obligation to guarantee benefits to all entails non-discrimination. If the benefits

²³⁴ See Declaration on RtD *supra* note 19 article 1; see especially Arjun Sengupta, RtD as a Human Right *supra* note 182 at 3

²³⁵ Declaration on RtD *supra* note 19 at article 3

²³⁶ Arjun Sengupta, RtD as a Human Right *supra* note 182 at 11-15.

favours some as against all, it does not fulfil the requirement of the RtD. RtD also mandates collective action of States to formulate international development policies geared towards realizing the right, and requires sustained effort to promote the rapid development of developing countries.²³⁷

3.8 *Why the WTO? Right to Development and the WTO*

Why the WTO? Why not some other traditional developmental institutions like the International Bank for Reconstruction and Development (World Bank) or the International Monetary Fund (IMF)? Seeing that the “telos of the GATT/WTO has traditionally been quite clear – the goal of trade liberalization”²³⁸ and as has been reaffirmed by some key WTO officials, in the past, in very clear terms- “the WTO is not an aid agency....”²³⁹ It is very helpful to recall that the WTO does not exist in isolation and as such is not immune from the prevailing intersections of public international law and the demands of what traditionally may be viewed as political discourse.²⁴⁰

States do not assume a different personality or remove the “cloak of human rights obligations” when operating in the WTO.²⁴¹ A very recent excerpt from a speech by the current Deputy Director General of the WTO captures succinctly the synergistic needs of

²³⁷ Declaration on Right to Development *supra* note 19 article 4

²³⁸ Tomer Broude *supra* note 9 at 276

²³⁹ See generally speech by Peter Sutherland former Director General of the GATT cited in Robert Howse, *Mainstreaming the right to development into international trade law and policy at the World Trade ESC* 2003/83 UNESCOR, 56th Sess, Supp No 4, UN Doc E/CN.4/Sub.2/2004/17, para 20; statement by Dr. Supachai Panitchpakdi, former Director – General WTO, then Deputy Prime Minister and Minister of Commerce for Thailand, WT/MIN (99) ST/31/31 December 1999 (99-5246).

²⁴⁰ See especially Asif H. Qureshi, “International Trade for Development: The WTO as a Development Institution?” (2009) 43:1 *Journal of World Trade* 173 at 177

²⁴¹ Margot E. Salomon, Anne Tostensen & Wouter Vandenhole, “Human Rights, Development and New Duty- Bearers” in Margot E. Salomon, Anne Tostensen & Wouter Vandenhole, eds, *Casting the Net Wider: Human Rights Development and New Duty- Bearers* (Antwerp, Oxford: Intersentia, 2007) 16

the global system- she opined that “trade is certainly not immune from the changing geopolitical realities of the past 10 years.”²⁴² Of course one cannot speak of the geopolitical realities of the past 10 years without mentioning the UN Millennium declaration or the MDGs. If the solemn pledges of the Millennium Declaration and the fundamental objective of the ongoing Doha Development Agenda, which is to place *the developmental needs of developing countries at the heart of the WTO*, are kept in mind, then the idea of a WTO in sync with the right to development becomes reasonable.

3.9 *The WTO framework and Development Dimensions*

The idea of development is not new to the WTO system. Indeed development particularly differential treatment to support the special needs of developing countries has been a feature of the multilateral trading body since the 1965 Protocol which amended the original GATT 1947 to include part IV titled “Trade and Development.”²⁴³ Article XXXVI (1) (a) is particularly instructive. Not only does it establish the progressive development of parties as an integral purpose of the trading system, it reaffirms the objective of raising standards of living in the preamble of the GATT and notes the attainment of this objective as an urgent need of less developed contracting Parties.²⁴⁴

A correlation can be drawn between the development dimensions in the GATT and the definition of development in the UN Rtd where development is a comprehensive

²⁴² World Trade Organization, News Release, “DDG Rugwabiza warns protectionism will hurt global growth” (4 November 2011) online: <http://www.wto.org/english/news_e/news11_e/ddg_04nov11_e.htm>

²⁴³ GATT, *Protocol Amending the GATT to introduce Part IV on Trade and Development*, GATT Doc L/2355, 1965, online: <http://www.wto.org/gatt_docs/English/SULPDF/90780015.pdf>

²⁴⁴ GATT 1947 article XXXVI (1) (a).

economic, social, cultural and political process which aims at improving the well-being of individuals.²⁴⁵ Part IV also highlights two important elements that are essential to the development of developing countries: increased export earnings and individual or joint action by developed countries targeted at the advancement of developing countries.²⁴⁶ A detailed descriptive analysis of the developmental dimensions in the WTO system via special and differential treatment has been undertaken in some other literature.²⁴⁷ This thesis however intends to emphasize some specific provisions in the GATT for their particular relevance in this discourse of the development dimensions of the WTO. They are as follows:

- a. Increased export earnings for less developed countries by reducing prices of essential imports and expanding market access for exports from developing countries;²⁴⁸
- b. Mandated integrated efforts by all contracting parties especially developed parties;²⁴⁹
- c. Expand market access for primary products e.g. agricultural produce, by the provision of stable, equitable and remunerative prices for primary products from less developed countries;²⁵⁰
- d. Market access for manufactured and processed goods from less developed countries to encourage industrial growth and diversification of export;²⁵¹

²⁴⁵ UN Declaration on RtD *supra* note 19 at para b

²⁴⁶ GATT *supra* note 12 article XXXVI (1) (b) & (c)

²⁴⁷ Raj Bhala, *Trade, Development and Social Justice* (North Carolina: Carolina Academic Press, 2003) 179-196; Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organization Law, Practice and Policy* (Oxford, New York: Oxford University Press, 2006) 220-226

²⁴⁸ GATT *supra* note 12 article XXXVI (1) (b) & (2)

²⁴⁹ *Ibid* article XXXVI (3)

²⁵⁰ *Ibid* article XXXVI (4)

- e. Collaboration with international financial institutions for expanding opportunities for economic development of less developed countries;²⁵²
- f. Collaboration with the UN specialized organs with expertise in the field of trade and economic development;²⁵³ and
- g. Mandatory lack of reciprocity on the part of developed countries for market access granted to less developed countries.²⁵⁴

In particular in paragraph (e) of article XXXVI there is a hint at an obligation,²⁵⁵ based on the understanding that international trade is a *means* to achieving economic and social advancement, to establish procedures that are consistent with the objectives of article XXXVI which reiterates the core objectives of the GATT system, and highlights particularly, that the attainment of this objective is urgent for less developed countries.²⁵⁶

Aside from these, the WTO Agreement also recognizes the need for positive efforts to ensure that developing and least developed countries are able to benefit from increased growth in international trade.²⁵⁷ It also recognizes in particular that LDCs will only be expected to take on commitments and concessions that are consistent with their individual development, financial, trade, administrative and institutional capabilities.²⁵⁸ It is important to note here that the above is by no means an exhaustive list of development

²⁵¹ *Ibid* article XXXVI (5)

²⁵² *Ibid* article XXXVI (6)

²⁵³ *Ibid* article XXXVI (7)

²⁵⁴ *Ibid* article XXXVI (8)

²⁵⁵ *C.f* Raj Bhala *supra* note 238 at 207 who observes that the categorization of the provisions of article XXXVI (1-7) is an exhortation and does not impose an obligation.

²⁵⁶ GATT *supra* note 12 article XXXVI (1) (e)

²⁵⁷ WTO Agreement *supra* note 39 Preamble para 2

²⁵⁸ *Ibid* article XI (2)

dimensions in the WTO system, the Doha Amendment of the TRIPS Agreement²⁵⁹ and the Aid for Trade Initiative²⁶⁰ are all development initiatives with a focus on differential treatment for the least advantaged.²⁶¹

3.10 *What then is the Problem?*

It can be assumed therefore that development is intrinsic to the WTO system.²⁶² Indeed the WTO covered agreements and structure are replete with numerous provisions and initiatives that reflect aspects of the right to development, especially, differential treatment, non-discrimination, capacity building and more recently inclusive participation. One might even argue that the WTO system is fulfilling the RtD in its own way by the recent reforms and changes in the system.²⁶³

Yet there are two major problems with the development initiatives in the WTO- the possibility to avoid the obligation to provide special and differential treatment in terms of market access and an approach to development solely as an economic objective and not as a human right.

²⁵⁹ See generally *Declaration on TRIPS Agreement and Public Health* WT/MIN(01)/DEC/20 November 2001 online: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

²⁶⁰ See generally WTO, "Third Global Review of Aid for Trade: Showing Results" Global Review 2011 online: http://www.wto.org/english/tratop_e/devel_e/a4t_e/global_review11_e.htm para 2

²⁶¹ For a detailed discourse of special and differential treatment in the WTO see Raj Bhala, *supra* note 235 at 183-190

²⁶² See Asif H Qureshi *supra* note 231

²⁶³ See WTO response to UN Working Committee on the Right to Development *supra* note 8

3.10.1 Market Access Impediments

In article XXXVII of the GATT developed countries are required to:

- a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;²⁶⁴ and
- b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties²⁶⁵

There are two caveats in the *chapeau* to this provision: developed countries are only expected to fulfil this obligation²⁶⁶ to the fullest extent possible and may derogate from it on the basis of compelling reasons be they legal²⁶⁷ or otherwise.

To further emphasize the effect of this *chapeau* to article XXXVII, this thesis draws an analysis from the requirement on Rules of Origin (RoO)²⁶⁸ and how it affects

²⁶⁴ GATT *supra* note 12 article XXXVII (1) (a)

²⁶⁵ *Ibid* article XXXVII (1) (b)

²⁶⁶ C.f. Preeti Gandhi, “International Trade and the Right to Development”, online: (2009) Selected Works at page 7 http://works.bepress.com/preeti_gandhi/1 who argues that because the provisions of article XXXVII allow for a derogation they are not obligations; Raj Bhala, *supra* note 104 at 226 he agrees that the provisions do qualify as obligations but argues that the possibility for derogation based on compelling reasons e.g. constitutional provision, statute or court order, questions how seriously the obligations are to be taken.

²⁶⁷ See generally Raj Bhala, *supra* note 238 at 225-6. He notes that a literal interpretation of the provision of article XXXVII is that perfection is not demanded and a mere effort will suffice.

²⁶⁸ *Agreement on Rules of Origin* Uruguay Round Agreement online: http://www.wto.org/english/docs_e/legal_e/22-roo_e.htm

preferential market access for goods originating from developing countries under the GSP.²⁶⁹

RoO are an integral part of the market access facilitation for developing and LDCs. The goal of RoO requirement in preferential market access arrangements is to encourage and protect domestic industry growth in developing countries in line with the provisions of article XXXVII (d) of the GATT by specifying a particular percentage of local content production or manufacturing element. The need for simplified and less restrictive RoO requirement criteria was reiterated at the recent WTO Hong Kong Ministerial Conference. In Annex F to the Hong Kong Declaration, developed countries were obliged to provide Duty Free and Quota Free (DFQF) market access for goods from LDCs. The enabling clause states that Members are to “*ensure that preferential rules of origin applicable to imports from LDCs are transparent and simple, and contribute to facilitating market access.*”²⁷⁰

Unfortunately, the RoO criterion in relation to the grant of preferential market access has been applied in a cumbersome manner that impedes the objectives of increased market access for developing countries and LDCs such that it almost defeats the essence of the paragraph (e) of article XXXVII of the GATT and the objectives of special and differential treatments.

²⁶⁹ See generally GATT, *Decision of Contracting Parties on the Establishment of Generalized, Non-Reciprocal and Non-Discriminatory Preferences Beneficial to the Developing Countries* (25 June 1971), 18th Supp BISD (1972) at 24.

²⁷⁰ See WTO, Committee on Trade and Development, *Least Developed Countries Proposal on Rules of Origin: Communication from Bangladesh on Behalf of LDC Group Revision* (24 June 2011), TN/CTD/W/30/Rev.2, TN/MA/W/74/Rev.2, Special Sess, (hereinafter WTO CTD Bangladesh) ; see also a similar provision on preferential market for goods originating in less developed countries in article XXXVII (3) (a)

For instance the US Africa Growth Opportunity Act (AGOA)²⁷¹ a US trade facilitation initiative to contribute to promoting development in Sub-Saharan Africa specifies three categories of products that qualify for market access: petroleum products, apparel products and a range of selected agricultural and industrial products.

To qualify for DFQF market access under AGOA, the RoO of AGOA provides that a textile product must satisfy the requirement that the yarn used in the production has been sourced in another benefiting sub-Saharan African country under the AGOA system or in the US.²⁷² This requirement poses two major challenges for the benefiting Sub-Saharan African country: the availability of textile yarn in another benefiting country in view of the infrastructure and industrial limitation in most Sub-Saharan African countries,²⁷³ and the cost and technical implications of sourcing yarn from the US.

From a different perspective but also addressing the cumbersome RoO requirements and the need for flexibility in the RoO criteria, Zambia, in a recent report submitted to the WTO Committee on Trade and Development on behalf of LDCs, argued for variation of the current “percentage criterion of value added or domestic content” approach to a *value of material calculation as numerator* based percentage criterion methodology.²⁷⁴ The *material calculation as numerator* methodology would, according

²⁷¹ African Growth Opportunity Act Title 1 US Trade and Development Act 18 May, 2000, online: <http://www.agoa.gov/agoa_legislation/agoatext.pdf> [hereinafter AGOA Act]

²⁷² *Ibid* section 112(b) (1); see also Aaditya Mattoo, Devesh Roy & Arvind Subramanian, “The African Growth and Opportunity Act and its Rules of Origin: Generosity Undermined” online: (2003) 26:6 World Economy 829 at 836-7 <http://onlinelibrary.wiley.com/doi/10.1111/1467-9701.00550/pdf>

²⁷³ Bernard Hoekman, Constantine Michalopoulos & L. Alan Winters, “Special and differential Treatment of Developing Countries in the WTO: Moving Forward After Cancun” online: (2004) 27:4 World Economy 481 at 485 <http://onlinelibrary.wiley.com/doi/10.1111/j.0378-5920.2004.00610.x/pdf>

²⁷⁴ WTO Committee on Trade and Development, *Least Developed Countries' Proposal on Rules of Origin: Communication from Zambia on Behalf of LDC Group Revision* (10 February 2011), WTO Doc

to the proposals from LDCs, ease the cumbersome and complex rules of proving allowable costs which developing countries have so far been saddled with under the present RoO scheme.²⁷⁵

Another problem which hinders market access facilitation traceable to the RoO is the different RoO rules that apply between the various donor countries and beneficiary countries and the absence of a binding WTO text on RoO.²⁷⁶ A harmonization of RoO rules and a specific text on RoO would help create predictability for all the benefiting countries and contribute to facilitating compliance with the rules and better market access.²⁷⁷

3.10.2 *Economic Growth objective or Human Right to Development*

An additional challenge with the WTO development dimension is the equation of development with economic growth. There is no doubt that an integral part to development is its economic aspect, thus growth in GDP is construed as an indicator of development. Since 1990 however, the UNDP has expanded an understanding of development through the Human Development Index (HDI) beyond growth in GDP.

TN/CTD/W/30/Rev.1 & TN/MA/W/74/Rev.1, Special Sess, note paras 17, 18, 21-22 & 38 [hereinafter WTO CTD Zambia]

²⁷⁵ *Ibid* para 21, 24 -5

²⁷⁶ For instance the RoO requirements of US under AGOA are different from the RoO requirements of the EU under the Cotonou Agreement and the Everything But Arms Initiative (EBA). Since the beneficiary countries under these preference giving arrangements are mostly sub Saharan African countries which belong to similar regional blocs, the different RoO rules further compound the difficulties of implementation.

²⁷⁷ See WTO CTD Zambia *supra* note 265 at para 4 and 8; see also Lawrence E. Hinkle & Maurice Schiff, "Economic Partnership Agreements Between Sub-Saharan Africa and EU: A Development Perspective" online: (2004) 27:9 World Economy 1324 <<http://onlinelibrary.wiley.com/doi/10.1111/j.0378-5920.2004.00654.x/pdf>>

Based on the UN HDI, indications of development includes: infant mortality rate, life expectancy, access to quality education, gender equality, access to food and hygienic water, civic engagement, environmental sustainability and of course GDP.²⁷⁸ This more inclusive definition of development does not negate the impact of GDP as an indication of development. But as the UN HDI observes, understanding development solely in economic terms and rise in GDP results in undue reliance on the interplay of market forces, excessive pressure to liberalize trade and diversify domestic economies to the exclusion of other essential indicators that are necessary for a more comprehensive approach to development.²⁷⁹

A focus on increased market access as a means of realizing development²⁸⁰ has been a focal point of the WTO both in the MFN principle and in its development initiatives for developing and least developed countries. Issues of equity which are integral to the RtD²⁸¹ compelling preferential and differential treatment even in the face of simultaneous demands for economic equality or reciprocity are foreign to the WTO system. A good example is the fact that SDT rules in the WTO, which are characterized as developmental dimensions, can only guarantee longer time frames²⁸² for implementing WTO obligations and not an absolute derogation from the rules.

²⁷⁸ UNDP, *2011 Human Development Index: Norway at top, DR Congo Last* (2 November 2011) online: <http://www.beta.undp.org/undp/en/home/presscenter/pressreleases/2011/11/02/2011-human-development-index-norway-at-top-dr-congo-last.html>

²⁷⁹ *Ibid*

²⁸⁰ See generally WTO Agreement *supra* Preamble; Caroline Dommen, “Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies” (2002) 24:1 Human Rights Quarterly 1at 46 [hereinafter Caroline Dommen Raising Human Rights]

²⁸¹ Milan Bulajac *supra* note 168 at 5; Arjun Sengupta, Theory of the RtD *supra* not 29 at 884

²⁸² WTO, “Special and differential Treatment for Least Developed Countries” 5 October 2004, WTO Doc WT/COMTD/W/135

Another example of the economic objective dimension of WTO's developmental framework is the recent WTO trade policy review report on Guinea. A prominent feature of the report was the emphasis on development in terms of economic advancement only. While the trade policy report made reference to official developmental assistance (ODA) as necessary to the economic advancement of Guinea and the menace of the recent civil conflicts and *coup d'état in* Guinea, the report focused mainly on the adverse effects of these civil disturbances to trade and the flow of foreign investment in Guinea. The analysis of Guinea's domestic taxes on foreign investment and tariff rates was viewed in terms of its contravention of WTO trade obligations without considering the possibility of such taxes as sources of government revenue for the provision of social services.²⁸³ The reforms suggested by the TPRB were more in line with greater liberalization of Guinea's service sector through liberal rules to attract foreign investment without consideration of the need to maintain domestic policy space to enable government fulfil its social and economic welfare obligations to its citizens.²⁸⁴ This narrow approach to development has created a WTO type development that does not meet the requirement of the human right to development.

²⁸³ WTO, "Trade Policy Review Report by the Secretariat Guinea" 24 August 2011, WTO Doc WT/TPR/S/251 page ix-x

²⁸⁴ *Ibid* xii

3.11 *What does Development as a Right mean for the WTO?*

The RtD as has been mentioned in previous paragraphs connotes – participation which implies effective contribution; guaranteed benefits for all; non-discrimination; the realization of all human rights and differential treatment. Any developmental initiative under the WTO must fulfil this requirement.²⁸⁵

For instance increased market access as a means to boost the economic and social development of developing countries must involve the active participation and contribution of recipient developing countries; it must guarantee benefits for all the parties²⁸⁶ involved and must not impede the realization of any human rights. Thus if increased market access and the necessity of reciprocity would jeopardize the realization of human rights, particularly for developing or least developed countries, then such reciprocal demands or market access would have to be sacrificed. Where such market access negotiations are absolutely necessary for the economic and social development of developing countries and LDCs in the long run, then steps have to be taken to mitigate or cushion the adverse effect which can only last for a limited period.

The WTO appears to be doing this in its Aid for Trade initiative which provides technical assistance for developing countries and liaises with donor organizations to provide financial support to cushion the adverse effects of trade liberalization. However the approach of the WTO development which is evident from the TPRM mechanism has

²⁸⁵ Arjun Sengupta, *Theory of the RtD* *supra* note 29 at 868

²⁸⁶ While the right to development connotes equity and special and differential treatment for the disadvantaged, it is important to emphasize that the right to development is not a right of developing countries, it is an inalienable human rights enuring to all peoples. Of course its goal of eliminating inequities tends to focus on developing countries but the essential idea of RtD is to ensure comprehensive development for all peoples irrespective of their geographical location. See generally Robert Howse *supra* note 227 at para 15.

been limited to capacity building to ensure that domestic trade policies are in line with the trade objective of the WTO without due regard to the socio economic development needs of the particular Member.²⁸⁷ There is an urgent need for the WTO to shift its capacity building and technical assistance mechanism from a project aimed at ensuring that developing countries and LDCs comply with WTO rules to technical assistance and capacity building that takes into consideration and reflects the peculiar and specific socio-economic development needs of a developing countries and LDCs.

With respect to RoO, especially its effect on LDCs as shown from the communication by Zambia, the WTO in order to implement development as a right must ensure the active participation of all the Members affected by the current RoO practice. This participation must go beyond numbers to include the meaningful contribution of Members and where necessary provide technical assistance such that the developing Members, particularly LDCs, understand the full implication of the proposed change to RoO rules and what they portend for their domestic economies. A right to development approach must guarantee benefits and not impede the realization of human rights. Where necessary, it may entail differential and preferential treatment for the less advantaged in the commitments undertaken by the other WTO Members.

In practical terms, an RtD approach in the WTO would result in serious consideration of the complaint by LDCs that the current RoO rules are long overdue for a revision in view of the problems they experience in implementing the rules particularly

²⁸⁷ *Ibid* at 10 para 29-30. He cites an example of a recent report of the WTO TPRB on Senegal which focused solely on Senegal's efforts at trade liberalisation and criticised its subsidization policies without taking due regard of Senegal's obligation to ensure the realization of socio economic rights for its citizens.

the percentage criterion.²⁸⁸ The allegation that donor countries are more interested in maintaining the status quo must be taken seriously also and not relegated to the background.²⁸⁹ Ways to address this allegation in a collaborative manner that reflects a realization of the interests of the benefiting developing countries must be devised; this will fulfil the much needed bottom to top approach to development.

The WTO seems to have made some progress over the years in terms of inclusive participation and contribution by all Members²⁹⁰ but a lot still needs to be done in terms of guaranteeing benefits to all and effective differential treatment. Development as a right would imply a revision of the provisions for market access and joint action in the WTO from a concessionary obligation to a binding obligation.²⁹¹

3.12 *Differential Treatment What Does This Portend for Non-Discrimination?*

The significance of non-discrimination in the realization of RtD cannot be over emphasized. Non-discrimination is an integral aspect of RtD in the sense that it guarantees equality for all which is necessary for the success of human rights in general and the multilateral trading institution specifically.²⁹² However, in the context of realizing development as a right, particularly for developing and least developed countries the emphasis cannot be on non-discrimination as an integral part of RtD but on differential treatment. In article 4, the UN Declaration recognizes generally that States have an

²⁸⁸ See WTO CTD Zambia *supra* note 265 at 31

²⁸⁹ *Ibid* 32

²⁹⁰ See especially Caroline Dommen, raising human rights *supra* note 271 at 41-42

²⁹¹ See generally GATT *supra* note 12 articles XXXVII & XXXVIII

²⁹² See generally Sarah Joseph *supra* note 143 at 144-5

obligation individually and collectively to formulate international policies that facilitate the realization of RtD.²⁹³ While recognizing that this is primarily the responsibility of a State either working alone or in collaboration with others States,²⁹⁴ the declaration highlights the special status of developing countries²⁹⁵ and their urgent need for rapid development calling for international cooperation to complement the efforts of these countries to foster their realization of RtD.²⁹⁶

This special treatment has been equated with the principle of equity²⁹⁷ and the need to correct social imbalances. If perchance the lot of the well-off is affected for some time in an effort to realize development for the less advantaged, this is surely a price worth paying.²⁹⁸

Since the WTO is primarily a trade regulating institution its role in the realization of RtD will be to ensure that trading rules are fair and benefit all its Members and mandatorily implement differential treatment for developing and LDCs. This will entail strengthening the current SDT provisions in the WTO taking into consideration the needs and views of developing countries with the aim of making it more flexible, adaptable, beneficial and binding on all Members.²⁹⁹

This focus on strengthening special and differential treatment rules portends problems for the underlying framework of non-discrimination in the WTO system which

²⁹³ UN Declaration on RtD *supra* note 19 article 4(1)

²⁹⁴ *Ibid* article 3(1)

²⁹⁵ Isabella Bunn *supra* note 165 at 1448

²⁹⁶ UN Declaration on RtD *supra* note 19 article 4(2) & 10.

²⁹⁷ Arjun Sengupta, Theory of RtD *supra* note 29 at 884

²⁹⁸ *Ibid*

²⁹⁹ See especially Isabella Bunn *supra* note 34 at 1464

is the backbone of the MFN and National Treatment rules; the core principles of the WTO system. These principles are implicitly founded on equality of all Members and prohibit any form discrimination; essentially what special and differential treatment implies.

Reciprocity has been the basis of trade negotiations in the WTO. Indeed it has been argued that a focus on special and differential treatment will not lead to the realization of development for developing countries or LDCs because it creates “incentives for developing countries not to engage in the process of reciprocal liberalisation of trade barriers and rule making process.”³⁰⁰ Of course special and differential treatment in the WTO is not the panacea for the inequities in global relations which RtD seeks to address but it is one of the mechanisms that will contribute to correcting inequities in international trade and contribute to developing countries realizing development as a right.

3.13 *Right to Development and Sustainable Development*

Finally, it is important to distinguish the RtD from Sustainable Development (SD) particularly the narrow view of SD which equates the principle with protection of the environment. SD is defined in the Bruntland Report as “development that meets the needs of the present without compromising the ability of future generations to meet their needs.”³⁰¹ Though the principle of SD incorporates social development, economic growth,

³⁰⁰ Bernard Hoekman *et al* supra note 264 at 503

³⁰¹ World Conference on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43

environmental protection³⁰² and the special needs of developing countries, it has acquired a meaning that is almost synonymous with ecological protection.

This idea of SD applying solely to environmental concerns is the view canvassed in international environmental treaties and the literature on trade and the environment³⁰³ and in the WTO system as evinced from the decision of the Appellate Body in *US Shrimp* and in the preamble of the WTO Agreement.

While environmental protection is an integral part of the principle of sustainable development, it is important to emphasize the social development dimensions of the principle and the particular needs of developing countries which were highlighted in the 2002 World Summit on Sustainable Development.³⁰⁴ This holistic view of sustainable development is pivotal and incorporated in the human right to development particularly article 6 which mandates States to eliminate obstacles to development.³⁰⁵ In this sense, environmental degradation becomes an obstacle to development since it inhibits the ability of individuals and peoples to realize comprehensive development which is the goal of the RtD.

³⁰² Marie- Claire Cordonier Segger & Markus w. Gehring, *Sustainable Development in World Trade* (The Netherlands: Kluwer Law International, 2005) 5

³⁰³ See generally Ilona Cheyne, "Gateways to the Precautionary Principle in the WTO Law" (2007) 19:2 *Jl Env L* 155; Jan Bohanes, "Risk regulation in WTO Law: A Procedure- based Approach to the Precautionary Principle" (2002) 40 *Colum J Transnat' L* 323

³⁰⁴ See generally *Johannesburg Declaration*, in Report of the World Summit on Sustainable Development, (2002) UN Doc A/AC.257/32 para 5

³⁰⁵ Shadrack Gutto *supra* note 161 para 6-7 & 50; Xigen Wang *supra* note at 46

Conclusion

In sum this chapter has sought to provide a different angle to the trade and human rights integration in the WTO via a mechanism intrinsic to the WTO system. It has argued that the developmental dimensions in the legal and procedurally framework of the WTO provide such a mechanism. It noted two essential factors: the right to development approach in the WTO is predicated on a consensus on the status of development as a right and the problems with development as it is currently pursued in the WTO system. It has advocated a shift from development as an economic objective to development as a human right. This shift in perspective is not unreasonable bearing in mind that the WTO system and their developmental dimensions reflect aspects of the RtD, especially non-discrimination, equal participation and to some extent differential treatment. It has suggested that an RtD approach to development in the WTO will not only provide a platform for the realization of human rights, but will contribute to *making the right to development a reality* as well as eradicating poverty; which arguably all Members of the WTO have pledged their commitment to in the Millennium Declaration. This call for a right to development approach is not new and has been advocated by other scholars in international economic law³⁰⁶ and is changing the dynamics of other intergovernmental organizations to align with the dictates of the global community.³⁰⁷

While the WTO appears to be evolving to confront the necessities of global relations by placing special and differential treatment provisions and agriculture and market access

³⁰⁶ Mitsuo Matsushita *et al* *supra* note 227 at 294; Robert Howse *supra* note 227 at 9- 12.

³⁰⁷ See *Malaysia Historical Salvors Sdn Bhd v. Malaysia*, (2009) Case No. ARB/05/10, (International Centre for Settlement of Investment Disputes),(Dissenting Opinion of Judge Mohamed Shahabuddeen)

for developing countries in the ongoing Doha Round, the end result of the negotiations will eventually tell if the WTO lives up to these anticipated expectations.

CHAPTER 4 MOVING FORWARD FROM DOHA USING A RIGHT TO DEVELOPMENT APPROACH

4.1 *Doha so Far*

As previously concluded in chapter 3 of this thesis, an expanded interpretation of development, a concept and process integral to the WTO system, provides a platform for integrating trade and human rights in the WTO, to correct inequities in the multilateral trading system and to create an environment where WTO obligations do not stymie states ability to realize human rights.³⁰⁸ The method advocated in this thesis is the adoption of a human right to development approach in the development dimensions of the WTO system. This right to development approach will entail *inter alia* mandatory *free, active* and *effective* participation and contribution of all Members in the rule making process, guarantee benefits for all, particularly the least advantaged and require special and differential treatment. This approach also represents the implementation of the concept of mutual supportiveness which provides for synergies between conflicting but interrelated regimes.

The on-going Doha Trade Round launched in November 2001 provides an opportunity for adopting and implementing this right to development approach and mutual supportiveness in negotiations and final rule making. The Doha Round, widely acclaimed as one of the most instrumental and significant rounds of the multilateral trading system,³⁰⁹ purposes to correct inequities in the global trading system by

³⁰⁸ Human rights here refers mostly to economic, social and cultural rights and the right to development

³⁰⁹ See generally address by the then Director General at the Fifth WTO Ministerial Conference in Cancún, WTO, "Address by Dr. Supachai Panitchpakdi Director General, 10 September 2003, WT/MIN(03)/10 page 1-2; see also Donna Lee, "The Cotton Club: The African Group in the Doha Development Agenda"

providing real and lasting opportunities for developing countries;³¹⁰ arguably why it acquired the mantra “Doha Development Agenda (DDA).”³¹¹

The development objective of the Doha Round is summed up in paragraph 2 of the Ministerial Declaration which stipulates that the goal of the current trade round is to place the “needs and interests (of developing countries) at the heart of the Work Programme adopted in this Declaration” in the light of the objectives of the Marrakesh Agreement establishing the WTO.³¹²

This purported goal of the Doha Round has birthed hopes for WTO Members especially developing countries that perhaps negotiation issues paramount to their trade and development interest, which also affect their ability to realize some fundamental human rights, particularly economic, social and cultural rights, would occupy a central role in negotiation themes. The core issues of central importance to developing countries are broadly categorized as outstanding implementation issues, and cover the review of special and differential treatment (S&D) provisions, agriculture and market access, subsidies and other implementation related concerns carried over from the Uruguay Round.³¹³

in Donna Lee & Rorden Wilkinson, eds, *The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda* (New York: Routledge, 2007) 137-143

³¹⁰ WTO, *WTO Public Symposium :The Doha Development Agenda and Beyond*, WTO News, online: http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_02_e.htm

³¹¹ WTO, *The Doha Round*, WTO News, online: <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm>

³¹² Doha Ministerial Declaration WT/MIN(01)/DEC/1, 20 November 2001 para 38 online: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm preamble [hereinafter Doha 2001]

³¹³ *Ibid* see generally paragraphs 12, 13, 14, 16 & 44

However, concerns have been expressed by many scholars and observers of the global trading system,³¹⁴ mostly justified, that the possibility of the Doha Round realizing the much needed equitable trading regime is doubtful because of the relegation of some trade issues of particular interest to developing countries (i.e. strengthened and binding special and differential treatment provisions) as the negotiations proceed.

As early as 2003, when the Doha Round was still in its nascent stage, Fatoumata Jawara and Aileen Kwa foretold a similar unfavourable outcome in their account of the events leading up to the Doha Declaration and the issues tabled for negotiation. Jawara and Kwa had observed that the Doha Ministerial Conference was characterised by arm twisting, coercion, and clear manipulation of developing countries by developed countries to accede to the inclusion of trade issues³¹⁵ detrimental to their developmental needs, while developed countries exhibited intransigence to embrace issues of interest to developing countries.³¹⁶ A similar account has been echoed by various authors leading many to wonder if the DDA is not another example of business as usual clad in a different cloak.³¹⁷

³¹⁴ See generally Elizabeth Smythe, "Democracy, Development and the WTO's Legitimacy" in Donna Lee & Rorden Wilkinson, *The WTO after Hong Kong: progress in, and Prospects for, the Doha Development Agenda* (New York: Routledge Taylor & Francis Group, 2007) 206; Tomer Broude, supra note 9 at 270.

³¹⁵ These new trade issues are more specifically described in the WTO parlance as the Singapore Issues and include matters such as: investment, competition policy, trade facilitation and transparency in government procurement.

³¹⁶ Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations Lessons of Cancun*, updated edition, (New York, USA: Zed Books Ltd, 2004) 259-266.

³¹⁷ See especially Ben Richardson, "From Doha to El Dorado?: The WTO, Agricultural Liberalisation and the False Promise of Free Markets" (2010) online: Centre for the Study of Globalisation and Regionalisation 266/10, <<http://www2.warwick.ac.uk/fac/soc/csgr/research/workingpapers/2010/26610.pdf>> 8; Antoine Bouet & David Laborde, "Eight Years of Doha Trade Talks Where Do we Stand?" (2009) online: IFPRI 61 <http://www.ifpri.org/sites/default/files/publications/ib61.pdf>; James Thuo Gathii, "The High Stakes of WTO reform: Behind the Scenes at the WTO: The Real World of Trade Negotiations/The Lessons of Cancun" book review (2006) 104 Michigan Law Review 1361 at 1364

The advent of elements of force and coercion in the Doha negotiations and the unwillingness of developed countries to negotiate and take concrete decisions on issues that will contribute to the development needs of developing countries does not only contravene the core requirements of the right to development but led to a stalemate at the Cancún Ministerial and a breakdown of the Doha process in 2008.³¹⁸ And though the process was resuscitated, hopes for a fruitful conclusion of negotiations are still not within sight.

The Doha Round sought to address the fears and scepticism that had surrounded the multilateral trading system since the Seattle debacle in 1999 by mandating a broad and balanced work program that incorporates methods of addressing the challenges facing the WTO based on the effective participation of all Members.

In the context of the Doha Ministerial Declaration and the mandate of the Doha Round, what role does the right to development play in the Doha negotiations and deliberations? Will observing and implementing the core content of the right to development have any impact in the eventual outcome of the Doha negotiations?

Firstly, in the light of article 1 of the UN declaration on RtD, the right to development approach in the context of the Doha Round will necessitate equal participation of each WTO member in the Doha Round deliberations, in other words, incidences of closed door meetings accessible only to a few cannot be the order of the day. As long as the final negotiated agreement will bind all WTO Members, then every member is entitled as of right to participate in the deliberations.

³¹⁸ See generally WTO OMC, “Day 5: Conference Ends Without Consensus” 14 September 2003, online: http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm

Secondly, article 1 of the declaration on RtD provides for the entitlement of “peoples” to contribute to the process of development, this idea of contribution is integral in the Doha Round negotiation process. It is a step beyond equal participation to include meaningful contribution. In this scenario type situation, the peoples do not only participate in the deliberations they are well informed to make meaningful contributions that will not only improve and advance the system, but contributions that will guarantee their opportunities to reap increased benefits from the system.

This leads to the third content of the RtD, the guarantee of enjoyment of economic, social, cultural and political development, the Doha Round negotiations in the light of the RtD must be conducted in such a way as to ensure the enjoyment of economic benefits in particular for all WTO Members. If some Members benefit while others are disadvantaged by the negotiation process, then the core of RtD has been defeated.

It is imperative that the Doha Round, which has from its inception being tagged a development Round, adopts this UN RtD approach to development. This suggestion is justified in the light of the UN Millennium Declaration and the MDGs which all Members of the international community have pledged their commitment to realize and are indeed taking meaningful steps domestically to realize through policies and international cooperation.

4.2 The Doha Declaration (*Outstanding Implementation Issues*)

The foremost developmental concerns addressed in the Doha Declaration are implementation issues.³¹⁹ Implementation issues were put on the table as early as the Geneva Ministerial in 1998 when WTO Ministers restated a commitment to periodic evaluation of the effect of implementing the covered agreements on the trade and development of Members.³²⁰ Little progress was however made and after the collapse of the Seattle Ministerial Meeting in 1999 it became obvious to WTO trade representatives that progress at Doha was dependent on the centrality of implementation issues in the Work Program.³²¹

The Doha Ministerial declaration classified the implementation issues for negotiation under two categories: those specifically mandated by the Work Program based on a decision of ministers in November 2001 and those to be determined by specific WTO negotiation groups at a later date.³²² Based on the Work Program adopted in 2001, the implementation issues currently tabled in the Doha negotiations fall broadly under: outstanding Uruguay Round implementation concerns raised by developing countries;

³¹⁹ WTO, *Ministerial Declaration*, 20 May 1998, WT/MIN(98)/DEC/, online: <http://www.wto.org/english/thewto_e/minist_e/min98_e/mindec_e.htm> are not only contentious but are long standing and have dominated WTO Ministerial since after the Uruguay Round.

³²⁰ *Ibid* para 8

³²¹ Doha WTO Ministerial, “Implementation Issues Central to WTO Future Work Program” (2001) online: http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief07_e.htm. Implementation issues in the Doha Agenda refer specifically to problems encountered especially by developing countries in implementing the WTO agreements

³²² Doha Ministerial Declaration *supra* note 312 at para 12

review of the agreement on agriculture; subsidies; rules of origin; textiles; government procurement; ASPM provisions and special and differential treatment (SDT).³²³

4.3 *The 2001 Decision*

The first paragraph of the WTO Decision on implementation related concerns deals with the clarification of the meaning and import of the provision of article XVIII and XII of the GATT1994 in relation to developing countries. Articles XVIII and XII respectively provide for government assistance for economic development and trade restrictions that a member can impose on imports to safeguard its balance of payment.³²⁴ The decision of the Work Program affirmed that Article XVIII is a SDT provision specifically formulated for developing countries to help in realizing their developmental needs and improve the living standards of their citizens, and urged particularly that actions taken by developing countries under this provision should be subject to less onerous standards of proof in comparison to actions taken under article XII of GATT.³²⁵

However not every outstanding Uruguay Agreement implementation related concern has been resolved in a manner that reflects the acclaimed objective of the Doha Round - to correct inequities in the global trading system and improve the trading capabilities of developing countries. A textual analysis of the implementation-related concerns decision highlights that while a few implementation concerns of developing countries were

³²³ See WTO Doha "Implementation Related Issues and Concerns", WT/MIN(01) 17, 20 November 2001 online: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm [hereinafter Doha Implementation Issues]

³²⁴ See generally GATT 1947 *supra* note 12 article XII

³²⁵ See Doha Implementation Issues *supra* note 310 para 1.1

negotiated in a manner that reflects a right to development approach, a good number were either relegated to a later date to be negotiated by future WTO councils or tabled for later negotiation and did not produce any concrete agreement that furthers the trade and development needs of developing countries.

4.3.1 Sanitary and Phytosanitary Measures

A good example is the Agreement on Sanitary and Phytosanitary Measures (ASPM). Essentially, the ASPM ensures that international trade does not inhibit a member's obligation to ensure food, animal and plant safety and health.³²⁶ The ASPM allows the introduction of certain safeguards on traded goods and products; mainly food, plant and animal produce.

Recognizing that the ASPM can be used as a disguised restriction on international trade, it provides that standards adopted by member countries have to be approved or set by international standard setting organizations for example the Codex Alimentarius Commission, the World Organization for Animal Health and the International Plant Protection Convention.

The ASPM applies two categories for the implementation of Sanitary and Phytosanitary Standards (SPS): the phased category and the immediate implementation category.³²⁷ The phased SPS usually allows Members 6 months to conform to the importing country's protection standards, while the immediate implementation category

³²⁶ See *Agreement on the Application of Sanitary and Phytosanitary Measures* of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 493, preamble

³²⁷ *Ibid* article 10 (2)

has to be carried out almost instantaneously. While the Agreement provides for technical assistance and allows special and differential treatment in the form of longer time frames for implementing SPS for developing and least developed countries, the reality is that SPS have in some instances, been implemented in ways detrimental to the trading interests of developing countries.³²⁸ Developing countries have consistently argued that SPS measures of some developed countries are disguised trade distorting mechanisms,³²⁹ and a crucial implementation concern with regards to improving the trading capacity of developing countries at Doha was to correct the negative effects of SPS measures and expand the trading opportunities of developing countries.

Unfortunately the decision of the Work Program adopted a one sided approach to the concerns of some developing countries³³⁰ in relation to SPS measures. The text of the decision on SPS related concerns provides for consultation between Members “with a view to finding a mutually satisfactory solution to the problem while continuing to

³²⁸ See *Mexico – Certain Measures Preventing the Importation of Black Beans from Nicaragua (Complaint by Nicaragua)* 20 March 2003, WTO DocWT/DS284/1 online:

http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS284%FC1%29&language=1, Nicaragua challenged Mexico before the WTO Panel on the grounds that Mexican authorities were administering more favourable procedures under the SPS to black beans from other countries in violation of articles 1 of the GATT 1994 and 2 & 5 of the SPS Agreement. The matter was eventually withdrawn after the parties entered into negotiation.

³²⁹ See generally J. Michael Finger & Philip Schuler, “Implementing the Uruguay Round Commitments: The Development Challenge”, online: (2002) 23:4 World Economy 511 at page 517-8 <http://onlinelibrary.wiley.com/doi/10.1111/1467-9701.00287/pdf>; Prema-Chandra Athukorala & Sisira Jayasuriya, “Food Safety Issues, Trade, WTO Rules: A Developing Country Perspective”, online: (2003) 26:9 World Economy 1395 at page 1396 <http://onlinelibrary.wiley.com/doi/10.1046/j.1467-9701.2003.00576.x/pdf>.

³³⁰ While the WTO system makes a general categorization of between developing and least developed countries, it is important to note that some developing countries e.g. China, Brazil and India cannot in practical terms be grouped in the same category as Bangladesh or Zambia, this is because countries like China, Brazil, and India have developed greater trading capacities and technological know-how that enables them compete at almost equal footing as developed countries. Thus in applying SPS Measures, a standard which may well be implementable for a country like Brazil may not be implementable in Zambia or Bangladesh.

achieve the importing member's appropriate level of protection.”³³¹ The effect of this provision is that while there appears to be mandatory consultation with the relevant parties especially when the applicable SPS has to be effected immediately, the solution and approach adopted guarantees benefit to or only one party, that is, the importing member who in a good number of cases, is the developed country. As at 2005, the core special and differential treatment measures that affect developing countries under the SPS- how developing countries can be promptly informed of SPS measures that are important for their trade, how to help them identify and evaluate the measures that could cause trade problems and how to help them identify and request technical assistance more effectively- were yet to receive clear recommendation from the SPS Committee thus further postponing the timeline set by the July 2004 Package.³³²

Developing countries have complained specifically that the difficulties associated with SPS measures lie in (a) complying with the different importing countries standards, (b) the cost of compliance procedures (c) lack of necessary infrastructure (d) and the proliferation of SPS standards especially through private sector standard setting groups for example supermarket chains.³³³

In 2005 developing countries submitted a proposal to the Committee on SPS measures specifically requesting for a provision mandating that new SPS measures can only be adopted after the impact on developing countries and LDCs has been assessed and that

³³¹ Doha Implementation Issues *supra* note 323 para 3.1

³³² See generally WTO New Item, “Private Sector Standards Discussed as SPS Committee Adopts 2 Reports” 29- 30 June 2005 online: http://www.wto.org/english/news_e/news05_e/sps_june05_e.htm

³³³ WTO Committee on Sanitary and Phytosanitary Measures, “Current Issues in SPS” online: http://www.wto.org/english/tratop_e/sps_e/sps_issues_e.htm; see also WTO, “Actions Regarding SPS Related Private Standards” Decision of the Committee, 6 April 2011, WTO Doc G/SPS/55.

no new SPS should be adopted unless developing and LDCs are able to comply with them.³³⁴

This proposal is yet to be adopted³³⁵ and thus the WTO SPS working modality is not reflective of the right to development approach which should guarantee benefits to all. By providing in particular that a mutually satisfactory solution to a SPS difficulty raised by a developing country, for instance, against standards of developed countries must continue to achieve the *importing member's appropriate standard of protection*,³³⁶ the text of the Implementation Decision suggests a weighing of preferences in favour of developed countries and developing countries with greater technological capacity. It exhibits an unwillingness to modify provisions of the SPS measures to accommodate the concerns and developmental needs of some developing countries.

The decision of the Doha Work Programme and the provision that SPS which contribute to liberalization of trade must not be unduly delayed evinces the overarching trade *only*³³⁷ objective of the WTO. In effect, the above decision of the Doha Work Programme simply means that developing countries must take all necessary steps to ensure domestic

³³⁴ See generally WTO New Item, "Private Sector Standards Discussed as SPS Committee Adopts 2 Reports" 29- 30 June 2005 online: http://www.wto.org/english/news_e/news05_e/sps_june05_e.htm

³³⁵ As at the date this thesis was concluded, there was no decision of the WTO Committee on SPS Measures or of the General Council adopting the proposal submitted by some developing countries and LDCs.

³³⁶ Doha Implementation Issues *supra* note 323

³³⁷ *C.f.* speech by the then WTO Director General at the opening of the Cancun Ministerial where he stated that WTO trade and negotiations must be seen in the broader context of the UN MDGs which seeks to halve the number of people living in extreme hunger and poverty by 2015. WTO, "Address by Dr. Supachai Panitchpakdi, Director-General", 10 September 2003, WT/MIN (03)/10 page 1.

conformation with SPS measures and more technical assistance has been promised to developing countries to help them respond adequately to the introduction of new SPS.³³⁸

A right to development approach in the light of the SPS measures implementation issues would insist on a solution to SPS measures concerns that reflects the interest of not only the importing Members but also the exporting Members. It would mandate not only consultation and financial and technical assistance, which is been provided to help developing countries adapt to the introduction of new SPS measures, but will focus on capacity building to help developing countries participate effectively in international standard setting organizations such that the standards also reflect the interest of developing countries.

While the decision recognized that effective participation of developing countries is crucial to the effective implementation, by developing countries, of SPS measures it only urges the Director General of the WTO to continue his cooperative efforts with standard setting organizations with a view to according effective participation to LDCs.³³⁹ By specifically listing LDCs as the recipients of technical and financial assistance to enhance their participation in international standard setting organizations, the decision clearly excludes other developing countries, as benefits accruing to LDCs under the WTO are usually not extended to other developing countries who are at various levels of development and may require financial and technical assistance.

Nevertheless, an important and commendable project is the on-going WTO project for developing countries especially LDCs - the current medium term strategy scheduled to

³³⁸ *Ibid* paras 3.2 & 3.6

³³⁹ *Ibid* 3.5;

last between 2012 and 2016. The aim of the project is to boost collaboration and information sharing on technical cooperation models to tackle pests, plants and animal diseases and contaminants, and to provide technical assistance tailored towards helping developing countries identify their needs, define their priorities and design project proposals that are likely to receive funding.³⁴⁰

4.3.2 *Agriculture*

The decision on Agriculture also raises a cause for concern. The Doha agreement on agriculture has been described by many as the litmus test for the WTO.³⁴¹ The importance of the final Doha agreement on agriculture is particularly significant, especially for developing countries and net food importing countries as it covers issues of human rights ranging from the right to food, food security and poverty alleviation. The removal of developed countries' agriculture subsidies under the "green and blue box", which has contributed to distortion in world market prices for agriculture products, is one of the major issues at the Doha negotiation. The text of the implementation decision on agriculture raises fears on the possibility of developing countries leaving Doha without any benefits.³⁴²

³⁴⁰ WTO News, Sanitary and Phytosanitary Measures "Agencies, Donors Boost Coordination on Food Safety, Animal and Plant Health Aid" 10 January 2012, online: http://www.wto.org/english/news_e/news12_e/sps_10jan12_e.htm

³⁴¹ See generally statement by the Chairman of the WTO Fifth Ministerial Conference, "Address by H.E. Dr. Luis Ernesto Derbez Secretary of Foreign Affairs Mexico and chairman of the Fifth Ministerial Session, 10 September 2003, WT/MIN(03)/9, page 2

³⁴² See especially Ben Richardson *supra* note 429 ; Patrick N. Osakwe, "Emerging Issues and Concerns of African Countries in the WTO Negotiations on Agriculture and the Doha Round" online: (2007) ATCP 32 MPRA <<http://mpira.ub.uni-muenchen.de/1850/>>

The WTO Agreement on Agriculture (AoA) allows different schedules of domestic support commitments for Members to boost agriculture production. The current schedule percentage commitment for developed countries is 5 percent while developing countries are allowed 10 percent domestic support under the WTO Aggregate Measurement of Support (AMS).³⁴³ While on the face of it, the level of domestic agricultural support allowed for developing countries under the AMS demonstrates differential treatment, the reality is that developing countries are unable to provide adequate support for domestic agriculture production despite having a higher margin of AMS commitments due to loan conditions imposed by international financial/ lending institutions.³⁴⁴ The most crucial issue with regards to agricultural trade under the Doha negotiation, especially from an RtD perspective, is not an increase in percentage of AMS schedule for developing countries but rather the removal of trade distortion mechanisms caused by blue and green box subsidies of developed countries to create a truly fair and equitable international agricultural trading system.³⁴⁵

The Doha implementation decision on agriculture does not address these pertinent concerns. The relevant text on the implementation concerns in relation to agriculture merely “*urges* Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns”³⁴⁶ [emphasis added]

³⁴³ See *Agreement on Agriculture supra* note 91 articles 6 & 1

³⁴⁴ See especially Sarah Joseph, *supra* note 150 at 185

³⁴⁵ *Ibid* 186-7

³⁴⁶ *Ibid* para 2.1

The idea of urging Members to exercise restraint does not create any binding obligation on Members; at best it only demands a best effort attempt from developed countries. The possible consequence of the text of the decision is that developed Members are again placed in a similar circumstance generated by the provision of part IV of the GATT 1994 which alluded to an esteemed ideal but provided no binding obligation for realizing it.

A more responsive approach and an approach in line with the right to development will necessitate an unequivocal commitment from developed countries and a firm binding obligation on developed countries not to challenge green boxes trade distorting mechanisms raised by developing countries which impede the realization of food security.

4.3.3 *Rules of Origin*

On the implementation of rules of origin, the Implementation Decision mentions the report of the WTO Committee on RoO on harmonization of rules of origin and urges the Committee to complete its work by the end of 2001.³⁴⁷ Apparently no such harmonization of RoO has materialized even after the 2005 Hong Kong Ministerial mandated simplified and transparent RoO to facilitate exports from LDCs.³⁴⁸ Six years afterwards, the problem of disparate RoO still persists and is evidenced by the proposal of Zambia and Bangladesh in their communication to the WTO Trade and Development Committee in 2011 referred to in chapter 3 of this thesis. The obvious conclusion that

³⁴⁷ Doha Implementation Issues *supra* note 323 para 9.1 & 4.3

³⁴⁸ WTO, Ministerial Declaration, 18 December 2005, Hong Kong, WT/MIN(05) / DEC, online: http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm paragraph 47 ^hereinafter Hong Kong Ministerial 2005

can be inferred from the inability of the Committee on RoO to come up with a harmonization of RoO rules, which could have been implemented in the interim³⁴⁹ pending the conclusion of the Doha negotiations, can only be traced to the intransigence of some Members to truly commit to processes, in this instance harmonized RoO rules, which would contribute to increasing the trading capacity of developing countries especially LDCs and actualize the touted developmental objectives of the Doha.

4.4 *Hortatory Commitments?*

A recurrent feature of the Doha Implementation Decision text is the frequent use of the word “urge” in matters relating to the concerns of developing countries as against a clear obligation.

The 11 times the word “urge” occurs in the implementation decision, all relate to proposals raised by developing countries,³⁵⁰ or relating to their peculiar developmental concerns. The word “instruct” on the other hand, which connotes a clear mandatory obligation, appears 5 times³⁵¹ and is used only in one respect in connection to a matter of direct importance to developing countries.³⁵² While the use of the words “urge” and “instruct” may be disregarded as conveying no significant import in relation to realizing the objectives of the DDA, the word “urge” connotes an admonition, it suggests a non-

³⁴⁹ *Ibid* 9.2

³⁵⁰ *Ibid* see paragraphs 2.1, 3.5(ii), 3.6(i), 3.6(ii), 5.3(ii), 5.4(i), 5.4(ii), 6.2, 8.2, 9.1, & 10.2

³⁵¹ *Ibid* paragraphs 3.3, 3.4, 7.2, 7.4 & 12

³⁵² The only time the Implementation mandates a clear instruction in connection to a matter integral to the trade and development of developing countries is in article 12 which mandates the Committee on Trade and Development to identify SDT provisions that are mandatory and non-binding under the WTO Agreements and consider the implication for developed and developing countries of making the non-binding provisions binding.

binding obligation and confirms the assertion of Jawara and Kwa that “at Doha the major powers scripted an agreement that created a mirage of a triumph for an equitable global trading system. They did so by weaving an illusion that all countries, rich and poor, gained something.”³⁵³

As a final gavel against the expectations of developing countries in the DDA, paragraph 13 of the Implementation decision demonstrates acutely the opposition to the right to development approach of the on-going Doha Round. In paragraph 13, the Doha Implementation Decision text provides that outstanding implementation related issues and concerns which are not covered in the implementation decision will be addressed in accordance with paragraph 12 of the 2001 Doha Ministerial Declaration. What this paragraph simply means is that other proposals and issues, raised particularly by developing countries, which were not addressed in the Doha Work Program, will be addressed by subsequent committees and negotiation groups set up in Geneva.

Considering the fact that one of the problems developing countries face in the current WTO system is their inability to participate effectively in the various WTO negotiation committees and groups due to a lack of sufficient experienced and qualified personnel,³⁵⁴ relegating the negotiation of key issues of interest to developing countries to these committees and negotiation groups, is contrary to the right to development approach which demands fairness and equal participation. Equal participation in the sense of the right to development does not only connote involvement of “all” in terms of numbers as a determinant of participation but extends to the active involvement of all and

³⁵³ See Fatoumata Jawara & Aileen Kwa, *supra* note 316 at 116

³⁵⁴ *Ibid* 20-21

the ability to make informed decisions predicated on a complete understanding of all relevant facts. When the multiplicity of negotiation Committees and Groups, inhibits the ability of developing countries to participate in each negotiation, or due to lack of expertise in a particular subject matter of negotiation they are unable to make informed contributions such that the ultimate decision undermines their interest,³⁵⁵ the obligation of free and equal participation under the right to development has been infringed.

4.5 *Cancún*

The Cancún Ministerial, a follow up to the Doha Round, was a forum for assessing progress made in the Doha negotiation Work Program. It also served to infuse more impetus for a projected conclusion of the Doha trade negotiations by 1 January 2005. At Cancún, the negotiation topics were narrowed into five key issues: Agriculture, Non-Agriculture market Access, Development Issues, Singapore Issues and Other issues.³⁵⁶

A significant highlight of the Cancún Ministerial, aside from the fact that negotiations ended abruptly without a consensus,³⁵⁷ was the introduction of the Cotton Proposal by some developing countries which compelled the addition of a specific negotiation framework on cotton trade chaired by the then WTO Director General.

The Cotton Proposal was crucial to the Doha agenda in general and the Cancún Ministerial in particular, as it became one of the determining factors of assessing the

³⁵⁵ See also Donna Lee, *supra* note 309 at 149

³⁵⁶ WTO OMC, “Day 1: Conference kicks off with ‘facilitators’ named and cotton debated” 10 September 2003, online: <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_10sept_e.htm>

³⁵⁷ See generally WTO OMC, “Day 5: Conference Ends Without Consensus” 14 September 2003, online: <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm>

beyond rhetoric approach to development of the Doha Round. The crux of the Cotton Proposal focused on two core issues: 1. the establishment of a mechanism to phase out support for cotton production with a view to its total elimination, and 2. transitional measures in the form of financial compensation for cotton-producing LDCs to offset their loss of revenue, until support for cotton production has been completely phased out.³⁵⁸

The Cotton Proposal was supported by the following countries: Canada, Australia, Argentina, Cameroon, Guinea, South Africa, Bangladesh, Senegal and India. The EU argued that its cotton production was relatively small and insignificant and had no influence on world cotton trade. The US on the other hand, argued against transitional measures holding that the trade related aspects of cotton had to be settled before the inclusion of other ancillary matters.

The changes proposed by cotton producing LDCs, affected by the US cotton subsidy would, if implemented, have contributed more to poverty alleviation for farmers in Central and West Africa and more export earnings greater than any form of developmental aid.³⁵⁹ Firstly, the implementation of a mechanism that phases out subsidies for cotton production would have placed farmers in the US and in Central and West Africa at an almost equal playing field, such that the international market price for cotton would be the true cost of production and not production cost cushioned by billions of dollars in subsidies.

³⁵⁸ See WTO, "Poverty Reduction: Sectoral Initiative in Favour of Cotton Joint Proposal by Benin, Burkina Faso and Mali" 15 August 2003, WT/MIN (03)/W/2, WTO Ministerial Conference Fifth Session, Cancún, 10-14 September 2003. [hereinafter Cancún Cotton Proposal]

³⁵⁹ See especially Donna Lee, *supra* note 309

Secondly, the payment of financial compensation to cotton producing LDCs for the duration of the subsidy period until a complete phase out is achieved would mean that LDCs will have funds which can be distributed to farmers to offset production cost from distortion in world cotton prices. The compensation fund can also be used as grants to fund research and development (R&D), on methods of improving and maximizing cotton production and market competitiveness.

In the light of the right to development approach to trade negotiations advocated in this thesis, the Cotton Proposal and its adoption in the Cancún Ministerial highlight two key issues which are commendable but not totally satisfactory in terms of end result. The adoption of the Cotton Initiative as part of the Doha negotiation issues shows the emergence of a concerted effort towards inclusive participation in the Doha WTO negotiations and some form of willingness to accord special importance to the needs of the less advantaged.³⁶⁰ However, the problem of participation coupled with intransigence negated any concrete benefits that could have accrued to cotton growers in developing countries. The major cotton subsidy giving country, the US, was unwilling to accept that its current cotton subsidy contributed immensely to the present distortion in world cotton trade and preferred a negotiation that would rather cover the whole production cycle of cotton from industrial policies support to high tariff on synthetic and finished products rather than an elimination of subsidies.³⁶¹ At the end of Cancún, the revised draft declaration only provided developing countries, in particular LDCs, with a promise of a continued consultation with heads of negotiation committees and an instruction to

³⁶⁰ See generally statement by then WTO Director General, WTO Cotton debated *supra* note 356

³⁶¹ *Ibid*

the Director General of the WTO to continue discussions with the Bretton Woods institutions on ways of diversifying the economies of the major cotton growing countries.³⁶²

In effect, the Cancún text failed to address the issue of subsidies which according to the proposal submitted by the LDCs could have easily been implemented gradually within the space of three years i.e. from 2004-2006 and would have solved urgently the worrying economic and social problems facing cotton producing LDCs.³⁶³

Though the Cancún Ministerial made some progress in adopting *free participation* of all Members the other important prong of *guaranteed benefits* which is integral to a right to development approach was neglected and mostly postponed to a future date leading one commentator of the Cancún Ministerial to note that the African Group had active participation but not meaningful influence or measurable results.³⁶⁴

By day five, Cancún ended with no quantifiable results for most WTO Members except a one- page Ministerial Statement which basically reiterated the maintenance of the status quo.³⁶⁵

³⁶² WTO OMC , “Draft Cancún Ministerial Text Second Revision” 13 September 2003, online: <http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm>

³⁶³ See Cancún Cotton Proposal *supra* note at 2

³⁶⁴ See Donna Lee, *supra* note 309 at 147

³⁶⁵ See WTO Ministerial Conference Fifth Session, “Ministerial Statement” 14 September 2003, WT/MIN(03)/20

4.6 The July 2004 Package

The post Cancún revitalization of the Doha Round was the July Package of 2004.³⁶⁶

The July Package represented a new momentum for the trade Round by setting out the framework and modalities for negotiation of the issues arrayed in the Doha mandate. The July Package appeared to reinforce the centrality of the developmental concerns of developing countries in the Doha Round by adopting certain working modalities and specific provisions relating to the cotton initiative and special and differential treatment provisions.

On the Cotton Sectoral initiative, the Work Program mandated two categories of working modalities. The trade related aspects of the Cotton Initiative would form part of the negotiation on agriculture,³⁶⁷ while the development aspects were delegated to the WTO Secretariat for future consultation with development communities and international organizations on mechanisms for diversifying the economies of cotton producing LDCs.

The working modalities for the negotiation of certain trade issues adopted what can be described as an *effective participation model* by specifying that negotiation meetings on outstanding implementation issues,³⁶⁸ relegated to WTO councils and

³⁶⁶ See generally WTO, “Doha Work Programme Decision Adopted by the General Council” 1 August 2004, WT/L/579, online: http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm [hereinafter July Package of 2004]

³⁶⁷ This working modality adopted in the Work Program was argued forcefully by the US, its adoption in the work program confirms the assertion that the WTO negotiations and rules always tilt towards favouring the strong and powerful.

³⁶⁸ Not all implementation issues raised by developing countries were slated for negotiation in the Doha, the implementation issues that formed the Doha Work Program were those specifically addressed in the

bodies, do not *overlap*; so as to ensure the full and effective participation of developing countries in the discussions.³⁶⁹ This is a commendable improvement from prior practices.

On effective and operational special and differential treatment as evidence of a right to development approach in the DDA, the July Package made some meaningful progress by specifically instructing that the Council for Trade and Development review expeditiously all outstanding agreement specific proposals relating to S&D provisions and make a clear recommendation for a decision of the General Council by July 2005.

The tariff reduction model also displayed differential treatment in favour of developing countries. For instance, the Doha Work Program emphasised the essentiality of SDT in tariff reduction formulas, and provided that rural development, food and livelihood security concerns of developing countries are factors to be considered to ensure that proportionality is achieved in any tariff reduction structure. This model will insure that commitments made by developing countries do not impede on rural development or food security demands.³⁷⁰

Another significant SDT measure contained in the Doha Work Program is the provision for flexibility for developing countries to designate an appropriate number of products as Special Products which would be subject to a different tariff structure. The importance of this provision is the underlying right to development approach that it connotes by specifying that the criteria for determining products that qualify for the Special Product category are food security, livelihood security and rural development

implementation decision of 2001, other issues were referred to WTO Councils to be established at a later date.

³⁶⁹ *Ibid* paragraph d

³⁷⁰ *Ibid* Annex B paragraphs 39-40

needs.³⁷¹ However the Work Program did not specify the exact percentage criterion to be adopted in determining products for designation as Special Products but left this as a subject of further negotiations. Increased liberalization of products in which developing countries have a comparative advantage is also exemplified by the requirement for full liberalization in tropical agricultural products,³⁷² this working mandate will, when implemented, enhance market access and earnings from agricultural products for developing countries.

The Work Program also incorporated recognition of the obligation for international cooperation and sustained action for the realization of development provided in Articles 4(2) and 10 of the UN Declaration on RtD. This recognition is manifested in the admonition to Members particularly, developed countries, to participate in development related issues and programs organized by international organizations.³⁷³

³⁷¹ *Ibid* paragraphs 41-42

³⁷² *Ibid* paragraph 43

³⁷³ *Ibid* paragraph 1 (b)

4.7 Hong Kong 2005

The Hong Kong Ministerial of 2005, in the words of the Director General of the WTO, put the Doha Round “back on track”,³⁷⁴ because of the “achievements” and specific decisions which, according to most delegates, represented a major compromise that broke the stalemate that had characterized prior Meetings and Ministerials.³⁷⁵

At Hong Kong, the development dimension concerns of the Doha Round conspicuously became relegated to future dates and the focus shifted to a market centred approach rather than the Doha goal of placing the development needs of developing countries at the heart of the work program. The only development, and by extension, human rights related concern of developing countries that received concrete and quantifiable agreement was the cotton initiative and the DQFQ market access for products originating from LDCs.

In relation to the cotton trade distortion caused mostly by US cotton export subsidies,³⁷⁶ the Hong Kong Declaration mandated the elimination of all forms of export subsidies on cotton trade by 2006.³⁷⁷ It is laudable that the proposal of some cotton exporting LDCs which highlighted the misery created for LDCs cotton growers by the subsidies of rich countries motivated this important decision to set a specific date for the elimination of all export subsidies on cotton. However, the elimination of export subsidies does not fully address the supply side constraint of the equation which can only

³⁷⁴ See WTO OMC, “Day:6 Ministers Agree on Declaration that ‘Puts Round Back on Track’ ”, 18 December 2005, online: <http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_18dec_e.htm>

³⁷⁵ See generally WTO OMC, “ Day: 5 Revised Draft Circulated, Ministers Comment” 17 December 2005, online: <http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_17dec_e.htm>

³⁷⁶ See generally WTO OMC, “Day: 2 Convergence Elusive on First Full Day of Consultations; Cotton also Discussed” 14 December 2005, online: <http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_14dec_e.htm>

³⁷⁷ See generally WTO, *Ministerial Declaration*, 18 December 2005, WT/MIN(05) / DEC, online: http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm paragraph 8 [hereinafter Hong Kong Declaration 2005]

be effectively addressed by granting full market access for cotton exports from LDCs. On market access for cotton products originating from LDCs, the Declaration provides that DFQF market access for cotton from LDCs shall commence from the implementation period of all market access negotiation under the DFQF agreement; thus postponing the market access requirement until the conclusion of the Doha Round negotiations.³⁷⁸

The review and operationality of special and differential treatment provisions for developing countries acquired a meaning synonymous to DFQF for LDCs. The negotiation talks under the committee for S&D were somehow “prioritized” and limited to the provision of DFQF for LDCs.³⁷⁹ This “prioritization” was reflected in the Hong Kong Declaration as the only SDT related concern that was addressed with a concrete and tangible result was the provision of DFQF access for products originating from LDCs, and an obligation to ensure that market access enjoyed by LDCs are effective by the adoption of simplified and transparent RoO requirements.³⁸⁰

Other special and differential treatment provisions, which under the July 2004 Package would have been reviewed, and a clear and specific decision taken by the following year were again postponed to December 2006 with an instruction to committee members to continue consultation expeditiously.³⁸¹ In contrast, however, clear and unequivocal commitments were agreed upon for the Non-Agriculture market Access

³⁷⁸ *Ibid*

³⁷⁹ See generally WTO OMC, “Day: 3 Tonga all Set to Join, as Movement Seen in Talks of Least Developed Countries” 15 December 2005, online:
<http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_15dec_e.htm>

³⁸⁰ See Hong Kong Declaration 2005 *supra* note 374 paragraph 47; refer to chapter 3 of thesis for the effect of RoO implementation on market access for developing and least developed countries.

³⁸¹ *Ibid* at paragraph 36

(NAMA) negotiation formula for tariff elimination.³⁸² The negotiations on agriculture received specific guidelines with an agreement on the model for reduction in the Final Bound total AMS and overall cut in trade distorting domestic support. While the agreement mandated greater cuts for members with high relative levels of Final Bound total AMS, the knotty issue of payments in the Green and Blue Box category was left unaltered as the Declaration mandated general reductions in the Final Bound total AMS “even if the sum reductions in Final Bound Total AMS... and Blue Box payments would otherwise be less than that overall reduction.”³⁸³ This approach failed to consider the possibility of increased domestic support being diverted into the Blue Box and Green Box payment category.³⁸⁴

Another worrisome issue with the conduct and tempo of the negotiations on special and differential treatment and outstanding implementation issues in the Doha Round is found in paragraphs 37 to 39 of the Hong Kong Declaration. In paragraph 37, the declaration bemoans the lack of progress made in category II implementation issues, that is, implementation issues that were not part of the Doha mandate and urges negotiation groups to work expeditiously to complete negotiations by December 2006; a mandate which was not realized.³⁸⁵

In paragraph 38, in particular, the wordings of the Hong Kong text suggest that the work of reviewing special and differential treatment provisions and determining methods for incorporating them into the architecture of the WTO system and outstanding

³⁸² *Ibid* paragraph 14

³⁸³ *Ibid* paragraph 5

³⁸⁴ *Ibid* paragraphs 4-7

³⁸⁵ *Ibid* paragraph 37

implementation issues had been put on hold due to failure to meet various deadlines scheduled since 2001. The Declaration mandates the special session to “resume work on all outstanding issues including the incorporation of S&D treatment into the architecture of the WTO rules.”³⁸⁶ This turn of events is contrary to the spirit of the Doha Round which placed special and differential treatment as integral to the entire negotiation process of Doha. If the central work of DDA has somehow acquired a demoted position, then the goal of the Doha Round has been defeated even before its completion.

4.8 *The July 2008 Package*

By July 2008, two issues dominated the negotiation agenda of the Doha Round: agriculture and NAMA.³⁸⁷ The NAMA negotiation in particular is very pivotal as it highlights the core complexities of the Doha Round and major disparities between the trading concerns of developed and developing countries in the WTO system. The July 2008 Package of the NAMA modalities for final negotiation reaffirmed the Hong Kong Declaration Swiss Formula for tariff cuts in industrial products with different coefficients for developed and developing countries.

An illusion to special and differential treatment for developing countries is reflected in the NAMA text by the provision that developed countries would be subject to a single harmonized coefficient for tariff cuts while developing countries would be allowed the

³⁸⁶ *Ibid* paragraph 38; another feature of the Hong Kong Declaration is the meaning attributed to outstanding implementation issues as relating primarily to the protection of geographical indicators under the TRIPs Agreement. See paragraph 39.

³⁸⁷ WTO, “Doha Development Agenda: Doha Work Program, The July 2008 Package” online: <http://www.wto.org/english/tratop_e/dda_e/meet08_e.htm>

flexibilities to choose between three different coefficients depending on the scale of flexibilities they adopt.³⁸⁸ The current Swiss Formula coefficient structure is set at 8 for developed countries and 20, 22 and 25 for developing countries.

In reality however, higher coefficient structures allowed developing countries under the Swiss Formula will still not contribute to developing countries realizing development at their own pace as it erodes the domestic development policy space that developing countries had in trade in industrial products. For instance, if a developing country decides to adopt a coefficient of 20 it is only entitled to make cuts in 14 percent of its most sensitive industrial tariff lines, and these tariff lines must not exceed 16 percent of the total value of its NAMA imports.³⁸⁹ If a developing country adopts the highest coefficient, that is, 25 it loses the right or option to set aside its sensitive industrial product from tariff elimination requirement and must apply the tariff elimination to all products without exception.

The real benefit of the Swiss Formula is the ability to exercise flexibility, that is, to separate particular industrial goods from the tariff elimination requirement to protect that particular industry's growth. This benefit and flexibility to remove certain industrial product(s) is available to a member when it chooses a lower coefficient.³⁹⁰ In other words, the real beneficiaries of the Swiss Formula under the NAMA are developed

³⁸⁸ See WTO Negotiation Group on Market Access, "Market Access for Non Agricultural Products: Report by the Chairman, Ambassador Don Stephenson to the Trade Negotiations Committee", 12 August 2008, JOB(08)/96, online:< http://www.wto.org/english/tratop_e/markacc_e/chair_texts_12aug08_e.pdf>

³⁸⁹ See WTO, "Market Access: Negotiations The 2008 NAMA Modalities Text Made Simple", online: <http://www.wto.org/english/tratop_e/markacc_e/guide_dec08_e.htm>

³⁹⁰ *Ibid*

countries who due to a high level of industrialization do not have to adopt a higher coefficient to protect and safeguard small local industries.

Developing countries who actually require the flexibilities to choose which industrial sector should be exempt from the tariff elimination requirement cannot make use of this benefit as adopting a lower coefficient would imply more liberalization of their domestic markets and expose their local industries to competition from foreign industrial products for which they lack the capacity to adequately compete on an equal footing. This limitation of flexibilities for developing countries to pursue domestic industry growth under the Swiss Formula was pinpointed in a communication from the African Group sent to the WTO Mini Ministerial in 2008.³⁹¹ Unfortunately, the Swiss Formula with its different coefficients that do not reflect true differential treatment, by according preference to the less advantaged, has been adopted as the working modality for the WTO and upon the conclusion of the Doha Round will form part of the Single Undertaking which every member both developed and developing would have to implement.

Conclusion

The Doha Trade Round was welcomed with much anticipation by all members of the WTO, particularly developing countries. The stalemate that characterized the Seattle Ministerial in 1999 and the hopes birthed by the 2000 Millennium Declaration placed the Doha Round as an integral part of the global model for correcting inequities in

³⁹¹ See generally WTO Trade Negotiation Committee, “Declaration of the African Group on the WTO Mini-Ministerial Geneva 2008”, 22 July 2008, TN/C/11.

international trade relations and contributing to the eradication of poverty. In this chapter, the progress of the Doha negotiations and the possibility of the Round realizing the goal of placing the developmental needs of developing countries at the heart of the work has been analyzed by focusing on the rule making and negotiation elements of the Doha Round. Various challenges were identified especially as regards the concretization of special and differential treatment provisions in the WTO system. The fact that the Doha negotiations are still ongoing means that there is still hope for the WTO members to go back to the original ideal of the Doha Round, that is, creating an equitable trading system whereby developing countries can reap meaningful and concrete benefits from the multilateral trading system. This is not an impossible task. However, it will require the willingness of WTO members to bend backwards where necessary to accommodate the interest of developing countries and LDCs such that they receive their fair and equitable share from the multilateral trading system.

CHAPTER 5 WORKING TRADE AND HUMAN RIGHTS THROUGH REGIONAL ECONOMIC BLOCS IN AFRICA: A GLIMPSE FROM ECOWAS AND SADC

5.1 Introduction

The preceding chapters, in particular chapters 2 and 3, identified the concept of development as an intrinsic part of the WTO system and argued that the integration of trade and human rights in the WTO system becomes possible when development is seen in the broader perspective of a human right and not just an economic process.

In the light of this argument chapter 4 examined the development dimension of the WTO under the current Doha Trade Round to find a reflection of the core characteristics of the human right to development: strengthened and binding special and differential treatment provisions, inclusive and active participation and contribution of all members that would be affected by the resultant WTO rules, guaranteed benefits for all peoples in negotiations, declarations and working rules of the Doha Round and a process that does not inhibit members ability to realize human rights.

The analysis of the previous chapter revealed major cause for concern which gives reason to believe that the development objective of the Doha Round may not be realized: in terms of creating an equitable trading system where developing countries can realize meaningful benefits for their development, by placing their interest at the heart of the Doha Work Program, and more specifically raises fears on the possibility of the

realization of the human right to development of millions of people in developing countries and LDCs plagued by the menace of poverty.

Since the Doha Round is still ongoing, hopes of returning to the original objective of the Round- the centrality of developmental needs of developing countries still subsists, if the WTO members can muster the necessary political will and courage to tilt towards equity rather than justice in its strict sense. In the light of this, the ensuing discourse draws on the experiences of the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) as a mirror for the WTO system.

The two regional economic blocs provide an interesting analogy for the WTO in the sense that both ECOWAS and SADC, in their constitutive instruments, incorporate the objectives of promoting sustainable economic growth, raising standards of living and pursue trade liberalization as a medium for realizing this like the WTO system. It is important however, to emphasize that the ECOWAS and SADC are still in embryonic phases, and while their experiences at integrating trade and human rights broadly and the right to development in particular may be simplistic for a well-tested model as the WTO, their experience provides lessons that the WTO can glean from.

5.2 Regional Economic Blocs in Africa: Development in the making

The birth of integration and more specifically regional economic communities (RECs) in Africa was motivated by various factors: the yearning to realize full African

political independence,³⁹² the pressing need to harness the benefits of globalization³⁹³ and the desire to equip Africa to participate effectively in the globalization process and in the world economy towards the socioeconomic advancement of its people.³⁹⁴

For any State or region, the ability to maximize the benefits of globalization is highly dependent on a developed economic system that thrives on trade in primary and manufactured goods, adequate infrastructure, and bilateral or multilateral cooperation with other States.³⁹⁵ The dire underdevelopment of the component African states- lack of infrastructure, road and communication networks, requisite manpower, technical capacity, small domestic market size and the aftermath of colonialism and civil conflicts make regional economic integration an attractive avenue for self-reliance and development.

With the birth of the Organization of African Unity (OAU) in 1963, now AU,³⁹⁶ the need for the economic integration of the various sub regions in the continent was recognized as an essential tool for the eventual socio- economic development of Africa. It was accepted that the “the future of Africa lies in the consolidation of integration

³⁹² S.K.B Asante, *The Political Economy of Regionalism in Africa: A Decade of the Economic Community of West African States (ECOWAS)* (New York, USA: Praeger Publishers, 1986) 45-49

³⁹³ Sisule Fredrick Musungu “International trade and Human Rights in Africa: A comment on Conceptual Linkages” in Frederick M Abott, Christine Breining Kaufmann & Thomas Cottier, eds, *International trade and Human Rights: Foundations and Conceptual Issues* (USA: The University of Michigan Press, 2006) 321 at page 323; some benefits of globalization are increased job creation opportunities through foreign direct investment, infrastructural development, access to information sharing for capacity building and larger markets.

³⁹⁴ See especially Eric M. Edi, *Globalization and Politics in the Economic Community of West African States* (Durham, North Carolina: Carolina Academic Press, 2007) at 23; United Nations Economic Commission for Africa (UNECA), *Economic Development in Africa Report: Strengthening Regional Economic Integration for Africa's Development*, UNCTAD, 2009, UNCTAD/ALDC/AFRICA 10, 4 [hereinafter UNCTAD Report 2009]

³⁹⁵ Sotonye Godwin- A Hart, “Integrating Trade and Human Rights: An Analysis of the ECOWAS Experience” 32 WRLSI [forthcoming in 2012]

³⁹⁶ *AU in a Nutshell*, online: African Union <<http://www.au.int/en/about/nutshell>>

schemes and regionalization.”³⁹⁷ Thus in 1967, the first of such regional integration communities, the East African Community (EAC) was established as an integration unit comprising Kenya, Tanzania and Uganda.³⁹⁸

From 1967 to date, there are approximately fourteen³⁹⁹ regional economic blocs spanning a Membership of all the 53 African states. The table below enumerates the regional economic communities, the/or its membership, and the trade integration and cooperation objectives of the blocs.

³⁹⁷ Eric Edi *supra* note 394 at 160

³⁹⁸ Unfortunately by 1977 the EAC had ceased to exist. The current EAC treaty in its preamble makes reference to the dissolved treaty as forming part of the historical rationale for the establishment of the economic bloc. See generally *Treaty Establishing the East African Community*, 30 November 1999, 2144 UNTS online: <http://www.eac.int/gender/index.php?option=com_content&view=article&id=41:eac-treaty&catid=3:key-documents>

³⁹⁹ United Nations Conference on Trade and Development (UNCTAD) “Economic Development in Africa Report” UNCTAD/ALDC/AFRICA/2009, at 9- 10

Table 5.1 Regional Economic Communities in Africa

Regional Economic Communities	Area of Integration /Cooperation	Members	Date of Entry into force	Specified Objective
Arab Maghreb Union (UMA)	Goods, services, investment migration	Algeria, Libyan Arab Jamahiriya, Mauritania, Morocco and Tunisia	17 Feb. 1989	Full Economic Union
Common Market for Eastern and Southern Africa	Goods, services, investment, migration	Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe	8 Dec. 1994	Common Market
Community of Sahel-Saharan States (CEN-SAD)	Goods, services, investment, migration	Benin, Burkina Faso, Central African Republic, Chad, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Gambia, Libya, Mali, Morocco, Niger, Nigeria, Senegal, Somalia, Sudan, Togo and Tunisia	4 Feb. 1998	Free trade area and integration in some sectors
Economic Community of Central African States (ECCAS)	Goods, services, investment, migration	Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Sao Tome and Principe, Rwanda	1 July 2007	Full economic union

Table 5.1 Regional Economic Communities in Africa (continuation)

Regional Economic Communities	Area of Integration /Cooperation	Members	Date of Entry into force	Specified Objective
Economic Community of West African States	Goods, services, investment, policies, migration	Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo	24 July 1993	Full economic union
Inter-Governmental Authority on Development	Goods, services, investment, migration	Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda,	25 Nov. 1996	Full economic union
Southern African Development Community (SADC)	Goods, services, investment, migration	Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe	1 Sept. 2000	Full economic union
Economic and Monetary Community of Central Africa (CEMAC)	Goods, services, investment, migration	Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon	24 June 1999	Full economic union
East African Community (EAC)	Goods, services, investment migration	Kenya, United Republic of Tanzania, Uganda, Burundi and Rwanda	7 July 2000	Full economic union
Southern African Customs Union	Goods, services, investment and migration	Botswana, Lesotho, Namibia, South Africa Swaziland	15 July 2004	Customs union
West African Economic and Monetary Union	Business law harmonization, macroeconomic policy convergence	Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo	10 Jan. 1994	Full economic union

Source: UNCTAD Economic Development in Africa Report 2009.⁴⁰⁰

Different ideologies formed the underpinning rationale for the establishment of regional economic blocs in Africa.⁴⁰¹ Economically, the theory that integration and trade liberalization within sub regions in Africa would allow for efficient and optimal allocation of resources for production, which would consequently lead to growth via investment in human and knowledge capital, dissemination of technology and create avenues to explore extensive regional markets were huge motivations for integration.⁴⁰² The need to break long ingrained colonial ties which had long informed the political and trade links of African states was also advocated. Thus in the particular case of West Africa it was argued that regional economic integration would end the “subjugation of West African countries to colonial and neo-colonial forces.”⁴⁰³ Regional economic integration units in Africa were basically established as vehicles for the realization of African development.⁴⁰⁴

While economic imperatives played a major role in the formation of RECs in Africa,⁴⁰⁵ the socio-economic and political realities of the African continent for example, gross underdevelopment, poverty, ethnic prejudices and civil conflicts entailed the

⁴⁰⁰ *Ibid*

⁴⁰¹ Political and cultural undertones also informed the establishment of African RECs for instance it was argued at the inauguration of the ECOWAS that its existence will help to recreate the “homogenous” society that existed in pre-colonial Africa. See especially Ibrahim A. Gambari, *Political and Comparative Dimensions of Regional Integration* (London: Humanities Press International, 1991) 10.

⁴⁰² See especially Richard E. Baldwin, “Review of Theoretical Developments on Regional Integration” in Ademola Oyejide, Elbadawi Ibrahim & Paul Collier, eds, *Regional Integration and Trade Liberalization in Sub-Saharan Africa Volume 1: Framework, Issues and Methodological Perspectives* (Great Britain: Macmillan Press Ltd, 1997) 24 at 57- 59; see also UNCTAD Report 2009 *supra* note 3 at 5-9

⁴⁰³ Eric M. Edi *supra* note 394 at 26

⁴⁰⁴ See generally Nneoma Nwogu, *supra* note 197 at 346

⁴⁰⁵ See generally *Revised Treaty of the Economic Community of West African States*, 24 July 1993, 2373 UNTS 233, 35 ILM 660, (entered into force 23 August 1995) [hereinafter Revised ECOWAS Treaty, or ECOWAS Treaty 1993] preamble and article 1 [hereinafter Revised ECOWAS treaty 1993]

introduction of issues which may be considered extraneous to trade and economic necessities such as democracy, good governance and human rights.⁴⁰⁶ In particular, a distinguishing feature of the African RECs since the 1980s is the inclusion of human rights related language or an allusion that the conduct of economic integration must be carried out in accordance with principles of human rights as provided in the African Charter on Human and Peoples Rights.⁴⁰⁷

Different societal dynamics propelled this change in perception. The most notable were: unequal levels of development in the component states which led to concentration of industrialization mechanisms in a few states;⁴⁰⁸ inequitable modes for distributing costs and benefits;⁴⁰⁹ civil wars, suspicion and political instability.⁴¹⁰ In particular, for instance, there was a deep feeling of rivalry and mistrust between the member States of the defunct EAC which hindered the establishment of institutional structures and mechanisms that propelled the economic integration agenda.⁴¹¹ In the West African region, the dual existence of other regional economic integration units - the Union Economique et Monetaire Ouest Africaine also known as the West African Economic and

⁴⁰⁶ For example the SADC Treaty recognized the necessity of involving the people of the region centrally in the process of development and integration making specific reference to the guarantee of democratic rights, the observance of human rights and the rule of law. See generally *The Treaty of the Southern African Development Community*, 17 August 1992, entered into force 1 September 2000, online: <http://www.sadc.int/index/browse/page/120> preamble [hereinafter SADC Treaty]

⁴⁰⁷ The following African RECs have specifically incorporated respect for human rights in their constitutive instruments. See generally *Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA)*, 5 November 1993, 265 UNTS 2314, entered into force 8 December 1994 article 6(e); *Treaty for the Establishment of the East African Community (EAC)*, 30 November 1999, UNTS 2144, entered into force 7 July 2000, article 6 (d)

⁴⁰⁸ Uka Ezenwa, *ECOWAS and The Economic Integration of West Africa*, (United Kingdom: C. Hurst & Co. (Publishers) Ltd, 1983), 32-41

⁴⁰⁹ Arthur Hazelwood, "The End of the East African Community: What Are the Lessons for Regional Integration Schemes?" (1979) 18:1 *Journal of Common Market Studies* 40 at 53-7

⁴¹⁰ Nneoma Nwogu, *supra* note 197 at 348

⁴¹¹ Arthur Hazelwood *supra* note 409 at 59

Monetary Union (UEMOA) and the Mano River Union (MRU) with members unified by a common colonial “god father”⁴¹² posed a major challenge to the realization of the economic integration agenda of the ECOWAS of 1975. One of the factors that motivated the change in the ECOWAS Structure in 1993 was the fear that the co-existence of the UEMOA and MRU, with a Membership consisting mostly of the Francophone West African countries and their allegiance to France, would adversely affect the economic integration agenda of the ECOWAS and destroy the goal of realizing self-sufficiency for the West African states. The new ECOWAS Treaty of 1993 reaffirmed the ECOWAS as the only economic integration community recognized in the West African sub-region and the sole regional economic unit which would eventually form part of the AEC. Aside from these factors, the advent of the Liberian and Sierra Leone civil wars, the long history of dictatorship in most countries, coup d’etats and misrule re-emphasized the need to establish democracy and the rule of law as an integral part of stability and economic integration in the continent.

The human rights mandate of the African RECs hints at a fundamental shift in the conduct of economic integration schemes and multilateral trade relations. Specifically the human rights mandate of the RECs supports the argument that trade and human rights can be and are mutually supportive.⁴¹³ It strengthens the argument that the ultimate objective of raising living standards and “ensuring developing countries and especially

⁴¹² The countries that make up the UEMOA and MRU were colonized by France. Because of the French complete assimilation colonial model, the Francophone West African countries owed more allegiance to the UEMOA and MRU than the ECOWAS. These economic integration units had the backing of France.

⁴¹³ See generally Oliver C. Ruppel, “Regional Economic Communities and Human Rights in East and Southern Africa” in A Bösl, & J Diescho, (eds), *Human Rights in Africa* ((Windhoek: Macmillan Publishers, 2009) 275 at 282

the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development⁴¹⁴ (an objective of the WTO system) can be realized through the instrumentality of a human rights' approach to trade using the human right to development.

5.3 The ECOWAS from economic development to Human Rights approach to development

The ECOWAS experience provides a useful starting point on the integration of trade and human rights in economic integration communities. The ECOWAS system was initially conceived purely as an economic integration scheme.⁴¹⁵ Its singular objective was to promote cooperation and development in all fields of economic activity. The ECOWAS was originally made up of: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. However, in 2000 Mauritania withdrew its Membership from the ECOWAS to join the AMU. In the 1975 Treaty, the Community committed itself to the aims of:

co-operation and development in... industry, transport, telecommunication, energy, agriculture, natural resources, commerce, monetary and financial questions and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability, of fostering closer

⁴¹⁴WTO Agreement *supra* note 39 see preamble

⁴¹⁵ See also Nneoma Nwogu *supra* note 197 at 347-8

relations among its Members and of contributing to the progress and development of the African continent.⁴¹⁶

These objectives were to be achieved through trade and other economic methods which involved: eliminating import and export duties on goods between Members, removal of quantitative barriers and other administrative bottlenecks to regional trade, establishing a uniform custom tariff to non-Members, harmonizing policies in economic, industrial relations and agriculture and the abolition of obstacles to trade in services, *inter alia*.⁴¹⁷

As a regional institution recognized under the GATT/ WTO system, the ECOWAS incorporated most favoured nation treatment as a sacrosanct trade rule amongst Members such that tariff concessions granted to non-Members could not be more favourable than those granted amongst Members.⁴¹⁸ The 1975 Treaty permitted restrictions on trade in the region only for the protection of security, control of arms, human, animal or plant life, public morality, national treasure, transfer of gold, silver or precious and semi-precious stones.⁴¹⁹ One of the institutions established under the 1975 Treaty was the ECOWAS Tribunal charged with the mandate of adjudicating disputes relating to the interpretation or implementation of the Treaty.⁴²⁰

⁴¹⁶ See *Economic Community of West African States*, (ECOWAS) 28 May 1975, 1010 UNTS 17, 14 ILM 1200, (entered into force 28 June 1976) State parties: [Hereinafter ECOWAS Treaty 1975] article 2(1)

⁴¹⁷ *Ibid* article 2 (2) (a-g)

⁴¹⁸ *Ibid* article 20

⁴¹⁹ *Ibid* article 18 (3). The exceptions to trade in the ECOWAS are on all fours with the exceptions to the MFN and National Treatment principle allowed under the WTO system in GATT 1947 article XX exceptions see GATT *supra* note 12 articles XX, XXI

⁴²⁰ ECOWAS Treaty 1975 *supra* note 416 article 4(1) 611190014

5.4 *Implementation Problems*

From its inception in 1975 to 1990, the ECOWAS made minimal progress in the realization of economic development in the Member States or greater economic integration in the region. Many factors accounted for this failure; the most prominent was the lack of a strong institutional structure and a viable mechanism for the redistribution of benefits from the net gainers to the less advantaged Members.⁴²¹ The crux of the integration scheme, - the removal of intra-regional custom duties on goods originating from the region, became the bane of the ECOWAS and a major impediment to the realization of economic integration.⁴²² A good number of ECOWAS Members particularly the landlocked states relied immensely on revenue generated from custom duties and import taxes. The obligation to eliminate custom duties implied lack of government revenue and consequently inability of national governments to embark on welfare related projects or programmes.

The experience of the Republic of Benin and Togo provide good examples. The two states relied on importation taxes from goods originating from neighbouring states particularly Nigeria.⁴²³ The implementation of the ECOWAS Treaty necessitated the removal of internal customs duties among member States. While for Nigeria, the oil boom of the 1970s provided an alternative source of revenue such that it could make up for its loss from custom revenue, for Benin and Togo the provisions of article 13 and 14 of the Treaty meant a total loss of government revenue with no alternative option. The

⁴²¹ UNCTAD Report 2009 *supra* note 390 at 15

⁴²² ECOWAS Treaty 1975 *supra* note 416 articles 13 & 14; See also Uka Ezenwa *supra* note 408 at 50

⁴²³ See especially Iwa Akinrinsola, "Legal and Institutional Requirement for West African Integration" (2004) 10 Law & Bus Rev Am 493 at 496

concomitant result was reluctance on the part of some member States in implementing this obligation.⁴²⁴ Also, the removal of custom tariffs and internal duties was hindered by bottlenecks at the various national borders and there was repeated incidents of demand and offer of bribes by government officials and citizens at the national borders for movement of goods between member States.⁴²⁵ In reality the provision to eliminate tariffs between members existed only in paper. The 1975 Treaty also failed to take into consideration the different levels of development in the region and applied an across-the-border approach to tariff elimination which failed to accommodate the needs of its less developed members.⁴²⁶ The broad approach to tariff elimination led to non-implementation of the trade liberalisation scheme.⁴²⁷

The non-involvement of the private sector in the integration scheme (i.e. the lack of a structure that allows the establishment of small and medium scale enterprises by community citizens in the different member States), hampered the effectiveness of the ECOWAS under the 1975 Treaty. The operational structure of the ECOWAS under the 1975 Treaty was that of an intergovernmental organization regulating strictly the affairs and policies of governments without a recognition of the input of the private sector as a factor that fosters economic integration. Despite the fact that the 1975 Treaty made

⁴²⁴ *Ibid*

⁴²⁵ *Ibid*

⁴²⁶ The 1975 treaty allowed for a 2 year grace period for Members to continue existing tariff structures prior to mandatory 8 year tariff elimination and a 5 year common external tariff. This lump sum approach failed to accommodate the needs of less developed Members. see also Uka Ezenwa *supra* note 408 at 60-61; According to Eric Edi the West African region, as at 1980, had a gross national product (GNP) of \$760 per capita with 7 of the 15 States among the 30 least developed countries in the world. This figure indicates the gross underdevelopment of the region and the dire need of any income generating source.. See Eric M. Edi *supra* note 394 at 24

⁴²⁷ This across the border approach adopted in the 1975 treaty hindered the goal of eliminating disparities in levels of development in the region as provided in article 2(g) of the 1975 treaty. See also Iwa Akinrinsola *supra* note 423 at 495.

provision for movement of capital within the region and the right of residence for community citizens, the lack of a specific provision that encouraged the involvement of the private sector⁴²⁸ and the protection of the economic and trade interests of private individuals under the 1975 Treaty slowed down the process of economic integration in the region.⁴²⁹ The importance of private sector involvement and the recognition of individual rights to establish enterprises, businesses and accept employment within the different member States for example⁴³⁰ were particularly exemplified by the ineptness of the ECOWAS Tribunal in the years prior to 1993 and the almost minimal movement of capital and foreign investment in the region. Because there was no protection of individual or private sector trade interests and rights, the community Tribunal only really existed on paper.

⁴²⁸ The Revised ECOWAS Treaty of 1993 corrected this malady by providing that one of the objectives of the new ECOWAS shall be the creation of measures that fosters the integration of the private sector by the establishment of an environment conducive for the promotion of small and medium scale enterprise.

⁴²⁹ ECOWAS Treaty 1975 *supra* note 416 article 39(4)

⁴³⁰ The 1975 Treaty provided for the abolition between member states of obstacles to the free movement of persons, services and capital however, under the 1993 Treaty, this right was expanded to include the right of residence and establishment, and the right of the private sector within the region to engage in joint venture schemes and cross border investments. See ECOWAS Treaty 1975 *supra* note 416 at 2(d) *c.f.* The *Revised Treaty of the Economic Community of West African States (ECOWAS)* 24 July 1993, 2373 UNTS 233, entered into force 23 August 1995, articles 3 (2) (d) iii & (f) [hereinafter Revised ECOWAS Treaty]

5.5 *Changing Teleology*

In 1993 the ECOWAS Treaty was amended to introduce fundamental changes in the structure, institution and provisional procedure of the organization. The change in ECOWAS was propelled, to some extent, by similar circumstances that led to the collapse of the EAC in 1977⁴³¹ and to a large extent by the realization that the ECOWAS would not attain the goal of an economic union unless there was a fundamental change to its institutional, structural and procedural framework.⁴³²

Fundamentally, the revised ECOWAS Treaty, by its structure, institutional and provisional framework became a mechanism for the promotion of economic integration and most importantly the realization of development as a right for the region.⁴³³ This transformation of the ECOWAS system to a human right based approach to development was achieved through two mediums: the express incorporation of human rights, as provided in the African Charter and the inclusion of human rights approaches in the constitution of the ECOWAS (e.g. in articles 4(g), (h) and (i) of the Revised ECOWAS Treaty of 1993) and the establishment of the ECOWAS Community Court as a vehicle

⁴³¹ The EAC the first of the regional economic blocs came to an untimely demise in 1977. Many factors undoubtedly contributed to its demise however the EAC treaty of 2000 emphatically highlights lack of strong political will, non- participation of the private sector and lack of civil society involvement as reasons that contributed to the collapse of the EAC of 1967; see also Arthur Hazelwood *supra* note ..at 56-8

⁴³² As at 1990, according to the projected time frame set by the founding fathers of ECOWAS, the ECOWAS was to have emerged into an customs union, however the region was still struggling as at 1990 with the creation of a free trade area amongst Members despite the coming into force of the protocol on free movement of persons, goods and services.; see also Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (England: Ashgate Publishing Limited, 2006) 36, 42-5

⁴³³ Nneoma Nwogu *supra* note 198 at 356

for realizing development and holding the Community institutions and Members accountable for fulfilling the goals of the Community.⁴³⁴

This transformation of ECOWAS is in line with the spirit of the African Charter which refers to the *solemn* obligation of all African states to intensify cooperation and efforts to achieve a better life for the people of Africa⁴³⁵ and has been confirmed by the African Commission on Human Rights in its decision on the right to development.

In analyzing the right to development, the African Commission held in *Centre for Minority Rights Development (Kenya) and Minority Groups International on Behalf of Endorois Welfare Council v. Kenya*⁴³⁶ that fulfilling the right to development is a “two pronged test that is both constitutive and instrumental”.⁴³⁷ The Commission held that for the right to development to be fulfilled, it has to be entrenched in legislation and there must be mechanisms set in place for its implementation. The Commission held that a violation of the procedural or substantive elements of RtD constitute a violation of the right.⁴³⁸ In other words, provisional enunciation of RtD in the body of a treaty alone amounts to fulfilling one of the two- prongs and will not satisfy the requirement of the right to development. The instrumental requirement of RtD entails programs, activities and processes for the implementation of the right to development. It was thus necessary for the ECOWAS to change to reflect the RtD approach.

⁴³⁴ See generally Revised ECOWAS Treaty 1993 *supra* note 430 article 15

⁴³⁵ African Charter *supra* note 148 preamble

⁴³⁶ See Communication No. 276/200, 11-25 November 2009 online:

<http://www.worldcourts.com/achpr/eng/decisions/2009.11_CMRD_v_Kenya.htm>

⁴³⁷ *Ibid* para 277

⁴³⁸ *Ibid*

5.6 *Change in Legal Structure and Provisional Incorporation of a RtD Approach*

The first change evincing a right to development approach in the ECOWAS is found in the preamble of the Revised ECOWAS Treaty. The preamble acknowledges first and foremost the overriding need to encourage, foster and accelerate the economic and social development of the ECOWAS Members as a means to improving the living standards of the people,⁴³⁹ and goes further to state the importance of “bearing in mind the African Charter on Human and People's Rights and the Declaration of Political Principles of the Economic Community of West African States adopted in Abuja by the Fourteenth Ordinary Session of the Authority of Heads of State and Government on 6 July, 1991.”⁴⁴⁰

The explicit recognition of the fundamental role of human rights, based on the African Charter, in economic integration initiatives in Africa is justified by a close examination of the provisions of the African Charter. In article 22,⁴⁴¹ the Charter recognizes the right of all peoples to economic, social and cultural development that pays regard to their freedom and identity and their right to equal enjoyment of the common heritage of mankind. In the light of the solemn objective in the preamble of the Revised ECOWAS Treaty and the provisions of article 22 of the African Charter, it was therefore necessary for the new ECOWAS in its economic development mechanism to introduce and elevate human rights as a core principle of its economic integration scheme.⁴⁴² It is important to emphasize here that while the African Charter recognizes the right to development as a right of peoples, it also recognizes the individual's right to

⁴³⁹ See Revised ECOWAS treaty 1993 *supra* note 430 preamble

⁴⁴⁰ *Ibid*

⁴⁴¹ African Charter *supra* note 148 article 22 (1) & (2)

⁴⁴² *Ibid* Nneoma Nwogu *supra* note 198 at 358.

development. This is because of the intertwining of individual and peoples right in the African understanding of human rights.⁴⁴³

The African Commission on Human and Peoples Rights held in *Centre on Housing Rights and Evictions v. The Sudan*⁴⁴⁴ that the right to development envisaged under article 22 of the African Charter is a “collective right endowed on a people”⁴⁴⁵ and that the responsibility rests on state parties to act individually and collectively in cooperation with each other to ensure the realization of the right to development.⁴⁴⁶ This responsibility to collectively ensure the promotion and implementation of RtD has motivated regional economic integration schemes in the continent with a focus on economic development but adopting a human rights related approach to its realization.⁴⁴⁷

5.7 Constitutive Incorporations of RtD Approach

The Revised ECOWAS Treaty of 1993 introduces certain fundamental characteristic of the RtD approach to trade and economic integration – inclusive participation of all factors of society: the individual, who is the ultimate beneficiary, governments, the private sector and NGOs in the developmental process. The importance of inclusive and free participation of all relevant factors of society in the development process was

⁴⁴³ In the African Human Rights context, individual and people’s rights are interrelated thus the saying goes “I am because we are and since we are therefore I am” Mbiti JS *African Religions and Philosophy* (1970) cited in Kihangi Bindu, *Environmental and Developmental Rights in the Southern African Development Community with Specific Reference to the Democratic Republic of Congo and the Republic of South Africa* (Ph.D Thesis, University of South Africa, 2010) unpublished.

⁴⁴⁴ See *Centre on Housing Rights and Evictions v. The Sudan*, Communication Nos. 279/03 & 296/05, African Commission on Human and Peoples’ Rights (2009)

⁴⁴⁵ *Ibid* paras 217-224

⁴⁴⁶ African Charter *supra* note 148 article 22(2)

⁴⁴⁷ See especially Oliver C. Ruppel *supra* note 413 at 282-301; Nneoma Nwogu *supra* note 198 at 356

highlighted in the *Centre for Minority Rights Development (Kenya) and Minority Groups International on Behalf of Endorois Welfare Council v. Kenya* decision where the Commission held that a denial of free participation, consultation of rural (indigenous population) or any form of coercion of a people to accede to an agreement or negotiation, in this instance the agreement that led to the displacement of the Endorois Community from their ancestral land to another farmland without adequate compensation, violated the principle of inclusive and free participation guaranteed under the RtD.⁴⁴⁸

Article 3 of the Revised ECOWAS Treaty provides for the creation of measures and an environment that will ensure the participation of small and medium scale enterprises in economic integration.⁴⁴⁹ This inclusive participation is further enhanced by the provision for the inclusion of professional organizations, trade unions and non-governmental organizations in schemes and projects pursued in realization of the objectives of the ECOWAS⁴⁵⁰ and the establishment of the ECOWAS Economic and Social Council (ECOSOC), as an institution of the Community.⁴⁵¹ The function of the ECOSOC as defined by the Revised Treaty is to act as an advisory body to the other institutions of the Community. The goal of the ECOSOC is to operationalize the transformation of the ECOWAS into a people-focused organization with policies and

⁴⁴⁸ Centre for Minority Rights Development (Kenya) and Minority Groups International on Behalf of Endorois Welfare Council v. Kenya *supra* note. ...at 132-135 online: <<http://www1.umn.edu/humanrts/africa/comcases/279-2003.html>> ; the Commission held in particular that the failure to adequately compensate the Endorois people for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, coupled with the lack of free and un-coerced consultation was a violation of the overall process of development of the Endorois people.

⁴⁴⁹ Revised ECOWAS Treaty *supra* note 430 article 3 (g)

⁴⁵⁰ *Ibid* 3(1) (2 a- b, k, i and m) & 82

⁴⁵¹ *Ibid* articles 6 (1) (d) & 14

programmes that are citizen driven.⁴⁵² The Revised Treaty also provides that the composition of the ECOSOC shall be representatives from different sectors of economic and social domains in the region and mandates the establishment of a Protocol that defines explicitly the functions and organization of the ECOSOC. Plans are currently underway under the ECOWAS vision document for the operationalization of the ECOSOC through the creation of forums for the effective involvement of the ECOSOC in decision making especially at the level of the ECOWAS Council.⁴⁵³

The ECOWAS Parliament, an institution of the Community, is also another mechanism for inclusive participation in the ECOWAS. The mandate of the ECOWAS Parliament is to provide opinions to the Council of Ministers on issues relating to communication links between Member States, cooperation in regional programmes, energy, media links, public health, education, youths, sports, technological and research.⁴⁵⁴ In terms of composition, the ECOWAS Parliament is drawn from elected representatives of the national parliaments of Member States. This advisory capacity of the ECOWAS Parliament to the ECOWAS Council is essential in the sense that the ECOWAS Council is the body charged with the negotiation of agreements, policies and Protocols that drive economic integration in the region. The law making function of the ECOWAS as it rests on the Council, the adoption and implementation of the law and policies of the Community rests on the Authority of Heads of States and Government. In this light, the ECOWAS Parliament plays an indirect role in the law making process of

⁴⁵² ECOWAS, Press Release , No.: 024/2011, “Committee Agrees Institutional Arrangement for Community – Wide Implementation of Strategic Plan” (27 February 2011), online: <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2011>

⁴⁵³ *Ibid*

⁴⁵⁴ *Ibid* article 13(1); see also Kofi Oteng Kufuor *supra* note 432 at 48-49

the Community through its advisory role to the Council of Ministers. There is still room for an enhancement of the powers of the ECOWAS Parliament and recent calls by Community stakeholders have focused on measures to strengthen the direct law making capacity of the ECOWAS Parliament in line with developments in the European Union and in the EAC.⁴⁵⁵ Both the ECOSOC and the ECOWAS Parliament are mechanisms that contribute to popular participation, a dimension of the RtD. By these provisions the Revised Treaty attempts to fulfil the requirement of article 4 of the UN Declaration on RtD which obliges states to adopt policies individually and in cooperation with other states to enhance through active participation the realization of development for the individual through their involvement in the process.

Another change that hints on the RtD approach to economic integration in the ECOWAS is the special and differential treatment (SDT) measures adopted in the Community. The Revised Treaty provides an approach to special and differential treatment that takes into consideration the effect of trade deflection on Community Members due to the elimination of quantitative restrictions and specifically provides for special measures, (e.g. longer time frames for implementing tariff elimination obligations, capacity building and information sharing mechanism for Small Island and landlocked states).⁴⁵⁶ A peculiar feature of the ECOWAS approach to special and differential treatment is that the Revised Treaty adopts an individual approach to special and differential treatment and not the across the border approach in the WTO system

⁴⁵⁵ "ECOWAS Constitutional Rule in Mali, Guinea Bissau" *This Day Newspaper* (15 May 2012) 38; Aaron Ossai, "Call for More Involvement of the ECOWAS Parliament in the Decision Making Process" *Nigerian Pilot* (16 May 2012) 5

⁴⁵⁶ See Revised ECOWAS Treaty *supra* note 430 at article 68

which groups all developing countries into one category and makes special differentiation for LDCs only.⁴⁵⁷

The Revised ECOWAS Treaty has created a mechanism that allows for proper and accurate dissemination of information to enable members make informed decisions. This is implemented through a medium that allows the flow and exchange of information between stakeholders and other factors of society including rural populations, women, youths, social and professional organizations, businessmen and others.⁴⁵⁸ This essential element of the RtD has been expanded in the ECOWAS by the conferment of observer status to non-governmental organizations (NGOs) at public meetings of the Council of Ministers and the ECOWAS Parliament. With the grant of the “observer status” NGOs have a right to make oral presentations and circulate documents⁴⁵⁹ where necessary, especially with regards to issues within the expertise of the particular NGO, but they do not have the power to vote in the Council or Parliament deliberations.⁴⁶⁰ These innovations contribute to the realization of an RtD approach to economic integration. The express incorporation of respect for and promotion of human rights in accordance with the African Charter, the principles of accountability, economic and social justice, and the provision for equitable distribution of costs and benefits also changes the dynamics of ECOWAS economic integration.⁴⁶¹ The obligation to observe human rights principles in

⁴⁵⁷ *Ibid* article 3 (k)

⁴⁵⁸ *Ibid* article 3(j)

⁴⁵⁹ Kofi Oteng Kufuor *supra* note 432 at 49

⁴⁶⁰ See Revised ECOWAS Treaty *supra* note 430 at article 81

⁴⁶¹ *Ibid* article 4(g, h & k)

carrying out the economic integration initiatives is incumbent on all institutions of the Community and member States respectively.⁴⁶²

5.8 *Instrumental Implementation of RtD: The ECOWAS Community Court*

The other prong of the RtD approach is the instrumental or implementation dimension of the right development approach. This instrumental or implementation dimension of the RtD goes beyond the enunciation of rules and policies to incorporate extra judicial activities through declarations, opinions,⁴⁶³ or combined activities or programmes that contribute to realizing an aspect of RtD, for example the joint health campaign for the eradication of malaria and polio recently launched in the region. The instrumental aspect of RtD is also realized through the instrumentality of judicial mechanism.⁴⁶⁴

Judicially, an RtD approach in the ECOWAS mandate has conferred on the ECOWAS Community Court jurisdiction to entertain disputes arising from the Treaty which involve the Community's institutions, member States or citizens of the Community.⁴⁶⁵ This new RtD approach is visibly obvious when compared with the initial mandate of the Community Tribunal under the 1975 Treaty. In the 1975 Treaty, the Community Tribunal had jurisdiction over disputes relating to the Treaty but proceedings

⁴⁶² *Ibid* article 4;

⁴⁶³ Oliver C. Ruppel *supra* note 413 at 281

⁴⁶⁴ For instance joint regional programmes targeted at realizing aspects of RtD have been embarked by the ECOWAS, one of such is the Health Campaign to eradicate Malaria an initiative launched in March 2011.

⁴⁶⁵ See *Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of the Protocol A/P.1/7/91 relating to the Community Court*. Articles 10 [hereinafter *Supplementary Protocol 2005*]

could only be instituted by the members or by a member on behalf of its citizen.⁴⁶⁶ The new RtD approach in the Revised ECOWAS Treaty has entailed the grant of a right of *individual access* to the Community Court and the conferment of jurisdiction to entertain human rights claims provided in the African Charter on the Community Court.⁴⁶⁷ This fosters the implementation of development in the region by the individual who is the ultimate beneficiary of the development process.

It will be recalled that the right to development is a right to economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.⁴⁶⁸ A violation of any fundamental right in the economic integration scheme whether carried out in the implementation of developmental activities jointly by member States, or carried out by a member individually in the course of its domestic affairs constitutes a violation of the RtD,⁴⁶⁹ It became necessary therefore, that in the conduct of trade or other economic activities, citizens be guaranteed not only the right to development but every other human right, both civil and political rights and economic, social and rights, which according to the African Charter are indivisible and equal, as an integral aspect of the right to development under the ECOWAS. A violation of fundamental rights recognized under the African Charter can give rise to a cause of action in the ECOWAS Court and intervention and sanction by the Authority of Heads of State and Government. This right to intervene especially in the political affairs of member States to enthrone the rule of law and democracy was introduced as an ad-hoc function of

⁴⁶⁶ See ECOWAS Treaty 1975 *supra* note 416 articles 11 & 56

⁴⁶⁷ See Supplementary Protocol 2005 *supra* note 465 at article 10(d)

⁴⁶⁸ See Declaration on the Right to Development *supra* note 19 article 1

⁴⁶⁹ Arjun Sengupta, *supra* note 29 859

the ECOWAS during the Liberia and Sierra Leone civil wars and has been solidified as a function and objective of the ECOWAS via the Supplementary Protocol on Good Governance and Democracy.⁴⁷⁰

5.9 *Human Rights in a Regional Economic Court*

The adjudication of human rights cases by the ECOWAS Community Court brings home, the human right to development approach in the new ECOWAS. In *National Coordination of Departmental Delegates of the Cocoa Sector (CNDD) v Republic of Cote d'Ivoire*⁴⁷¹ the Applicants who were cocoa and coffee farmers brought an action before the Court arguing that the Government of Cote d'Ivoire violated their right to higher remuneration for coffee and cocoa based on a World Bank Report. One of the issues the Court had to decide was whether the applicant as a corporate body could argue a violation of its human rights. The Court held that by virtue of article 10 (d) of the supplementary Protocol of the Court and article 1 (h) of the Protocol on Good Governance, individuals had legal standing to sue for breaches of human rights. While the Court did not rule on the argument of the respondent as to whether the applicant being a corporate entity could bring an action for violation of human rights, it appears that the Court concluded the issue of its jurisdiction to entertain the suit on the basis that the

⁴⁷⁰ The ECOWAS began to exercise its power to impose sanctions and interfere in the domestic affairs of Member states with the outbreak of the Liberian civil war and the establishment of the ECOMOG. This right to intervene in the domestic affairs of Members to ensure the rule of law and democracy has been elevated to a governing principle under the Revised ECOWAS Treaty and the Supplementary Protocol on Good Governance and Democracy; See *Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security* 21 December 2001: online: <http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf>

⁴⁷¹ ECW/CCJ/JUD/05/09

applicants were representing a specified group of individuals, that is, cocoa and coffee growers. This group of individuals could constitute a “people” as has been loosely defined by the African Commission on human rights.⁴⁷² As a “people”, the *National Coordination of Departmental Delegates of the Cocoa Sector* were entitled to the protection of their people’s rights recognized under the Charter, such as the right to development which entails the realization of socioeconomic rights, like the right to remuneration for equal work. The Court however ruled that because there was no employment relationship between the applicants and the respondent, there could not be a violation of the right to equal remuneration.

In *Chief Ebrimah Manneh vs. The Republic of Gambia*,⁴⁷³ the applicant, a journalist with the Daily Observer, a newspaper based in Banjul, was arrested and detained by the National Intelligence Agency of The Gambia without a warrant of arrest and reasons for his arrest disclosed to him at the premises of the Daily Observer. In an action for wrongful arrest and detention, the Community Court found that applicant’s right to freedom, personal liberty and dignity guaranteed under the African Charter had been infringed and awarded pecuniary damages in his favour against the Government of Gambia.

⁴⁷² In *Centre for Minority Rights Development (Kenya) and Minority Groups International on Behalf of Endorois Welfare Council v. Kenya*, *supra* note ... at 150-162 the African Commission held that the term people has been loosely defined because of the different connotations that may apply based on geographical, cultural or trading relations. The commission was of the view that the term people cannot be interpreted narrowly to express a singular idea because of the diversity of the African communities and cultures.

⁴⁷³ ECW/CCJ/JUD/03/08; see also *Manneh v The Gambia* (2008) AHRLR 171

In *Etim Moses Essien vs. The Republic of Gambia and Another*⁴⁷⁴ the applicant filed an action before the Community Court claiming a violation by the Republic of Gambia and the University of Gambia of his right to equal pay for equal work guaranteed under articles 5 and 15 of the African Charter and article 23 of the UDHR. The respondents on their part argued that the substantive merit of the applicant's claim was not covered under human rights but was an issue of contract of employment, and argued that the Community Court lacked jurisdiction to entertain the claim because of an arbitration clause in the contract of employment between the parties. In its judgment, the Community Court held that the determination of the jurisdiction of the Court was to be gleaned from an examination of the plaintiff's documents before the Court. The Court held that because the applicant had grounded his claim on the provision of articles 5 and 15 of the African Charter and article 23 of the UDHR, the jurisdiction of the Community Court was invoked by virtue of the provision of articles 4 (g) of the Revised ECOWAS Treaty and 10 (d) of the Supplementary Protocol of the Court which gave the Court jurisdiction to determine human rights claims arising under the African Charter between Community citizens and Members States or institutions of the Community.

In *Odafe Oserada v ECOWAS Parliament*⁴⁷⁵ the Community Court was called upon to determine a suit bordering on core characteristics of the RtD approach to economic integration. The applicant brought an action challenging regulation C/REG.5/06/06 of the ECOWAS Council of Ministers which allocated the post of the secretary general of the Community Parliament to the Republic of Guinea. Interestingly, the arguments by the

⁴⁷⁴ ECW/JUD/APP/05/07; *Essien v The Republic of The Gambia and Another* (2007) AHRLR 131

⁴⁷⁵ ECW/CCJ/JUD/01/08

applicant in *Odafe's* case were that the decision of the Council to allocate the post of secretary to the Parliament to a particular member State violated the principle of equal rights and opportunities for all and specifically violates the right to development which mandates non-discrimination and equal participation in the process of development. Unfortunately, the Community Court dismissed the action on the grounds of a technicality and the lack of *locus standi* of the applicant, and failed to rule on the implication of the Council's decision on the mandate of the Community and its institutions to show non-discrimination and equality in the conduct of its affairs.

Though the Court failed to rule on the effect of the ECOWAS Council decision and how it affects the realization of the RtD in the region, the suit highlighted fundamental concerns that any institution, government or region that purports to adopt a right to development approach must consistently practice. These concerns and requirements are non-discrimination, equality and fairness in the distribution of costs and benefits. The RtD approach does not only entail creating an enabling environment for an individual to realize his or her developmental goals, or popular participation and differential treatment, it also demands equality, fairness and non-discrimination. A violation of any of these core principles is a violation of the right to development.

However, it is important to emphasize that notwithstanding the decision of the Community Court in *Odafe Osareda's case*, the Court is gradually developing as an institution of the Community fostering the goal of economic integration. The Court is also reinforcing citizens' confidence in the acclaimed goal of economic integration in the

region; which is to improve the living standards of the citizens of the Community.⁴⁷⁶ Interestingly, most of the cases heard by the Court since its inception have raised certain aspects of human rights. For example, the cases of *Afolabi Olajide vs. Federal Republic of Nigeria*⁴⁷⁷ and *Frank Ukor vs. Rachad Laleye*⁴⁷⁸ which dealt specifically with rights of trade and free movements of goods guaranteed under the Treaty also raised issues involving the right to freedom of movement. This introduction of a human rights mandate in the ECOWAS through the utility of the Community Court is fostering the economic integration objective of the Community and advancing the goals of realizing a supranational organization in the region. The importance of supranationality to the effectiveness of ECOWAS was not only recognized in the preamble of the Revised Treaty but accounts for the new strengthened institutions.⁴⁷⁹ The human rights mandate of the ECOWAS is pivotal to the region's economic integration as it serves as a mechanism that is contributing to the development and harmonization of the jurisprudence of the Court for the benefit of Community citizens, institutions and members.

⁴⁷⁶ See generally *Hadidjatou Mani Koraou v. The Republic of Niger* ECW/CCJ/JUD/06/08 where the Community Court delivered a judgment in favour of a citizen of the Republic of Niger who had been subjected to slave trade. Besides the judgment of the Court which found the Republic of Niger in violation of its obligation to ensure the removal of slavery and all forms of slavery from within its borders, the Court moved from its seat to Niamey the capital of Niger to hear the suit due to the financial incapacity of the applicant.

⁴⁷⁷ ECW/CCJ/JUD/01/04

⁴⁷⁸ ECW/CCJ/JUD/01/05

⁴⁷⁹ Revised ECOWAS Treaty *supra* see preamble & article 6

5.10 The SADC

The SADC like the ECOWAS owes its creation to the workings of internal and external dynamics peculiar to the African region- mostly the need to formalize historical economic connections between the peoples, the need to address the endemic menace of poverty and the demands of globalization.⁴⁸⁰ According to the Treaty establishing the SADC, the SADC is a development community charged with the responsibility of promoting cooperation and collaborative actions among the governments of Southern Africa towards the progress and socioeconomic well-being of the people of the region.⁴⁸¹ The Members of the SADC are Angola, Botswana, Democratic Republic of Congo, the Kingdom of Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, the Kingdom of Swaziland, Zambia and Zimbabwe.

The current SADC Treaty reformed and created the Southern African Development Coordination Conference,⁴⁸² which was established in 1980 as a loose partnership arrangement between the countries of the Southern Africa region, to an institutional framework for economic co-operation and development of the region.⁴⁸³ As an economic and trade institution, the SADC embraces parallel economic and developmental interests similar to the WTO. The SADC Members have committed themselves to the objective of achieving development, sustainable economic growth, the eradication of poverty and ensuring of support for the socially disadvantaged through regional economic

⁴⁸⁰ SADC Treaty *supra* note 406 preamble

⁴⁸¹ *Ibid* preamble paras 1 & 2

⁴⁸² The Treaty expressly states that the goal of establishing a development community for the independent Southern African states was an objective of the Lusaka Declaration of 1980. See generally SADC Treaty Preamble *supra* para 1

⁴⁸³ Thoke Kaime, "SADC and Human Security: Fitting Human *Rights* into the Trade Matrix" (2004) 13:1 African Security Review 109 at 111

integration.⁴⁸⁴ While the Uruguay Agreement Establishing the WTO does not refer to alleviating poverty as a goal of the WTO, the objective of improving living standards of people and ensuring that developing countries secure a share in international trade commensurate to their economic development,⁴⁸⁵ can be broadly interpreted to incorporate poverty alleviation; as any sustainable effort that better the living conditions of people is a step towards the eradication of poverty.

5.11 The SADC- Making Trade and Human Rights Work

Since the objectives of the SADC are founded upon mutual cooperation of the member governments, the Treaty enlists areas of cooperation targeting fields of economic development. The specific areas of cooperation envisaged under the SADC require the coordination and harmonization of Members' domestic macroeconomic and sectorial policies in line with the provisions of the SADC Treaty and its annexed Protocols.⁴⁸⁶ This provision is similar to the obligations Members accede to under the WTO system which requires them to adjust and bring their domestic policies in line with the WTO rules.⁴⁸⁷ However, the distinguishing feature of the harmonization and cooperation envisaged under the SADC Treaty is the requirement that it must be carried out on the basis of balance, equity and mutual benefit.⁴⁸⁸

⁴⁸⁴ SADC Treaty *supra* note 406 article 5(1) (a)

⁴⁸⁵ WTO Agreement *supra* note 39 preamble

⁴⁸⁶ SADC Treaty *supra* note 406 article 21 (2) & (3) (a-g)

⁴⁸⁷ See Doha Ministerial Declaration 2001 *supra* note 303 at para 38

⁴⁸⁸ SADC Treaty *supra* note 406 article 21(1)

5.12 *Human Rights Approaches in the SADC*

Chapter three of the SADC Treaty which encapsulates the principles, objectives and general undertaking of the SADC Members expressly states that the institutions of the SADC and the Members shall act in accordance with the principles of human rights, equity, balance and mutual benefit.⁴⁸⁹ The right to development approach in this provision is revealed first by the express mention of human rights and then by equity, by balance and by mutual benefit. The RtD besides being a right to a comprehensive economic, social, cultural and political process that aims at the constant improvement of the well-being of individuals and populations is a fundamental human right that entails the implementation and promotion of civil, political, economic, social, and cultural rights.⁴⁹⁰ The RtD affirms an inalienable human right equal to civil and political rights and economic, social and cultural rights; and this indivisibility of RtD with other human rights is also reflected in the African Charter. By mandating that the SADC's objectives are to be carried out in accordance with the principles of human rights, there is an inherent inclusiveness and binding obligation to adopt the RtD approach in the SADC. This is reinforced by the requirement under article 4 of the SADC Treaty to implement the objectives and programmes of the SADC in accordance with the principles of equity and mutual benefit which are intrinsic characteristics of the right to development.⁴⁹¹

This obligation to act in accordance with the principles of human rights, equity, balance and mutual benefit must be read in conjunction with articles 5, 21 and 22 of the

⁴⁸⁹ *Ibid* article 4 (c) & (d)

⁴⁹⁰ UN Declaration on RTD *supra* note 19 at preamble and article 6(1) ,(2) & (3)

⁴⁹¹ For a description of RtD see generally chapter 3

SADC Treaty which enumerates the goals of the Community, the specific areas of cooperation and the Protocols in furtherance of the objectives. Thus, for instance, the objective of developing policies aimed at the progressive elimination of obstacles to the free movement of capital, labour, goods and services within the region,⁴⁹² improving economic management and performance,⁴⁹³ promoting and maximizing productive employment and utilisation of resources⁴⁹⁴ and harmonizing political and socio-economic policies and plans,⁴⁹⁵ must be performed in a way that is respectful of the principles of human rights, one of which is the right to development.

The rationale for this is also grounded on the fact that human rights are already a principle that informs the implementation of the objectives of the Community. Since human rights are one of the principles that guide the activities and programs of the Community, by extension therefore the right to development, which is a human right recognized in the African Charter, which all Members of the SADC have ratified, is a human right that should influence the economic objectives of the Community.

⁴⁹² See SADC Treaty *supra* note 406 article 5 (2) (d)

⁴⁹³ *Ibid* article 5 (2) (g)

⁴⁹⁴ *Ibid* article 5(1) (f)

⁴⁹⁵ *Ibid* article 5(2) (a)

5.13 SADC Protocol on Trade

In particular, the SADC Protocol on Trade⁴⁹⁶, which regulates the obligations of Members in relation to intra-regional trade, must be read and implemented in conformity with the principles of human rights stated in the Treaty specifically the right to development. This obligation is in line with the decision of the SADC Tribunal in *Nixon Chiranda & Others vs Mike Campbell (Pvt) Limited & Others*⁴⁹⁷ where the Tribunal held that the provisions of a rule or any subsequent instrument made under a Protocol cannot have precedence over the Protocol itself. Though the Tribunal was, in the above case, referring to the hierarchical relationship between a Protocol of the SADC Tribunal and the Rules of the SADC Tribunal, the reasons adduced for the decision are apt and apply with equal vigour in comparing the relationship between the SADC Protocol on trade and the SADC Treaty. The SADC Treaty is the quasi-Constitution of the Community. As the constitution, it is the backbone upon which the various Protocols regulating economic integration in the region are founded. Indeed the Protocol itself manifests human rights principles in particular a right to development approach, by providing specifically that trade liberalization approaches and arrangements within the region must be fair, mutually equitable and beneficial.⁴⁹⁸

The Protocol mandates the conduct of intra-regional trade in a manner that ensures efficient production and is reflective of the current and dynamic comparative advantages

⁴⁹⁶ SADC See *Protocol on Trade of the SADC*, 24 August 1996, online:

<<http://www.sadc.int/index/browse/page/161#article37>> entered into force 1 September 2000. Article 2

⁴⁹⁷ See SADC (T) CASE No. 09/08 online: <<http://www.sadc-tribunal.org/docs/case092008.pdf>> page 5

⁴⁹⁸ See Protocol on Trade of the SADC *supra* note 496 at article 2

of the Members.⁴⁹⁹ This requirement is particularly instructive bearing in mind that geographical location, natural resource endowment and technological know-how play an integral role in efficient production. By obliging trade that is reflective of the current and dynamic comparative advantages of member States, the Protocol on trade is adopting a mechanism of equitability that will help forestall unfair trade deals and trade distorting approaches within the region. Article 2 of the Protocol on Trade will enable the SADC Members to focus individually on the efficient production of goods reflective of their current state of comparative strength and realize economic development, diversification and industrialization, which are the ultimate objectives of the trade Protocol.⁵⁰⁰ Like the ECOWAS Treaty, the SADC Protocol on Trade requires the elimination of import duties in pursuance of trade liberalization within the region.⁵⁰¹ The method of eliminating import duties adopted under the SADC also shows differential treatment. The SADC trade Protocol adopts different tariff lines for different goods,⁵⁰² a system of phased reduction of import duties which must be accompanied with an industrialization strategy to improve the competitiveness of Members.⁵⁰³

⁴⁹⁹ *Ibid* see especially articles 2(2) & (4)

⁵⁰⁰ *Ibid*

⁵⁰¹ *Ibid* article 4

⁵⁰² *Ibid* article 3 (d)

⁵⁰³ *Ibid* article 4

5.14 The SADC Tribunal

The SADC Tribunal as an institution of the Community is a mechanism for the implementation and enforcement of the RtD in the region's economic integration. The Tribunal was established pursuant to articles 9 and 16 of the SADC Treaty and became operative by virtue of the Protocol of the Tribunal which entered into force in 2000.⁵⁰⁴ The Tribunal generally has jurisdiction over disputes and applications referred to it in accordance with the SADC Treaty.⁵⁰⁵ However the action must be initiated by a natural or legal person against a member State or against the Community or its institutions.⁵⁰⁶ Unlike the ECOWAS Community Court, the SADC Tribunal does not have jurisdiction over disputes involving individual citizens of the Community. In *Albert Fungai Mutize & Others vs. Mike Campbell (private) Limited & Others*⁵⁰⁷ the Tribunal refused to assume jurisdiction over an action instituted by a citizen of the Community against another citizen holding that the Protocol of the Tribunal has expressly laid down the jurisdiction and the parties that can appear before the Tribunal. The limited jurisdiction of the SADC Tribunal, in terms of parties that can legally seek redress before it, does not in any way detract from the human rights dimensions and principles that govern the operations of the SADC Tribunal. The Tribunal is mandated to provide interpretation on the implementation of the SADC Treaty and the Treaty recognizes human rights as a principle that informs the conduct of economic integration in the region.⁵⁰⁸

⁵⁰⁴ See SADC Protocol on Tribunal and the Rules of Procedure Thereof, 7 August 2000, online: <http://www.sadc.int/index/browse/page/163> [hereinafter Protocol of the SADC Tribunal]

⁵⁰⁵ *Ibid* article 14

⁵⁰⁶ *Ibid* article 15 (1)

⁵⁰⁷ See SADC (T) CASE No. 8/08 online: <http://www.sadc-tribunal.org/docs/case082008.pdf>

⁵⁰⁸ Protocol of the SADC Tribunal *supra* note 504 article 14

The Tribunal is also conferred with jurisdiction to decide on the interpretation, validity and application of the SADC Protocols and other subsidiary instruments⁵⁰⁹ adopted within the framework of the Community. Two of such subsidiary instruments are the Protocol on Gender and Development⁵¹⁰ and the Charter of Fundamental Social Rights in the SADC.⁵¹¹ The Protocol on Gender and Development reflects an important dimension of the right to development. In Article 13, the Protocol provides for the equal participation of women in the decision making processes of the Community and mandates the establishment of policies, strategies and programmes that build on the capacity of women to assume leadership roles and strengthen existing structures that enhance gender mainstreaming in the Community.⁵¹² The above provision can be juxtaposed with article 8 of the UN Declaration on the RtD which provides that effective measures should be undertaken to ensure that women play an active role in the development process and mandates, where necessary appropriate economic and social reforms to eradicate social injustices against women.⁵¹³ Any violation of the provisions of the SADC Protocol on Gender and Development by a member government or an SADC institution can be legally adjudicated before the SADC Tribunal, and the Tribunal is obliged to ensure that the provisions of the Protocol are implemented in accordance with the spirit of the developmental objectives of the region.

⁵⁰⁹ *Ibid* article 21

⁵¹⁰ See *SADC Protocol on Gender and Development*, online <<http://www.sadc.int/index/browse/page/465>> [hereinafter Protocol on Gender and Development]

⁵¹¹ See *Charter of Fundamental Social Rights in SADC*, 26 August 2003 online: <<http://www.sadc.int/index/browse/page/171>>

⁵¹² Protocol on Gender and Development *supra* note 510 article 13 (1) & (2) (a & c)

⁵¹³ Declaration on the RtD *supra* note 19 article 8

5.15 Looking from the Lens of the Tribunal

Some decisions of the SADC Tribunal are particularly apt in highlighting the right to development approach of the SADC. In *Bach's Transport (PtY) Ltd vs. The Democratic Republic of Congo*⁵¹⁴ the respondent's officials wrongfully restricted the movement of the applicant's goods through its border and subsequently impounded and sold the applicant's goods. The applicant in an action claimed the sum of US\$1,988 079.49 as pecuniary damages. The Tribunal in awarding the damages sought held that the applicant was a legally recognized person of the Community who had suffered prejudice (i.e. discrimination and a violation of his rights guaranteed under the SADC Treaty).⁵¹⁵ While the Tribunal did not base its decision on the right to free movement or the right to own property (a human right guaranteed to Community citizens) it appears that these human rights obligations formed part of the *ratio decidendi* of the Tribunal's decision.

In *Swissbourgh Diamond Mines (PtY) Ltd & Others vs. The Kingdom of Lesotho*⁵¹⁶ the respondent, the Kingdom of Lesotho, failed to file their defence brief within the stipulated 90 days ordered by the Tribunal in response to the applicant's claim for damages in the sum of ZAR 1324 million for breach of a contract between the applicants and the respondent. The issue for determination before the Tribunal was whether the respondent had satisfied the requirement for the exercise of the Tribunal's discretion to grant condonation. The applicants argued that the respondent was not entitled to a grant of condonation on the grounds that it had wilfully refused to file its defence brief within

⁵¹⁴ See SADC (T) 14/2008 online: <<http://www.sadc-tribunal.org/docs/case142008.pdf>>

⁵¹⁵ *Ibid* page 9

⁵¹⁶ See SADC (T) 04/2009 online: <<http://www.sadc-tribunal.org/docs/case042009.pdf>>

the stipulated 30 days ordered by the rules of the Tribunal and that even after the grant of a 60 day extension period, the respondents still failed to file their defence and only filed a purported defence brief after the lapse of the stipulated time period. The respondent on its part argued that the case before the Tribunal raised technical issues and documentation that stretches over 35,000 pages and matters that had been concluded at its Court of Appeal nine years before. It argued that the length of the documentation involved in the suit and, in particular, the amount claimed which was very substantial in relation to the economy of the respondent, were peculiar circumstances which justified the grant of condonation to enable the respondents to file their defence brief in response to the applicant's claim. The Tribunal held that in view of the amount of money involved in comparison to the respondent's economy it was fair and proper to grant the respondent the equitable order of condonation to enable the respondent be heard upon the allegations. The instructive part in this decision of the Tribunal is the emphasis on an important aspect of the RtD approach -*equity* which seeks to mitigate the harsh legality of justice in compelling circumstances.⁵¹⁷

The case of *The United Republic of Tanzania vs. Cimexpan (Mauritius) Ltd and Others*⁵¹⁸ also raised an aspect of the conglomerate human right to development. The respondent, a citizen of Mauritius, filed an action before the Tribunal claiming wrongful deportation, detention, ill-treatment and battery upon himself and his family by officials of the applicant. The applicant filed a preliminary objection to the action challenging two issues: the jurisdiction of the Tribunal to entertain the claim on the grounds that the

⁵¹⁷ *Ibid* see especially pages 4-6

⁵¹⁸ Case No. SADC (T) 01/2009 online: <http://www.sadc-tribunal.org/docs/case012009.pdf>

respondents had failed to exhaust local remedies in accordance with the provision of article 15 of the Protocol of the Tribunal; and that the main claim did not accord to the provision of articles 14 and 15 of the Protocol of the Tribunal which provides that the Tribunal shall have jurisdiction over disputes referred in accordance with the interpretation and application of the SADC Treaty.

In delivering its ruling, the Tribunal held that the issue of its jurisdiction to entertain the claim was unquestionable as article 15 (1) of the Protocol of the Tribunal expressly confers on the Tribunal jurisdiction to entertain disputes involving natural and legal persons against member States. The Tribunal was satisfied that the respondents satisfied this requirement of the Protocol as they were natural and legal persons recognized under the law. However, the Tribunal could not determine the substantive claim alleged against the applicant on the grounds that the respondents had failed to fulfil the requirement for the exhaustion of local remedies provided in article 15(2), which was *sine qua non* to the exercise of the Tribunal's jurisdiction. Though the Tribunal dismissed the case of the respondent for failure to exhaust local remedies, it is instructive to note that the issues of forceful deportation, wrongful detention and battery alleged by the respondents are claims that the Tribunal has power to decide. These claims are founded not only on the SADC Treaty⁵¹⁹ which guarantees free movement to Community citizens, but are also human rights recognized in the ICCPR and the African Charter. On the understanding that the right to development mandates the fulfilment of all fundamental rights, both economic, social and cultural rights and civil and political rights,⁵²⁰ the powers of the

⁵¹⁹ See SADC Treaty *supra* note 406 at article 2(d)

⁵²⁰ UN Declaration on RtD *supra* note 19 at article 1(2).

Tribunal would have been rightly invoked to entertain the human rights claim if the respondent had fulfilled the requirement to exhaust local remedies.

In a similar light, the decision of the Tribunal in *Luke Munyandu Tembani vs. The Republic of Zimbabwe*⁵²¹ highlighted again the RtD approach of the Tribunal. In *Tembani's case* the Tribunal's jurisdiction was invoked to rule on the wrongful seizure and sale of the applicant's farmland by the respondent. The Tribunal ruled that the seizure and sale of the farmland of the applicant by the Agricultural Bank of Zimbabwe (ABZ) under an act of the bank and the Constitution of the respondent was in contravention of the principle of human rights enshrined in articles 4(c) and 6 (1) of the SADC Treaty which all the members of the SADC were under an obligation to respect, protect and promote.⁵²²

Finally, in the case of *Mike Campbell (PvT) Ltd & Others vs. The Republic of Zimbabwe*⁵²³ which involved the "unlawful"⁵²⁴ acquisition of agricultural lands belonging to the applicants by the respondent, the Tribunal was for the first time faced with an action that dealt solely with the human rights of Community citizens. The applicants, white Zimbabwean farmers were forcefully ejected from their farmlands without

⁵²¹ Case No. SADC (T) 07/2008 at page 15 online: <http://www.sadc-tribunal.org/docs/case072008-final.pdf>

⁵²² See also the case of Ernest Francis Mtingwi vs. SADC Secretariat SADC (T) Case No. 1/2007 online: <http://www.sadc-tribunal.org/docs/case012007.pdf> a case that involved the purported wrongful termination of a contract of employment between the applicant and the SADC Secretariat. Though the tribunal did not determine the substantive issues in the case e.g. the wrongful termination of employment without granting the applicant fair hearing, it is important to note here that the Tribunal had power to entertain the claim on the strength of the Charter of Fundamental Social Rights of the SADC which guarantees right to an employer and determines employer and employee relationships in the region.

⁵²³ See SADC (T) 2/2007 / SADC (T) 02/2008 online: < <http://www.sadc-tribunal.org/docs/case022007.pdf> > [hereinafter Campbell's Case]

⁵²⁴ While the seizure of the farmlands belonging to white Zimbabwean farmers may have been unlawful on the face of it, section 16 of the amended Constitution of the Federal Republic of Zimbabwe made pursuant to Amendment No. 17 of 2005 lawfully vested in the government the power to acquire agricultural lands for public policy purposes thus making the government's action legal in Zimbabwe.

compensation in furtherance of an agricultural reform policy of the respondent. In its argument against the appropriation of their land, the applicants said that the decision of the Zimbabwean government was motivated by racial discrimination and was contrary to the principles of human rights which the SADC Treaty enjoins.⁵²⁵ In arguing against the jurisdiction of the SADC Tribunal to adjudicate over the claim, the respondent averred that though the SADC Treaty enjoined Members to observe the principles of human rights in the realization of the economic integration objectives of the Community, there was no Protocol on human rights or agrarian reforms annexed to the SADC Treaty. The respondent furthered contended that lacunae existed as there was no standard for Members to adopt in the implementation of the provision of article 4 (c) of the Treaty. The respondent also argued that in the absence of a clear incorporation of a human rights Treaty or referral to a particular human right instrument, the Tribunal could not borrow standards from other treaties as this would amount to the Tribunal legislating on behalf of SADC Members.⁵²⁶

The above argument of the respondent was well founded as the SADC Treaty unlike the ECOWAS Treaty refers only to the obligation to be guided by the *principles of human rights* without express reference or incorporation of the African Charter as an instrument annexed to the Treaty or binding on the Community.⁵²⁷ The Tribunal in delivering its judgment, however, ruled that the Protocol establishing the SADC Tribunal which derives its validity from articles 9 and 16 of the SADC Treaty enjoins the Tribunal

⁵²⁵ *Ibid* pager 12-13

⁵²⁶ *Ibid* page 23

⁵²⁷ See generally Revised ECOWAS Treaty 1993 *supra* note 430 at preamble and article 4(g) *c.f* SADC Treaty *supra* note 406 at article 4 (c)

to develop its own jurisprudence “having regard to applicable treaties, general principles and rules of public international law.”⁵²⁸ The Tribunal held that in furtherance of the duty to interpret the proper implementation of the SADC Treaty imposed upon it by the Treaty and its Protocol, it has power to refer to other treaties and conventions where the SADC Treaty was silent and especially so since human rights is a fundamental principle of the Community. The Tribunal found unanimously in favour of the applicants that the government of Zimbabwe was in violation of their right to non-discrimination based on the provisions of article 4 (c) of the Treaty and referred copiously to the African Charter and other international human rights instruments.⁵²⁹ This decision is worthy of note as the SADC Tribunal could be said to have broken out of the boundaries imposed by a lack of explicit provision in the SADC Treaty dealing with human rights *simpliciter* to do justice, fairness and equitability in the face of compelling circumstances. The Tribunal was legally empowered to have recourse to other internationally recognized human rights instruments or principles by virtue of the Protocol of the Tribunal which enjoined the Tribunal to develop its jurisprudence in accordance with the general principles of international law. It is very instructive to note here that the articles 9 and 16 of the SADC Treaty is very similar to the provision of article 3 (2) of the WTO DSU which enjoins that the WTO dispute settlement system is clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law.⁵³⁰

⁵²⁸ See Campbell’s Case *supra* note 408 at 24-25

⁵²⁹ *Ibid* see pages 47-8 & 57

⁵³⁰ See WTO DSU *supra* article 3(2)

5.16 *Implementation Challenges*

Perhaps the biggest challenge to the integration of trade and human rights in African RECs especially in the ECOWAS and SADC, using the right to development approach, is not the absence of inclusive participation or special and differential treatment, or human rights' provisions or principles in treaties or even the absence of judicial mechanisms, but it is the problem of enforcing decisions of Community judicial bodies in national territories. This problem traces its root to the absence of a well-defined legal relational structure and hierarchy between a Community's legal system and member's national legal systems and institutions.⁵³¹

5.16.1 *Institutional Structure of ECOWAS and SADC*

Institutionally, the ECOWAS and SADC both have eight main institutions. In ECOWAS there is the Authority of Heads of State and Government (AHSG), the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Executive Secretariat, the Fund for Cooperation, Compensation and Development and the Specialised Technical Commissions⁵³² while SADC has the Summit of Heads of State and Government, the Organ on Politics, Defence and Security, Council of Ministers, Integrated Committee of Ministers, the Standing Committee of Officials, the Secretariat, the Tribunal and the SADC National

⁵³¹ Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa* (Cambridge, UK: Cambridge University Press, 2011) 40-49

⁵³² Revised ECOWAS Treaty *supra* note 430 at article 6

Committees.⁵³³ The AHSB is the primary organ charged with the responsibility of determining the general policies and laws of the Community and ensuring its implementation.⁵³⁴ The Revised ECOWAS Treaty confers on the Council of Ministers delegated powers to make laws which are binding on member States and institutions with the approval of the AHSB. In the SADC each institution has a specialized organ known as the “Troika” which is responsible for decision making, implementation and providing policy directions.⁵³⁵

5.16.2 *Community versus Domestic Institutions Relational Problems*

In terms of the enforcement and implementation of decisions or resolution of the Communities or their institutions, the decisions and resolutions of the ECOWAS become binding on the Community, its institutions and members sixty days after the date of publication in the official journal of the Community,⁵³⁶ in the SADC, there is no specific time frame when decisions become binding on Members, however there is an implied sense of good faith implementation of Community obligations in line with the general undertakings of Member States.⁵³⁷

The applicability and enforcement of the ECOWAS and SADC laws in its institutions, the Communities and member States is taken for granted as a given norm based on the *pacta sunt servanda* rule however the problem which bedevils the ECOWAS and SADC and which affects the domestic enforcement of judgments of the

⁵³³ SADC Treaty *supra* note 406 at article 9

⁵³⁴ Revised ECOWAS Treaty *supra* note 430 at article 7

⁵³⁵ SADC Treaty *supra* note 406 at article 9A

⁵³⁶ Revised ECOWAS Treaty *supra* note 430 at article 9 (1) & (6)

⁵³⁷ SADC Treaty *supra* note 406 at article 6 (1)

ECOWAS and SADC Court/Tribunal is the lack of clear and defined legal relationships and methods for the reception and application of Community laws in domestic jurisdictions.⁵³⁸ In terms of the applicability of the ECOWAS law in members' domestic territories, the Revised Treaty mandates its Members to take constitutional measures to ensure the enactment of legislation and statutory texts as may be necessary for the domestic implementation of the Treaty.⁵³⁹ This obligation is in line with the objective of realizing a supranational institution in the region to which the members agree to gradually cede some elements of their individual sovereignty.⁵⁴⁰ Sadly, this obligation is yet to be implemented in some member States due to the different legal traditions and treaty assimilation procedures in the region. Apart from the monist West African states that have adopted direct applicability and implementation of international law, the English speaking West African States which operate the dualist system of treaty assimilation are yet to domesticate the Revised ECOWAS Treaty, so as to make it directly applicable or enforceable in its national jurisdictions. The SADC Treaty does not have a provision similar to article 5(2) of the Revised ECOWAS Treaty, however there is a presumption that the provisions of article 6 of the SADC Treaty which enumerates the general undertaking of members to adopt policies for the harmonization and implementation at the domestic level of the goals of the Community, can be interpreted as an obligation to adopt domestic legislation that ensures the enforcement of SADC rights and obligations in national territories.

⁵³⁸ Richard Oppong *supra* note 531 at 46-48, 70 & 90

⁵³⁹ Revised ECOWAS Treaty *supra* note 430 at article 5(2); The SADC does not have a similar provision

⁵⁴⁰ *Ibid* the preamble of the Revised ECOWAS Treaty provides that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will.

The problem of lack of an integrated legal system between the community legal systems and national legal systems is a topical one and was particularly emphasized by the ECOWAS Court in *Ugokwe v. Federal Republic of Nigeria*,⁵⁴¹ where the Court held that there is an urgent need to harmonize and integrate the relationships between the Community and national courts to create a coordinated jurisprudence. Interestingly there is an implied relationship nexus between the national courts' jurisprudence and Community Courts as decisions of national courts are cited regularly and possess persuasive authority in Community Courts.⁵⁴² The problem, however, is the influence of Community Courts judgments in national courts when treaties, which are the backbone upon which Community Court jurisprudence are founded, are not part of domestic legislation. This lack of coordination and clearly defined relationship between RECs and domestic legal institutions is beyond the scope of this thesis but it suffices to say that the lack of domestication of Community laws and clearly defined legal relationships between the Community's legal order and domestic legal orders impedes the ability to apply and enforce rights guaranteed under Community law and judgments of Community judicial institutions in domestic territories.⁵⁴³

This is a pressing challenge to the budding integration of trade and human rights in African RECs and will require the political will of member States and the active participation of citizens, and national judicial activism to resolve. The need for strong

⁵⁴¹ ECW/CCJ/JUD/03/05

⁵⁴² For instance in *Essien vs. The Republic of Gambia*, both counsel and the Court referred copiously to the Nigerian court decisions in *Mabal Ayonkoya and 8 others v E Aina Olukoya and Anor* (1991) 4 NWLR (part 440) at 31, *Alhaja Refatu Ayorinde & 4 others. Alhaja Airat Oni & Anor* (2000) 75 LRCN 206 at 234 to 235; and *Joseph Atuegbu & 4 others v Awka South Local Government & Anor* (2002) 15 NWLR (pt 791) 635 at 653. A similar practice applies to the SADC

⁵⁴³ Richard Oppong *supra* note 531 at 78

political will becomes even more urgent when examined in the light of the experiences of enforcing the judgments of ECOWAS and SADC Community Courts. The SADC Tribunal's Protocol like the ECOWAS Community Court's Protocol provides that the decisions of the Tribunal/Court are to be enforced in accordance with domestic civil procedure rules of member States.⁵⁴⁴ However, the inability of the applicants in *Campbell's case* to enforce the judgment of the Tribunal in the High Court of Zimbabwe, though the same judgment had been registered in the High Court of South Africa,⁵⁴⁵ points to need to strengthen the *defacto* enforcement mechanism of regional Courts decisions and judgments. In 2010, the applicants in *Campbell's case* instituted another action before the SADC Tribunal⁵⁴⁶ to report the failure of the government of Zimbabwe to implement the decision of the Tribunal. Unfortunately all the Tribunal could do was to refer the non-enforcement of its decision to the Summit of the SADC for appropriate sanctions as provided under article 32(4) of the Protocol of the Tribunal. Regrettably, the SADC Treaty does not specify the kind of sanctions that can be imposed on an erring member like the ECOWAS Treaty; sanctions under the SADC are to be determined on a case by case basis.⁵⁴⁷

⁵⁴⁴ See generally Protocol of the SADC Tribunal *supra* note 504 article 32; See Supplementary Protocol Amending the ECOWAS Court *supra* note 465 article 11

⁵⁴⁵ See especially Richard Frimpong Oppong, "Enforcing Judgments of the SADC Tribunal in the Domestic Courts of Member States" in *Monitoring Regional Integration in Southern Africa Yearbook 2010* (Trade Law Centre for Southern Africa: The Konrad-Adenauer-Stiftung, 2011) 115 at 122-3

⁵⁴⁶ See Louis Karel Fick & Others vs. The Republic of Zimbabwe SADC (T) 01/2010 online: <<http://www.sadc-tribunal.org/docs/case012010.pdf>>

⁵⁴⁷ *Ibid* page 2-4; See SADC Treaty *supra* note 406 at article 33; the ECOWAS Treaty lists the sanctions to be imposed on Members for non-compliance with Community obligations. Some of the sanctions are: denial of voting rights, exclusion from presenting candidates for statutory and professional posts, suspension of new community loans and assistance etcetera. See Revised ECOWAS Treaty *supra* article 77

In the ECOWAS also, the Community Court has been beleaguered with the enforcement of its notable judgment in *SERAP v Federal Government of Nigeria and Universal Basic Education Commission*⁵⁴⁸ which centred on the realization of the right to education and the right to development under the African Charter. In its judgment against the Nigerian Government in an action instituted by an NGO, the Court held that Nigeria, as member of the ECOWAS and having ratified the African Charter, was under an obligation under the ECOWAS Treaty and the Charter to provide free basic primary education. It has been two years since the landmark judgment was delivered yet there is to date, no record of a registration of the judgment in the Nigerian courts due to the non-domestication of the ECOWAS Treaty in Nigeria. Thus, literally speaking, the decision of the ECOWAS Court does not carry any weight of law in Nigeria.

The above scenarios are not peculiar to the SADC or the ECOWAS, indeed most African RECs Courts or Tribunals are confronted with the inability to enforce their decision in domestic jurisdictions.⁵⁴⁹ Unfortunately, community citizens/ plaintiffs cannot request or compel their government to retaliate against an erring member state either by placing trade sanctions or barriers like is provided for in the WTO system, such decisions are totally under the ambit of the particular citizen's government.⁵⁵⁰ The solution to this problem lies in the domestication of treaties through national legislative means and

⁵⁴⁸ ECOWAS Community Court Unreported Suit No ECW/CCJ/APP/08/08

⁵⁴⁹ See especially Solomon T. Ebobrah, "Human Rights Development in Sub-regional Courts in Africa during 2008" (2009) 9 African Human Rights Journal 313 at 327

⁵⁵⁰ For instance recently in March 2012 the Nigerian Government in retaliation to the forced deportation of about 125 Nigerians from South Africa on the grounds of faked Yellow Fever vaccination cards, deported about 84 South Africans. Though the issue between the two countries was more of a diplomatic dispute, the ongoing trade and commercial relations between the 2 countries compelled the governments to reach a mutually agreeable solution however it is doubtful if the resort to retaliation by Nigeria was compelled by demands from affected Nigerian citizens. See generally, News 24 "'Nigeria Lashes out at SA Xenophobia'" online: <http://www.news24.com/SouthAfrica/News/Nigeria-lashes-out-at-SA-xenophobia-20120306>.

particularly the incorporation of Community laws in domestic constitutions and a provision that forbids the invalidation of Community laws by domestic constitutions as Richard Oppong has suggested.⁵⁵¹ This will make for the domestic enforcement and implementation of judicial decisions of RECs and will contribute to the speedy realization of the objectives of regional economic integration and citizens' enjoyment of benefits of economic integration. In response to the decision of the ECOWAS Community Court in *SERAP's case*, the Nigerian government recently announced the Nigerian ministry of justice as the national authority responsible for implementing decisions of the Community.⁵⁵² However this announcement has not resulted in the registration or enforcement of the judgment in Nigeria to date.

5.17 *Learning from ECOWAS and SADC*

Notwithstanding the above enforcement problems, the important lesson from the ECOWAS and SADC experience is that the conduct of economic integration cannot be separated from human rights, particularly when an organization or institution commits itself to developmental goals. The complexity of economic integration as an aspect of realizing socio-economic development demands respect for human rights and fundamental freedoms. These human rights and fundamental freedoms may be extrinsic to the conduct of international trade or the idea of development in an economic sense but

⁵⁵¹ Richard Oppong *supra* note 531 at 106

⁵⁵² See generally ECOWAS Court News, "The Republic of Nigeria Designates the Competent National Authority for Implementing Decisions of the Court" 9 June 2011, online: http://www.courtecowas.org/site/index.php?option=com_content&view=frontpage&Itemid=15&lang=en

they are integral factors that foster holistic development as a process and as an end result. It is therefore imperative that human rights play an integral role in economic and trade relations in view of the fact that they both seek the same objective- the wellbeing of the individual. Human rights cannot therefore, be alienated from trade or economic integration particularly when community citizens or peoples are the driving force or/and ultimate beneficiaries, as is the case in most RECs.

This realization is becoming more and more apparent not only in economic integration in African RECs but in the protection of individual and peoples' human rights, and is beginning to take centre stage in RECs in different regions of the world.⁵⁵³ Since the WTO, through the Doha Round, has avowed itself as an organization committed to realizing development, especially for its less advantaged members, it needs to now take the next step of moving from a purely economic approach to development to seeing it as part of the human right to development, not necessarily by empowering its adjudicative body to entertain human rights claims but by adopting the principles of the human right to development in negotiations and rule making.

⁵⁵³ The growth of economic integration in the Mercado Comun del Sur is beginning to create regional forum that seeks to advance the need to address topics of regional political dimensions such as human rights. See generally Andre Lucas Garin, "Human Rights and Regional Integration in Mercosur: A bipolar relationship" (2010) Paper delivered at the VIII World Congress Constitutional Law on Constitutional Principles" Mexico December 2010; human rights are values upon which the EU is founded and these values are embedded in the Treaty of the European Union. Countries seeking to join the EU must or to conclude trade or other agreements with the EU must respect human rights.

CONCLUSION

The issue of integration between trade and human rights in general, and in the WTO particularly, is a complex and topical issue with varied angles. The importance of integration between the two systems has become more urgent in the light of the solemn obligation in the Millennium Declaration of 2001- that the right to development must become a reality for all peoples, and the goals of the MDGs which are currently influencing domestic governmental policies globally. The Millennium Declaration emphasized the fervent objective of realizing the right to development and placed the WTO at the centre of discourse, activities and mechanisms channelled towards realizing development and eradicating poverty for billions of people. By doing so, the Millennium Declaration has tacitly affirmed the relationship between the international trading system and human rights.

This relationship between the WTO and human rights, precisely the human right to development, is strengthened by the ongoing Doha Round which was labelled the Doha Development Agenda upon its inception.

The aim of the Doha Trade Round was to place the developmental needs of developing countries at the heart of the work program adopted in the WTO and to ensure that developing countries receive a fair share from international trade needful for their socio-economic advancement.

Though the relationship between trade and human rights is a contested one based on the supposed different theoretical and normative foundations underpinning the two

systems, this thesis has shown that the normative foundation of international trade under the WTO system is very similar to the normative foundation of the human rights system; as both systems ultimately seek to improve the well-being of individuals. This thesis also argues that the idea of justice as fairness, a philosophical rationale propounded by Rawls which underlies the human right to development, also finds reflection in the WTO space especially in the GATT and the AoA.

This similarity in normative and philosophical foundation has sadly not resulted in the integration of the two systems because of the peculiarity of the WTO system, where the obligations and rights of members are determined by the Marrakesh Agreement Establishing the WTO and its covered agreements.

Since the WTO law operates under the wider purview of public international law, there is an obligation incumbent upon its members to ensure that the application of WTO obligations does not stymie their ability to fulfil their other obligations in international law for example, human rights. This obligation is summed up in the *pacta sunt servanda* rule.

In the light of the specificity of the WTO system and its laws, this thesis has identified the burgeoning principle of mutual supportiveness, a principle of interpretation and rule making, which provides a model that contributes to creating synergies and integration between systems or regimes in international law that are interrelated, but may sometimes be conflicting. The model of mutual supportiveness advocated in this thesis is the concept of development as a human right.

Development as a concept is a process intrinsic to the WTO system, development is also a human right recognized under the international human rights system. However the problem of seeing development solely as an economic concern has led to developmental projects and mechanisms in the WTO that do not contribute to the realization of the human right to development of its members, especially developing countries and LDCs. The argument canvassed in this thesis is that a shift in the approach to development practised in the WTO system from an economic process to a human right approach is necessary for an integration of trade and human rights and the realization of the human right to development. This shift would require the provision of centrality of the characteristics of the human right to development in the WTO process. These characteristics are free, active and inclusive participation not in terms of numbers only, but in terms of meaningful participation, and mandatory contribution of all peoples in the economic process, a system that guarantees benefits for all and special and differential treatment which is more specifically referred to as equity.

Laudably, the WTO has imbibed and practiced certain characteristics of development as a right through its special and differential treatment provisions; however there is a need to strengthen the SDT provisions in the WTO system to make them mandatory and enforceable on all WTO members.

With regards to the other characteristics of the human right approach to development - inclusive participation, contribution of all peoples and guaranteed benefits, the experiences of the on-going Doha Round recounted in this thesis provides examples that show that these important aspects have not been applied in totality as required by the

right to development approach thus leading to unsatisfactory results. In particular, the experiences of Doha manifest a relegation of key implementation issues (for example RoO, Agricultural trade distorting mechanisms, cotton trade initiative and the strengthening of SDT provisions from a central theme of the Doha Round) to a theme taking backstage. The possible reasons for this are lack of political courage on the part of the WTO members and a focus on reciprocity in obligations that is, focusing on non-discrimination rather than equity and fairness, which the right to development demands.

Since the WTO has avowed itself to development as its goal under the Doha Round, the WTO members cannot neglect the demands and attributes of the human right to development in the WTO system or in its processes. An institution that affirms development as a goal must, of necessity, practice development as a human right, in line with the UN declaration which is arguably the only detailed treaty that enumerates the standards to be adopted and the yardsticks to evaluate the implementation of development as a right. Based on this understanding, this thesis explored the experiences of the ECOWAS and SADC in integrating trade and human rights in regional economic communities. Initially, these communities started solely as economic integration organizations but the compelling socio-economic concerns of the African continent (e.g. the gross underdevelopment of the regions, poverty, misrule and political instability) have led to RECs that have incorporated human rights as a guiding principle for the conduct of economic integration.

These new dimensions in the conduct of regional economic integration in Africa are not idealistic in the sense that the RECs have realized that the only way to achieve

lasting development in the region is by incorporating human rights principles, particularly the attributes of the RtD to guide economic integration.

Of course the experiences of the RECs are not without challenge and there is an urgent need to domesticate in national territories the treaties of the RECs and define clearly the legal relationships between the RECs institutions and national institutions. This will make for the applicability and enforcement of the RECs obligations in domestic territories and lead to a fuller integration of trade and human rights which is very much still in its formative stages. The adoption of human rights in the RECs examined was made possible by the clear incorporation of human rights in the constitutive instruments of the RECs, and was further strengthened by geographical proximity and legal similarities in the RECs. All the RECs discussed have ratified the African Charter on human rights which recognizes the right to development.

While the WTO system does not have this similarity peculiar to the RECs, that is, a human right instrument that binds all its members or members that are unified by geographical location or proximity, the WTO can still adopt human rights in its systems through the incorporation of development as a right.

Indeed the WTO system cannot shy away from the need to address firmly the issue of its relationship with human rights, as human rights are becoming a common feature of economic and trading communities. The EU, for instance, has human rights embedded in its Treaty and respect for human rights is not only *sine qua non* to joining the EU but affects and influences the EU's trade agreements with third parties.

It is very probable in a few years; we may see human rights and trade totally integrated in the conduct of economic integration schemes in the different regions of the world. When this happens, the WTO system would have members that have domestically and regionally integrated trade and human rights and which see them as indispensable to economic relations, growth and advancement.

The WTO however does not have to wait for this to happen before it makes the necessary shift. The shift advocated in this thesis is not the empowerment of the WTO DSB to entertain human rights disputes, but rather it is for the WTO to adopt the elements of the human right to development enumerated in this thesis along with principles of equity and fairness, in the ongoing Doha Round to correct imbalances and inequities in global trade.

By doing this, the WTO will have contributed to the economic advancement of billions of people, along with the eradication of poverty, for millions of people in developing countries and LDCs, which Amartya Sen has argued is a violation of a human right.

The time to act is now, as the world awaits the conclusion of the Doha Round to determine if it will be “business as usual” or lead to the creation of a renewed world trading system that includes tangible and meaningful benefits for the less advantaged.

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Appendix A

List of Treaties

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